

28th May 2015



The Honourable Marcia Neave AO
Commissioner
Royal Commission into Family Violence
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Dear Commissioner Neave,

Submission to the Royal Commission into Family Violence

Background

The Tenants Union of Victoria (TUV) is a charity which aims to:

- Inform and educate Victorian tenants about their rights;
- Improve the conditions and status of renters; and
- Represent the collective interests of tenants in law and policy making.

We provide advice and assistance to tenants who have been affected by family violence in relation to their rights and obligations under the *Residential Tenancies Act 1997* (Vic) ('RTA') and other relevant laws.

The types of matters that we usually assist people affected by family violence with include:

- reducing the fixed term of the tenancy agreement if the client wants to vacate the rental property;
- terminating the current lease, and creating a new lease in the client's name, if they reside in the rental property but are not on the lease, or they are jointly on the lease with the perpetrator;
- defending bond and compensation claims by landlords, where the damage to the rental property is a result of family violence; and
- seeking apportionment of liability under the tenancy agreement, where a creation of tenancy has been ordered.

As we interact with people affected by family violence in the context of tenancy law, our submission focusses on improvements that could be made to the RTA including where resolution or determination is required by the Victorian Civil and Administrative Tribunal (VCAT or the Tribunal).

There are a number of provisions in the RTA which specifically refer to family violence and empower VCAT to take into account family violence when making determinations.

There are also a number of provisions in the RTA that impact on tenants who have been affected by family violence, but do not enable VCAT to take that family violence into consideration when dealing with those provisions.

...continued

1. Creation of a tenancy agreement

Under section 233A-233B, a tenant or resident of a property may apply to VCAT for an order terminating the existing lease, and creating a new lease, if:

1. They are a protected person in a final intervention order made under the Family Violence Protection Act 2008 (Vic) ('FVPA');
2. A tenant has been excluded from the rental property by this order; and
3. The applicant is either a party to the lease, or resides in the property as their principal place of residence.

The Tribunal can consider the following factors in deciding whether to grant this application:

1. Whether the protected person and other tenants can be reasonably expected to comply with the tenancy agreement;
2. The hardship to the protected person and their dependent children if they are forced to vacate the rental property, and whether this exceeds the landlord's hardship if the application is granted;
3. The length of the exclusion under the final order and the length of the tenancy; and
4. The interests of other tenants on the lease.

If the Tribunal grants the application, the protected person can ask the Tribunal to make determination of liability between the tenants with respect to the bond, rent, utilities and other obligations under the tenancy agreement.

No party to the tenancy agreement is able to claim compensation for early termination of the lease under section 233B.

2. Reduction of fixed term tenancy agreement

Under section 234(2A) of the RTA, a tenant who is a protected person in an intervention order made under the FVPA can apply for an order that their fixed term lease be reduced. The intervention order can be interim or final for this application.

Under section 234(1) of the RTA, a tenant who has been affected by family violence but does not have an intervention order in place may make an application for reduction of tenancy. They need to satisfy the Tribunal that they will face severe hardship if the reduction is not granted, and their hardship exceeds the landlord's hardship.

Case Study #1

Andrea applied for a reduction her fixed term tenancy because she had a final family violence intervention order against her former partner Steven. He had already been removed from the lease and the bond through agreement between the landlord and tenants. However, Andrea was concerned for her safety if she continued to live in the rental property as Steven had threatened her and come to the rental property while her daughter was home alone. Andrea was ordered to pay \$722 compensation to the landlord for advertising and reletting fees because the lease was reduced. Steven was not ordered to pay any compensation as he had already been removed from the lease.

Case Study #2

Helen had a 12 month final intervention order against her former partner Alex. Alex broke in to her rental property 3 months in to a 12 month lease and refused to leave. Helen vacated the rental property, but left some of her goods there for the next 3 months. She continued to pay rent for 5 months. Helen's intervention order expired and she did not seek to renew the intervention order. 6 months after Alex moved in to the rental property, the landlord applied to VCAT for a possession order based on the property being occupied without consent. Helen then applied to VCAT for a reduction of the fixed term and sought to have the reduction backdated to the date that she removed all her possessions. At the hearing, the Tribunal member appeared unwilling to grant the

application for a reduction of fixed term because there was not a current intervention order in place and it was unclear exactly when Helen had vacated the premises. Helen negotiated with the real estate agent to terminate the lease on the date of the hearing, with the only compensation for the early termination of the lease to be rent until the date of the hearing. This meant that Helen owed \$1570 rent arrears.

Case Study #3

Olivia had a final intervention order against her ex-partner Kon. Kon was not a tenant on the lease. Olivia had a fixed term lease and wanted to end the lease early due to concerns for her safety. She applied for an order that the fixed term lease be reduced. However, she returned the keys on the day before the VCAT hearing. VCAT dismissed the application as she had returned the keys and the tenancy had already terminated.

In our experience, VCAT will dismiss the application for reduction of the fixed term if the tenant has given up possession prior to the hearing, on the basis that the tenancy has already terminated and therefore the fixed term cannot be reduced by the VCAT order. This means that tenants continue to be liable for rent until the VCAT hearing, even if they have already moved out.

A landlord can seek compensation from the tenants (including the protected person) because of the reduction of the fixed term. Compensation sought can include advertising costs, lost rent and reletting fees. The “reduction of fixed term tenancy” provisions do not enable the Tribunal to apportion liability between the tenants.

It is unclear under these provisions whether the Tribunal is simply reducing the fixed term of the tenancy, or whether the Tribunal is empowered to terminate the lease. Under section 230 of the RTA, a periodic tenancy is deemed to be created if a tenant continues to reside in a rental property after the fixed term has ended, on the same terms and conditions of the fixed term lease. If the Tribunal reduces the fixed term of the lease, and the perpetrator of family violence or another tenant continues to reside in the rental property, then a periodic lease may be created.

This creates a number of problems. If a periodic lease is created, how can the person affected by family violence end their liability under the lease? The RTA does not allow one tenant to be removed from the lease if they give notice of their intention to vacate but other tenants remain in occupation. This is because the tenancy has not terminated under section 219 of the RTA. The tenants are jointly and severally liable and have not given vacant possession back to the landlord until they have all vacated the rental property.

There are also issues with the return of the bond. Before tenants can make an application to VCAT for the bond, they must have vacated the rental property. If the bond is lodged in the names of several tenants, then the application for the bond may not be granted by the Tribunal until all tenants have vacated the rental property. This can cause a delay in the tenant affected by family violence recovering their bond. It also increases the chance that they will have to pay for rent arrears or damage to the property that occurs after they vacate the rental property.

3. Bond and compensation claims

Case Study #4

Amy entered a fixed term lease with her former partner David. She took out a loan to pay the entire bond, but it was lodged in the names of both tenants. Amy was assaulted by David and an interim family violence intervention order was made which excluded David from the rental property. Amy applied to VCAT for an order that the lease be reduced to the day of the VCAT hearing. The tenants were ordered to pay \$707 compensation to the landlord for rent arrears (for 22 days of rent after Amy vacated the rental property). Subsequently, Amy applied for the bond. David agreed that she

paid the entire bond and that it could be repaid to her by the RTBA. We requested that VCAT only deduct half the amount of rent arrears from the bond as the landlord could claim the remainder from David. The Tribunal refused to allow this, and ordered the outstanding rent arrears be deducted from the bond. This meant that Amy ended up paying for this entirely. The landlord subsequently applied for compensation for damage to carpets and tiles in the rental property. The Tribunal would not apportion liability between the tenants, which meant that orders were made for both tenants to pay a further \$350 compensation.

We have assisted clients who have been affected by family violence in relation to bond and compensation claims by their landlord. In some cases, the landlord makes a claim against the victim for the cost of repairing damage that has been caused to the rental property by the perpetrator of family violence.

If the perpetrator of family violence is not a party to the lease, and there is evidence that they caused the property damage (such as a police report) then we can usually assist tenants to defend this claim.

If the damage is caused by a co-tenant, and our client has obtained an order for a creation of tenancy, we could apply for an order for the Tribunal to apportion liability under section 233C.

If the client wants to reduce the period of a fixed term lease, and the damage was caused by a co-tenant, then the RTA does not allow for apportionment of liability. The only way that the client could avoid being jointly liable with the perpetrator for the cost of this damage is to argue that liability should be apportioned under the *Wrongs Act 1958* (Vic) on the basis that they are 'concurrent wrongdoers'. This requires us to argue complicity in the damage in order to apportion the damage at the lowest proportion possible.

We have also found clients who have not been able to leave the rental property in a reasonably clean condition because they have fled the rental property at short notice, and do not want to alert the perpetrator of violence about their intention to flee. The costs of cleaning will usually be ordered to be paid from the clients' bond or as compensation to the landlord, regardless of the circumstances in which the tenancy ended.

Recommendation(s)

- 1. We recommend a new part of the RTA be introduced, to address termination of both fixed term and periodic tenancies where there is family violence. This part would incorporate the existing "creation of a tenancy agreement" provisions with some additional provisions to clarify the effect of a "reduction of a fixed term" and to enable the termination of either fixed term or periodic agreements where there is family violence.**
- 2. We recommend that the provisions for a reduction of fixed term (section 234(2A)) be replaced with a section that provides for termination of a fixed term lease or periodic lease where a tenant has:**
 - either an interim or final intervention order under the FVPA; or
 - has been affected by family violence.
- 3. We recommend that a definition of family violence be inserted in to the RTA which reflects the definition of family violence under the FVPA. This would enable a tenant who has been affected by family violence, but has not obtained an intervention order, to make this application.**
- 4. We recommend that the RTA specifically state that the Tribunal is able to make an order under this section even if the applicant has returned the keys to the rental property.**

- 5. We recommend that the Tribunal have discretion to order compensation to be paid to the landlord for the early termination of the tenancy.**

New Notice to Vacate

- 6. In addition to the above, we also recommend that a tenant who is an affected family member under a final family violence intervention order be able to give an immediate notice of intention to vacate the rental property. This should apply whether the lease is fixed term or periodic. The Notice to Landlord form could be modified to be used for this purpose. The notice should be served on the landlord and all other tenants, and have a certified copy of the intervention order attached. The legislation should state that the person who gives this notice is not liable for any compensation to the landlord for early termination of the lease.**
- 7. We recommend that the amendment specifically states that the person who gives this notice ceases to be a tenant if they vacate in accordance with this notice.**

A similar provision exists in New South Wales. Under section 100 of the *Residential Tenancies Act 2010* (NSW) ('RTA NSW'), a tenant can give a 14 day termination notice to terminate a lease if a co-tenant, occupant or former co-tenant or occupant is prohibited from accessing the rental property by a final apprehended violence order. Under section 100(4), a tenant is not liable for any compensation as a result of early termination.

We believe that an immediate, rather than a 14 day notice, is appropriate due to the risk to safety of the person giving the notice. The RTA already enables a landlord to give an immediate notice to vacate if a tenant endangers the safety of neighbours, and either landlord or tenant can give an immediate notice to terminate the lease if the rental property is unfit for human habitation. We believe that these situations are analogous. We are also concerned that the perpetrator may cause damage to the rental property if a longer notice period is required.

Listing of VCAT applications

Case Study #5

We assisted a tenant, Rachel, who was affected by family violence but did not have an intervention order against her co-tenant Tom. We helped her to apply for a reduction of the fixed term under section 234 of the RTA and filed this application two days after she vacated the rental property. Her application was not listed for hearing until 17 days after her application was filed. The VCAT member would not backdate the reduction of the tenancy and reduced the lease to the date of the hearing, which meant that the tenant was liable for rent until this date.

Case Study #6

Catherine and her former partner Andrew were co-tenants on a 12 month fixed term tenancy agreement. During this lease, Andrew was arrested and an interim intervention order made which excluded him from the rental property. Four months later, a final intervention order was made which also excluded Andrew from the rental property. The fixed term lease ended, but due to section 230 of the RTA, a periodic tenancy in both names was created. Catherine continued to reside in the rental property. Catherine applied to VCAT for an order that the joint tenancy be terminated and a new tenancy be created. She also sought an order for apportionment of liability between the tenants because she had paid the full rent on two occasions. At the hearing, her application was adjourned as she did not specifically state that she would like any liability for rent to be paid from the bond. Although the Tribunal directed that the matter should be listed with priority, it was not relisted for hearing for 19 days.

- 8. We recommend that VCAT be required to list an application for termination of the lease within 2 business days. This will enable the matter to be resolved as soon as possible, and limit liability under the lease for the family violence victim.**

The Tribunal is currently required to list urgent repairs applications and applications based on Notices to Leave within 2 business days, so we believe that this would be manageable for the Tribunal.

Apportionment of Liability by VCAT

- 9. We recommend that the Tribunal be given a specific power to apportion liability between tenants when:**
- **a notice of intention to vacate has been given by a tenant with a final intervention order; or**
 - **the Tribunal has made an order to terminate the lease because the tenant has an intervention order under the FVPA or has been affected by family violence.**
- 10. We recommend that the power to apportion liability be the same as that provided to the Tribunal by section 233C, in the case of a creation of tenancy. This would mean that the Tribunal could apportion any existing liabilities under the tenancy and the RTA, including the bond and outstanding utility bills. This would enable the Tribunal to apportion liability for damage to the rental property, rent and any compensation payable to the landlord for the lease ending early.**
- 11. We also recommend that the Tribunal be given a general power to apportion liability between tenants when there has been family violence to deal with situations where family violence is a factor but the provisions of the Act do not specifically allow for that to be taken into account.**

4. Tenancy databases

A tenant may be listed on a tenancy database as a result of family violence. For example, if a perpetrator of family violence deliberately causes damage to the rental property, this may lead to a Notice to Vacate being given to all tenants. If the landlord applies to VCAT for a possession order, and VCAT is satisfied that there are grounds to give the Notice to Vacate, then VCAT must grant a possession order against all tenants. The tenant affected by family violence could be listed on a tenancy database as a result. A tenant who has been affected by family violence may also have been listed on a tenancy database because the Tribunal was unable to apportion liability between the tenants and, as a result, they were ordered to pay the landlord compensation exceeding the bond.

Case Study #7

When Sophie was 18 she signed a tenancy agreement with her then partner Tim as a co tenant. He soon became violent and because of financial reasons it was very difficult for her to leave. He would often use threats of withholding the rent over Sophie to keep her with him. She sought help from her Agent who told her that she had no options and would be breaking her lease if she left. Eventually things got so bad that Sophie obtained an intervention order and fled the property and the city fearing for her safety. Her partner stayed but stopped paying the rent and caused damage. The landlord obtained a possession order for rent arrears and award of bond and compensation. Sophie again sought help of her agent and explained her situation but the agent told her she couldn't help and insisted on listing her on a tenancy database. The database operator kept her on the database for 8 years (5 years more than they are legally allowed to). Because of this Sophie spent a lot of

those 8 years homeless, in boarding houses and in insecure housing. She moved inter-state to try escape her rental history.

Recommendation

- 12. We recommend that the RTA be amended to enable a tenant to make an application to VCAT for an order that they be removed from the tenancy database because the incident that was listed occurred due to family violence.**

5. Security modifications

Under section 64 of the RTA, a tenant must get consent from the landlord to modify a rental property. The landlord can refuse to allow the modification, regardless of the fact that tenants are required to pay for the cost of restoring the property when they vacate, and regardless of the reason that the alteration is sought. This means that even if a person is affected by family violence they have no right to alter a rental property to increase their personal security.

Recommendation

- 13. We recommend that section 64 of the RTA be amended to state that the landlord must not unreasonably withhold consent to a request to modify the rental property, when modifications are requested to improve the security of the rental property, and the tenant is affected by family violence.**

6. Public Housing

Case Study #8

Abby was as client living in a DHS property. She had a very violent partner who was involved in drug dealing and manufacture. DHS child protection took custody of her children and said that if she remained in the rental property she could not have them back due to the risks to their safety. Due to family violence and threats to her and her children she had to abandon her DHS property. After Abby fled, her former partner came to the property looking for her. When he discovered that she had gone, he significantly damaged the rental property and her possessions, breaking many windows, walls and doors. Several years later, DHS issued the client a \$20,576.80 claim for compensation for this damage. The Tenants Union complained to DHS that it was against their policy to seek compensation for damage which has been caused by family violence. DHS insisted on pursuing the matter at VCAT and refused to accept a police report which indicated that Abby reported a burglary and vandalism as evidence that she did not cause the damage, because the Police Report did not specifically mention the property address. This is despite the fact that DHS were aware they were renting that address to her during this time. We were unable to obtain an amended report containing the address of the rental property from the police, so we applied for a summons to Victoria Police to give evidence at the hearing that the incident occurred at the rental property address. DHS were only awarded \$1067.85 of the \$20,576.80 sought. All claims for damage relating to family violence were dismissed and only compensation for rubbish removal, gardening and items the tenant had already conceded fault for were awarded as compensation.

We have assisted public tenants who are affected by family violence in relation to very large compensation claims made against them by the Director of Housing in relation to a property that they have vacated. The DHS policy states that they will generally not claim compensation against a tenant for property damage where the damage was caused by “the criminal actions of a third party and the tenant could not prevent it from occurring, for example, family violence.” However, as the case study above illustrates, the DHS policies in relation to making claims against a tenant

are not always followed.¹ We have also found that claims are initiated for an amount of compensation that far exceeds what is reasonable to expect to be ordered by VCAT. One reason for this is that the claims are not reduced for depreciation. If the compensation claim relates to an item that has fully depreciated, VCAT will not order the tenant pay any compensation for the cost of repairing damage. We are particularly concerned about the impact of these compensation claims on public tenants who do not attend the VCAT hearing, or do not have representation at the hearing. We are also concerned that a tenant may agree to pay the full compensation claim as they are intimidated by the amount of compensation sought.

The DHS allocations manual requires an applicant for public housing to repay any outstanding charges to DHS before the applicant can go on to the waiting list.² We are concerned that excessive compensation claims may present a barrier to people affected by family violence accessing public housing.

Recommendations

- 14. We recommend that DHS housing staff be provided with training on their policies regarding tenant damage and family violence.**
- 15. We recommend that DHS do not issue any further compensation claims against tenants which are not reduced for depreciation or that claim for fair wear and tear.**
- 16. We recommend that DHS policies be reviewed to ensure that outstanding charges do not prevent people affected by family violence from accessing public housing in the future.**

If you have any questions regarding this submission, please contact me on 9411 1444.

Yours sincerely,

Mark O'Brien
Chief Executive Officer
Tenants Union of Victoria

¹ The policy is contained in Policy statement: Tenant property damage, Chapter 5, Maintenance Manual, available via this link <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/maintenance-manual/5.-tenant-property-damage>.

² Applications and eligibility, Allocations Manual, <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/allocations-manual>.

Summary of Recommendations

1. We recommend a new part of the RTA be introduced, to address termination of both fixed term and periodic tenancies where there is family violence. This part would incorporate the existing “creation of a tenancy agreement” provisions with some additional provisions to clarify the effect of a “reduction of a fixed term” and to enable the termination of either fixed term or periodic agreements where there is family violence.
2. We recommend that the provisions for a reduction of fixed term (section 234(2A)) be replaced with a section that provides for termination of a fixed term lease or periodic lease where a tenant has:
 - either an interim or final intervention order under the FVPA; or
 - has been affected by family violence.
3. We recommend that a definition of family violence be inserted in to the RTA which reflects the definition of family violence under the FVPA. This would enable a tenant who has been affected by family violence, but has not obtained an intervention order, to make this application.
4. We recommend that the RTA specifically state that the Tribunal is able to make an order under this section even if the applicant has returned the keys to the rental property.
5. We recommend that the Tribunal have discretion to order compensation to be paid to the landlord for the early termination of the tenancy.
6. In addition to the above, we also recommend that a tenant who is an affected family member under a final family violence intervention order be able to give an immediate notice of intention to vacate the rental property. This should apply whether the lease is fixed term or periodic. The Notice to Landlord form could be modified to be used for this purpose. The notice should be served on the landlord and all other tenants, and have a certified copy of the intervention order attached. The legislation should state that the person who gives this notice is not liable for any compensation to the landlord for early termination of the lease.
7. We recommend that the amendment specifically states that the person who gives this notice ceases to be a tenant if they vacate in accordance with this notice.
8. We recommend that VCAT be required to list an application for termination of the lease within 2 business days. This will enable the matter to be resolved as soon as possible, and limit liability under the lease for the family violence victim.
9. We recommend that the Tribunal be given a specific power to apportion liability between tenants when:
 - a notice of intention to vacate has been given by a tenant with a final intervention order; or
 - the Tribunal has made an order to terminate the lease because the tenant has an intervention order under the FVPA or has been affected by family violence.
10. We recommend that the power to apportion liability be the same as that provided to the Tribunal by section 233C, in the case of a creation of tenancy. This would mean that the Tribunal could apportion any existing liabilities under the tenancy and the RTA, including the bond and outstanding utility bills. This would enable the Tribunal to apportion liability for damage to the rental property, rent and any compensation payable to the landlord for the lease ending early.
11. We also recommend that the Tribunal be given a general power to apportion liability between tenants when there has been family violence to deal with situations where family

violence is a factor but the provisions of the Act do not specifically allow for that to be taken into account.

12. We recommend that the RTA be amended to enable a tenant to make an application to VCAT for an order that they be removed from the tenancy database because the incident that was listed occurred due to family violence.
13. We recommend that section 64 of the RTA be amended to state that the landlord must not unreasonably withhold consent to a request to modify the rental property, when modifications are requested to improve the security of the rental property, and the tenant is affected by family violence.
14. We recommend that DHS housing staff be provided with training on their policies regarding tenant damage and family violence.
15. We recommend that DHS do not issue any further compensation claims against tenants which are not reduced for depreciation or that claim for fair wear and tear.
16. We recommend that DHS policies be reviewed to ensure that outstanding charges do not prevent people affected by family violence from accessing public housing in the future.