WEstjustice
Western Community Legal Centre

Residential Tenancies Act Review – *Fairer, Safer Housing*

Western Community Legal Centre submission in response to the 'Security of Tenure' issues paper

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1. Introduction

1.1 About WEst Justice (Western Community Legal Centre)

WEst Justice (Western Community Legal Centre) was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service, and the Wyndham Legal Service. WEst Justice is a community organisation that provides free legal assistance and financial counselling to people who live, work or study in the Maribyrnong, Wyndham and Hobsons Bay areas.

WEst Justice has a particular focus on working with newly arrived communities. More than 40% of our clients over the last four years spoke a language other than English as their first language. Further, approximately 57% of our clients during that period were newly arrived, having arrived in Australia in the last five years.

1.2 About the WEst Justice Tenancy Program

WEst Justice employs two tenancy lawyers who provide specialist advice, casework and representation to vulnerable and underprivileged tenants who live in Melbourne's West. In the past five years WEst Justice's tenancy program has assisted over 1,100 clients with almost 1,800 matters. Our catchment area includes suburbs in Melbourne's inner-West (including Footscray, Sunshine, and Braybrook), and Melbourne's outer-West (including Werribee, Wyndham Vale, Hoppers Crossing and Melton).

As part of our tenancy program, we also provide a duty lawyer service to assist tenants with on-the-spot advice and representation one day per week at the Victorian Civil and Administrative Tribunal ("**VCAT**") in Werribee. Whilst we primarily assist tenants in private tenancies, we also advise tenants who live in rooming houses, public and community housing.

Our tenancy program has a particular focus on working with clients from refugee and non-English speaking backgrounds. We work closely with local refugee settlement agencies and community development workers, and almost 60% of our tenancy clients in the past two years were born outside of Australia.

WEst Justice also undertakes specialist insurance casework within the context of our tenancy program. This program has focused on the impact of landlord insurance policies on tenants.

WEst Justice's submission and recommendations are informed by our significant experience in utilising the *Residential Tenancies Act 1997 (Vic)* ("**the Act**") in the course of the above casework.

2. Executive Summary

Security of tenure is a multidimensional concept and refers to the degree of certainty tenants have about their ongoing occupancy. It is particularly important as a greater proportion of Victorians are renting than ever before, and remain so for longer. Delivering and enhancing security of tenure is beneficial for tenants – through more meaningful engagement in education and employment, and their engagement in social and support networks – and for the community as a whole.

WEst Justice has focussed on this issue for a number of years. Through our considerable casework and policy experience, we lodge this submission to the Residential Tenancies Act Review for consideration. Core to our submissions is that the perception and reinforcing of renting as a transient, short-term form of occupancy should no longer be a part of the overall framework. Tenancies must more appropriately be viewed as viable and legitimate long-term housing outcomes.

In **Part 4** we assess the current rental situation in Victoria. It is clear that renting, as a proportion of overall occupancy, has increased in number and duration since the original Act of 1997 commenced. We also analyse in further detail why security of tenure is important in **Part 5**.

We submit that delivering and enhancing security of tenure is build upon four key pillars:

1. Longer lease terms (**Part 6**);
2. Building a 'grounds-based' termination system that is fairer and more equitable for tenants (**Part 7**);
3. Regulating rent increases to ensure they are less frequent and more predictable (**Part 8**); and
4. Reforming the provisions around repairs, renovations and modifications (**Part 9**).

West Justice's recommendations stem from over 1,800 tenancy matters dealing primarily with refugees, newly arrived migrants and those on low incomes. On a daily basis, our service assists those who are most vulnerable and susceptible to changes in their housing. We believe that security of tenure can, and ultimately must be improved upon to better reflect support in Victoria.

3. Summary of recommendations

Recommendation 1:

The application of the Act should be expanded to include all residential tenancy leases, irrespective of its term.

Recommendation 2:

In the absence of any correctly proven termination action by the landlord, tenants should be given the first right of renewal the lease at the end of a fixed term. Failing this, leases should simply roll over onto the same term that was originally agreed to, and not default to a month-to-month lease.

Recommendation 3:

Industry practice must change to ensure that tenants' rights are better explained to them, and not misrepresented.

Recommendation 4:

That the ability for landlords to recover break lease fees be capped, to prevent significant impediments to tenants entering long term leases. Leases up to 5 years should restrict landlord's ability to claim compensation after 12 months. Leases over 5 years should restrict a landlord's ability to claim compensation to the first 24 months.

Recommendation 5:

Where a landlord seeks possession of a property as their principal place of residence, or for occupation by family, they must give sworn evidence to this effect at VCAT.

Recommendation 6:

The evidentiary burden must be high where a landlord seeks to evict a tenant for renovations and repairs under section 255 of the Act. The focus in these circumstances should be on coming to an appropriate resolution whereby the tenancy and renovations can co-exist.

Recommendation 7:

Notice periods under sections 255, 256 and 258 of the Act should be lifted to 6 months.

Recommendation: 8

Notice period for rent arrears terminations should be lifted from 14 days to 28 days. Further, landlords must be required to show they have attempted good faith negotiations to resolve the arrears situation before applying for a possession order.

Recommendation 9:

The Act should be amended to include a penalty equivalent to three months rent where a landlord has found to have issued a Notice to Vacate and did not have a proper basis to do so.

Recommendation 10:

The Act should be reformed to allow challenges to breach of duty notices in a quick, fee-free and streamlined manner before VCAT.

Recommendation 11:

Where a tenant is served with a Notice to Vacate for persistent breaches, the termination period should be extended to 28 days.

Recommendation 12:

That the 120-day 'no reason' Notice be abolished as a grounds of termination.

Recommendation 13:

The defence of retaliation contained in section 262(2) of the Act should be extended to apply to all Notices to Vacate, and at all VCAT hearings in relation to determining whether a possession order should be made.

Recommendation 14:

The Act should be amended to reduce VCAT's role of discretion in relation to eviction matters by creating clearer statutory guidelines on under which circumstances a possession order may be granted.

Recommendation 15:

Rent increases should be limited to once every 12 months.

Recommendation 16:

Rent increases should be capped at twice the CPI over a 12-month period.

Recommendation 17:

Penalty provisions in the Act should be strengthened for landlords who attempt to circumvent the rent increase procedures.

Recommendation 18:

Retaliation as a defence must be expanded to all Notices to Vacate, and that rent increases should be disallowed where a tenant has requested repairs, but the landlord has not complied with such requests.

Recommendation 19:

Where appropriate, mediation services should be expanded to handle non-urgent repair matters to facilitate a suitable repairs arrangement within the framework of the Act.

Recommendation 20:

Landlords should not be permitted to unreasonably withhold consent to modify a property. Further, rent increases should not be permitted where the landlord has poorly maintained a property, or the quality of housing has not been improved.

Recommendation 21:

Tenants should be permitted to recoup depreciated investments in modifying the property once they have vacated.

Recommendation 22:

The Act should be amended to include a mechanism for minimum standards for rental properties to ensure that al renters have access to safe and secure housing.

4. The rental market – key statistics and indicators

As of September 2015, the overall median rent in Victoria sat at $355 per week, while the median weekly rent for metropolitan Melbourne was $380 a week.[1] This contrasts with the same quarter five years ago, when the overall median rent was $320 a week (an increase of nearly 10%), and metropolitan Melbourne's median rent was $340 a week (an increase of 10.5%).[2] Some 27.5% of households in Victoria rent – 424,316, or 26.1% of all Victorian households, rent through private landlords, which is an increase from 16.9% in 1994.[3] Around 26% of a median income in the state goes toward a median rent[4] – as a measure, households that pay 30% or more of their incomes in rent are considered to be in rental stress.

Victoria's private tenants (and tenants in general) are more likely to be on lower incomes, be under the age of 45, and be relatively recent migrants to Australia.[5] Approximately 9.1% of Victorian households face rental costs greater than 30% of their gross household income,[6] an impact concentrated in particular geographical areas. Australian Bureau of Statistics data analysed by the Council to Homeless Persons in 2014 established that one in three renters in outer suburban and regional electorates of Victoria (including electorates that WEst Justice service) are in rental stress.[7] These renters will typically be earning low incomes of $640 a week or less, and even rents considerably lower than the state median will require over a third of that income.

Long-term private rental is on a steady increase nationally. One third of all private renters are long-term renters (defined as renting for periods of 10 years or more continuously), an increase from just over a quarter in 1994.[8] This increasing long-term rental demand is exacerbated by a shortfall in supply. In 2012, the National Housing Supply Council identified a growing cumulative shortfall of

[1] Victoria State Government Department of Health and Human Services ("DHHS"), *"Rental report statistics – September quarter 2015"*, September 2015. Accessed at http://www.dhs.vic.gov.au/__data/assets/pdf_file/0005/956894/Rental-Reptort-September-quarter-2015.pdf, 16 December 2015.

[2] Victoria State Government Department of Health and Human Services ("DHHS"), *"Rental report – September quarter 2010"*, September 2010. Accessed at http://www.dhs.vic.gov.au/__data/assets/pdf_file/0004/589261/Rental-Report-September-2010.pdf, 16 December 2015.

[3] Australian Bureau of Statistics 2013, Housing Occupancy and Costs 2011-12, State and Territory data, 1994-1995 to 2011-2012, cat no. 4130.0, Table 18: Vic Households, Selected household characteristics.

[4] Wendy Stone, Terry Burke, Kath Hulse and Liss Ralston, *Long-term private rental in a changing Australian private rental sector*, Table 8: Median rents as a percentage of median income, states and territories 1981 and 2011, p. 20; Australian Housing and Urban Research Centre ("AHURI"), Swinburne-Monash Research Centre, July 2013. Accessed at http://www.ahuri.edu.au/downloads/publications/EvRevReports/AHURI_Final_Report_No209_Long-term_private_rental_in_a_changing_Australian_private_rental_sector.pdf, 16 December 2015.

[5] Ibid p. 29.

[6] National Housing Supply Council ("NHSC"), "*Housing Supply Affordability Report 2012-13"*, Table 1.2: Households with rents of more than 30 per cent of gross household income, p. 11, 2013. Accessed at http://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2013/NHSC/Downloads/PDF/housing_supply_affordability_report_2012-13.ashx, 16 December 2015.

[7] Council to Homeless Persons ("CHP"), *"Low income families crushed by rent in outer suburbs"*, 8 October 2014. Accessed at: http://chp.org.au/wp-content/uploads/2014/10/141008-making-social-housing-work-housing-stress.pdf, 16 December 2015.

[8] Stone et al, p.2. It must be noted that whilst longer-term tenancies are increasing, 74% of tenants (including 39% in private tenancies) have moved in the last five years, compared with 29% of those who own their houses; Hulse et al. p. 54.

dwellings in Victoria, with an estimated gap of 10,000 between estimated dwelling demand and supply as of 2011.[9] Vacancy rates in Victoria continue to fluctuate significantly. Metropolitan Melbourne has risen since 2010 from under 2.5% to 3.0%, while regional vacancy rates have fluctuated between 1.5% and 3.5%, and are currently at 2.3%.[10]

Supply in the private rental market can be contrasted with the number of applicants on the waiting list for public housing in Victoria (34,726 in total).[11] It is clear that public housing is no longer a reliable catch-all for renters who lose their tenancies in the private system – in this context, mechanisms to support security of tenure become more important than ever.

[9] National Housing Supply Council ("NHSC"), "*Housing Supply and Affordability – Key Indicators, 2012*", Table 4.3: Estimated dwelling gap since June 2011, states and territories, p. 25.
[10] Real Estate Institute of Victoria ("REIV"), *"Rental Vacancy Rates, 6-Month Average Trend"*, November 2015. Accessed at http://www.reiv.com.au/property-data/propertydata-files/chart-data/pg-8-vacancy-rates-melb-and-regional-vic.aspx, 16 December 2015.
[11] Victoria State Government Department of Health and Human Services ("DHHS"), *"Public housing waiting and transfer list September 2015"*. Accessed at http://www.dhs.vic.gov.au/__data/assets/excel_doc/0006/953403/Public-Housing-Waiting-and-Transfer-List-Sep-2015.xls, 16 December 2015.

5. What is security of tenure and why is it important?

Security of tenure is fundamental to tenants' ability to live their lives with certainty and dignity. It is a broad concept and includes, among many other factors, the length of the lease term, the way and manner in which tenancies are terminated, how much choice tenants have to stay or leave, sustainability of rent levels, and the extent to which properties are maintained in a proper manner.[12] When ensured, security of tenure adds greater legitimacy to renting as a housing option, and provides stability to tenants who could not otherwise afford to purchase a property and depend on tenancy as a long-term housing solution.[13]

As noted above, a greater number of Victorians are renting, and for longer. Stable residential accommodation is important not only for tenants at an individual and familial level, but also for their broad engagement with the community, education, support services and employment.[14] Tenants who enjoy stable housing often see its benefits reflected in better health, economic and social outcomes.[15]

WEst Justice's client base, which includes tenants on lower incomes, tenants with dependents, and those with other vulnerability indicators, are likely to be disproportionately impacted by frequent moves, and the uncertainty that the current legislative framework affords.[16]

As a result of our experiences, security of tenure is not enjoyed by many tenants. An unfortunate consequence of this is that tenancies are largely rendered an insecure form of residential occupancy. Tenants feel they have little control over the stability of their housing, which affects their lives more broadly.

5.1. While flexibility suits some, security is essential for the most vulnerable

Tenancies are more stable than in the past. Between 1996 and 2011, the number of tenants who moved in the last 12 months decreased from 77.6% to 31.1%.[17] Housing stability, in the context of secure tenure, is largely a positive for tenants and the community more broadly in terms of the benefits it affords.

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[12] Housing vulnerability is therefore not just about moving house, or losing a tenancy, but is broadly about vulnerability in housing, and factors beyond tenants' control. Indeed, the study conducted by Hulse et al. showed that whilst tenants did not necessarily want to move, a significant proportion believed that they would have to due to factors they could not control. See Kath Hulse, Vivienne Milligan and Hazel Easthope, *Secure occupancy in rental housing: conceptual foundations and comparative perspectives*, 2011, Australian Housing and Research Institute, Swinburne University, p. 54.

[13] Kath Hulse, Vivienne Milligan and Hazel Easthope, *Secure occupancy in rental housing: conceptual foundations and comparative perspectives*, 2011, Australian Housing and Research Institute, Swinburne University, p. 14. The authors of this paper note that many tenants feel that owning your property is the only way to deliver security of occupation.

[14] Australian Institute of Health and Wellbeing, accessed at http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442474106, 11 December 2015, p. 1.

[15] Victorian State Government, *"Residential Tenancies Act Review: Security of Tenure Issues Paper"* (2015), p. 8.

[16] Hulse et al., above n 13; Above n 15, p. 14.

[17] Above n 15, p. 9.

A recent study by the Tenants' Union of Victoria ('TUV') shows that tenancies over three years in length are generally held by those aged 55 or over. These tenants are mostly pensioners, usually live alone and rent from a private landlord.[18] This study also showed that a key factor in preferring stability was ensuring that children had a stable living environment. Many respondents noted that moving was a very stressful process, and that longer term leases meant more stable rents and made it easier to maintain a household budget.[19]

On the other hand, renting is also seen as delivering more flexibility as compared to home ownership.[20] This need for flexibility can reflect a desire for tenants to want shorter leases, often for those expecting a change in their circumstances in the near future, or those who were simply uncertain about their future.[21] Of those tenants in leases 12 months or less, TUV's study found that 51% are share households and a significant number of these tenants are students, and on low incomes (<$20,000 per year).[22]

Where flexibility is necessary for some in the community, security is essential for our clients. WEst Justice's casework shows that many of tenants have been in their properties longer than 12 months. Often, when tenants are asked whether they would like to remain in the property or move, when confronted with a Notice to Vacate, invariably the response we hear is that tenants want to remain in the property. Not only is the process of moving difficult – both from an individual standpoint, and a housing market position – it is expensive, and often tenants have created a home they do not wish to uproot from.

Of particular importance in our client group is the presence and proximity of community support networks. For recent migrants and refugees, the areas of Footscray and Sunshine provide a rich array of support and settlement agencies, housing organisations, along with familial, religious and cultural ties. When asked to leave, many of our tenants plead that they cannot move away from their house because it will damage their link to this support. As a general rule, migrants and refugees are also adapting from a major and sometimes traumatic move, and further disruption and change impacts on their ability to establish themselves in Australia. This means that for recent migrants and refugees, security of tenure is of particular importance.

[18] Tenants Union of Victoria, "Online Survey Of Victorian Private Market" (2015), p. 11.
[19] Ibid p. 8.
[20] Hulse et al., above n 13, p. 12.
[21] Above n 18, p. 8. It is worth mentioning, as per the TUV's findings, that where tenants have been in their property for longer than 12 months, only 12% wanted to move residences.
[22] Above n 18, p. 11.

THE PILLARS OF SECURITY OF TENURE

Security of tenure is fundamental to ensuring tenants are, and feel, more secure and certain in their accommodation. We argue that there are four key pillars upon which strengthening this security of occupation rests:

1. Lease terms;
2. Terminations;
3. Rent increases; and
4. Repairs, maintenance and modifications.

We cover each pillar below, and put forward recommendations as to how tenancy law and practice in Victoria can be reformed to strengthen tenants' degree of security.

6. Longer lease terms increase security of tenure

Lease term refers to the period a tenancy agreement is to last.[23] Parties are free to negotiate the term of a tenancy, which is often fixed for a certain period. This is known as a 'fixed term lease', and is often for a period of six or 12 months. Upon the expiration of a fixed term, the lease is either renewed by agreement, or transitions into a periodic ('month-to-month') lease.[24]

The relatively short term of tenancies in Victoria is not replicated in many other parts of the world. In France, for example, minimum lease terms are between three and six years.[25] Germany typically has unlimited terms with fixed terms only permissible in limited circumstances.[26] In the absence of any contrary agreement, leases in Ireland are four years, which automatically renew upon expiration.[27] In Victoria, then, as compared with many parts of the world, there is a situation whereby tenants often have little certainty beyond their initial six or 12-month tenure.[28]

As a tenant advocate service, WEst Justice believes that longer-term tenancies contribute significantly to security of tenure and its beneficial flow-on effects. To achieve this, reform to the Act is required, along with changes to industry practice.

6.1. There are a number of obstacles to longer lease terms

WEst Justice advocates for the removal of key obstacles to longer-term leases. These range from legislative reforms to changes in industry practice.

[23] Above n 15, p. 13.
[24] *Residential Tenancies Act 1997* (VIC) s 230.
[25] Above n 15, p. 28.
[26] Ibid; Hulse et al., above n 13, p. 127.
[27] Above n 15, p. 28; Hulse et al., above n 13, p. 128.
[28] Hulse et al., above n 13, p. 127.

6.1.1. The Act should apply to all leases irrespective of the term

The *Residential Tenancies Act 1997* (VIC) establishes tenants' and landlords' duties and obligations. It provides a comprehensive legal framework for tenancies, and also contains several safeguards for tenants. An important shortcoming of the Act, however, is its non-applicability to leases over five years in term.[29] This establishes a key obstacle to tenants and landlords entering into longer-term leases.

Firstly, the Act refers tenancy disputes to VCAT. The Tribunal is required to determine matters with as little formality and technicality as practicable.[30] Application fees are relatively low when compared to the Magistrates' Court of Victoria, and many of our clients qualify for fee waivers on grounds of hardship.[31] Experiences of our workers, clients and stakeholders consistently report that insofar as access to justice is concerned, VCAT is more desirable and less costly than the courts. Whilst the Act may not be a perfect protector of tenants' rights, it is certainly preferable than governance by the common law and the courts.

Further, the Act provides a relatively straightforward and accessible system for landlords and their agents. The alternative of operating within the common law is potentially higher costs, passed on as higher rents to tenants.

An additional consideration from the tenants' perspective is that the safeguards the Act includes would theoretically no longer apply if a lease ran longer than five years. This is not a particularly desirable outcome for tenants, and it is highly unlikely we would ever advise a client to enter into an agreement with a lease term of this length under the law as it stands.

Recommendation 1: the application of the Act should be expanded to include all residential tenancy leases, irrespective of its term.

6.1.2. Default terms should be longer, and the same term should automatically renew

The Act stipulates that when a fixed term lease expires, it rolls onto a periodic lease on the same terms.[32] Periodic leases offer greater flexibility to tenants, but it significantly reduces their security of occupancy, and allows landlords to terminate the tenancy more simply.

Some of our clients have reported that coming to the end of their tenancy is a stressful time. Many state that they contact landlords or agents in an attempt to secure their ongoing tenancy into the future with mixed success. Largely, the decision to renew a lease is that of the landlord, irrespective of whether a tenant wants to sign a new fixed term lease.

[29] *Residential Tenancies Act 1997* (VIC) s 6. Where the Act does not apply, nor its predecessor the *Residential Tenancies Act 1980* (VIC), the tenancy agreement is subject to the common law and the *Landlord and Tenant Act 1958* (VIC).
[30] *Victorian Civil and Administrative Tribunal 1998* (VIC) s 98(1)(d).
[31] *Victorian Civil and Administrative Tribunal 1998* (VIC) s 132(1).
[32] *Residential Tenancies Act 1997* (VIC) s 230.

Case study – An – sought to renew her lease

An had leased a property on a 12-month fixed term lease. Several months prior to the expiration of the lease, she sought clarity from the landlord what their intentions were, and whether they would renew her lease. An received no response for several months on this question, and her lease by default rolled onto a periodic lease. This was not enough security for An, as she prioritised her security of housing.

An was forced to vacate after the landlord refused to renew her lease.

International examples deliver greater certainty

Victoria does not compare favourably to many other jurisdictions in this context. Leases in Ireland, for example, are fixed for four years in the absence of any contrary agreement. The lease simply rolls onto another four year fixed term upon expiration.[33] In Belgium, short-term leases (three years or less) can only be extended once before it must transition to a nine year fixed term.[34] In New Jersey, a tenant must be given the right to renew the lease upon expiration unless termination action is taken on correct grounds.[35]

Moving toward the relatively high level of security afforded in these jurisdictions could change tenancy for our clients. In association with a grounds-based eviction system (see below), it would deliver greater security of tenure, and shift the perception of tenancies from being short-term, transient types of occupancy to being an accommodation option where tenants feel they have more control over how they live.

Recommendation 2: In the absence of any correctly proven termination action by the landlord, tenants should be given the first right of renewal the lease at the end of a fixed term. Failing this, leases should simply roll over onto the same term that was originally agreed to, and not default to a month-to-month lease.

6.1.3. Industry practices should be changed to inform tenants of their rights to negotiate terms

A change in industry practice has the potential to change the perception of tenancies. One notable industry practice is the default lease term of 6 or 12 month lease terms. As little as 20% of tenants seek to negotiate longer terms.[36] One positive change would simply be informing tenants that they

[33] Above n 15, p. 28; Hulse et al., above n 13, p. 128.
[34] Hulse et al., above n 13, p. 127.
[35] Ibid.
[36] Above n 18, p. 7. Note than in a number of Western European jurisdictions, the standard default term is 3 years.

are within their rights to negotiate terms of a lease. In a majority of cases where tenants did negotiate longer terms, the TUV have found that they were successful.[37]

One key obstacle is that low income households at a higher risk of experiencing rent stress will generally suffer from much less bargaining power, as they have a narrower range of affordable and suitable options to choose from. Unfortunately, these tenants are those who are most likely to benefit from longer terms and thus greater security of occupancy.

Landlords should also be more proactive when a possibility of a lease break arises. Although under section 234 of the Act,[38] tenants can apply to VCAT for reduction of a fixed-term tenancy agreement on hardship grounds, it is rare for landlords or agents to notify tenants of this right if a dispute comes up. As VCAT has the power under section 234 to order compensation (where relevant) between parties, using its jurisdiction more often would produce greater certainty and fairness for landlords and tenants.

Recommendation 3: both the Act and industry practice must be changed to ensure that tenants' rights are better explained to them, and not misrepresented by landlords or their agents through words, actions or omissions.

6.1.4. Where leases are longer, landlords' ability to claim 'lease break fees' must be capped

One further obstacle to longer-term leases is an unwillingness of tenants to enter such arrangements where financial penalties may attach in 'break lease' situations.[39] The Act provides limited scope for tenants to terminate a fixed term tenancy without giving recourse to the landlord. Some examples include:

- Where a tenant suffers severe hardship because of an unforseen change in circumstances – perhaps job loss or disability – they may apply for a reduction of the fixed term.[40] The Tribunal must determine that the hardship that the tenant would suffer would be greater than that of the landlord if the term was reduced.[41]
- The Act also includes family-violence related provisions, which may allow for a perpetrator to be excluded from a property and removed from a tenancy agreement, or allow a victim to break a lease early.[42]

We note that numerous instances of abandonment and lease breaks that clients have presented to WEst Justice with suggest these provisions may not be well understood or utilised by tenants

[37] Above n 18. Note that our client group is very different, and suffers much more prejudice in the rental market. Whether the statistics in the TUV report reflect the reality for our clients is questionable.
[38] *Residential Tenancies Act 1997* (VIC) s 234.
[39] Often referred to as 'breaking the lease'.
[40] *Residential Tenancies Act 1997* (VIC) s 234.
[41] *Residential Tenancies Act 1997* (VIC) s 234(2).
[42] *Residential Tenancies Act 1997* (VIC) s 233A; *Residential Tenancies Act 1997* (VIC) s 234(2A).

Where a tenant terminates a fixed term lease beyond these provisions, however, the law currently allows landlords to claim a number of fees in compensation. There are three common fees landlord claim when a tenant leaves:

1. Advertising fee;
2. Re-letting fee; and
3. Rent until a new tenant moves into the property.

In our experience, these fees are often inaccurately claimed by landlords. Advertising fees are frequently not supported by invoices or evidence of listings, the letting fee is not claimed on a pro-rata basis, and tenants are too often advised by landlords and agents that they must pay rent for the balance of the fixed term rather than until alternative tenants are found.

The reality is that tenants leave properties for a variety of reasons. Our client group often vacate or abandon premises due to associated vulnerability factors including family violence and the necessity of safe housing. For tenants who face illness and disability, including complications during pregnancy, the requirement to move closer to treatment and support may be a pressing reason to terminate early.[43] While we advocate for longer-term tenancies, this must be balanced with a restriction on the financial penalty that applies to tenants.

Casework at WEst Justice shows that tenants almost always have a substantial reason for seeking to break their lease. Most common are where tenants must move for employment, they are purchasing a house and are ready to take possession, the cost of living becomes particularly high or the rent unsustainable, or because the condition of the property has become unacceptable to them.

Case study – Vincent – broke his lease because they property was inappropriate

Vincent is a refugee from Myanmar. His family was living in a property on a 12-month fixed term lease, which he signed with no assistance of an interpreter. There was a special condition in the lease, which was not fully explained to Vincent, allowing the landlord to begin extensive building works whilst he was still living there. Having not realised what he signed, and without knowing his rights, Vincent vacated the property with 7 months of his fixed term remaining.

At the demand of the landlord's agent, Vincent paid over $1,500 in fees because he did not know his rights. Vincent sought WEst Justice's advice only after this, and we did not have an opportunity to contest the payment of these fees directly with the landlord. He informed us that he did not want to move and was happy at the property, however he could not deal with the building works any more, let alone with young children.

[43] Note that the Act does include family-violence related provisions, which may allow for a perpetrator to be excluded from a property and removed from a tenancy agreement, or allow a victim to break a lease early. Numerous instances of abandonment and lease-breaks that clients have presented to WEst Justice with suggest these provisions may not be well-understood or utilised by tenants.

Case Study – Praneel – broke his lease due to lack of repairs

Praneel and his wife took possession of a property in March 2015 on a 12-month lease. Two months into the lease, he was informed that the landlord would be performing much needed maintenance on a leak in the bathroom. The leak was extensive and would involve re-flooring, during which time the toilet, shower and sink could not be used for two weeks.

Praneel had never been told that repairs of this scale were going to be conducted on the property his stay. He had no family or close friends in Melbourne to stay with and his wife was expecting a baby in November. The landlord offered one week's rent free, but this would not help the household afford a fortnight's alternative accommodation.

After unsuccessful attempts to negotiate for repairs to be delayed or for more compensation for inconvenience, Praneel lost patience and broke his lease six months early with 14 days' notice. He only sought legal advice after the landlord's agent brought a VCAT claim against him claiming lost rent, advertising and letting fees. We were able to settle the matter for a reduced amount. Although we advised him of the value of bringing a counterclaim, Praneel had just started a full-time job and was reluctant to seek time off work to attend VCAT

Leaving aside the types of compensation a landlord may claim in a break lease situation currently, any extension of lease terms must also be accompanied by a cap on the ability of landlord to recoup costs in the event of early termination by the tenant. To create a situation where long lease terms also bring with it the risk of many years' worth of compensation would not be an equitable situation, and create a significant obstacle to tenants signing long-term leases. There is suggestion in a recent study that if the choice is between a short-term lease, or a long term lease that results in higher compensation to the landlord in the event of a lease break, tenants prefer the former option.[44]

Recommendation 4: that the ability for landlords to recover break lease fees be capped, to prevent significant impediments to tenants entering long-term leases. Leases up to 5 years should restrict landlord's ability to claim compensation after 12 months. Leases over 5 years should restrict a landlord's ability to claim compensation to the first 24 months.

[44] Above n 18, p. 8.

7. Terminations – building a 'grounds-based' system

The second key pillar in strengthening security of tenure is reforms to termination of tenancies.[45] The Act provides various means for landlords to terminate a tenancy, and specifies minimum notice periods a tenant must be given. Clear and reasonable grounds and processes on which a tenancy can be terminated are closely linked with the certainty tenants have over the continuation of their tenancy, and degree of control over their housing.[46]

From a security of tenure perspective, Victoria is reasonably unique in its combination of relatively short vacate periods, tacit use of termination provisions in retaliation to tenants exercising their rights, and the provision for termination on no grounds. These factors together undermine security of tenure. Reforms in these three areas are essential to deliver fairer, safer housing.

7.1 Vacate periods must be extended

7.1.1. 60 day Notices do not provide enough time to find alternative housing

The Act provides a number of grounds a landlord may terminate a tenancy and give the tenant 60 days notice to leave the premises. We focus on the following provisions:

- Repairs – a landlord may serve a Notice to Vacate pursuant to the Act if they intend to repair, renovate or reconstruct the premises immediately after the termination date. The landlord must have all permits and necessary consents to carry out the works, and demonstrate that the works cannot be performed whilst the tenancy is ongoing.[47]
- Demolition – where a landlord intends to demolish the property immediately after the termination date, a Notice to Vacate can be served on the tenant.[48]
- Occupation by landlord or their family – a landlord give a tenant 60 days notice that they, or their family, intend to occupy the premises after the termination date.[49]

Terminations of a tenancy on these grounds are among the most common WEst Justice's clients receive. We suggest that it is preferable for the minimum notice periods in these provisions to be extended not only to allow tenants time to access information and advice, but to find alterative accommodation in a difficult rental market, and provide a deterrent effect to landlords who may misuse these bases of termination.

One important reason for extending the length of these Notices is that they are often given as an alternative to the Act's 'no reason' Notices,[50] but with considerably shorter vacate periods. The commentary to the Act stipulates that any Notice given for repairs or renovations must outline why these are inconsistent with an ongoing tenancy. Our experience shows that where many tenants suspect that the work will not be completed, the standard of evidence required by VCAT to establish

[45] This section focuses on landlord-initiated terminations, as tenant-initiated terminations are covered above.
[46] Hulse et al., above n 13, p. 129.
[47] *Residential Tenancies Act 1997* (VIC) s 255(1).
[48] *Residential Tenancies Act 1997* (VIC) s 256(1).
[49] *Residential Tenancies Act 1997* (VIC) s 258(1).
[50] *Residential Tenancies Act 1997* (VIC) s 263. See discussion below on 'no reason' Notices.

the termination ground is not particularly onerous. We find that VCAT will often merely accept quotes and verbal evidence (often not from a qualified tradesperson) that the tenant must move out.[51]

Case study – Khoo – evidentiary burden proving a termination is not particularly vigorous

Khoo received for repairs and renovations, shortly after the landlord was requested to complete non-urgent repairs. Khoo was ultimately successful at VCAT because the landlord had failed to provide any evidence that the repairs and renovations were inconsistent with any ongoing tenancy. It was determined by VCAT, however, that quotes and a schedule of when the works were to begin would have satisfied the evidentiary burden to prove the grounds of termination

We note that WEst Justice's client base is overwhelmingly a low-income one. A primary concern for many of these tenants is how little time 60 days is to find alternative accommodation and raise the necessary finances associated with moving. Work, education, medical or childcare obligations can limit the time available to do this, and those same factors, along with affordability, limit the areas and the types of properties that are suitable and available. This combination becomes even more challenging for refugees and recent migrants, with many suffering prejudice because of their precarious financial position, lack of rental history and even their ethnic background.

Case study – Priya – did not have enough time to find alternative accommodation

Priya lives with her family in the Western suburbs of Melbourne. She is on a low income, and is solely reliant on Centrelink payments. Upon receiving a Notice to Vacate, Priya began applying for alternative properties, but experienced severe difficulty in securing housing. In all, she applied for over 25 properties, and was rejected by all of them. She believes that it was because of prejudice against her in the rental market. Priya was particularly concerned that over the course of the 60-day notice period, she was unable to secure any housing for her family, and this was causing her significant distress

Further, we suggest that extending vacate periods for these bases should not prove overly onerous for landlords. They are in effect notices of a landlord's future intent, and not necessarily of an immediate nature.[52] Certainly, the deterrent effect of dissuading landlords for issuing these Notices, often in lieu of a longer 'no reason' Notice, without a proper basis would outweigh any

[51] This is similarly the case with respect of landlords' occupation, where we find that little more than an agent's verbal evidence, is often acceptable.

[52] *Residential Tenancies Act 1997* (VIC) s 245. The Act provides a mechanism whereby a landlord may terminate for immediate repairs where a property uninhabitable.

inconvenience the extension would cause. There would also be a strengthening of the grounds based termination system we advocate for.

Recommendation 5: where a landlord seeks possession of a property as their principal place of residence, or for occupation by family, they must give sworn evidence to this effect at VCAT.

Recommendation 6: the evidentiary burden must be high where a landlord seeks to evict a tenant for renovations and repairs under section 255 of the Act. The focus in these circumstances should be on coming to an appropriate resolution whereby the tenancy and renovations can co-exist. Rent should also be reduced accordingly to compensate tenants for the inconvenience.

Recommendation 7: notice periods under sections 255, 256 and 258 of the Act be lifted to 6 months.

7.1.2. The termination period for rent arrears should be extended

Where a tenant falls 14 days in rental arrears, a landlord may serve a Notice to Vacate terminating the tenancy .[53] This provision provides one of the shorter termination periods available to either landlord or tenant under the Act, and permits a landlord to give a vacate date as little as 14 days from the date the Notice is deemed served.[54] Research into housing security and WEst Justice's own casework reflects that rental arrears is the most common reason for termination.[55] Often, arrears are resultant from an acute event – such as sudden unemployment – or a misunderstanding or miscommunication with the landlord or agent, and rarely a blatant disregard for their rental obligations.

Case study – Matthew – unexpected event meant he fell into rent arrears

Matthew has lived in his property for 2 years. He had never had any rental arrears problems in the past, and though finances were tight, he always paid on time. Matthew is a nurse and requires extensive use of his vehicle for work, traveling between patients' homes.

Unexpectedly, Matthew was required to spend $2,000 on car repairs. He would lose his job otherwise, and was forced to use money earmarked for rent on these repairs. Consequently, a Notice to Vacate was served for rent arrears, and a possession hearing was

[53] *Residential Tenancies Act 1997* (VIC) s 246.
[54] *Residential Tenancies Act 1997* (VIC) s 246(2).
[55] Hulse et al., above n 13, p. 63.

scheduled. Matthew attended WEst Justice for advice, and explained that if it were not for needing the repairs to the car, in order to keep his job, the rent arrears would never have happened. WEst Justice was ultimately successful in negotiating a payment plan on his behalf, and the tenancy is ongoing

Case study – Hattie – misunderstanding and miscommunication

Hattie had lived in a property with her family since 2012. For the first two years of the tenancy, she dealt directly with her landlord. Although the tenancy agreement required that rent must be paid a month in advance, the landlord was very relaxed about enforcing this and didn't mind that Hattie was paying regularly, but technically two weeks behind when rent was due.

In early 2015, a real estate agent took over management of the tenancy. They immediately began sending Hattie text message warnings that her rent was behind and threatening possession of the property. Hattie did not understand the month in advance obligations and was upset that the agency was always demanding more money when she had been paying regularly.

Although Hattie asked her property manager for a copy of her ledger, which was emailed to her, she was not computer literate and did not open the attachment. She became suspicious that the agency was demanding money from her unlawfully and reacted by ceasing rental payments until they explained themselves. She only sought legal advice after receiving a possession order for being over a month in arrears. Although we were successful in having the possession order dismissed, clear communication between the agency and the tenant could have avoided a stressful situation for both our client and her landlord.

There are two consequences from this short termination period. First, many tenants wish to maintain the tenancy and seek a payment plan to address the arrears. That is, tenants will pay rent plus an additional sum to reduce what is owed to the landlord. The notice period of 14 days, however, provides very little time to negotiate a payment plan. For our low-income clients, this period often involves needing an appointment with financial counsellor or housing service to determine what is a sustainable plan into the future for their rental situation.

Case study – Mischa – minimal time for negotiating a payment plan

Mischa had been a tenant in her property for 5 years. She is an older tenant and when she sought assistance of WEst Justice, explained that moving house would be difficult for her financially, and for her health. Mischa only sought our assistance after an Order for

possession had been granted by VCAT, and a Warrant purchased. With only two days before the Warrant was to be executed, WEst Justice urgently sought to negotiate a payment plan with the landlord to save the tenancy. Thankfully for Mischa, the landlord did accept a plan to address the outstanding arrears, and the Warrant was cancelled. However, the fact remains that such negotiations should more appropriately have occurred prior to any Order for possession

Secondly, should a tenant be required or decide to move, it provides very little time to find alternative accommodation. In a highly competitive rental market, in addition to the costs and stress of moving, we submit that it is preferable to extend the termination period for rent arrears to give tenants a reasonably opportunity

Ultimately, in rent arrears situations, tenants should be given adequate time to come up with a suitable and sustainable payment plan with the landlord. Further, we would argue that it is more beneficial to have tenants continuing on payment plans and addressing the arrears than an Order for compensation to a landlord for an evicted tenant that may ultimately never really be enforceable.[56]

Internationally, the extent to which arrears may accrue before eviction occurs varies widely. For example in France, a tenant may be as much as 18 months behind in their rent before eviction occurs. This sort of leniency would not necessarily be appropriate in Australia, as sometimes eviction for arrears can be a 'blessing in disguise' for unsustainable rentals. However it is worth noting that 14 days is harsh by international standards, particularly given the lack of preliminary considerations required before a landlord applies for possession of a property.

For the benefit of both parties, applications to VCAT for possession order in the event of rent arrears should be reframed to show that good faith negotiations have occurred to resolve the arrears impasse. When this is not done, it often falls to VCAT at a hearing to establish a suitable arrangement for payments that the parties could have finalised with reduced time, cost and anxiety. With this in mind, it should be a requirement that a landlord demonstrate to VCAT at any possession hearing that they have attempted to enter a payment plan in the first instance.[57]

Case Study – Hannah – tried to negotiate an outcome with the landlord

Hannah lives alone with her teenage son. In September 2015, she fell 21 days into arrears when she took time off her casual work as a receptionist to care for a dying relative. When she received a Notice to Vacate, closely followed by a Notice of Hearing at VCAT, she

[56] Note that a significant proportion of our clients are judgment proof, pursuant to the *Judgment Debt Recovery Act 1984* (VIC).

[57] It is worth noting here that in many consumer contracts – including finance, insurance, credit and utility contracts – financial hardship considerations have come to the fore over the last 15 years. When consumers find themselves in financial difficulty, it becomes incumbent on the parties to resolve the matter in a sustainable and amicable manner, rather than simply litigate any repudiation by the consumer. In this sense, tenancy agreements should reflect commercial practice – financial hardship should become a key consideration when dealing with, and determining, rental arrears.

approached our office for legal advice. We established that she could reduce her arrears within three weeks under a payment plan. When we approached the landlord's agent with Hannah's proposal, we were notified that the landlord wanted possession and would not be negotiating. The landlord's agent appreciated that VCAT would likely approve the payment plan and possession would not be granted, but explained she was obligated to carry out the landlord's wishes.

The VCAT hearing went ahead as scheduled and the member presiding issued an identical payment plan to that originally offered by the tenant. Hannah had to miss a shift of work to attend (as she is a casual employee, she was not paid) and the agent had to make a 40 kilometres round-trip from their office. Had an attempt at good faith negotiations been a clear legal prerequisite to applying for a possession order, significant loss of time and earnings could have been avoided on both sides

Recommendation 8: notice period for rent arrears terminations should be lifted from 14 days to 28 days. Further, landlords must be required to show they have attempted good faith negotiations to resolve the arrears situation before applying for a possession order.

7.2. Landlords must be prevented from misusing Notices to Vacate

The validity of a Notice to Vacate is a key concern when we advise tenants of their rights. As we have already alluded to, however, Notices are frequently misused to remove tenants. This certainly goes against notions of security of tenure, and reforms are required to ensure that tenants do not vacate properties, or worse, are subject to possession orders, on incorrect or fabricated grounds.

A recent, and very blatant example of misuse was in respect of a Notice to Vacate issued under Section 256 of the Act for demolition:[58]

Case study – Vu – basis of landlord's termination incorrect

Vu had been requesting repairs at his property for several months. The repairs required were extensive. The landlord served a Notice to Vacate under section 256 of the Act, stating that the property would be demolished immediately upon termination. Vu complied with the Notice and vacated the property, however he reported that he noticed a "for let" sign on the property shortly after he had left. The house has not been demolished and appears to have been re-let

[58] *Residential Tenancies Act 1997* (VIC) s 246.

The Act does provide an avenue for tenants to claim compensation in such a scenario.[59] However, this does not negate the fact the manner in which security of occupancy has been undermined. The tenant has been required to uproot her family based on a claim for possession the landlord did not follow through with. Not only must Victoria reform termination of tenancies to a 'grounds based' framework, but also ensure that landlords are held strictly to their burden of proving a correct basis when seeking possession.

We reiterate the recommendations at paragraph 6.1.

Recommendation 9: the Act should be amended to include a penalty equivalent to three months rent where a landlord has found to have issued a Notice to Vacate and did not have a proper basis to do so.

7.3. Reform to breach of duty as a basis of termination

A tenancy may be terminated under the Act for persistent breaches. Tenants obligations are found in Part 2, Division 5 of the Act and include the duty not to cause nuisance or interference,[60] the duty to avoid damage to the premises,[61] and the duty to keep rented premises clean.[62] Landlords may issue two Breach of Duty Notices to tenants in respect of a failure to uphold their obligations, before the third can be issued as a Notice to Vacate.[63]

The first issue tenants must deal with is whether or not to challenge the Notice at VCAT. Notices give 14 days for a tenant to 'comply' before another Notice may be served. In the meantime, a tenant who wants to challenge the validity and basis on which the Notice was served will need to receive advice from a tenancy advocate, followed by an application to VCAT, simply to argue that the Notice is incorrect. We find that many of our tenants will either simply follow the breach notice because they think they must (for fear of further ramification, or worse, eviction) or wait to challenge all notices at a possession hearing.

Beyond the procedural issues with the Act's breach of duty system, we encounter ongoing substantive issues. Notices can be retaliatory, and founded on unreliable or scant evidence. We have seen neighbours of tenants utilise the breach of duty process to harass them by making vexatious complaints to landlords and agents.

Further, Breach of Duty Notices often demand that tenants fulfil tasks that VCAT might not otherwise permit. In once instance, a WEst Justice client was 'required' to re-paint her entire house, and replace all carpets to remedy her alleged breach of duty to avoid damage. Ultimately liability and quantum for significant damage are a matter VCAT is best placed to decide. However, in this case the tenant feared losing her property so much she simply complied.

[59] *Residential Tenancies Act 1997* (VIC) s 210.
[60] *Residential Tenancies Act 1997* (VIC) s 60.
[61] *Residential Tenancies Act 1997* (VIC) s 61.
[62] *Residential Tenancies Act 1997* (VIC) s 63.
[63] *Residential Tenancies Act 1997* (VIC) s 249.

Case study – Xi – repeated Beach of Duty Notices

Xi unexpectedly received a Breach of Duty Notice from the landlord regarding alleged damage to carpets and walls. The Notice required that Xi replace all of the carpets in the property, and repaint the walls she was said to have damaged. Having not received any advice at this stage, Xi painted the walls at considerable expense, but did not have time, nor the money, in the 14 days to replace the carpet. Consequently, a second Breach of Duty Notice was served on Xi for the carpets.

Xi was concerned that the carpets were old when she moved in, and that normal wear and tear should be taken into account. WEst Justice suggested to the landlord that it was the responsibility of VCAT to determine liability and damages. Our position was not accepted, and a Notice to Vacate was issued for a third breach. Throughout the period the Notices had been served, Xi suffered significant stress, and consistently queried why the landlord was able to hold her liable like they had

This system of Breach Notices can replace less adversarial solutions such as dispute resolution. The system of successive orders to rectify by a landlord on a 'three-strike' basis is extremely stressful to our clients, and ultimately detracts from security of tenure. For many tenants, the first opportunity they get to challenge a minor alleged breach of duty is at a possession hearing.

Recommendation 10: the Act should be reformed to allow challenges to breach of duty notices in a quick, fee-free and streamlined manner before VCAT.

Recommendation 11: where a tenant is served with a Notice to Vacate for persistent breaches, the termination period should be extended to 28 days.

7.4. 'No reason' Notices should be abolished

As a general premise, the Act requires a landlord to have a valid reason for issuing a Notice to Vacate to a tenant.[64] These reasons are outlined in the Act, and many have been canvased in this submission. Section 263 of the Act, however, allows a landlord to evict a tenant for no reason. It is our view that the existence of 120-day 'no reason' Notices to Vacate represent one of the most significant impediments to housing security for tenants.

For example, if a tenant is issued with a Notice to Vacate for rent arrears that appears to be invalid, the tenant will have the right to challenge that Notice to Vacate at VCAT. However, in these circumstances a prudent lawyer will nonetheless need to advise the tenant of the risk of eviction

[64] *Residential Tenancies Act 1997* (VIC) ss 243-262A.

regardless of the outcome; if the original notice is found to be invalid, the landlord will have the option of issuing a 120-day Notice to Vacate and evict the tenant anyway. While a tenant could challenge this subsequent notice by arguing that it is retaliatory and should be of no effect, it is far from certain that VCAT will accept this claim. At any rate, the issuing of a Notice to Vacate can have significant effect on a tenant's certainty and security, as well as their wellbeing

We outlined in WEst Justice first submission to the *Fairer, Safer Housing* review that pursuant to Division 1 of Part 3 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**the *Charter***), the responsible Minister of Parliament must prepare a statement of compatibility that states whether any new residential tenancies legislation is compatible with the human rights set out in the Charter. We also note that section 13 of the *Charter* establishes that Victorians have a right not to have their home arbitrarily interfered with.[65] As 'no reason' Notices to Vacate allow tenants to be arbitrarily evicted from their homes, it is our submission that a decision to retain them would be contrary to the rights set out in the *Charter*.

At its most fundamental level, the Act must be reformed to provide for grounds-based termination. The 'no reason' Notice is an impediment to this.

Recommendation 12: that the 120-day 'no reason' Notice be abolished as a grounds of termination.

7.5. Retaliation as a defence should be expanded

Under the Act, there are few legislated defences available to tenants who have been issued with Notices to Vacate. It is our submission that the defences available to tenants should be increased, along with the removal of the role of discretion in VCAT Members' decision-making in some circumstances.

In particular, it is our view that there should be a review of the defence of 'retaliation'. Under the Act, a Notice to Vacate may be challenged on the basis that it was issued in response to the exercise, or proposed exercise, by the tenant of a right under the Act.[66] However, at present there are two significant impediments to a tenant who believes that the Notice to Vacate was issued in retaliation:

- A tenant may only challenge a Notice to Vacate that is issued at the end of a fixed term tenancy or a 120-day no reason Notice to Vacate.[67] This means that in cases where another type of Notice to Vacate has been issued, tenants are not able to argue that it was issued in retaliation, even though, for instance, the Notice may have been issued immediately after a request for repairs; and

[65] *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 13; See *Homeground Services v Mohamad (Residential Tenancies)* [2009] VCAT 1131 (6 July 2009) for further discussion on the interaction between 'no reason' Notices and the *Charter*.
[66] *Residential Tenancies Act 1997* (VIC) s 262(2).
[67] *Residential Tenancies Act 1997* (VIC) s 266(2).

- The defence only applies if the tenant opts to launch a pre-emptive challenge to the Notice to Vacate. Time limits apply for pre-emptive challenges.[68] Often we find that our clients have not met the time limit for pre-emptive challenges, and do not understand their rights in this regard.

Our casework shows that the defence of retaliation would be of particular benefit to tenancies terminated under the repairs provision. When advising clients on periodic leases or near the end of a fixed term who seeking a repairs order from VCAT, or simply asking what their rights are with regards to the maintenance of their home, we are often forced to regretfully advise of the risk that their lawful attempts may result in a Notice to Vacate. This is clearly goes against notions of security of occupancy.

We further note that where tenancies have been considered 'difficult' over their fixed term, they may be the subject of a Notice to Vacate.

Recommendation 13: The defence of retaliation contained in section 262(2) of the Act should be extended to apply to all Notices to Vacate, and at all VCAT hearings in relation to determining whether a possession order should be made. Penalties should be included where a landlord is found to have acted in retaliation.

7.6. The role of discretion by the Tribunal in some instances

It is also our submission that the review should consider the role of discretion in relation to VCAT's decision to issue possession orders. The structure and wording of the current Act means that if a valid Notice to Vacate is issued, and if the tenant is still in possession of the property,[69] the Tribunal has the discretion to dismiss or adjourn the matter in certain circumstances.[70] For instance, if a tenant is 14 days in arrears at the time that a Notice to Vacate is issued, they may still be lawfully evicted even though they are up to date with their rent payments on the day of hearing.

Our view is that in order to provide greater certainty and security for tenants it is preferable to reduce the role of discretion in determining whether a tenant should be evicted and instead provide specifically legislated defences to an application for possession. For instance, in relation to an application for possession for rent arrears, it is our view that the Act should be amended so that a landlord's application must be dismissed where the tenant has not attended VCAT in relation to an arrears matter in the past year and is up to date with the rent on the day of hearing.

Recommendation 14: The Act should be amended to reduce VCAT's role of discretion in relation to eviction matters by creating clearer statutory guidelines on under which circumstances a possession order may be granted.

[68] *Residential Tenancies Act 1997* (VIC) s 266(3).
[69] *Residential Tenancies Act 1997* (VIC) s 330.
[70] *Residential Tenancies Act 1997* (VIC) s 331.

8. Rent Increases

Rent level is a key determinant for tenants when selecting a property.[71] Where the rent is too high, for instance, financial distress can ensue, and tenancies can become unsustainable. Understandably, successive rent increases beyond the ability of a tenant to afford them will impact on security of tenure. The Act provides mechanisms for landlords to increase rents, and for tenants to respond where they disagree with an increase. Largely, this revolves around the review of proposed rents and rights to challenge this before the Tribunal.

Section 44 of the Act states that a landlord must give no less than 60-days notice in writing of a proposed rent increase.[72] Rents may only be increased once every six months,[73] and must not be increased during a fixed term unless the agreement allows for this.[74] Where a tenant believes that a rent increase is excessive, they can apply for a review to the Director of Consumer Affairs Victoria.[75] Following this report, the matter can be escalated to VCAT.[76]

We have three main concerns with how rent increases are effected under the current legislation.

Firstly, in our experience, many clients ask whether enforcing their rights under the Act means they will face a rent increase. That is to say, they perceive that if they simply keep quiet about repairs that may be required, for instance, their rent levels will remain static. Many tenants have even gone so far as to request repairs or modifications to the property, only to be told that this would necessarily require a rent increase.

Secondly, to the extent that rent increases are permissible, we submit that every 6 months is too frequent. Increases at this frequency disproportionately affect renters on lower incomes and reduces certainty around budgeting and finances more broadly.

Finally, we see that landlords often attempt to avoid the rent increase process by either terminating the tenancy, for the purpose of increasing rent without fear of the Director rejecting the increase, or providing tenants with new leases and a new rent amount without a valid Notice of Rent Increase.

Case Study – Aditi – facing a Notice of Rent Increase

Aditi and her husband are asylum seekers who commenced a 12-month fixed-term tenancy agreement in February 2015. The advertisement for the rented premises stated that it included unzoned ducted heating and a smaller wall heater for the living room. As they are on a very low income, the household decided they would rely on the smaller wall heater to keep their power bills down. When the weather became colder in April, Aditi learned that the wall heater did not work. She was told by the landlord that it was disused, the landlord would not fix it, and she should use the ducted heating instead.

[71] Above n 18.
[72] *Residential Tenancies Act 1997* (VIC) s 44.
[73] *Residential Tenancies Act 1997* (VIC) s 44(4A).
[74] *Residential Tenancies Act 1997* (VIC) s 44.
[75] *Residential Tenancies Act 1997* (VIC) s 45.
[76] *Residential Tenancies Act 1997* (VIC) s 45.

> Forced to heat the whole house to keep their infant son warm, we estimated that Aditi and her husband spent about $650 more on power bills over the winter than they would have using the smaller heater that was advertised. We brought a claim against the landlord for misleading and deceptive conduct in the way the property was first advertised, and settled the matter by agreeing that the tenants would receive two weeks rent-free from the landlord (equivalent to $650).
>
> The landlord has now notified Aditi that if they wish to renew the agreement their rent will increase by $20 a week. Aditi suspects this might be retaliatory after the landlord lost rental income in the settled agreement, and is unable to challenge and negotiate the rent rise as she could under a periodic lease

The system in Victoria contrasts with Western European jurisdictions. In France, rents may only be increased where a property is undervalued.[77] Where a rent is increased, the notice period is 6 months.[78] In Germany, rents are based on a local average, and cannot increase more than 20% over three years.[79]

We submit that it is preferential for rent increase mechanisms under the Act to be changed to allow for annual increases that are in some way tied to the rate of inflation. This provides more certainty to tenants and their budgets, and strengthens security of occupancy.

Recommendation 15: rent increases should be limited to once every 12 months.

Recommendation 16: rent increases should be capped at twice the CPI over a 12-month period.

Recommendation 17: penalty provisions in the Act should be strengthened for landlords who attempt to circumvent the rent increase procedures.

[77] Above n 18, p. 28.
[78] Ibid.
[79] Ibid. This still represents twice the rate of CPI in Australia, however.

9. Repairs, maintenance and modifications

Landlords have a duty under the Act to ensure that a property is maintained in good repair.[80] Repairs, maintenance and modifications are an important pillar of security of tenure because they will affect the suitability of the property to the tenant's needs.[81] Of course, these needs may change over time, particularly for older and recent migrant tenants.[82] We submit that there are four areas requiring reform: removing barriers to tenants raising maintenance issues, emphasis on dispute resolution in repairs situations, provision for modifications to properties, and introduction of minimum standards.

9.1. Risks associated with maintenance requests must be removed

Repairs matters constitute a substantial proportion of WEst Justice's casework. These range from 'non-urgent repairs' – commonly fences, problems with bathrooms, broken cabinetry and guttering – to urgent repairs, which are defined under the Act and include major plumbing repairs, electrical malfunctions and issues relating to security.[83] Whilst the procedures for urgent and non-urgent repairs vary, it follows that the landlord must first be given an opportunity to rectify the matter. Should this fail, the tenant may lodge an application to VCAT for a repairs Order.[84]

Many of our clients are relieved to know that landlords do have obligations around repairs, and there is a procedure to have these attended to. However, WEst Justice finds that many tenants will not exercise their rights for fear of rent increases, or worse, fear of eviction.

Case study – Jeedor – fearful of eviction and did not pursue his rights

Jeedor has lived in Victoria for 12 months, and rents a property in Sunshine. He lives with his wife and three young children. As the weather became cooler, Jeedor came to realise that his heater did not work. Following advice from WEst Justice, which included representations on his behalf to have the heater repaired, Jeedor decided that he did not want to pursue the landlord at VCAT because he was scared of 'rocking the boat.' That is, he was prepared to deal with a cold house rather than run the risk of a rent increase he could not afford, or eviction and the angst of needing to relocate his family.

[80] *Residential Tenancies Act 1997* (VIC) s 68. An exception to this provision is where a tenant has caused the damage: *Residential Tenancies Act 1997* (VIC) s 68(2)(a).
[81] Ibid; See also Hulse et al., above n 13, p. 154.
[82] Above n 18, p. 19.
[83] *Residential Tenancies Act 1997* (VIC) ss 3, 72.
[84] Note that under the Act, a tenant may have urgent repairs attended to at their own expense where they cannot get consent (up to a value of $1,800), and later seek reimbursement from the landlord. As most of our clients are on Centrelink as their primary source of income, this is often not a viable option. See *Residential Tenancies Act 1997 (Vic)* s 72(1).

Recommendation 18: retaliation as a defence must be expanded to all Notices to Vacate, and that rent increases should be disallowed where a tenant has requested repairs, but the landlord has not complied with such requests.

9.2. Dispute resolution mechanisms should be strengthened for repairs and maintenance issues

The Act clearly establishes how repairs matters are to be dealt with. In virtually all such cases at WEst Justice, tenants have either contacted the landlord themselves to get repairs completed, or we make representations on their behalf. It is preferable for repairs and maintenance requests to be resolved at this stage, rather than progress to VCAT, incurring time, expense, and the stress of attending the Tribunal.

There has been a trend in other jurisdictions to have matters such as these mediated before arbitration commences.[85] The two most obvious means of providing such services are by expanding the Dispute Settlement Centre of Victoria ('DSCV') or a more streamlined mediation through VCAT itself.[86] Certainly this will not be appropriate in all circumstances. However a VCAT Order should not be necessary in every repairs matter, and indeed we find that often the hurdle between tenant and landlord has been a language barrier or difference of expectation, which has led to communication breakdown.

Recommendation 19: where appropriate, mediation services should be expanded to handle non-urgent repair matters to facilitate a suitable repairs arrangement within the framework of the Act.

9.3. Tenants should be given greater freedom to make modifications to create a 'home'

The needs of a tenant may change over time. This may be owing to age, an expanding family, or constraints on their income that means they cannot feasible move from the property they are in. What a tenant does to a property must be within the context of the Act, which outlines duties to avoid causing damage,[87] and keeping the property reasonably clean.[88]

There are many international examples that allow tenants to modernise properties, sometimes irrespective of whether they have the landlord's consent. In Germany, for instance, tenants can modify the premises without the consent of the landlord, but putting together a 'modernisation

[85] Hulse et al., above n 13, p. 134.
[86] *Victorian Civil and Administrative Act 1998* (VIC) s 88. Mediation provided through DSCV is free, and VCAT's service should be without charge.
[87] *Residential Tenancies Act 1997* (VIC) s 61.
[88] *Residential Tenancies Act 1997* (VIC) s 63.

agreement.'[89] This allows a tenant to recoup (depreciated) investments when they vacate.[90] Laws in Germany also afford a right for tenants with a disability to modify a property in accordance with this disability, and a landlord cannot withhold consent to modifications that make a property safer or more suitable for their use.[91] Similarly, the Netherlands has a points system that ties rents to property quality.[92] In effect, landlords cannot increase rents on properties of a poor standard, or poorly maintained.

These jurisdictions have enhanced security of tenure through such measures. Tenancies in this sense become more about living in a home, rather than occupying a property temporarily. We suggest this approach is preferable in Victoria, and particularly relevant to our clients, many of who are establishing a home after relocating to Australia in traumatic circumstances.

Recommendation 20: landlords should not be permitted to unreasonably withhold consent to modify a property. Further, rent increases should not be permitted where the landlord has poorly maintained a property, or the quality of housing has not been improved.

Recommendation 21: tenants should be permitted to recoup depreciated investments in modifying the property once they have vacated.

9.4. The need for minimum standards for rental housing

At present, there are no minimum standards for rental properties in the Victoria. Under the current Act, landlords are only required to maintain rental properties, meaning that a tenant can only compel a landlord to carry out repairs to fixtures that were provided from the commencement of the tenancy.[93] This means that in Victoria housing can be rented without basic amenities such as heating, running hot water or a working oven or stove.

The position in relation to tenancies can be contrasted with rooming houses, in which minimum standards are set out by way of regulations.[94] The relevant rooming house regulations, for instance, prescribe that rooming houses must be provided with a cooktop, power outlets in working order and that an electrical safety check must be carried out every five years.[95]

[89] Hulse et al., above n 13, p. 148.
[90] Ibid.
[91] Ibid, p. 149.
[92] Ibid.
[93] *Residential Tenancies Act 1997* (VIC) s 68, Division 6 of Part 2.
[94] *Residential Tenancies Act 1997* (VIC) s 142B; *Residential Tenancies (Rooming House Standards) Regulations 2012* (VIC).
[95] *Residential Tenancies (Rooming House Standards) Regulations 2012* (VIC) ss 7, 11, 20.

In light of the current affordable housing shortage in Victoria,[96] WEst Justice sees large number of tenants who have no choice but to accept rental properties that are in a poor condition. It is therefore our submission that the market has failed to ensure that all renters have access to secure, safe housing that does not jeopardise their health. In light of this, it is our submission that residential tenancy legislation needs to play a greater role in ensuring minimum standards.

Recommendation 22: the Act should be amended to include a mechanism for minimum standards for rental properties to ensure that al renters have access to safe and secure housing.

[96] Victorian Government Department of Human Services ("DHS"), *"Rental Report – Quarterly: Affordable Lettings by LGA"*, December 2014, Accessed at http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/research,-data-and-statistics/rental-reports-2014. In March 2000 31.2% of Victoria's rental housing was classified as affordable, in December 2014 it was 22%.