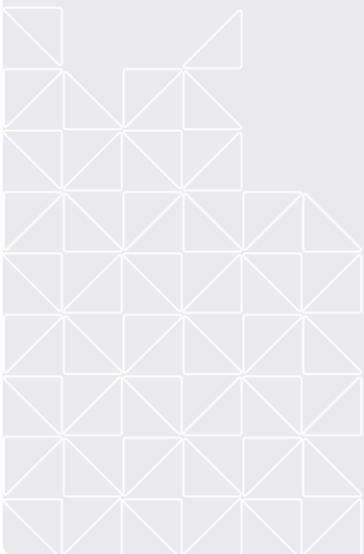


# Charting a stronger course

Submission to the Eight Year Charter Review

June 2015



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# 1. Executive summary and four key recommendations

Justice Connect Homeless Law (**Homeless Law**) welcomes the opportunity to contribute to the 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).

This submission addresses aspects of the Charter's operation that Homeless Law has direct experience with through our provision of legal representation to approximately 400 clients per year. This submission identifies how Homeless Law has seen the Charter working well to protect the human rights of Victorians who are homeless or at risk of homelessness, as well as those areas where there are opportunities to strengthen the Charter's effectiveness.<sup>1</sup>

Homeless Law's experience is that the Charter has the potential to:

- Make room for individual circumstances to be considered and competing priorities balanced when making difficult decisions;
- Encourage the negotiated resolution of disputes between public authorities and individuals;
- Generate better, fairer outcomes for people dealing with public authorities; and
- Prompt reflection – by courts, public authorities and the community – on laws, policies or practices that unjustifiably limit human rights.

**Annexure 1** provides an indication of what this means in practice. It summarises 21 Homeless Law matters where the Charter was used to identify viable alternatives to eviction and to avoid imprisonment for unpaid fines. This work prevented a total of 37 people, including 21 children, from being evicted from social housing into homelessness.<sup>2</sup>

The seven case studies contained in this submission also show how the Charter has been used to bring about better, fairer outcomes for people experiencing or at risk of homelessness.

There are, however, a number of factors which are limiting the Charter's effectiveness and impeding its ability to provide meaningful protection of human rights in Victoria. Eight years in, it is time to reflect on these factors and take steps to address them.

Homeless Law makes four key points and recommendations regarding the Charter's current operation and measures to improve its effectiveness:

1. **Clarity about who is covered by the Charter** – In the housing sector, there is ongoing uncertainty about whether community housing providers are public authorities under the Charter and therefore have obligations to give proper consideration to, and act compatibly with, human rights when making decisions about tenancy management. This uncertainty is a barrier to the incorporation of the Charter in the day-to-day work of community housing providers. Homeless Law recommends that housing providers registered under the *Housing Act 1983* (Vic) are confirmed to be public authorities for the purposes of the Charter and are supported with training and resources to adopt Charter-based policies and practices.
2. **Meaningful human rights accountability** – Since the decision of *Director of Housing v Sudi* [2011] VSCA 266 (**Sudi**), VCAT does not have jurisdiction to consider whether a social landlord has complied with its obligations under section 38 of the Charter in eviction proceedings, and any questions about Charter compliance in eviction matters must be considered by the Supreme Court. This has reduced the preventative role of the Charter, slowed the practical guidance provided by Charter-based decisions, and diminished protection and accountability in the event of non-compliance. Homeless Law recommends that the Charter is amended to expressly confer jurisdiction on VCAT to hear and decide Charter unlawfulness under section 38 by way of defence in tenancy proceedings brought by social landlords. This is a modest, practical and straightforward amendment that overcomes a complex jurisdictional issue and, in doing so, would give meaning to human rights – for both tenants and social landlords – in tenancy proceedings. In addition to this specific amendment, Homeless Law supports the amendment of section 39 of the Charter to create an independent cause of action and remove the confusion currently attached to the requirement to 'piggyback' a Charter argument on another cause of action.
3. **Building Victoria's human rights culture through education and training** – Education and training about the Charter and how it operates in practice has stalled and human rights are not at the forefront of decision-makers' minds in Victoria. Increased

<sup>1</sup> Homeless Law gratefully acknowledges Ron Merkel QC, Daniel Aghion and Christine Melis of counsel for their pro bono advice; Justice Connect volunteers Jenny Nguyen and Jill Beale for their assistance with the case studies in this submission; Homeless Law pro bono lawyers for their work on the matters behind the case studies; and the clients whose experiences have informed this submission.

<sup>2</sup> 'Social housing' includes public housing and housing provided by community housing organisations, including transitional housing.

education, resources and training are needed for frontline staff in public authorities, and for courts, tribunals and members of the community. The ongoing delivery of relevant, practice-based training will continue to entrench human rights in day-to-day activities and decision-making and, in doing so, will lead to improved services and better outcomes for all Victorians.

4. **Protecting and promoting all human rights** – Economic and social rights – including rights to an adequate standard of living (e.g. adequate food, clothing and housing), education, and the highest attainable standard of physical and mental health – are the rights that matter most to many Victorians. The commitment to respect economic and social rights does not confer absolute rights; it is a commitment to ensure the ‘progressive realisation’ of those rights, within the maximum of available resources. Homeless Law recommends that economic and social rights should be protected by the Charter, so that they are considered by Parliament when making laws, by public authorities when making decisions and by courts when interpreting laws. Protection and promotion of these rights is an important part of creating a fair and just Victorian community.

These changes have significant potential to generate a clearer, more robust and accessible framework for protecting human rights in Victoria. The benefits will be widespread. Decision-makers in public authorities will be equipped with tools and understanding to make their roles easier; their obligations will be clearer; and the consideration of human rights in tenancy matters will be happening in a forum that is accessible for both tenants and social landlords. In these ways the modest changes proposed will set the Charter back on course for improving laws, decisions and lives in Victoria.

## 2. Human rights and homelessness: the Charter in practice

Homeless Law is a specialist legal service for people experiencing or at risk of homelessness. Homeless Law staff work closely with pro bono lawyers to provide legal advice and representation to over 400 people experiencing or at risk of homelessness each year.<sup>3</sup> Our services are outreach based and client centred, and our two staff social workers allow us to respond to clients' legal and non-legal needs.

In 2013–14 Homeless Law prevented the eviction of 129 clients and their families through legal representation and social work support. In that same year, Homeless Law provided legal representation to 109 people dealing with fines and infringements for conduct directly related to homelessness, including 15 people charged with begging as part of Operation Minta in the City of Melbourne.

Based on the evidence-base and insights from this work, this submission addresses six of the Terms of Reference (TOR) for the 2015 Charter Review:

- The development of a human rights culture in Victoria, particularly within the Victorian public sector (TOR 1(d));
- The application of the Charter to non-State entities when they provide State-funded services (TOR 1(e));
- clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations (TOR 2(a));
- Clarifying the provision(s) regarding legal proceedings and remedies against public authorities (TOR 2(b));
- Any other desirable amendments (TOR 2(i)); and
- A recommendation under section 45(2) as to whether any further review of the Charter is necessary (TOR 3).

Homeless Law (then the PILCH Homeless Persons' Legal Clinic) made a detailed submission, *Charting the Right Course*, to the Scrutiny of Acts and Regulations Committee (SARC) as part of the 2011 Inquiry into the Charter (2011 Submission).<sup>4</sup> The 2011 Submission identified that the Charter had brought about a gradual but noticeable improvement in the way decisions were made by public authorities and the outcomes that were being achieved for vulnerable Victorians. The 2011 Submission featured 20 case studies where the Charter had been used to negotiate or advocate for clients. In those matters, 42 people, including 21 children, had avoided eviction into homelessness and over 50% had been resolved through negotiation (i.e. without VCAT needing to make a determination). There have been significant changes in the Charter's operation since the 2011 Submission and this submission discusses the impact of those changes.

This section provides an update on the two main areas in which Homeless Law relies on the Charter to improve outcomes for clients who are homeless or at risk of homelessness. These are:

- Prevention of evictions into homelessness; and
- Addressing the disproportionate and discriminatory impact of the fines and infringements system and laws regulating public space on people experiencing homelessness.

### 2.1 Preventing evictions into homelessness

#### Housing and homelessness in Victoria

A snapshot of the housing and homelessness context in Victoria is:

- There are approximately 22,789 Victorians experiencing homelessness, almost half are women and one-sixth are children under the age of 12.<sup>5</sup>
- 99,892 people sought assistance from specialist homelessness services in Victoria in 2013–14.<sup>6</sup>

<sup>3</sup> Homeless Law's partner law firms are: Allens, Clayton Utz, Corrs Chambers Westgarth, Harwood Andrews, Herbert Smith Freehills, King & Wood Mallesons, Minter Ellison and Transport Accident Commission. Our clinics are at: Central City Community Health Service, HomeGround Services, Melbourne City Mission, Port Phillip Prison, Salvation Army Geelong, VACRO and a library in the City of Melbourne.

<sup>4</sup> Justice Connect Homeless Law (formerly the PILCH Homeless Persons' Legal Clinic), *Charting the Right Course: Submission to the Inquiry into the Charter of Human Rights and Responsibilities*, 6 June 2011 (2011 Submission).

<sup>5</sup> Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2011* (12 November 2012) 12 (Census 2011).

<sup>6</sup> Australian Institute of Health and Welfare, *Specialist Homelessness Services: 2013–2014* (2014) (AIHW Report).

- There are currently 33,933 people on the state-wide public housing wait list, including 9,556 who are eligible for 'early housing' due to urgent needs.<sup>7</sup>
- A recent snapshot of private rental properties showed that less than 0.1% of rental properties in Metropolitan Melbourne are affordable for single parents relying on the single parenting pension and only 0.8% of rental properties are affordable for these families in coastal or regional Victoria.<sup>8</sup>
- 20,070 applications for possession orders were made to VCAT in 2013–14.<sup>9</sup>
- Specialist homelessness services in Victoria currently turn away 92 people each day because of overwhelming demand.<sup>10</sup>
- People experiencing homelessness have higher interaction with health, justice and welfare systems than people with stable housing which is estimated to cost government services \$29,450 per person more than for the rest of the Australian population.<sup>11</sup>
- There is a potential cost of over \$34,000 per year to support a tenant evicted from public housing through homelessness services, compared to approximately \$4,300 in service costs per year for a household in public housing.<sup>12</sup>
- Homelessness has long term impacts on individuals, families and children: '[we] know that children who become homeless ... frequently suffer the trauma of disrupted schooling and friendships and that homeless families almost always experience financial disadvantage'.<sup>13</sup>

In this context – a chronic shortage of affordable housing, overwhelming demand for homelessness services and knowledge of the hardship and long term impact of homelessness – Victoria needs a legal, policy and services framework for making evictions into homelessness a last resort.

The Charter has an important role to play in this framework.

## Charter-based decision-making in social housing

For clients living in public or community housing, Homeless Law frequently engages in Charter-based negotiation with social landlords with a view to preventing the eviction of vulnerable tenants into homelessness.<sup>14</sup> Where appropriate, Homeless Law queries whether, in taking steps to evict the tenant, the landlord has given proper consideration to, or acted compatibly with, the tenant's rights under the Charter as required by section 38.<sup>15</sup>

The decision to take steps to evict the tenant (for example, by issuing a notice to vacate, applying to VCAT for a possession order or purchasing a warrant), potentially engages the following Charter rights:

- Section 13(a) – A person has the right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with';
- Section 17(1) – 'Families are the fundamental group unit of society and are entitled to be protected by society and the State'; and/or
- Section 17(2) – 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.

Homeless Law also identifies the built-in mechanism for balancing competing priorities under section 7(2) of the Charter, which sets out factors to be taken into account to determine if any limitation on rights was reasonable and 'demonstrably justified' in the circumstances.<sup>16</sup>

<sup>7</sup> Department of Health and Human Services, *Public Housing Waiting and Transfer List March 2015 (Public Housing Waitlist)*.

<sup>8</sup> On 11–12 April 2015, less than 0.1% of private rental properties in metropolitan Melbourne were affordable and appropriate for a single mother of two children who relies on a parenting pension: Anglicare Australia, *Anglicare Australia Rental Affordability Snapshot (2015) (Anglicare Snapshot)* 88. See also Department of Health and Human Services, *Rental Report December Quarter 2014 (DHHS Rental Report)*: just three in 100 two-bedroom rental lettings in the December 2014 quarter were affordable to a single parent reliant on Centrelink.

<sup>9</sup> Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2013–2014*, 8 September 2014, 24 (*VCAT Annual Report*).

<sup>10</sup> See AIHW Report, above n 6, 'Table VIC 5.5: Daily average unmet requests for assistance, by type of service requested and sex, 2013–14, adjusted for non-response'.

<sup>11</sup> Kaylene Zaretsky et al, *The cost of homelessness and the net benefit of homelessness programs: a national study*, AHURI Final Report No 205 (2013) 4. Of this increased cost, \$14,507 related to health services, \$5906 related to justice services, and \$6620 related to receipt of welfare payments.

<sup>12</sup> Department of Human Services, *Support for High Risk Tenancies Strategic Project* (October 2006) cited in Department of Human Services, *Human Services: The case for change* (December 2011).

<sup>13</sup> Angela Spinney et al, *Homelessness prevention for women and children who have experienced domestic and family violence: innovations in policy and practice*, AHURI Final Report No 196 (2011).

<sup>14</sup> For further discussion about whether community housing providers are covered by section 38 of the Charter see part 4.

<sup>15</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

<sup>16</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

As the 20 social housing related examples in **Annexure 1** show, the Charter played an important role in the robust negotiations that ultimately prevented 37 people, including 21 children, being evicted into homelessness.

In Homeless Law's experience, the Charter provides a helpful framework for negotiating with social housing providers making difficult decisions because it:

- Encourages consideration of a tenant's individual circumstances, including their family, any health problems and their risk of homelessness;
- Allows these considerations to be balanced against the competing obligations of social landlords (including, for example, the safety or comfort of other tenants and reliance on rent revenue); and
- Encourages proper consideration of alternatives to eviction.

It is important to note in this context that the Charter does not prohibit evictions. It does not, for example, prevent social landlords from evicting in the event of ongoing risks to safety or long-term failure to pay rent with no proposal for addressing the arrears. It does, however, act as a check and balance to ensure that viable alternatives to eviction have been genuinely contemplated so that evictions from social housing – which in the current climate inevitably lead to homelessness – only occur as a last resort.

The below case study highlights the way in which the Charter framework can promote a balanced, appropriate exercise of discretion, which in this case meant a single mother and her six children avoided eviction into homelessness.

### **Negotiation enables mother of six to avoid eviction into homelessness**

When Nina approached Homeless Law, she was living in public housing with six young children. She had lived in the property for nine years with her ex-partner who had recently been excluded pursuant to a final family violence intervention order. Nina was not an Australian citizen so had only been listed as a resident at the property, and not as a tenant, due to the eligibility requirements for public housing that state that a tenant must be an Australian citizen.

The Office of Housing issued a notice to vacate to Nina's ex-partner for rent arrears that had accrued after he was excluded from the property and sought a possession order. Homeless Law assisted Nina to have the arrears matter adjourned and to apply to enter into a tenancy agreement for the property because of the final family violence intervention order. The Director of Housing indicated that it would oppose the application for the new tenancy, on the basis that, as a non-Australian citizen, Nina was not eligible for public housing.

All of Nina's children attended schools nearby the property. Nina had no friends or family that would be able to provide accommodation for her. Homeless Law argued that the refusal of the creation application would force Nina and her family into homelessness which would be catastrophic for Nina and her children, and likely to force Nina to lose her part-time employment.

Homeless Law referred to section 38 of the Charter which requires the Director of Housing to give proper consideration to Nina and her family's human rights when making decisions that affect them, in particular:

- Nina's right not to have her privacy, family, or home unlawfully or arbitrarily interfered with (section 13(a) of the Charter); and
- Nina's six children's right to protection that is in their best interests, and needed by reason of them being children, as well as protection of the family unit more generally (section 17 of the Charter).

Homeless Law asserted that the Director of Housing had discretion to allow Nina and her family to stay in the property. While not strictly in accordance with the eligibility policy, it was argued that rigid adherence to these policies would be incompatible with the rights of Nina and her children under the Charter.

The negotiations led to the Office of Housing entering into a new tenancy agreement with Nina, avoiding the need for a creation of tenancy application at VCAT. This enabled Nina to stay at the property and to have the correct rental rebate calculated and backdated to the date Nina's partner left the property.

Homeless Law strongly supports the existence of clear, detailed policies to guide and support staff within public authorities in making their decisions, for example in relation to allocations and evictions.<sup>17</sup> Policies should not, however, be rigidly applied without consideration of individual circumstances and the Charter is crucial for the balanced, fair, well-informed exercise of discretion by decision-makers. In the absence of the Charter, rigid adherence to the eligibility criteria would have seen a victim of family violence and her six children evicted into homelessness.

The case study below highlights another example of the way in which the Charter provides a framework for avoiding unnecessary evictions into homelessness. In this case, a single mother would have been evicted into homelessness prior to her release from prison. Research indicates that homelessness upon exit from prison makes re-offending twice as likely.<sup>18</sup> As a matter of policy, termination of tenancies that cause tenants serving short sentences to exit prison into homelessness should be avoided and the Charter is one mechanism for encouraging this.

### **Mother serving a short prison sentence avoids being released into homelessness**

Wendy, an Office of Housing tenant, had been in prison for almost six months when she contacted Homeless Law. Wendy had received a notice to vacate for rent arrears and was at risk of entering homelessness upon release from prison. Wendy had applied for a six month temporary absence from her property and requested that the Office of Housing apply rebated rent of \$15 per week during her temporary absence. This request was not completed on the basis that the Office of Housing did not receive the correct paperwork to approve the rental rebate, so Wendy's rent remained at its usual \$90 per week, resulting in her quickly falling into arrears.

Wendy had a 17 year old son, Max, who was living with her at the property before she went to prison. Max went into juvenile custody around the same time that Wendy was imprisoned, and shortly after, Max was paroled to his father's house. Max wanted to continue to live with Wendy at her property after her release.

Homeless Law applied for an extension of Wendy's temporary absence, raising her exceptional circumstances and her rights under the Charter. Wendy's lawyers argued that that the Director of Housing must ensure that its actions, including whether to issue a notice to vacate and seek possession of the premises, are compatible with human rights under section 38(1) of the Charter. Relevantly, both Wendy and Max's rights under sections 13(a) and 17(1) and Max's rights under section 17(2) were impacted by a decision to end Wendy's tenancy. An eviction would not only mean that Wendy would be homeless upon release from prison, it would also prevent Max from living at the property with his mother.

The negotiations resulted in an extension of Wendy's temporary absence until her release date and correct calculation of the rebated rent. Wendy was able to return to her property upon completion of her prison term and Max was able to stay with his mother at the property.

In a housing and homelessness context, Charter-based decision-making is a key component of strategies focussed on intervening early and diverting people away from homelessness and, when it does this successfully, it generates significant personal, social and financial benefits.

## **2.2 Fines, infringements and the regulation of public space**

In addition to homelessness prevention, Homeless Law provides legal representation with fines and infringements directly related to homelessness. In 2013–14, we assisted 109 clients to navigate a system that impacts disproportionately on people experiencing homelessness.

The types of fines and infringements that people experiencing homelessness commonly receive are for 'public space offences', including begging, being drunk in public, possessing an open container of liquor, littering, using offensive language, and conduct on public transport (for example, not having a ticket, smoking on the platform or having feet on the seat).

People experiencing homelessness are more likely to get fines and infringements because they are forced to carry out their private lives in public places; and less likely to be able to address the fines and infringements through payment or navigating the complex legal system. By way of example, a fine for being drunk in public is over \$600 and a person's weekly income if they are reliant on the Newstart Allowance is approximately \$250.

<sup>17</sup> See, eg, Justice Connect Homeless Law, *Home Safe: Submission to the Royal Commission into Family Violence* (May 2015) part 5.4, which discusses the diminished transparency as a result of the current removal of detailed Office of Housing policies from the Department of Health and Human Services website ([Homeless Law Royal Commission Submission](#)).

<sup>18</sup> Eileen Baldry, Desmond McDonnell, Peter Maplestone and Manu Peeters, 'Ex-Prisoners, Homelessness and the State in Australia', *The Australian and New Zealand Journal of Criminology*, 39, 2006, 24.

In terms of the level of hardship accompanying an experience of homelessness, a recent study by the City of Melbourne of the city's rough sleeping population found that: 'throughout their lives, many of the participants had experienced violence, sexual abuse, poverty, neglect, incarceration and exposure to drugs or alcohol from a young age ... the pathways into homelessness are complex and individual. These are people whose lives have been defined by disadvantage'.<sup>19</sup>

Homeless Law assists individual clients to resolve overwhelming fines and infringements related to their homelessness and uses the evidence-base from this work to inform systemic changes in the fines and infringements system.

The Charter has had two main impacts on this work:

- Human rights-based scrutiny of expanded move-on powers; and
- Charter-based strategic litigation led to legislative reform, which reduced the risk of imprisonment of disadvantaged people for unpaid fines.

## Highlighting the human rights impact of expanded move-on powers

In 2014 the *Summary Offences and Sentencing Amendment Act 2014* (Vic) significantly expanded powers for police and PSOs to direct people to move-on and introduced 'exclusion orders' which could see people excluded from public places for up to 12 months.

Together with a number of other community legal centres, Homeless Law submitted that the Summary Offences and Sentencing Amendment Bill 2013 (Bill) unjustifiably and unreasonably limited rights, in particular the rights to freedom of movement, peaceful assembly, association and expression. Homeless Law's submission to the Scrutiny of Acts and Regulations Committee (SARC) recognised that rights can of course be permissibly limited, but queried whether these limitations were reasonable or demonstrably justified. Homeless Law noted that the Bill was identified as intending to 'better protect the community from lawless behaviour on our streets',<sup>20</sup> but that it created powers for police and PSOs to direct people to move-on and to arrest people for contravening the move-on direction when there was no suggestion of jeopardised public safety (for example, where a person has littered in the area, possessed an open container of liquor or jaywalked).

The Statement of Compatibility tabled for the Bill stated that while the Bill would impose a limitation on an individual's right to move freely within Victoria, and possibly the rights to freedom of expression, peaceful assembly and association, those limitations were justified under section 7(2) of the Charter. According to the Statement of Compatibility, the new grounds for the use of move-on powers 'ensure there is an appropriate balance between the right to freedom of movement, freedom of expression, peaceful assembly and freedom of association of one individual and the protection of the rights of others, including the rights of others to freedom of movement, privacy, property rights and security.'<sup>21</sup> The Statement of Compatibility also explained that the Bill includes 'a range of safeguards that minimise effects on the relevant [Charter] rights and ensure any limitation is reasonable.'<sup>22</sup>

Although the Act was introduced, there was arguably an increased level of accountability as a result of the Charter's dialogue model. The requirement under section 28 of the Charter for a Statement of Compatibility and, under section 30, for SARC to consider the Bill and report to Parliament, provided a formal mechanism by which human rights concerns with the Bill and its operation could be raised. While this mechanism of human rights accountability did not prevent the passage of the Bill in unchanged form, it did serve to inform parliamentary debate and it did require the consideration of human rights in (a) drafting; and (b) implementing the new laws.

The level of debate both inside and outside government regarding these laws arguably contributed to the attention they received from the current Government when they were elected. Homeless Law welcomed the Government's 2015 repeal of these powers, including the recognition by the Attorney-General that the expanded powers:

*... had the potential to disproportionately harm some of the most vulnerable groups in our society. Indeed, Geoff Bowyer, former president of the Law Institute of Victoria, stated at the time the laws could 'have a significant and devastating impact on the homeless who, by the nature of their situation, are forced to gather in public places, often returning to a familiar spot after being moved on'.<sup>23</sup>*

This example highlights the role of legislative scrutiny in an area – namely regulation of public space – that is highly contested and has significant potential to impact on marginalised members of the community. The Charter's 'front end' mechanism for considering the human rights impact of the expanded powers and justifying the obvious limitations started a dialogue that may not otherwise have existed. In this case, the ultimate result was the repeal of laws that could not be justified as a reasonable limitation on rights.

<sup>19</sup> City of Melbourne, Media Release: Finding a Way Out: New Study into Homelessness (29 January 2014) (available at: <http://www.melbourne.vic.gov.au/AboutCouncil/MediaReleases/Pages/Findingawayoutnewstudyintohomelessness.aspx>).

<sup>20</sup> Second Reading Speech, Hansard, 12 December 2013, 4681.

<sup>21</sup> Statement of Compatibility, Summary Offences and Sentencing Amendment Bill, Hansard, 12 December 2013, 4680.

<sup>22</sup> Ibid.

<sup>23</sup> Second reading speech of the Summary Offences Amendment (Move-on Laws) Bill 2015 by the Hon. Martin Pakula, Victorian Parliamentary Debates, Legislative Assembly, vol. no. 2, 11/02/2014, 175.

## Reducing the risk of imprisonment for unpaid fines

The Charter has also been the foundation for another significant development in reducing the disproportionate impact of fines and infringements on disadvantaged members of the community.

Homeless Law welcomed the decision in *Victoria Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37 (**Taha**) and its potential to prevent vulnerable people from being imprisoned for unpaid fines.

In Taha, the Court of Appeal confirmed that section 21 of the Charter was engaged in circumstances where an infringement offender was brought before the Court pursuant to section 160 of the *Infringements Act 2006* (Vic), and that section 32 of the Charter supported a unified construction of section 160. The result of this unified construction adopted in Taha is that a presiding Magistrate had a duty to inquire as to whether an offender had special circumstances as well as whether, in light of all the circumstances, imprisonment would be unjust, disproportionate or excessive.

The decision in Taha was followed by legislative reform, which introduced a limited right of rehearing for people facing imprisonment for unpaid fines where certain circumstances (including links between the offending and mental illness, substance dependence and homelessness or the fact that imprisonment would be excessive, disproportionate and unduly harsh) had not been taken into account or were not before the Court at the time the hearing.<sup>24</sup>

Taha is a strong example of the Charter's effectiveness: the Charter provided the basis of successful strategic litigation to challenge an aspect of the law that was causing the imprisonment of vulnerable people without any right of review or appeal; two individuals avoided imprisonment for unpaid fines; and Parliament then reflected on the gaps in the legislation and attempted to remedy this problem through legislative reform.

The case study below highlights the way these new, Charter-informed legislative provisions worked to avoid the imprisonment of a young man with six kids who was battling mental illness, substance dependence and had experienced periods of homelessness.

### **Charter and Taha used to help a father of six young children to avoid imprisonment for outstanding infringements**

In 2011, Robert was placed on an imprisonment in lieu order by the Magistrates' Court in relation to a number of outstanding infringement offences. The offences were committed whilst Robert was struggling with a range of substance use and mental health issues.

At the time he was placed on this order, Robert had six children, serious mental health and substance dependence issues, and relied wholly on Centrelink for his income. Despite this, the Court was not asked by Robert's legal representative to discharge any portion of the fines in light of these circumstances. Subsequently in 2012, Robert and his family became homeless and he defaulted on the order which resulted in a warrant for imprisonment of 44 days being automatically issued.

A member of the Sherriff's office contacted Homeless Law in relation to Robert due to concerns they had about the effect of imprisonment on his mental health. When Homeless Law contacted Robert they learned that despite his family having recently being allocated public housing, Robert had been sleeping rough and couch surfing for over six months due his fear of being incarcerated.

Homeless Law worked intensively with Robert to obtain letters of support and psychiatric reports in relation to his long history of substance abuse and mental health issues. Homeless Law then assisted Robert to make an application for rehearing on the basis of the new right of rehearing introduced post-Taha.

Homeless Law appeared for Robert and submitted that Robert should be granted a rehearing in respect of the first hearing in 2011, as his relevant special circumstances and other evidence were not before the Court at the time the imprisonment in lieu order was made.

Homeless Law's application was accepted with all outstanding infringements on the imprisonment in lieu order being struck out. Robert planned to move back with his family to their new housing and has also re-engaged with drug counsellors and a psychologist in his local area to get help with his issues.

<sup>24</sup> *Infringements Act 2006* (Vic) ss 160A-E.

The examples in this section highlight the tangible benefits of the Charter as an instrument for improving decision-making, prompting review of unfair laws and, where necessary, providing a basis for the courts to consider human rights when interpreting legislation.

While the Charter has delivered clear and positive outcomes to Victorians, there a number of aspects of the Charter's operation that remain, or have become, confusing or inaccessible. These aspects are discussed below, together with the modest proposals to address these setbacks in the Charter's effective operation.

### 3. Setbacks in the Charter's effective operation

The 2011 Submission identified two significant benefits of the Charter in its first four years of operation:

- Better outcomes for individuals (including by avoiding evictions where eviction would have been an unlawful or arbitrary interference with a person's home and, in many cases, would have been incompatible with the rights of children and the protection of families under the Charter); and
- Gradual, but noticeable, improvements in the quality of services provided to clients and the processes and practices that public authorities follow in delivering services and making decisions.<sup>25</sup>

Homeless Law noted, however, that while resolution of Charter-based issues by a court or tribunal is a last resort that only arises when the front end measures have failed, the protection of rights under the Charter would not be as effective or efficient in the absence of an enforcement role for courts and tribunals. In particular, the 2011 Submission highlighted the following benefits of the adjudicative powers of courts and tribunals:

- Preventative function – it provides a more compelling incentive to avoid breaches;
- Guidance by the courts and tribunals – these decisions provide clarity about the application of the Charter in practice; and
- Additional layer of protection – on rare but important occasions an independent decision-maker is needed to avoid unjust outcomes.<sup>26</sup>

There have been two major jurisdictional developments in relation to the Charter's operation since the 2011 Submission:

- The decision in *Director of Housing v Sudi* [2011] VSCA 266 (**Sudi**), which confirmed that VCAT does not have jurisdiction to consider whether a social landlord has complied with section 38 of the Charter when determining applications for possession. As a result, questions of Charter compliance in eviction matters must be determined in the Supreme Court; and
- The recent decision in *Burgess v Director of Housing* [2014] VSC 648 (**Burgess**), which found that the decision to issue a notice to vacate ceases to have ongoing legal effect (and therefore cannot be quashed) once VCAT makes a possession order. In practice, this means that tenants must commence judicial review proceedings in relation to Charter unlawfulness after the decision to issue the notice to vacate but before VCAT has made a possession order or after the decision to purchase a warrant before the locks are changed.

This section discusses the ways in which these changes have largely eroded the three benefits of adjudication identified in the 2011 Submission.

#### 3.1 Less accountability for Charter compliance: reduced preventative function

Prior to the Court of Appeal's decision in *Sudi*, VCAT members were considering whether or not a social landlord had complied with section 38 of the Charter when determining applications for possession. In Homeless Law's experience, this accountability (i.e. the knowledge that VCAT would consider Charter compliance in eviction proceedings) provided a compelling incentive for social landlords to consider the client's circumstances and to contemplate reasonable alternatives to eviction.

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<sup>25</sup> 2011 Submission, above n 4, 8.

<sup>26</sup> *Ibid* 35–43.

In *Sudi*, the Court of Appeal held that, in determining an application for a possession order, VCAT does not have jurisdiction to consider whether the public authority landlord has complied with section 38 of the Charter in making its decision to proceed with eviction.<sup>27</sup> As a result, these questions must be raised via judicial review in the Supreme Court.

This section discusses two developments that are arguably linked to the inability of VCAT to consider Charter compliance when determining applications for possession:

- Reduced willingness to consider alternatives to eviction or to engage in Charter-based negotiations; and
- Renewed use of ‘no reason’ notices to manage social housing tenancies and residencies.

## A more reluctant approach to negotiations

Since *Sudi*, Homeless Law has observed less accountability for human rights compliance, which presents a greater risk of eviction for vulnerable tenants. In Homeless Law’s experience, some social landlords are less motivated to try to comply with human rights obligations because there are limited consequences of not doing so. Although social landlords still have an obligation under section 38 of the Charter to act compatibly with human rights and to give proper consideration to human rights in decision-making, it is unlikely that tenants have meaningful recourse in the event of non-compliance given the costs and complexity associated with challenging the decisions of social landlords in the Supreme Court.

The lead up to the decision in *Burgess* provides an example of the way in which the limited prospect that a tenant would commence a Supreme Court challenge arguably contributed to a reluctance to negotiate on behalf of the Director of Housing. This reluctance was referred to by Macaulay J in his judgment.<sup>28</sup> He notes that the detailed letters to the Office of Housing, referred to as the ‘April letters’, contained substantial information about the impact that eviction would have on Ms Burgess and her son:

*The April letters sought to persuade the Director to meet with PILCH and explore alternatives to ‘forcing homelessness on Ebony’. The letters detailed the impact that eviction would have on both Ms Burgess and her son Carlton. Amongst other things, the letters suggested the Director may have acted contrary to the Charter in various respects.*

*The Legal Services Director at the Department of Human Services responded on behalf of the Director. The Director did not admit any of the allegations made in the PILCH correspondence but argued:*

*... as your client has not issued, or even foreshadowed issuing, proceedings in the correct forum to agitate these issues, the Director does not propose to otherwise respond to your allegations at this time.<sup>29</sup>*

Homeless Law reiterates that the ‘correct forum’ is not required to determine whether or not the section 38 obligations exist for the Director of Housing – that is undisputed. As it stands post-*Sudi*, however, the Supreme Court is required to determine whether a decision-maker has complied with section 38 in making the decision to evict. As the Director’s response to the ‘April letters’ shows, this can lead to a reduced regard for Charter obligations and a diminished willingness to negotiate alternatives to eviction.

## Evictions for ‘no reason’

A second example of a ‘post-*Sudi* regression’ is the re-adoption of use of ‘no reason’ notices to vacate by social housing providers. The 2011 Submission identified the movement away from use of these notices as one of the clearest examples of the Charter providing an impetus for improved practices by public authorities. The 2011 Submission referred to the practice of transitional housing managers (THMs) periodically issuing tenants with a notice to vacate to compel them to move out of short-term housing and into longer-term housing and noted:

*When it commenced, this process was a logical way for THMs to make sure that people were actively trying to find long-term accommodation, so that other people who needed short-term housing could access transitional properties. Unfortunately, the acute shortage of affordable housing in Victoria means that there is often no long-term accommodation for tenants to relocate to upon leaving transitional housing. For this reason, the standard practice of issuing 120 day Notices to Vacate to move people out of transitional properties was no longer an appropriate policy or practice.<sup>30</sup>*

The flaws in this policy were also recognised in the 2010 Inquiry into the Adequacy and Future Directions of Public Housing in Victoria, which recommended that the ‘Victorian Government reviews the Transitional Housing program to determine its

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<sup>27</sup> *Director of Housing v Sudi* [2011] VSCA 266 (**Sudi**): Warren CJ [43]; Maxwell P [62]–[63]; Weinberg JA [284]. Their Honours held that, when exercising original jurisdiction, VCAT has no power to undertake a collateral review of the Director’s purported administrative decisions on judicial review grounds. Warren CJ stated: ‘VCAT should treat relevant purported administrative decisions as being valid unless and until set aside by a court of competent jurisdiction’.

<sup>28</sup> See *Burgess v Director of Housing* [2014] VSC 648 [48], [49] and [225] (**Burgess**).

<sup>29</sup> *Ibid* [4]–[49].

<sup>30</sup> 2011 Submission, above n 4, 24.

effectiveness in the context of extensive waiting times to access public housing and in context of broader changes to social housing provision'.<sup>31</sup>

In the face of performance targets and funding agreements, however, there was no impetus to change the outdated practice until the Charter was used to identify the impact on marginalised Victorians. The VCAT decisions in *HomeGround Services v Mohamed*<sup>32</sup> and *Metro West v Sudi*<sup>33</sup> drew attention to the fact that these policies risked pushing people into a revolving cycle of rough sleeping and emergency accommodation and, gradually, social housing providers stopped issuing tenants with no reason Notices to Vacate as standard practice.

Post-Sudi, some social housing providers have re-commenced the use of 120 day 'no reason' Notices to Vacate to manage tenancies and residencies. While they will not always act on these notices and may choose to 'roll over' to a new 120 day tenancy, the fact that an instrument called a 'notice to vacate', the first step in the eviction process, is issued to tenants at the commencement of their tenancy and can then be acted on by the social landlord if they choose to is a problematic mechanism for managing social housing.

Homeless Law also notes that these notices are not just being used to manage short-term tenancies, but are also used by social housing providers to deal with fraught tenancies where landlords are reluctant to use the compliance-based mechanisms under the Residential Tenancies Act. Some community housing providers indicate that they are unable to use compliance or breach provisions in the Residential Tenancies Act because these notices have a higher evidentiary threshold and certain procedural requirements (such as identifying the reason for the notice to vacate with a sufficient degree of particularity to enable the tenant to understand and respond to the allegations),<sup>34</sup> which can be difficult to satisfy at VCAT. In some cases, community housing providers indicate that they are unable to gather sufficient evidence of breaches, danger or illegal use because witnesses are fearful of giving evidence.

Homeless Law appreciates the challenging role of social housing providers in managing complex tenancies with limited resources, but we reiterate that these situations are where accountability for Charter compliance is essential. The below case study provides an example of the use of a 'no reason' notice to vacate in response to concerns about conduct. It highlights the importance of procedural safeguards and oversight for Charter compliance, but in the post-Sudi environment there is very limited capacity to challenge these decisions.

#### Using 'no reason' notices to vacate to deal with compliance

Zoe lived in a rooming house managed by a community housing provider. She received a 120 day notice to vacate for no specified reason. Zoe's landlord applied to VCAT for a possession order and Zoe approached Homeless Law for assistance.

Zoe was on the priority list for transitional housing with her partner Brett, but she had not been able to find suitable accommodation. Zoe is on the disability support pension and suffers from health issues and post-traumatic stress disorder. Zoe believed that she was being evicted because her partner Brett regularly came to visit her at the property and sometimes let himself in, using Zoe's key. Brett had also been accused of threatening and abusing two other residents and did not get along well with one of Zoe's neighbours.

Homeless Law attempted to negotiate with the landlord to find an alternative to evicting Zoe, however the landlord refused to negotiate and insisted that the matter be heard at VCAT. Homeless Law represented Zoe at the VCAT hearing, but there was no ability to defend the application for possession because the notice to vacate was given for 'no reason'.

On Zoe's instructions, Homeless Law asked the VCAT member to adjourn the application on the basis that Zoe would make any undertakings required to address any of the landlord's concerns. The landlord was unwilling to accept this offer. The VCAT member was unwilling to order an adjournment on the basis that there was nothing incorrect about the issuing of the notice to vacate. An order for possession was made, with Zoe given 30 days before a warrant for possession could be executed.

Homeless Law acknowledges the need for community housing providers to manage conduct and to balance the safety and comfort of other tenants or residents. Homeless Law's firm view, however, is that concerns about conduct should be managed via the breach and compliance mechanisms or the cause-based eviction provisions (such as danger, illegal use, successive breaches or breach of compliance order) set out in the Residential Tenancies Act. These mechanisms clearly identify the alleged breach and give the tenant or resident an opportunity to address it. If the matter does proceed to VCAT, there are procedural and evidentiary

<sup>31</sup> Family and Community Development Committee, *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria* (September 2010) xxxiii.

<sup>32</sup> *HomeGround Services v Mohamed* [2009] VCAT 1131 (6 July 2009).

<sup>33</sup> *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009).

<sup>34</sup> *Smith v Director of Housing* [2005] VSC 46.

requirements that the landlord must satisfy and the tenant has an opportunity to defend the possession application. As Zoe's case highlights, when landlords use 'no reason' notices to vacate this element of transparency and accountability and the accompanying safeguards against arbitrary eviction are lost. In the absence of VCAT's ability to consider the section 38 compliance of the social landlord's decision to evict, there is no way of defending a possession application made for 'no reason'.

Pre-Sudi, the Charter was operating as an effective reminder that rigid application of certain housing policies and tenancy legislation was no longer delivering the best outcomes for Victorians. It also protected numerous individuals who would otherwise have been homeless as a result of outdated policies and procedures.

The lack of oversight from VCAT has also slowed down – and in some cases reversed – positive changes in social housing policies and practices that the early years of the Charter's operation had delivered.

Although public authorities still have an obligation under section 38 of the Charter to act compatibly with human rights and to give proper consideration to human rights in decision-making, Homeless Law has observed that organisations feel less compulsion to comply with these obligations because they will not be held accountable at VCAT in the event of non-compliance. This means that the ability of the Charter to prevent matters proceeding to VCAT unnecessarily and to prevent unnecessary evictions into homelessness has been hampered.

## 3.2 Sparse guidance from decisions by courts and tribunals

Pre-Sudi, when VCAT was considering Charter questions in eviction proceedings, there was a vibrant and engaged conversation regarding the scope of the Charter and how it worked in practice.

The 2011 Submission cited two examples of VCAT decisions which, although not binding in the same way as a court decision, created clarity and provided useful guidance to the sector about the content of Charter obligations and how to apply them in practice:

- The clarification of the scope of a 'public authority' in the housing sector. In *Metro West v Sudi* the analysis of Bell J provided a degree of clarity to community housing providers about the scope of the obligations of public authorities. The decision provided practical guidance about what factors need to be considered in determining whether an entity is a public authority. Within the housing and homelessness sector, this decision removed some of the confusion as to whether non-government providers of public housing were covered by the Charter.<sup>35</sup> In providing this clarification, the Metro West decision also created awareness and reiterated the importance of Charter compliance in decision-making processes and practices.
- The legitimacy of the practice of issuing tenants in transitional housing with a notice to vacate at the commencement of their tenancy. In *HomeGround v Mohamed*, Member Perlman considered the common practice of transitional housing providers of issuing a periodic notice to vacate as a mechanism for managing their limited supply of short-term accommodation. While not binding, Member Perlman's consideration of these practices became well-known in the community housing sector. The decision made it clear to many organisations who engaged in similar practices that blanket application of policies is not an appropriate mechanism to meet the needs of vulnerable clients and was unlikely to be permitted under the Charter.

These public statements played a role in encouraging policy and practice-based changes. In the case of Metro West and Mohamed, VCAT's consideration of enforceable human rights reminded public and social landlords about their obligations under the Charter and provided guidance about what kinds of policies and practices were at risk of breaching clients' rights under the Charter.

The post-Sudi stagnation of these decisions – and the flow-on conversations, training, guidance and reflection – has generated a resurgence of uncertainty in relation to application of the Charter. Nowhere is this more apparent than on the question of whether or not community housing providers are 'functional public authorities' for the purposes of the Charter. The 2009 decision in Metro West is seen as providing guidance, but not binding authority and, despite a number of matters being commenced in the Supreme Court which would have provided clarity on this point, none have been run to completion, so the confusion regarding the applicability of Charter obligations to community housing providers has prevailed.

The significant benefits of VCAT generating decisions about the application of the Charter to social housing evictions are currently on hold, which is stymying the Charter's impact and effectiveness both for individuals and in terms of positive changes to policies and practices.

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<sup>35</sup> See Tony Keenan, CEO, Hanover Welfare Services, 'From Human Rights Compliance to Human Rights Culture', Law Institute Human Rights Conference (May 2010): 'From 2006, there was a high degree of uncertainty and debate as to whether not for profits, which have their own private income and importantly limited negotiating capacity in contracting with government, or control over housing programs or budgets, are public authorities when delivering homeless services'. Mr Keenan then states that the decision in Metro West: 'has provided a degree of certainty as to the public authority issue' (although he notes that, as decisions of VCAT are not binding, 'the scope still exists for a different decision in a case with similar facts to be made by VCAT at a later date') (at 3).

### 3.3 Diminished protection against human rights non-compliance

As reiterated throughout this submission, Homeless Law's position is that the Charter's greatest potential to generate better decision-making processes and fairer outcomes in a housing context lies primarily in its ability to foster negotiation based on:

- Consideration of a tenant's individual circumstances, including their family, any health problems and their risk of homelessness;
- Balancing individual circumstances against competing obligations of social landlords (including, for example, the safety or comfort of other tenants and reliance on rent revenue); and
- Genuine contemplation of alternatives to eviction.

When these negotiations are not successful, however, there needs to be an accessible forum to consider Charter compliance. As the 2011 Submission identified, on rare but important occasions an independent decision-maker is needed to avoid unjust outcomes.

Presently, this additional layer of protection does not exist in practice for social housing tenants.

Weinberg JA suggested in Sudi:

*... if tenants are prevented from relying in VCAT upon Charter breaches in answer to proceedings brought by the Director for possession, and must instead seek judicial review to set aside the Director's actions, then that is hardly likely to be catastrophic. The legal profession in this State has shown a ready willingness to provide assistance, often through legal aid or pro bono, in proceedings that give rise to legitimate Charter issues.<sup>36</sup>*

While the legal profession is generous with its commitment to pro bono, the suggestion that the Supreme Court is an accessible forum for social housing tenants facing eviction into homelessness who have questions about the Charter compatibility of their eviction, has proven to be optimistic. The Supreme Court is a complex, daunting and inaccessible forum for both social housing tenants and social landlords. The current reliance on it to determine Charter unlawfulness has reduced accountability for human rights compliance; slowed down conversations regarding Charter compliant practices; and diminished the protection for tenants against evictions that fail to give proper consideration to human rights.

By way of example, while Burgess is a powerful judgment in terms of its determination of the Director's failure to give proper consideration to Ms Burgess and her son's Charter rights in making eviction decisions, it is also a 'near miss' in that what was later deemed to be an unlawful eviction very nearly went ahead.

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<sup>36</sup> Sudi, above n 27, [303].

### ***Burgess v Director of Housing* [2014] VSC 648: mother and son turn to the Supreme Court to prevent eviction**

Ms Burgess had lived in a public housing property since 2006 and her teenage son regularly stayed at the property. Ms Burgess had a history of substance dependence, as well as anxiety and depression, and served a custodial sentence for trafficking offences dated 2008 and 2011. She was released from prison in December 2012 and engaged in rehabilitation and counselling. On 22 March 2013, the Director issued Ms Burgess with two notices to vacate under sections 250 and 250A of the *Residential Tenancies Act 1997* (Vic) in relation to 'illegal use' of the property.

VCAT made an order of possession on 13 May 2013 with written reasons dated 10 June 2013 and, on 18 June 2013, the Director applied for a warrant of possession to evict Ms Burgess from the property.

Homeless Law, with Clayton Utz and counsel acting pro bono, assisted Ms Burgess and her son to apply to the Supreme Court for judicial review of the Director's decisions to issue the notices to vacate and apply for the warrant of possession. They claimed that the decisions of the Director of Housing were affected by jurisdictional error because the Director of Housing did not accord procedural fairness or natural justice before issuing the notices to vacate; failed to take into account relevant matters he was bound to consider in making the decisions to issue the notices to vacate and apply for the warrant of possession; and, in making these decisions, failed to act compatibly with or give proper consideration to Ms Burgess and her son's Charter rights.

The plaintiffs sought relief in the nature of certiorari to quash the decisions made by the Director or VCAT, as well as associated declarations.

#### **The Director of Housing's decision to issue notices to vacate**

Macaulay J held that the decision of the Director to issue the notices to vacate failed to observe the rules of natural justice and failed to take into account certain matters the Director was bound to consider, including rights protected under section 17 of the Charter. Accordingly, the decision to issue the notices to vacate was affected by jurisdictional error and was unlawful within the meaning of section 38 of the Charter. However, His Honour found that the Director's decision to issue the notices to vacate ceased to have ongoing legal effect once VCAT made its possession order so that, on the principles set out in *Wingfoot Australia Partners v Kocak* [2013] HCA 43, this decision was not amenable to the remedy of certiorari.

His Honour found that the Director had failed to consider the rights of Ms Burgess and her household to the protection of their family group, and the best interests of any child affected by the decision, as sanctioned by section 17 of the Charter. He commented, at paragraph 222, that these failures would have lead him to quash the decision if not for his finding based on Wingfoot.

#### **The Director of Housing's decision to apply for the warrant of possession**

Macaulay J found that the Director of Housing was obliged by law to consider the facts surrounding Ms Burgess's health and the significance of maintaining the rented premises to her health and wellbeing. The Director's failure to do this constituted a jurisdictional error.

The Director was obliged by law to consider the human rights of Ms Burgess and her son identified in section 17 of the Charter. Failure to take these rights into account made the Director's decision unlawful under section 38 of the Charter.

His Honour made a declaration that the decision to apply for the warrant was and is of no legal force or effect, and was unlawful by reason of the Charter.

Fortunately for Ms Burgess, she was able to obtain pro bono legal representation and was courageous enough to commit to protracted legal proceedings, which carried significant stress, as well as a risk of overwhelming costs in addition to homelessness, if she was unsuccessful.

This is not, however, an avenue that is available to the majority of social housing tenants. By way of example, the Director of Housing made 14,396 applications to the VCAT Residential Tenancies List in 2013–14<sup>37</sup> and, while it is not clear what proportion of these were possession applications, the fact that there was only one judicial review matter that proceeded to judgment from that

<sup>37</sup> VCAT Annual Report, above n 9, 21.

period indicates that the Supreme Court is not providing meaningful human rights outcomes for struggling tenants. This lack of accessible accountability creates a risk that vulnerable tenants are more likely to be evicted back into a cycle of homelessness and to experience the serious hardship that this inevitably brings with it.

The subsequent sections of this submission set out proposals for improving the effectiveness of the Charter and re-instating its ability to play a constructive, helpful role in decision-making about housing and homelessness.

## 4. Clarifying which social housing landlords have Charter obligations

***This section addresses Terms of Reference 1(d), 1(e), 2(a) and 2(b).***

The lack of clarity regarding whether community housing providers are public authorities for the purposes of the Charter, and therefore have obligations under section 38, continues to hamper the Charter's effectiveness.

This uncertainty is problematic for a number of reasons, including:

- The missed opportunity for community housing providers to adopt the Charter as a helpful framework for decision-makers in making difficult decisions;
- The lack of guidance or direction from government and the absence of funding to support community housing providers to embrace Charter compliance; and
- The confusion slows down the development of a 'human rights culture' and practices that are Charter compliant.

In light of these reasons, this section sets out:

- The way in which the lack of certainty regarding coverage of community housing providers by the Charter is impeding the Charter's effectiveness;
- An analysis of whether community housing providers are covered by the Charter;
- The alignment between the Charter and the practice and culture of most community housing providers; and
- Recommendations for providing certainty that community housing providers are public authorities for the purposes of the Charter when making decisions in relation tenancy management.

### 4.1 Lack of certainty impeding the Charter's impact

To date, there has been no decision of the Supreme Court to provide guidance on whether a community housing provider is a functional public authority for the purposes of the Charter. Any Supreme Court proceedings that have been commenced by tenants of community housing providers have settled before judgment.

This lack of clarity has led to a confusing situation whereby some community housing providers accept that they are public authorities for the purposes of the Charter and recognise that their obligations under section 38 of the Charter are consistent with their organisational objectives and culture;<sup>38</sup> and others do not accept that they are legally obliged to comply with the Charter, but agree in principle to give proper consideration Charter-rights in their decision-making.<sup>39</sup>

In Homeless Law's experience, there are no community housing providers who assert that they do not want to act compatibly with human rights in managing their affordable housing. Further, it is Homeless Law's understanding that much of the resistance to being covered by the Charter stems from anxiety about 'being taken to the Supreme Court'. In this way, the consequences of Sudi may also include increased resistance to the Charter because of a concern about litigation, despite a philosophical and cultural attachment to the human rights protections contained in the Charter.

In the case study below, the community housing provider denied that they were a public authority for the purposes of the Charter but agreed to a negotiated outcome that avoided the client's eviction into homelessness.

<sup>38</sup> See, eg, Keenan above n 35, 5.

<sup>39</sup> See, eg, Community Housing Federation of Victoria, *Charter of Human Rights and Responsibilities: Submission by the Community Housing Federation of Victoria* (June 2015) 9–10 (**CHFV Charter Submission**).

### **Human rights negotiations result in an agreement between tenant and landlord as an alternative to eviction**

Jessica contacted Homeless Law and instructed that her landlord, a community housing provider, had recently obtained a possession order from VCAT, and would soon be purchasing a warrant for her removal from the premises. Jessica's landlord was concerned about the condition of the premises, and in particular, the accumulation and cluttering of personal items at the property which had become an issue for several neighbours.

Jessica had previously told her landlord that clutter was a symptom of her mental illness and that she was continuing to see medical professionals to assist with this. Jessica instructed that her previous housing manager was aware of her mental health issues and had not sought to evict her as a result of the clutter. Her new housing manager, however, had decided to take legal action against Jessica for breach of a compliance order. Without local family supports or other long-term accommodation options, Jessica was fearful of losing her housing as the instability of homelessness would significantly exacerbate her mental health issues.

Homeless Law assisted Jessica by negotiating with her landlord not to purchase a warrant to remove her from the property. Homeless Law's negotiation encouraged the social housing provider to explore other options that might help to address their concerns. Homeless Law asserted that, as a provider of low-cost housing to vulnerable tenants on behalf of the government, the community housing provider was a functional public authority under the Charter. Under section 38 of the Charter, the housing provider was required to give proper consideration to Jessica's Charter rights, particularly the right to privacy, and to act compatibly with those rights.

Homeless Law asserted that the housing provider had failed to adequately take Jessica's mental health issues and inevitable homelessness into account prior to deciding to evict her, noting that Jessica's two mental health support workers had not been contacted to better understand the reasons for non-compliance, or the effect that eviction would have on her. Throughout the negotiations, the landlord did not accept that they were a functional public authority under the Charter.

Notwithstanding the lack of clarity regarding the landlord's obligations under the Charter, as a result of the negotiations, a detailed agreement was entered into between Jessica and her landlord. The agreement allows Jessica to remain in the premises provided that she continues to engage with relevant support services, and to make efforts to address her landlord's concerns in relation to the premises.

Jessica has kept her housing and this stability has allowed her to continue engaging with relevant support workers to improve her health and address the clutter that had accumulated at her property.

While negotiation was successful in the above matter, it was an ad hoc, one-off outcome and throughout the negotiations the community housing provider maintained that they were not a public authority and were not bound by the Charter. This was despite the fact that they were committed to considering alternatives to eviction and benefited from the framework for negotiation provided by the Charter.

The lack of certainty regarding Charter obligations is preventing the consistent, systemic adoption of Charter compatible policies and procedures by community housing providers and, in this way, is limiting the potential positive impact of the Charter in the housing sector.

## **4.2 Analysis of community housing providers as functional public authorities**

As mentioned above, functional public authorities are defined in the Charter as 'an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)'.<sup>40</sup>

In the social housing context, this can be broken into two questions, which are whether, when making decisions about the management of tenancies, including evictions, community housing providers are: (a) performing functions of a public nature; and (b) doing so on behalf of the State or a public authority. These concepts are to be given a 'wide and generous interpretation'.<sup>41</sup>

<sup>40</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(c).

<sup>41</sup> *Metro West v Sudi* [2009] VCAT 2025 [129] and [140].

In *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009), Bell J provided practical guidance about the interpretation of section 4 of the Charter in the context of transitional housing. He found that:

- The function of providing social housing, which includes the management of transitional housing tenancies, is a function of a public nature;<sup>42</sup> and
- Although determined on a case by case basis, this function is generally performed on behalf of the State (for example, under a service agreement with government and with public funding).

## Functions of a public nature

As Bell J stated in *Metro West*, whether the functions being exercised are of a public nature turns on the nature of the functions and whether they are being exercised in the public interest, not the nature of the entity. Factors relevant to whether the function is of a public nature include whether it is connected to or generally identified with functions of government and whether it is funded by the State.<sup>43</sup>

Relevantly, the Department of Health and Human Services describes community housing in this way:

*Community housing is rental housing managed by not-for-profit organisations for people on low incomes or with special needs. These organisations are registered and regulated by the state government and work closely with us. Some specialise in helping specific groups, like people with a disability, women, singles and older people.*<sup>44</sup>

The objects and stated purposes of community housing providers commonly include aims such as promoting relief of poverty, providing affordable rental housing to persons in housing need and low-income households, and reducing homelessness.

In *Metro West*, Bell J considered that the provision of social housing involved the performance of functions of a 'public nature', noting that '[p]roviding social housing is a function of fundamental importance, which the government exercises on behalf of the community in the public interest' and that the *Housing Act 1983* (Vic) 'recognises the importance of housing as function of government'.<sup>45</sup>

It is also strongly arguable that, if a decision to provide social housing involves the performance of a function of a public nature, so too does a decision to terminate social housing. By way of example, the England and Wales Court of Appeal held in *London & Quadrant Housing Trust v Weaver*, '[t]he grant of a tenancy and its subsequent termination are part and parcel of determining who should be allowed to take advantage of this public benefit'.<sup>46</sup>

## Provided on behalf of the State

The second question is whether the function is being provided on behalf of the State.

Community housing providers operate in a variety of forms with a diversity of funding, investment, infrastructure and contractual arrangements,<sup>47</sup> and some community housing providers suggest that some of their affordable housing is provided independently of the State, rather than on behalf of it.

The vast majority of community housing providers are, however, registered and regulated under the *Housing Act 1983* (Vic). The Housing Registrar describes the 'registered housing sector' in this way:

*Registered housing agencies are not-for-profit organisations that provide affordable rental housing for low income households, registered as either housing associations or housing providers under the Housing Act 1983.*

*All registered agencies must comply with Performance Standards and demonstrate skills, expertise and resources to manage a viable social housing business.*

*Registered housing agencies:*

- own, manage and develop affordable rental housing
- provide a range of housing support and assistance to clients
- are viable businesses partnering with both government and the community
- have met registration criteria and meet ongoing regulatory compliance against performance standards.<sup>48</sup>

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<sup>42</sup> Ibid [146].

<sup>43</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(2)(b) and (d).

<sup>44</sup> Department of Health and Human Services, *Housing.vic.gov.au: Community Housing* (available at: <http://www.housing.vic.gov.au/community-housing>).

<sup>45</sup> *Metro West v Sudi* [2009] VCAT 2025 [17] and [144]–[148].

<sup>46</sup> *London & Quadrant Housing Trust v Weaver* [2009] EWCA Civ 587 [76] (Elias J).

<sup>47</sup> See, eg, CHFV Charter Submission, above n 39, 2–4.

<sup>48</sup> Housing Registrar, *Registered Housing Sector* (available at: <http://www.housingregistrar.vic.gov.au/Registered-Housing-Sector>).

Most community housing providers receive government financial support from the Director of Housing. Support is provided under a range of programs, including operational funding, head leases of State-owned housing stock or one-off capital grant funding. In *Metro West*, Bell J held that the fact that the company provided housing services ‘as the government’s paid independent contractor’ was sufficient to conclude that the company performed those functions on behalf of the State or a public authority.<sup>49</sup>

Bell J also found that the government exercised substantial control over the company under an agreement that imposed reporting and auditing obligations, and that the State provided funding to the company.<sup>50</sup> Bell J noted that ‘if there is an arrangement under which, in exercising functions of a public nature, an entity represents or carries out the purpose of the State or a public authority in a practical sense, it will be acting on their behalf within s 4(1)(c)’.

Importantly, Bell J noted that section 4(1)(c) ‘covers relationships which may be looser than contract, agency and other legal categories’.<sup>51</sup>

Some community housing providers combine the revenue from their existing properties with their own finance to invest in more properties.<sup>52</sup> These particular properties do not have government funding, but are nonetheless provided in accordance with the Housing Act and the *Performance Standards for Registered Housing Agencies*. They are part of diverse housing portfolios held by community housing providers, which may include a mix of transitional housing, State-owned housing stock, and housing funded through capital grants.

Taking into consideration the diverse financial and contractual structures of registered housing agencies in Victoria, Homeless Law’s position is:

- The provision of affordable housing to people unable to access the private rental market is a function of a public nature; and
- Community housing providers provide this housing on behalf of the State. The role of the State exists in a variety of forms, often including a combination of contractual relationships, operational funding, lease arrangements, provision of capital or assets and regulation. In some cases, community housing providers will have some properties that are independently funded. It is important to recognise, however, that this stock does not exist independently of the heavily subsidised stock or of regulation. Community housing providers have diverse portfolios of housing, but they are regulated under the Housing Act and by the Housing Registrar. The assertion that the community housing provider would be providing some housing to some tenants on behalf of the State, but not others, is not a sensible proposition. It is also not consistent with the representations the State makes about community housing providers, who it clearly identifies ‘are registered and regulated by the state government and work closely with us’.<sup>53</sup>

Homeless Law’s view is that, despite the four categories of community housing (transitional housing, leased State-owned property, property funded by a capital grant from the State and independently funded property), when managing community housing tenancies in accordance with the *Housing Act 1983* (Vic) community housing providers are public authorities for the purposes of the Charter and there would be significant benefit in providing this certainty. Importantly, as the next section identifies, with additional education and support, this should be unproblematic for community housing providers whose principles and cultures are often already aligned with human rights.

### 4.3 Alignment with the culture and practice of community housing providers

Homeless Law’s experience is that a number of community housing providers are already making decisions that take into account human rights and some already consider themselves to be public authorities for the purposes of the Charter.<sup>54</sup> For example, the submission of the Community Housing Federation of Victoria to the 2015 Charter Review states:

*In the face of this uncertainty and a lack of policy direction from DHHS, CHFV advises that its members voluntarily give due consideration of tenants’ human rights ... [in] their tenancy management policies and practices ... as a matter of good practice, consistent with the mission and values of community housing to seek to sustain tenancies and provide assistance to some of the community’s most marginalised people.*<sup>55</sup>

The obligation to consider a tenant’s rights under the Charter is consistent with best practice for most community housing providers. As mentioned above, ‘registered agencies’, which include both registered housing associations and registered housing providers, are already subject to regulation under the *Housing Act 1983* (Vic). This includes compliance with the *Performance*

<sup>49</sup> *Metro West v Sudi* [2009] VCAT 2025 [151].

<sup>50</sup> *Ibid* [152]–[161].

<sup>51</sup> *Ibid* [141].

<sup>52</sup> See, eg, ‘agency profiles’ on the Housing Registrar website (available at: <http://www.housingregistrar.vic.gov.au/Registered-Housing-Sector/Housing-association>).

<sup>53</sup> Department of Health and Human Services, *Housing.vic.gov.au: Community Housing* (available at: <http://www.housing.vic.gov.au/community-housing>).

<sup>54</sup> See CHFV Charter Submission, above n 39, 9–10.

<sup>55</sup> *Ibid* 10.

*Standards for Registered Housing Agencies*, which contain requirements be committed to sustaining successful tenancies and using eviction as a last resort.<sup>56</sup>

The below case study highlights the way in which community housing providers are, in many cases, open to Charter-based negotiation which encourages alternatives to evictions.

#### **Negotiations result in withdrawal of notice to vacate by consent at VCAT**

Kate lives in a block of units managed by a community housing provider. She approached Homeless Law after receiving an immediate notice to vacate on the basis that she had allegedly endangered the safety of a neighbour in the block of units. She was alleged to have intentionally dropped some crockery off her balcony which landed on the balcony below, narrowly missing a neighbouring tenant and her child.

Kate has numerous mental health issues, including bipolar disorder, depression, post-traumatic stress disorder and severe anxiety. She also had numerous health issues, including epilepsy. Kate had history of homelessness and had been the victim of serious physical and sexual assaults.

Homeless Law entered into negotiations with the landlord to prevent Kate from being evicted into homelessness. Homeless Law asserted that the landlord had obligations as a functional public authority for the purposes of the Charter, and that section 38 of the Charter required the landlord to act compatibly with human rights and to give proper consideration to human rights in deciding to issue Kate with a notice to vacate. Homeless Law referred to section 13(a) of the Charter, pursuant to which Kate had a right not to have her home unlawfully or arbitrarily interfered with.

Homeless Law argued that the incident was a one-off which would not occur again. Kate's lawyers explained that taking steps to evict Kate in the circumstances would have been unreasonable and not justified, given the negative consequences that eviction would have for her, taking into consideration her mental and physical health issues and history of homelessness.

While Homeless Law sought to have the notice to vacate withdrawn, the landlord proceeded to VCAT. Following further negotiations, the application for possession was withdrawn as part of orders made by consent at VCAT, which provided that Kate could remain in the property provided she did not throw any items from her balcony in the future.

In Kate's case, as with many community housing tenants or residents, the community housing provider was willing to consider alternatives to eviction. Using the Charter as a framework for negotiation and decision-making made it clear that there is already an alignment between the objectives and culture of community housing providers and human rights compatible decision-making, and that with training, resources and regulatory certainty this culture could be better incorporated into day-to-day operations.

## **4.4 Providing certainty for community housing providers and tenants**

In Homeless Law's view, it is not practical or desirable to wait for Supreme Court authority on whether community housing providers are functional public authorities for the purposes of the Charter. In any case, because community housing providers have a broad range of funding, governance and operational structures, any determination in respect of one organisation would not necessarily resolve the uncertainty for Victorian community housing providers.

Homeless Law recommends that all housing providers registered under the *Housing Act 1983* (Vic) are confirmed as public authorities for the purposes of the Charter. Within the parameters of the current legislation, this could be done by declaring community housing providers registered under the Housing Act to be public authorities via the Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013 (Vic).<sup>57</sup>

In addition, with a view to incorporating Charter compliance into the day-to-day operations of community housing providers, service contracts between the Victorian Government and the entity undertaking a public function should contain a clause stipulating that

<sup>56</sup> Housing Registrar, *Performance Standards for Registered Housing Agencies*, 12.

<sup>57</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(h). See also section 40A(3) of the *Human Rights Act 2004* (ACT), which sets out a list of functions that are taken to be of a public nature, including 'public housing'. In the ACT, community housing providers have been accepted by ACAT as functional public authorities: see *Canberra Fathers and Children Services Inc & Michael Watson* (Residential Tenancies) [2010] (29 October 2010).

the entity is a public authority in exercising those functions and is required to be Charter compliant. We note, however, that this is not the same as the provision of clarity through regulation because it means Charter compliance is dealt with one-on-one in private contracts with Government, rather than at a systemic level in public declarations that apply to all community housing providers.

Homeless Law is confident that providing certainty that community housing providers are public authorities for the purposes of the Charter when making decisions in relation to tenancy management will:

- Give decision-makers a helpful framework, without placing an unreasonable constraints on decision-making;
- Lead to improved decision-making processes and practices within social housing providers;
- Encourage negotiated outcomes, rather than litigation;
- Provide an impetus for Government guidelines and properly funded training and education; and
- Support the continued development of a culture of human rights in Victoria.

## 5. Meaningful, accessible human rights protection

***This section addresses Terms of Reference 1(d), 2(b) and 2(i).***

As discussed in part 3 of this submission, the effectiveness of the Charter experienced a significant setback following the decision of the Court of Appeal in *Sudi*, which confirmed that VCAT does not have jurisdiction to consider public authorities' compliance with section 38 of the Charter in eviction proceedings.

Prior to *Sudi*, the knowledge that VCAT would consider Charter compliance in eviction proceedings provided a compelling incentive for public authorities to consider the client's individual circumstances and to contemplate reasonable alternatives to eviction.

While technically tenants have the option of seeking review of a social landlord's decision in the Supreme Court, in reality, the complexity of this process, the potential adverse cost consequences and the extremely limited capacity of legal services to assist with such actions, make it highly unlikely that this option will be pursued. This also impedes cultural change within organisations, because there is less incentive for organisations to provide the training, guidance, reporting and accountability needed to avoid contravening Charter obligations.

More recently, while *Burgess* is a powerful decision in terms of its findings about the Director of Housing's failure to comply with section 38 obligations when deciding to evict Ms Burgess and her son, an unfortunate result of the decision is that tenants now have a narrower window for seeking judicial review of the eviction decisions of social landlords.

As noted in part 3, Macaulay J found that the Director of Housing's decision to issue the notices to vacate ceased to have ongoing legal effect once VCAT made its possession order so that, on the principles set out in *Wingfoot Australia Partners v Kocak* [2013] HCA 43 (**Wingfoot**), this decision was not amenable to the remedy of certiorari. In practice, Macaulay J's decision means that social housing tenants facing eviction will need to commence judicial review proceedings in relation to alleged Charter unlawfulness:

- After the social housing provider has made the decision to issue the notice to vacate but before VCAT has made a possession order; or
- After the social housing provider has made a decision to purchase a warrant.

This further limits the accessibility of a mechanism for ensuring the human rights compliance of social housing providers in eviction proceedings: not only do social housing tenants have to raise Charter questions in the Supreme Court, but they now have a narrow and oddly shaped window for doing so. It is undesirable that low income tenants have to make a decision to commence proceedings in the Supreme Court prior to exhausting the no cost, much less onerous avenue available to them in VCAT. Furthermore, the timeframe between the decision to purchase the warrant and the execution of the warrant is short but unpredictable and, accordingly, there is a high risk that the locks will be changed and the tenant will be left without a remedy before the judicial review proceedings can be commenced.

In preparing to contribute to the Charter's eight year review, Homeless Law briefed Ron Merkel QC, Daniel Aghion and Christine Melis of counsel to provide advice on legislative amendments that would overcome the jurisdictional barriers presented by *Sudi* and now *Burgess*.

Counsel identified five 'policy matters' relevant to VCAT's lack of jurisdiction to consider Charter unlawfulness when determining applications for possession by social housing providers. These are set out below.

**Position of Ron Merkel QC, Daniel Aghion and Christine Melis of counsel on five ‘policy matters’ related to VCAT’s lack of jurisdiction (an extract)**

1. *The Charter is underutilised. There are very few decisions relative to its significance, and very little public awareness of its operation or utility.*
2. *The experience of Sudi and Burgess suggests that this may, in part, be due to the following factors:*
  - a) *S39 of the Charter has the effect that Charter rights are ancillary – it requires lawyers to think of primary rights first, and only to consider the Charter as supplementary;*
  - b) *human rights litigation in the Supreme Court is time and labour intensive, complex and lengthy. Relief is not easily obtainable;*
  - c) *under the present system community members who are least able to protect themselves and are most deserving of Charter protection, are also the ones who must bear the heaviest burden when seeking those protections.*
3. *The Charter would be assisted by developing a body of precedent, and therefore knowledge, about the Charter rights, their proper interpretation, and their application. This can best be achieved by the jurisdiction not being confined to the courts but also extending it in a limited way to the appropriate members of VCAT who will commonly encounter, and now will be able to decide the human rights issues arising under s 38 of the Charter.*
4. *It is worth noting that prior to Sudi, when VCAT (incorrectly) believed that it had power to consider Charter rights, it demonstrated that it – and its members – were competent in the application of Charter principles.*
5. *These policy considerations further support the proposed amendments to the Charter.*

Informed by the advice of counsel and Homeless Law’s own case work expertise, this section discusses:

- The current reliance on the Supreme Court to determine Charter unlawfulness in eviction proceedings, including a summary of the jurisdictional issue and an overview of the judicial review process;
- The proposal to amend section 39 of the Charter to expressly confer jurisdiction on VCAT to hear and decide Charter unlawfulness under section 38 by way of defence with respect to tenancy proceedings brought by public authorities;
- VCAT’s role in considering Charter compliance, including how this would operate in practice; and
- The need for an independent cause of action in relation to Charter unlawfulness (in addition to a provision conferring jurisdiction on VCAT in tenancy matters involving social landlords).

## 5.1 Relying on the Supreme Court to determine Charter questions

### A summary of the jurisdictional issue

As noted above, by virtue of the decision of Sudi, VCAT does not have jurisdiction to consider lawfulness under section 38 of the Charter in determining an application for possession by a public authority because:

- VCAT does not have jurisdiction to conduct judicial review of the decision of a public authority to issue a notice to vacate;<sup>58</sup> and
- VCAT does not have jurisdiction to consider Charter unlawfulness by way of collateral review. VCAT's powers are confined to those conferred upon it by statute, either expressly or by implication. There is nothing in the *Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act)*, the *Residential Tenancies Act 1997 (Vic)* or the Charter that suggests that VCAT has power to engage in a collateral review on Charter grounds.<sup>59</sup>

The Court of Appeal held that VCAT's limited role is to consider whether the factual basis for the notice to vacate is made out. If it is made out, then VCAT must issue a possession order.

According to the Court of Appeal in *Sudi*, unlawfulness because of the Charter can only be challenged if a tenant is able to seek, independently of the Charter, any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful. If that condition is satisfied, section 39(1) of the Charter enables the tenant to seek 'that relief or remedy' on the supplementary ground of unlawfulness arising because of the Charter.<sup>60</sup>

Put another way, section 38 is required to be read in conjunction with section 39 in order to apply the Charter in a legal proceeding commenced by a tenant in social housing.

A tenant's challenge to a social landlord's decision to issue a notice to vacate therefore requires an application for judicial review on non-Charter grounds in the Supreme Court, to which Charter grounds may be added.

## An overview of the judicial review process<sup>61</sup>

As a consequence of *Sudi*, a bifurcated process has been created, with the Court conducting judicial review of the decision to issue a notice and VCAT considering the factual basis for the notice.

The bifurcated process is managed by VCAT staying its own process, pending determination of an application for judicial review of a notice decision.<sup>62</sup>

Alternatively, the tenant may obtain a stay in the Practice Court, based on the usual test for interlocutory relief, which is a prima facie case and balance of convenience.<sup>63</sup>

The primary basis for a challenge is therefore judicial review of the decision to issue the notice to vacate in respect of which there may be grounds for review, because of the natural justice/procedural fairness requirements of that decision. These requirements are also evident in the Director of Housing's own policy material.<sup>64</sup>

The decision of the social landlord to purchase a warrant is also amenable to judicial review. It is however more limited because the only matter that the Director of Housing is required to consider on the policy material is 'changed circumstances' of the tenant since the original notice decision was made.<sup>65</sup>

Once VCAT has made a possession order, then the legal effect of the notice decision is spent. From that point in time, the notice decision is not amenable to judicial review.<sup>66</sup>

The legal effect of the warrant decision is not spent however until such time as the warrant is executed. That is because under the *Residential Tenancies Act 1997 (Vic)* the tenancy agreement subsists until such time as the tenant gives up possession of the premises.<sup>67</sup>

As discussed throughout this submission, this means that tenants facing eviction will need to commence judicial review proceedings, including for alleged Charter unlawfulness, after the social housing provider has made the decision to issue the notice to vacate but before VCAT has made a possession order, or after the social housing provider has made a decision to purchase a warrant.

<sup>58</sup> See, eg, *Sudi*, above n 27: Warren CJ [20]: 'if Parliament intended to confer on VCAT the power to carry out judicial review of administrative decisions, it would have done so expressly, or at least by clear implication. No such express provision can be found, or clear implication discerned, in the VCAT Act, the RTA, or the Charter'.

<sup>59</sup> *Ibid*: Warren CJ [43]; Maxwell P [62]–[63]; Weinberg JA [284]. Their Honours held that, when exercising original jurisdiction, VCAT has no power to undertake a collateral review of the Director of Housing's purported administrative decisions on judicial review grounds. Warren CJ stated: 'VCAT should treat relevant purported administrative decisions as being valid unless and until set aside by a court of competent jurisdiction'.

<sup>60</sup> *Ibid* [96] per Maxwell P.

<sup>61</sup> This section is largely extracted from the advice of Ron Merkel QC, Daniel Aghion and Christine Melis of counsel. Both Chris Melis and Daniel Aghion acted for the applicants in *Burgess* and we acknowledge their work.

<sup>62</sup> *Burgess*, above n 28, [90].

<sup>63</sup> *Burgess v Director of Housing* [2013] VSC 626 [40] per Ginnane J.

<sup>64</sup> See, eg, Department of Health and Human Services, Tenancy Management Manual (available at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/tenancy-management-manual>), which was referred to and considered in *Burgess*, above n 28, [165] ff.

<sup>65</sup> *Burgess*, above n 28, [224] ff. But see Homeless Law Royal Commission Submission, above n 17, part 5.4, regarding the current process being undertaken by the Director of Health and Human Services to amend the policy manuals to reduce detailed guidance and to remove them from the DHHS website so they are no longer publicly available.

<sup>66</sup> *Ibid* [143] and preceding.

<sup>67</sup> *Residential Tenancies Act 1997 (Vic)* ss 334(1) and 342.

Counsel describe the 'timing and choice of forum issues' with this process:

- a) *the application for the stay pending judicial review is time-critical – ... [in] two matters where Justice Connect has assisted a tenant to obtain an injunction in the Supreme Court, one was obtained on less than an hour's notice, and the other on 36 hours' notice;*
- b) *an application by the tenant to the Supreme Court for judicial review, as distinct from the tenant's defence of an application by the Director of Housing to VCAT for a possession order, is resource-heavy. It is time intensive and reliant upon the pro bono referral schemes for referral to and representation by appropriately experienced solicitors and counsel;*
- c) *judicial review has cost risk for the tenant, compared with the no cost jurisdiction of VCAT;*
- d) *if an injunction is sought in the Supreme Court, the tenant must give an undertaking as to damages; and*
- e) *the typical client of Justice Connect is ... [not] well-suited to contest difficult litigation in the Supreme Court.*

By way of example, the judicial review proceedings for Ms Burgess and her son commenced in June 2013 and the judgment was handed down 18 months later in December 2014. It was a protracted period throughout which there was the perpetual fear of losing her home and being liable for significant costs.

With these limitations in mind, counsel has advised Homeless Law on potential legislative amendments to confer jurisdiction on VCAT to consider Charter compliance in applications by social housing providers.

## 5.2 Legislative reform: the defence of Charter unlawfulness in VCAT

The advice of counsel on the 'simplest and least contentious solution' to the jurisdictional barriers created by the decisions of Sudi and Burgess is to 'amend the Charter to expressly confer jurisdiction on VCAT to hear and decide Charter unlawfulness under [section] 38 **by way of defence** with respect to proceedings brought by public authorities to evict tenants under the [Residential Tenancies Act]' (emphasis in original).

The advice from Merkel QC, Aghion and Melis of counsel states:

*[In the first instance decision of Director of Housing v Sudi (Residential Tenancies) [2010] VCAT 328] Bell J recognised that VCAT does not have the power to engage in judicial review. However, his Honour did not think that the issues raised by the Director's breach of the Charter could only be determined through judicial review and they could and should be reviewed by the Tribunal.<sup>68</sup> His Honour further accepted that there were analytical similarities between VCAT engaging in a consideration of the Director's compliance with the Charter and VCAT engaging in judicial review but despite this the two processes were distinct.*

*On the reasoning of Bell J, the legal consequences that would flow from a determination that a public authority has acted unlawfully under s38 of the Charter would be to invalidate the Director's application for a possession order. It would be open to the Director to put before the Tribunal evidence that the human right engaged in the proceeding was subject to such reasonable limits as can be demonstrably justified in a free and democratic society, taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitation and the nature and extent of the limitation.<sup>69</sup>*

*... although not explicit and not how it was put on appeal, Bell J's reasoning allowed the defendant to an application for a possession order to engage s38 of the Charter by way of defence.*

...

*In effect, the amendment that would overcome the main burden of the bifurcation problem ... give legislative effect to Bell J's reasoning and, for the purposes of an application under the RTA, untangle s38 from s39 of the Charter in an RTA proceeding. This would give VCAT the ability to consider breaches of the Charter by way of defence, rather than more generally by way of judicial review, so that no tension arises with respect to VCAT's powers and the powers of judicial review traditionally exercised by the courts.*

*In response to a defence of s 38 Charter unlawfulness, it would be open to the landlord to rely upon the proportionality and balancing factors under s7 of the Charter.*

...

<sup>68</sup> *Director of Housing v Sudi (Residential Tenancies) [2010] VCAT 328 [129].*

<sup>69</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic) s 7(2).*

*The proposed amendment would also clarify and confine VCAT's jurisdiction with respect to the Charter, and delineate between an original s 38 jurisdiction which would apply to a defence to applications under the RTA, and the judicial review jurisdiction which would remain with the Court.*

The amendment proposed by counsel and preferred by Homeless Law is a new section 39A of the Charter:

**39A Proceedings in relation to the Residential Tenancies Act 1997**

*(1) A party to a proceeding in relation to a matter arising under the Residential Tenancies Act 1997 (Vic) may raise a defence of unlawfulness under s38 of the Charter.*

*(2) Upon a defence of unlawfulness under s38 of the Charter being raised pursuant to sub-section (1), the Tribunal or the Court thereafter has jurisdiction to hear and determine that defence.*

Counsel identify that the proposed amendment would:

- a) *create certainty in the law when it comes to VCAT's jurisdiction with respect to decisions made by public authorities to evict under the RTA;*
- b) *re-focus public authorities on their obligations under the Charter when making decisions to evict;*
- c) *restore the ability of Justice Connect to negotiate outcomes for tenants based on grounds under the Charter and in many circumstances avoid the need to come before a court and tribunal, saving all parties legal costs, uncertainty and delay;*
- d) *develop jurisprudence about the scope of the s 38 Charter obligations; and*
- e) *reduce the litigation burden upon tenants and public housing providers, by removing the current problem of bifurcation.*

Counsel advise that the proposed amendments to the Charter will give VCAT power to consider a question of Charter unlawfulness by way of defence and, in doing so, can provide it with the power to invalidate the notice or application for possession, or stay the application so that it should not entertain it further. Counsel notes that, for clarity, the proposed amendment to the Charter could be accompanied by an amendment to the *Residential Tenancies Act 1997 (Vic)* to confirm that a finding of unlawfulness would result in the application being dismissed for invalidity, however, counsel advise that this is not strictly necessary as the proposed amendments specifically state that section 38 unlawfulness *may* be raised as a defence, 'which carries the statutory implication that the defence if successful will result in refusal to grant the relief being sought'.

Homeless Law commends an amendment to this effect to the Reviewer and to Government. It is a modest, practical and straightforward amendment that overcomes a complex jurisdictional issue and, in doing so, would give meaning to human rights – for both tenants and social landlords – in tenancy proceedings.

## 5.3 VCAT's role in considering Charter compliance

As noted throughout this submission, prior to Sudi, VCAT members were undertaking assessments of Charter compliance as part of eviction proceedings brought by social landlords. Accordingly, there is some indication of how the proposed amendment would operate in practice. This section considers two aspects of how the proposed amendment would operate, including the role for VCAT members and the efficient operation of VCAT.

### Charter compliance in practice

In practice, the proposed amendment to give VCAT jurisdiction to consider Charter unlawfulness as a defence in applications by social landlords, will require VCAT to consider:

- Whether the social landlord is a public authority under section 4 of the Charter and therefore has obligations under section 38 of the Charter. This is a practical exercise using the framework set out in *Metro West v Sudi*, however, as explained in part 4 of this submission, it would be preferable if this was clarified by regulatory amendment confirming that all housing agencies registered under the *Housing Act 1983 (Vic)* are public authorities for the purposes of the Charter.<sup>70</sup>
- Which, if any, Charter rights are engaged by the social landlord's decision to apply for possession. This will most likely be the rights under section 13(a) (regarding arbitrary interference with privacy, family and home) and/or section 17 (regarding family and children) of the Charter.

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<sup>70</sup> In relation to any suggestion that it would be problematic if VCAT was required to undertake one set of enquiries for social housing providers and another slightly more straightforward set for private landlords, Homeless Law refers the Reviewer to sections 250A and 250B of the *Residential Tenancies Act 1997 (Vic)* (introduced via the *Residential Tenancies Amendment (Public Housing) Act 2011 (Vic)*), which deal with 'drug-related conduct in public housing' and 'prescribed indictable offences in public housing' and set up separate regimes for public and private landlords.

- Whether the landlord has acted in a way that is compatible with the Charter rights and, when making a decision, given proper consideration to relevant Charter rights in accordance with section 38.
- Whether any limitation on the relevant rights is justified and proportionate under section 7(2) of the Charter. This will include considering evidence presented by the social landlord about its obligations to manage the waiting list for social housing and to manage tenancies in a way that ensures the safety of other tenants and how these are balanced against the individual circumstances of the tenant, including their vulnerabilities, likelihood of homelessness and impact on their children or family.

This is a balancing exercise based on evidence that VCAT members are well placed to undertake. This has been noted by VCAT members with reference to the decision of Emerton J in *Castles v Secretary to the Department of Justice*:<sup>71</sup>

*Emerton J decided that a public authority would meet its obligation under section 38(1) if there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications of the decision for the affected person, and that the countervailing interests or obligations were identified. While it would not be enough for a decision-maker to merely invoke the Charter, a sophisticated legal exercise is not required given that the consideration of human rights is intended to be part of the day to day work of employees of public authorities.*<sup>72</sup>

An assessment of Charter compliance does not involve considerations that are outside the expertise of VCAT members. In particular, we note that VCAT's *Member Competency Framework*, launched in December 2010, identifies 'possess[ing] a sound knowledge and understanding of the *Charter of Human Rights and Responsibilities Act 2006*' as one of four key competencies in 'knowledge and technical skills' required by VCAT members.<sup>73</sup>

VCAT members also routinely consider the Charter in other lists, including proceedings in the Human Rights List pursuant to the *Equal Opportunity Act 2010* (Vic) and the *Mental Health Act 1986* (Vic). As explained in a paper delivered by the President of VCAT, the Honourable Justice Garde,<sup>74</sup> the Charter has also been considered in administrative matters,<sup>75</sup> planning matters<sup>76</sup> and in matters of civil procedure.<sup>77</sup>

There has been some suggestion that the judiciary is better placed to decide Charter questions,<sup>78</sup> however, Homeless Law's view is that regular members – who are deciding disputes between tenants and social landlords day-in-day-out – are familiar with the factors that will be relevant to assessments of lawfulness and proportionality and are well equipped to make these decisions based on the evidence before them. The Charter should be like any other law that is applied by members in the general course of their work.

In addition, Homeless Law recommends that VCAT members are provided with training and guidelines in relation to considering a Charter-based defence in tenancy matters involving social landlords. A Practice Note could also be developed to guide the timing and format for raising Charter defences.

Prior to Sudi, VCAT members were engaging in consideration of the Charter as part of their determination of applications for possession by social landlords and VCAT members were effectively balancing human rights considerations against the competing obligations of social housing providers in making their decisions. The proposed amendment would provide a lawful basis to return to this position and would provide meaningful human rights accountability in the context of housing and homelessness.

## Efficient, affordable access to justice

In 2013–14, the VCAT Residential Tenancies List received 61,126 applications;<sup>79</sup> 14,396 of the applications were brought by the Director of Housing; and 20,007 of the applications were for possession orders.<sup>80</sup>

With this volume of matters, it is understandable that there might be concerns about the resourcing implications of conferring VCAT with jurisdiction to consider Charter compliance as a defence in social housing proceedings. Warren CJ in Sudi, for example, said:

<sup>71</sup> *Castles v Secretary to the Department of Justice* [2010] VSC 310 [185]–[186].

<sup>72</sup> *Director of Housing v KJ* (Residential Tenancies) [2010] VCAT 2026 (16 December 2010) [81]. See also *Director of Housing v TK* (Residential Tenancies) [2010] VCAT 1839 (16 November 2010) [57]–[58].

<sup>73</sup> Victorian Civil and Administrative Tribunal, *Member Competency Framework* (1 December 2010) 4. The other three required competencies in the knowledge and technical skills section are: possess a sound and detailed knowledge of VCAT's legal framework and jurisdiction as set out in the VCAT Act and enabling enactments; possess a detailed knowledge of VCAT's procedures and apply appropriately; and Specialist Members possess an in depth and up-to-date expert knowledge of the subject matter of the relevant VCAT jurisdiction.

<sup>74</sup> The Honourable Justice Garde AO RFD, President of VCAT, *VCAT Charter Cases – A Review* (paper delivered on 15 May 2013 to a seminar hosted by the Law Institute of Victoria).

<sup>75</sup> *Caripis v Victoria Police* [2012] VCAT 1472 (27 September 2012); *Pham & Anor v Clark & Anor* [2012] VCAT 801 (13 June 2012).

<sup>76</sup> *Smith v Hobsons Bay City Council* [2010] VCAT 668 (12 May 2010).

<sup>77</sup> *Guss v Aldy Corporation & Anor* [2008] VCAT 912 (1 May 2008).

<sup>78</sup> See, eg, Sudi, above n 27, [209]–[212] (Weinberg JA): 'In the present case, Bell J observed that VCAT was the most suitable forum for determining Charter questions of the kind raised by Mr Sudi. With great respect, I have misgivings as to whether that is so'. We also note that the advice of Merkel QC, Aghion and Melis of counsel to Homeless Law proposed the option of matters involving the defence of Charter unlawfulness being considered by judicial members in VCAT. The benefits of this were identified as including the judicial consistency between VCAT and the Courts when applying the Charter in Victoria, but the practical limitations in terms of the 'high volume jurisdiction' of the Residential Tenancies List were also acknowledged.

<sup>79</sup> VCAT Annual Report, above n 9, 21.

<sup>80</sup> *Ibid.*

'VCAT is intended to be a forum for speedy and inexpensive resolution of specific kinds of disputes in respect of which the legislature saw fit to confer jurisdiction'.<sup>81</sup> Homeless Law reiterates, however, the observations of Merkel QC, Aghion and Melis of counsel:

*The limitations on the legal rights of a tenant that have been created by the decisions of Sudi and Burgess are most acute with respect to marginalised members of the community who are at risk of homelessness. The procedural burden of a bifurcated process is undesirable in principle but that is particularly so in respect of the Charter rights of those at risk of homelessness. The policy benefits of maintaining VCAT's role as a forum for quick, efficient and inexpensive resolution of Charter issues arising in a matter involving the RTA should properly fall within VCAT's jurisdiction<sup>82</sup> in order to give practical content to the human rights of persons who are at risk of homelessness.*

Counsel then stated: 'We consider that there are compelling reasons to amend the Charter in the manner described ... to overcome the problems that we and the Supreme Court have identified'.

Homeless Law also notes that it is not only counsel and tenant representatives who identify the desirability of VCAT as the forum to decide questions of Charter compliance in social housing matters. The submission to the 2015 Charter Review of the Community Housing Federation of Victoria also recommends that VCAT should be given jurisdiction to determine whether a landlord that is a public authority has acted inconsistently with the Charter. CHFV notes the benefits of this approach:

- *VCAT is quick and cost effective forum for the resolution of disputes. [Community housing organisations (CHOs)] can appear in VCAT without legal representation. This places questions of compliance with the Charter in an accessible and affordable forum which allows development of a body of practice regarding how the Charter applies to actions under the RTA by a landlord that is a public authority.*
- *Where a Charter issue arises out of a residential tenancy dispute, the factual basis for the various claims (breach of the Charter and breach of the RTA) are likely to be the same. It is efficient for one decision maker to hear all of the evidence and facts and be in a position to make a determination on all of the relevant issues.<sup>83</sup>*

Essentially, the ability of VCAT to deliver the prompt, cost effective resolution of disputes, and its accessibility for both social landlords and tenants, are key reasons why it is the appropriate forum for considering Charter lawfulness in social housing matters. The separation of Residential Tenancies Act proceedings from Charter proceedings creates an artificial divide that isolates rather than entrenches the Charter in the decision-making of social housing providers.

Importantly, as discussed in part 3 of this submission, accountability for Charter compliance at VCAT has a role to play in promoting negotiated outcomes. Accordingly, there is scope for the proposed amendment to reduce the current heavy reliance on VCAT to resolve disputes that could be addressed via negotiation or mediation. As discussed above, in Homeless Law's experience, the knowledge that VCAT can consider compliance with section 38 of the Charter prompts social landlords to genuinely consider their Charter obligations and can lead to improved decision-making. Pre-Sudi, Homeless Law was achieving more negotiated outcomes and observing a decreasing need to resort to VCAT for determinations. Such changes had the potential to improve efficiency and reduce the burden on VCAT, but since Sudi these changes have been on hold.<sup>84</sup>

Related to the efficiency of VCAT, another concern that may be raised is a perceived potential for 'the Charter to be used to thwart the processes laid down for eviction by the RTA' or to be misused.<sup>85</sup> This concept has been considered in the United Kingdom, including by the UK Supreme Court in *Manchester City Council v Pinnock* [2011] UKSC 6, which in response to a suggestion that 'possession claims against demoted tenants could be procedurally derailed if tenants could raise public law points in the course of the possession proceedings', said: 'the ability of a tenant to delay possession proceedings by raising a public law point would be greater if such points had to be taken in separate proceedings in the High Court'.<sup>86</sup>

In Homeless Law's view, the risk that the defence of Charter unlawfulness will be misused is limited and an unmeritorious Charter defence can be swiftly dealt with at the hearing. Concerns regarding potential misuse should not outweigh the significant benefits of accessible human rights accountability in a social housing context. VCAT and other users of the Residential Tenancies List should be consulted on the preferred procedural requirements for raising a Charter-based defence, for example, a form or notification process for tenants proposing to raise the defence, which may assist VCAT in managing the Residential Tenancies List.<sup>87</sup>

Homeless Law strongly recommends that any procedural requirements put in place to manage VCAT's listings, operation and resourcing do not place unreasonable limitations on the ability of tenants to access the proposed mechanism for considering

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<sup>81</sup> Sudi, above n 27, [19].

<sup>82</sup> *Ibid* [39] and [56].

<sup>83</sup> CHFV Charter Submission, above n 39, 8–9.

<sup>84</sup> Homeless Law notes that, between 2009–10 and 2010–11 (i.e. the period before Sudi identified the limitations on VCAT's jurisdiction to consider Charter unlawfulness), there was a 25.6% reduction in the proportion of applications to the Residential Tenancies List that were possession applications. While Homeless Law is not in a position to identify the reason for this, it would be worthwhile considering whether this was attributable in part to social landlords engaging in more careful decision-making before resorting to a possession application.

<sup>85</sup> Sudi, above n 27, [289] and [291].

<sup>86</sup> *Manchester City Council v Pinnock* [2011] UKSC 6 [87].

<sup>87</sup> Another possibility raised by counsel was that an application for leave is required, which would be refused if the defence has 'no real prospects of success'. Homeless Law is not, however, of the view that this is a workable proposal in that it adds an additional hearing to VCAT's already heavy load and presents a risk that the application for leave will become a 'hearing before a hearing' where the same matters and evidence are considered twice.

Charter unlawfulness in tenancy proceedings. Onerous requirements will defeat some of the key benefits of the proposed reform, which focus on the accessibility of VCAT for both tenants and social landlords.

In making these recommendations, Homeless Law reiterates the ability of VCAT to consider whether a social housing provider has complied with their obligations under section 38 of the Charter, and to dismiss any application where they have not, will deliver substantial benefits in the form of:

- Prevention – it provides a more compelling motivation to incorporate the Charter into policies and practices, and to reach negotiated or mediated outcomes without reliance on VCAT;
- Guidance by the courts and tribunals – these decisions provide clarity about the application of the Charter in practice, which is beneficial for tenants, advocates and social housing providers; and
- Additional layer of protection – in the event that the application is unlawful under section 38 of the Charter, there will be a meaningful consequence for tenants and social housing providers, which is only very rarely the case under the current system.

## 5.4 An independent cause of action in the Charter

Homeless Law's position based on our legal case work with clients facing eviction from social housing, including our experience running the Burgess matter, has informed the tailored recommendation to confer VCAT with jurisdiction to consider section 38 compliance in tenancy matters brought by social landlords.

More broadly, however, Homeless Law reiterates our recommendation from the 2011 Submission that the Charter should contain an independent cause of action.

Homeless Law considers that the current limitation on a person's ability to commence legal proceedings for non-compliance with the Charter under section 39 creates confusion and unnecessary complexity. This detracts from the ability of the Charter to provide just and timely remedies for infringements of rights.

By way of example, section 40C of the *Human Rights Act 2004* (ACT) provides that if a person claims that a public authority has acted in contravention of section 40B (the requirement that public authorities must act consistently with human rights), and that person is or would be a victim of the contravention, the person may start a proceeding in the Supreme Court against the public authority or rely on the person's rights under the *Human Rights Act 2004* (ACT) in any other proceedings.

This is an appropriate and clear expression of the rights of affected people to enforce their legal and human rights under the Charter. While most Victorians' human rights are complied with most of the time, when they are not, it makes sense that a person would be able to take action for the non-compliance. Accordingly, Homeless Law recommends that there should be a free-standing cause of action for breaches of rights protected by the Charter.

While the relief most commonly being sought by Homeless Law's clients will include injunctive relief, declaratory relief, mandamus and certiorari with a view to preventing eviction into homelessness, Homeless Law's view is that, in the event that a breach of a person's human rights is found to have occurred, the courts should have the discretion to award an appropriate remedy, including damages if necessary. Homeless Law notes that in the United Kingdom where the *Human Rights Act 1998* (UK) includes a power to award damages for a breach, damages are rarely awarded, with judicial review and declaratory and injunctive relief frequently providing an effective remedy.<sup>88</sup>

Essentially, the absence of an independent cause of action and available remedies sends a strange message that a breach of the Charter is not unlawful. Amending this provision will remove the confusion and ensure accountability in the event of non-compliance with Charter obligations.

## 6. Entrenching human rights: training, resources and review

In addition to the confusion regarding public authorities and VCAT's jurisdictional limitations, the impact of the Charter has been constrained by the lack of investment in training and resources to support implementation of Charter-compliant policies and practices.

There is significant potential for renewed commitment to, and investment in, Charter-based training, education and resources to improve the culture of human rights in Victoria.

<sup>88</sup> See *Human Rights Act 1998* (UK) s 8. In the UK, between 2000–2006, there were only three cases under the Human Rights Act which resulted in the payment of compensation. See UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act (2006)* 18. See also Equality and Human Rights Commission 'The Case for the Human Rights Act – Part 1 of 3 Responses to the Commission on a Bill of Rights: HRA Plus not Minus' (2013) 78.

This section discusses:

- The need for training and resources to support organisations to adopt the Charter in their day-to-day operation; and
- The ongoing review of the Charter and its effectiveness, which should be continued despite not needing to be legislatively mandated.

## 6.1 Human rights training and resources

***This section addresses Term of Reference 1(d).***

Education, resources and training are needed for frontline staff in organisations that are bound by the Charter, and for courts, tribunals and members of the community, to promote understanding, compliance and a culture of human rights.

At Charter-based training sessions that Homeless Law delivered in 2010–2011, workers commented that service providers require better knowledge of their obligations under the Charter; and that advocates need more training to better understand how to use the Charter in a practical way. One comment at a regional Homelessness Networkers meeting was that further training and resources regarding the Charter would lead to the Charter being more effectively incorporated into standard practice of service providers, so that advocates did not need to resort to the Charter when a situation becomes adversarial, or use it only as a ‘problem solving’ device.

Since the 2011 Submission, investment in training and resources regarding the Charter appears to have declined.

Simultaneously, while Homeless Law witnessed changes in the quality and transparency of service provision to our clients in the initial years of the Charter’s operation, as set out in part 3, some of these changes have stalled or even regressed.

Institutional change takes time, and practical, compliance-focussed training is important to strengthening the Charter’s ability to deliver fair outcomes for Victorians. It is important that training is refreshed and repeated, particularly to accommodate for staff turnover and for new developments in the Charter’s operation.

Importantly, a major concern of community housing providers in relation to whether or not they are covered by the Charter is the fact that they have not been supported to understand or incorporate the Charter into their practice. The Community Housing Federation of Victoria runs Charter training for their members and Homeless Law understands that they are also in the process of developing resources and checklists to help community housing providers effectively adopt the Charter in their decision-making. In terms of government led support and resources, however, the submission of the Community Housing Federation of Victoria to the 2015 Charter Review states:

*CHFV’s members have not received any support or guidance from DHHS about its expectations, or instructions on how to comply with the Charter. DHHS has not made resources available to CHOs and leasing or capital grant programs are not adjusted to provide additional funding. To the best of our knowledge, compliance with the Charter is not a condition of any funding agreements between DHHS and CHOs. This means that if the Charter applies to CHOs, then CHOs are effectively being asked to absorb the costs associated with these extra management obligations and risks into their operating model.<sup>89</sup>*

It is only through education and resources that the Charter obligations will become fully entrenched in Victoria. The ongoing delivery of relevant, practice-based training will continue to embed human rights compliance in the day-to-day activities of decision-makers and, in doing so, will lead to improved services and better outcomes.

## 6.2 Future reflection on the Charter’s effectiveness

***This section addresses Term of Reference 3.***

Homeless Law considers that regular reflection on the Charter and its effectiveness is important, but we are not of the view that this review needs to be mandated in the Charter itself.

The mandated review was an effective mechanism for a new piece of legislation and this eight year review provides a significant opportunity to improve the Charter’s operation and impact. After eight years, however, the Charter is an established piece of legislation and arguably does not need to be the subject of reviews that can be heavily shaped by the views of the government at the time.

In order to strengthen Victoria’s human rights culture and public authorities’ Charter compliance, future reflection should be conducted at four year intervals, with broad public consultation being key to the review process. The terms of reference of any future review should, similar to the eight year review, be directed at identifying ways in which the Charter can be strengthened and improved to best meet its purpose of the protection and promotion of human rights in Victoria.

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<sup>89</sup> CHFV Charter Submission, above n 39, 8.

## 7. Protecting all rights

Homeless Law recommends that the rights under the *International Covenant on Economic, Social and Cultural Rights* should be included in the Charter for the following reasons:

- Economic and social rights are rights that matter the most to many Victorians and the protection of these rights is necessary to create a fair society and to address disadvantage; and
- It is practicable to protect economic and social rights in the Charter – it will not bring about a flood of litigation or impose unworkable obligations on Government.

### 7.1 Economic and social rights matter the most to many Victorians

The economic and social rights most relevant to Homeless Law's client group are the rights to:

- An adequate standard of living (including adequate food, clothing and housing);<sup>90</sup>
- The highest attainable standard of physical and mental health;<sup>91</sup> and
- Education.<sup>92</sup>

These are the rights that are most important to Homeless Law's clients, because these rights are at greatest risk. As part of the National Human Rights Consultation in 2009, Homeless Law held 18 workshops at homelessness service providers in Victoria to ask people experiencing homelessness about their views on human rights in Australia. In total, Homeless Law consulted with 145 people who were experiencing, or who had experienced, homelessness. Ninety-nine percent of participants said that a 'Human Rights Act' should protect economic, social and cultural rights in Australia.<sup>93</sup>

This is consistent with the findings from the National Human Rights Consultation:

*The most basic economic and social rights – the rights to the highest attainable standard of health, to housing and to education – matter most to Australians, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community.*<sup>94</sup>

The circumstances of Victorians experiencing homelessness make the relationship between civil and political rights and economic and social rights clear – without protection of basic economic and social rights (including to adequate housing, health care and education), the ability to enjoy the civil and political rights that the Charter currently protects is seriously constrained. As one participant in our consumer consultation told us in 2009, 'you can't have one right without the others.'<sup>95</sup>

Inclusion of economic and social rights in the Charter would mean that these rights are considered and debated in the initial stages of law making. As we have seen with the rights currently protected under the Charter, this contributes to well-considered and transparent laws and policies. Formal legal protection of these rights would also have a positive impact on decision-making within public authorities. As noted in VEOHRC's consultation paper on economic, social and cultural rights, in relation to the views of people with an experience of homelessness:

*The findings indicated that the strong desire in this group for the proposed economic, social and cultural rights to be formalised and included in the Charter is linked not only to changing or improving their material circumstances but to changing or improving the way in which they are treated by public authorities (and the broader community) when attempting to access government services and programs.*<sup>96</sup>

The inclusion of economic and social rights as part of the Charter would strengthen the Charter's capacity to improve the treatment of struggling Victorians and address disadvantage and inequality in Victoria.

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<sup>90</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3, art 11 (entered into force 3 January 1976) (ICESCR).

<sup>91</sup> *Ibid* art 12.

<sup>92</sup> *Ibid* art 13.

<sup>93</sup> See Justice Connect Homeless Law (formerly PILCH Homeless Persons' Legal Clinic), *Promoting and Protecting the Human Rights of People Experiencing Homelessness in Australia: National Human Rights Consultation Submission setting out the views and comments of people experiencing homelessness about human rights in Australia* (15 June 2009) (PILCH Human Rights Consultation).

<sup>94</sup> National Human Rights Committee, Report of the National Human Rights Consultation Committee (September 2009), [15.1]; Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – Consulting with Victorians about Economic, Social and Cultural Rights and the Charter* (March 2011), 4 (VEOHRC ESC Report), which found that among the interviewed group: 'there is very strong support for the inclusion of economic, social and cultural rights in the Charter'; and '[a]mong those with an experience of disadvantage, this view [i.e. the support for inclusion of economic, social and cultural rights in the Charter] was strongly informed by their experiences' (at 5).

<sup>95</sup> PILCH Human Rights Consultation, above n 93, 24.

<sup>96</sup> VEOHRC ESC Report, above n 94, 26.

## 7.2 It is practical to protect economic and social rights in the Charter

Just as the current Charter rights have not imposed blanket constraints on government decision-making, protections of economic and social rights would not impose such constraints. The protection of economic and social rights is not an absolute protection. In the context of housing, the right to adequate housing does not create an obligation to provide every Victorian with a home. The obligation is to take steps to ensure the 'progressive realisation' of those rights, within the maximum of available resources.<sup>97</sup>

We refer to part 7.1 of our 2011 Submission where this recommendation is discussed in more detail.

Homeless Law also notes that in the Commonwealth context, the Parliamentary Joint Committee on Human Rights (**Committee**), established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), examines Bills and Acts of Parliament for compatibility with human rights, including economic and social rights. In performing its role, the Committee considers Australia's international human rights obligations under the seven core United Nations human rights treaties to which Australia is a party, including the ICESCR.<sup>98</sup> We note that the current mechanism for scrutiny of new Victorian legislation, which only requires consideration of whether the proposed law is incompatible with the human rights contained in the Charter, is therefore weaker and more restrictive in terms of the human rights considered than the protections contained in the equivalent federal process.

Homeless Law recommends that economic and social rights should be protected by the Charter, so that they are considered by Parliament when making laws, by public authorities when making decisions and by courts when interpreting laws. If a staged approach is more feasible, Homeless Law recommends the inclusion of economic and social rights for the purposes of Part 3, Division 1 of the Charter, dealing with the scrutiny of legislation.

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<sup>97</sup> ICESCR, above n 90, art 2. See also Dr John Tobin, Victorian Equal Opportunity and Human Rights Commission, *Occasional Paper: Economic, Social and Cultural Rights and the Charter of Human Rights and Responsibilities – A Framework for Discussion* (2010) 5.

<sup>98</sup> International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities.

## Annexure: 21 case studies showing use of the Charter for clients who are homeless or at risk of homelessness

	Client (name changed)	No. in household	No. children in property	Summary of outcome
<b>NEGOTIATION UNDERTAKEN – MATTER DID NOT PROCEED TO VCAT</b>				
1.	Nina	7	6	<p><b>Public housing – notice to vacate for rent arrears and creation of tenancy application</b></p> <p>Nina, a vulnerable mother of six young children, become the sole tenant at the property after her ex-partner was excluded under a final family violence intervention order.</p> <p><i>See case study on page 7</i></p>
2.	Wendy	2	1	<p><b>Public housing – notice to vacate for arrears while in prison</b></p> <p>The Charter was used in an application for an extension of Wendy’s temporary absence while in prison, and for correct calculation of her rebated rent. The extension of the temporary absence enabled her to return to her property after exiting prison and for her teenage son to live with Wendy at the property after her release.</p> <p><i>See case study on page 8</i></p>
3.	Sara	1	0	<p><b>Public housing – notice to vacate for no specified reason, issued while in prison</b></p> <p>Sara was sentenced to 12 months in prison. She was informed that her tenancy would be terminated because her sentence exceeded the six month temporary absence permitted under the Office of Housing’s Temporary Absence Policy.</p> <p>Homeless Law applied to the Office of Housing for an extension of Sara’s temporary absence, highlighting the Office of Housing’s obligations to consider Sara’s human rights under the Charter in applying the Temporary Absence Policy and making any decision to evict Sara. Following negotiations, the Office of Housing extended the temporary absence until Sara was released from prison.</p>
4.	Raymond	3	2	<p><b>Public housing – notices to vacate for illegal use of the property, issued while in prison</b></p> <p>Raymond was issued with notices to vacate for alleged drug trafficking from his property while he was still in custody. Raymond is a father of four children, including two daughters that live with him part-time. He had experienced substance abuse issues and was on the disability support pension.</p> <p>Drawing on Raymond and his daughters’ rights under the Charter, Homeless Law proposed an alternative to eviction, namely that Raymond would complete a drug rehabilitation program, continue to access drug related counselling after his release and refrain from any illegal use of the property. This proposal was rejected. Homeless Law continued its negotiations with the Office of Housing. Ultimately the notices to vacate and the application for possession were withdrawn before the matter proceeded to VCAT, enabling Raymond to remain in the property.</p>
5.	Dustin	1	0	<p><b>Public housing – notice to vacate for illegal use of the property, issued while in prison</b></p>

	Client (name changed)	No. in household	No. children in property	Summary of outcome
				Dustin has lived in the same property for more than 18 years. He was sentenced to a short term of imprisonment and the day before his sentencing and release from prison, he was issued with a notice to vacate for illegal use of the property. Homeless Law sought clarification regarding the illegal use of the premises and the evidence that the Director of Housing intended to rely upon at the upcoming possession order hearing. The VCAT hearing was adjourned by consent and the notice to vacate was withdrawn. Homeless Law wrote to the Office of Housing explaining Dustin's circumstances, including his history of mental health and substance abuse issues. Homeless Law raised the Director of Housing's obligation under section 38 of the Charter to consider Dustin's rights under sections 13 and 17 of the Charter, and referred to the decision in <i>Burgess v Director of Housing</i> [2014] VSC 648. Homeless Law outlined a proposal whereby Dustin would continue to engage with supports and not conduct any further illegal activity at the property, as an alternative to eviction. No further notice to vacate was issued.
<b>NEGOTIATION UNDERTAKEN – MATTER STILL PROCEEDED TO VCAT</b>				
6.	Kate	1	0	<p><b>Social housing – notice to vacate for endangering a neighbouring tenant</b></p> <p>Kate, who was suffering from mental health issues, was allowed to stay in her property following consent orders made by VCAT.</p> <p><i>See case study on page 21</i></p>
7.	Maureen	4	3	<p><b>Social housing – possession order made for rent arrears</b></p> <p>Maureen is an older woman who was living in a community housing property with her two children and grandchild when she was incarcerated due to outstanding infringements. Maureen then lost her two part time jobs and rent arrears accrued. The community housing landlord issued a notice to vacate and applied to VCAT for a possession order. Maureen was not aware that the VCAT hearing had been scheduled and a possession order was made in her absence.</p> <p>The landlord purchased a warrant and was taking steps to remove the family from the premises. Homeless Law urgently applied for review of the VCAT hearing at which the possession order was made, and negotiated with the landlord to enter into an arrears repayment agreement instead of evicting the family. The lawyers raised the community housing landlord's responsibility as a functional public authority under the Charter, and submitted that eviction of Maureen in these circumstances was disproportionate given her right to privacy under section 13(a) and protection of families and children under section 17 of the Charter.</p> <p>These negotiations were successful, and at the subsequent VCAT review hearing, an order by consent was made for Maureen to repay the arrears at an affordable rate. Maureen is now living back in her community housing property with her family.</p>
8.	Clare	2	1	<p><b>Public housing – notice to vacate for rent arrears</b></p> <p>Clare, who lived with her teenage son, fell into arrears when health issues left her unable to work. She received a notice to vacate. Homeless Law attempted to negotiate with the Office of Housing for the withdrawal of the possession order application, referring to the Office of Housing's obligations to Clare and her son under sections 38, 13(a) and 17 of the Charter.</p> <p>While willing to agree to the making of orders by consent, the Office of Housing wished to proceed to VCAT. VCAT ordered a payment plan that enabled Clare and her son to remain in the property and Clare to pay back the arrears at an affordable rate.</p>

	Client (name changed)	No. in household	No. children in property	Summary of outcome
9.	Faith	1	0	<p><b>Public housing – possession order for rent arrears</b></p> <p>Faith, an Ethiopian refugee without any family support in Australia, was at serious risk of homelessness if her tenancy in public housing could not be sustained. She came to Homeless Law when a possession order had been made for arrears of over \$5000.</p> <p>Homeless Law negotiated with the Office of Housing to reach an agreement on an affordable payment plan for Faith. The payment plan formed the basis of VCAT's orders enabling Faith to remain at the property and address the arrears at an affordable rate.</p>
10.	Gerard	1	0	<p><b>Social housing – notice to vacate for endangering a neighbouring tenant</b></p> <p>Gerard was issued with a notice to vacate for endangering a neighbouring tenant, following an altercation which Gerard instructed involved people living at another social housing property, not a neighbour in his building. Homeless Law used the Charter in negotiations with the landlord to withdraw the notice to vacate issued to Gerard, raising his mental health issues including bipolar disorder and his serious risk of homelessness. The matter proceeded to VCAT, where Gerard and his neighbour both made undertakings regarding their conduct which formed part of a VCAT order. No possession order was made, enabling Gerard to remain in the property.</p>
11.	Therese	1	0	<p><b>Public housing – notice to vacate for no specified reason</b></p> <p>Therese, a mother of three children, had a six month temporary absence approved while she was in prison. The Office of Housing rejected an application for an extension of a temporary absence while Therese completed her term of imprisonment. This decision was appealed to the Housing Appeals Office on the basis of the Office of Housing's alleged failure to consider Therese's rights and her children's rights under the Charter. The appeal was refused and the matter proceeded to VCAT where the notice to vacate was held to have been invalid.</p>
<b>NEGOTIATION ATTEMPTED – MATTER PROCEEDED TO SUPREME COURT</b>				
12.	Ebony	2	1	<p><b>Public housing – warrant purchased for illegal use of the property</b></p> <p><i>See case study of Burgess v Director of Housing [2014] VSC 648 on page 16</i></p>
13.	Katherine	5	4	<p><b>Public housing – possession order for alleged breach of a compliance order</b></p> <p>Katherine is the sole tenant of an Office of Housing property where she has lived for over 13 years with her four children. She has been a sole parent since her partner passed away in 2006, reliant on Centrelink payments to support her family.</p> <p>When Katherine contacted Homeless Law she was at immediate risk of eviction. A possession order had been made at VCAT for alleged breaches of a compliance order. The landlord had purchased a warrant of possession which the police had been directed to execute.</p> <p>After negotiations with the Director of Housing were unsuccessful, Homeless Law applied to the Supreme Court challenging the possession order and the Director of Housing's decision to evict Katherine. Homeless Law argued that VCAT had erred in granting the possession order because the notice to vacate did not include sufficient details of the alleged breach and that the Director of Housing</p>

	Client (name changed)	No. in household	No. children in property	Summary of outcome
				had failed to consider the family's rights under the Charter. The Director of Housing agreed to settle the Supreme Court proceedings. The terms of settlement enabled Katherine and her family to remain in their home.
14.	Linda	1	1	<p><b>Social housing – two notices to vacate (one for no specified reason and one for rent arrears)</b></p> <p>Linda was issued with a notice to vacate for no specified reason and a notice to vacate for vacate for rent arrears. At the time, Linda was in arrears of around \$1500, had no income and had an active intervention order against her ex-partner. Her eldest of three children was living with her at the property.</p> <p>Homeless Law negotiated with the landlord, referring to their obligations under the Performance Standards for Registered Housing Agencies and Linda and her daughter's rights under section 13(a) and section 17 of the Charter, however the landlord sought to have their possession order application heard at VCAT. Homeless Law represented Linda in a number of VCAT hearings, and briefed Counsel to make a judicial review application in the Supreme Court.</p> <p>Following further negotiations, the Supreme Court action was withdrawn by consent and the landlord withdrew both applications for a possession order, as well as the notice to vacate for no specified reason. At the conclusion of the matter, Linda was subject to an earlier consent order to pay rent arrears each fortnight on top of her weekly rent.</p>
<b>NEGOTIATION UNDERTAKEN – AFTER HEARING IN VCAT</b>				
15.	Jessica	1	0	<p><b>Social housing – possession order made for breach of duty (offensive odour coming from property)</b></p> <p>Negotiations which highlighted the community housing provider's obligations under the Charter resulted in an agreement pursuant to which Jessica could stay in the property and continue to engage with support services.</p> <p><i>See case study on page 18</i></p>
16.	Rita	3	2	<p><b>Public housing – possession order made for rent arrears</b></p> <p>A possession order was made against Rita for arrears of less than \$950. Rita had fallen behind on her rent following a change to her Centrelink payments, resulting in a temporary cessation of her direct debit rental payments.</p> <p>Homeless Law applied for a review of the possession order shortly before a warrant was scheduled to be executed. VCAT did not grant the review application, so the possession order stood. The Office of Housing indicated that the warrant would be executed unless Rita repaid the entire balance of the arrears.</p> <p>Homeless Law wrote to the Office of Housing explaining Rita's circumstances, including suffering from severe depression since losing full time custody of her six children and a long history of family violence and homelessness. Homeless Law referred to the Director of Housing's obligation under section 38 of the Charter to act in a way that is compatible with human rights and to give proper consideration to the human rights impact of any decision to remove Rita from the property, including section 13(a) and section 17. The decision to proceed with the eviction would leave her homeless and extremely vulnerable, and highly unlikely to retain her visitation rights with her children.</p>

	Client (name changed)	No. in household	No. children in property	Summary of outcome
				Despite these negotiations, the Office of Housing required the repayment of the arrears in full. Rita managed to sell some personal property to get together the remainder of the arrears and the warrant laps
17.	Peter	1	0	<p><b>Social housing – notice to vacate for rent arrears</b></p> <p>Peter, a refugee with a history of homelessness and a chronic gambling addiction, was issued with a notice to vacate when he fell into arrears of less than \$2000. He had been in arrears previously, also due to his gambling addiction, but he was extremely committed to addressing the arrears and sustaining his tenancy. Despite his past history of homelessness and fragile mental health, Peter had managed to sustain part-time employment for eight years, which would be seriously jeopardised if he was to be evicted into homelessness.</p> <p>Homeless Law negotiated with Peter’s landlord, requesting that they refrain from purchasing a warrant of possession while Peter had the opportunity to reinstate his rental payments and seek professional help for his gambling addiction. The negotiations resulted in an agreement for Peter to repay the arrears, enabling him to remain in his property.</p>
<b>NEGOTIATION ATTEMPTED – TENANCY WAS NOT SUSTAINED</b>				
18.	Zoe	1	0	<p><b>Social housing – notice to vacate for no specified reason</b></p> <p>Homeless Law attempted to negotiate with Zoe’s landlord, a community housing provider, to identify an alternative to evicting Zoe from the rooming house she was living in. The landlord refused to negotiate and the matter proceeded to VCAT where a possession order was made.</p> <p><i>See case study on page 13</i></p>
19.	Esmé	1	0	<p><b>Transitional housing – notice to vacate for end of a fixed term lease</b></p> <p>Esmé was issued with a notice to vacate by her landlord on the same day that she signed her 13 week fixed term tenancy agreement. Esmé was 64 years of age, with no family supports and was undergoing treatment for depression, so was unable to quickly find another property to live in. Homeless Law negotiated with the landlord, drawing on the landlord’s obligations under sections 38 and 13(a) of the Charter and requesting a two month adjournment for the possession order hearing, to enable Esmé to find alternative housing. The negotiations for a two month adjournment were successful, enabling Esmé to find an alternative affordable property in regional Victoria.</p>
20.	George & June	6	4	<p><b>Public housing – two notices to vacate for illegal use of the premises</b></p> <p>George and June received notices to vacate based on illegal use of the premises. They had lived in the property for 13 years with four of their children, including an adult son with a disability. Both George and June are reliant on Centrelink pensions. Around two years prior, they had been charged with possession and trafficking cannabis and were sentenced to community corrections orders. Neither George nor June had engaged in any illegal drug use or criminal activity since.</p> <p>In negotiating for the possession application to VCAT to be withdrawn, Homeless Law asserted that the Director of Housing is required to give proper consideration to the human rights of George, June and their family in deciding to evict them from the property under</p>

	Client (name changed)	No. in household	No. children in property	Summary of outcome
				<p>section 38 of the Charter, in particular section 13(a) and section 17. Homeless Law explained it would be highly unlikely for George and June and their family to access alternative accommodation if evicted. Eviction would mean the family would be split up, with the children required to stay with different family or friends. Homeless Law asserted that evicting George and June would not be reasonable or proportionate.</p> <p>The Director of Housing did not withdraw the notices to vacate and the matter proceeded to VCAT. A possession order was made, however following negotiations the Director of Housing gave an undertaking not to request a warrant of possession for five months to enable George and June to look for other suitable accommodation.</p>
<b>CHARTER USED TO PREVENT IMPRISONMENT FOR UNPAID FINES</b>				
21.	Robert (father of six children)			<p><b>Application for review of an imprisonment in lieu order</b></p> <p>Homeless Law's application to the Magistrates' Court for rehearing of an imprisonment in lieu order was accepted and all outstanding infringements on the order were struck out.</p> <p><i>See case study on page 10</i></p>