



SUBMISSION BY EASTERN COMMUNITY LEGAL CENTRE

Security of Tenure Issues Paper

Residential Tenancies Act Review

21 January 2016

Contact:

Belinda Lo

Principal Lawyer

E BelindaL@eclc.org.au

Connie Chen

Community Lawyer

E ConnieC@eclc.org.au

Eastern Community Legal Centre

Suite 3, Town Hall Hub

27 Bank Street

Box Hill VIC 3128

P (03) 9285 4822

F (03) 9285 4822

www.eclc.org.au | [@EasternCLC](https://www.instagram.com/EasternCLC)

Background

Eastern Community Legal Centre (ECLC) is located in the Eastern region of Melbourne and serves the Cities of Whitehorse, Boroondara, Manningham, Maroondah, Knox and the Shire of Yarra Ranges. The ECLC Tenancy program serves an additional municipality namely, the City of Monash. ECLC offers free legal advice from its offices in Box Hill, Boronia and Healesville during the day, at night and also through various outreach locations across the East, with a priority being given to those who are disadvantaged.

The Eastern Region has a number of areas of significant disadvantage. Healesville, in the Shire of Yarra Ranges, is home to the second most populous indigenous population in Victoria. The cities of Whitehorse, Maroondah and Knox host large communities of new arrivals to Australia.

In addition to direct legal services, ECLC also focuses on community development and education activities that empower clients, workers and the general community. It raises awareness of its service, new legal developments and human rights through various projects.

The ECLC Tenancy Advice and Advocacy Program (“TAAP”) has been operating since 2012, and is funded by Consumer Affairs Victoria (CAV) to protect vulnerable and disadvantaged tenants. In providing funding, CAV ‘recognises that some of the most v[ulnerable] and d[isadvantaged] Victorians often experience tenancy problems. These can lead to adverse outcomes, including homelessness, if they remain unaddressed.’¹

The ECLC TAAP has assisted in more than 895 separate tenancy matters since it opened in late 2012, and its advocates assist clients via advice, advocacy, negotiation and representation at the Victorian Civil and Administrative Tribunal (‘VCAT’). The tenant advocates at ECLC have over twenty years tenancy experience between them. All of the ECLC TAAP clients have limited financial resources and receive Centrelink allowances.

Additionally, ECLC has been funded by Deakin University since April 2012 to provide on-site legal information, casework and support to all currently enrolled Deakin University students at the Burwood campus. Tenancy matters make up about 20% of this work, and the service has provided assistance on 115 tenancy matters to date. The majority of students are either receiving a Centrelink benefit and/or are being fully or partially supported by their families and/or working only nominal casual hours. Many clients are also international students for whom English is not their first language, are unfamiliar with Australian culture and the legal system, and are first-time renters.

¹ Department of Justice, Consumer Affairs Victoria., *Guidance on TAAP- Operational guidelines on the Tenancy Advice and Advocacy Program*, p 6

This submission is informed by the experiences of our clients from TAAP and the Deakin University program. We have utilised case studies in this submission which are based on the real-life experiences of our clients.

We have directly addressed questions raised in the Security of Tenure Issues Paper in areas where we believe the Centre's and clients' experience will add value in considering reforms to the Residential Tenancies Act 1997 (Vic) (the 'Act').

Tenant Profiles

1 Why is security of tenure important for Victorian tenants?

2 What factors influence tenants' preferences for stability and flexibility in rental accommodation?

Twenty years ago the housing market was characterised by many tenants renting before buying their own property. However, due to today's increasing house prices many people will never be able to afford to buy their own home and be renting their whole lives.

Tenants exist across the social spectrum: they can be all ages, and at different stages of their lives; they can live as a single person, part of a couple or in families with children. Tenants may be students completing further qualifications, or they may be older people who have retired from full time work. Tenants exist across the socioeconomic spectrum although tenants who are the lowest end of the socioeconomic bracket will be the least likely to ever afford their own home.

We also note that due to high rental prices, the incidences of shared housing arrangements has increased among people on low income, while the laws governing shared housing arrangements have not been updated to comprehensively cover disputes in those circumstances.

At ECLC our experience with tenants is that people with different backgrounds will have vastly different priorities for how and where they want to live. However, we note that every tenant experiences great stress and upheaval where legal issues arise surrounding their homes. We have therefore provided a snapshot of some common client groups that regularly attend our service for advice, although we note that these are broad generalisations of client types, and individual clients will have their own specific needs.

Students

Students tend to be more flexible and want more flexibility in their tenancies. They have low incomes and are generally looking to save money by living in shared households whether this is through rooming houses, subletting, or joint tenancies. They are likely to rent with friends or other students with similar lifestyles. They tend to seek housing near public transport and close to where they are studying.

Many students have very predictable holiday dates or graduation dates where they might want to make a change to their living arrangements - such as going home (overseas or interstate), moving in with a partner or friends, moving for work after graduation, etc.

Students are extremely reluctant to move during the semester and especially during exams as they find this interrupts their studying schedule.

As many students are studying at a tertiary level some can be quite sophisticated tenants who are able to self-advocate. However, there are also a large number of students who are young people living away from home and renting for the first time. If they are international students, there is often the additional barrier of unfamiliar language, culture and laws that they need to navigate. Nor is it correct to assume that most students will have financial and social support from their families, and many will have demanding schedules dividing their time between part-time work and full-time study.

Parents with Dependent Children

Parents with children include many single parents (primarily mothers) who may have multiple dependent children. Sometimes the children may also have disabilities that require extra care.

Stability is an extremely important factor for parents. It is important for children to have a regular routine, and to be able to attend a local school or childcare facility. Parents typically look to rent alone in houses with several bedrooms and space for the children to play in (such as a large backyard). Parents are often more embedded into the local community, and may rely on relatives, neighbours or other parents for assistance with their children. If they move, they will attempt to look for properties close-by to in order to keep children enrolled in the same school.

Parents will also prioritise the safety and health of their children beyond any other factors. Where there are repair issues in the house (such as mould, asbestos, unsafe structures, etc), many will prefer to move into a new property if outstanding issues are not repaired in a timely way.

For these reasons, parents may prefer and benefit from longer term leases.

Older People (65 years and older)

Older people who have usually retired tend to have very stable lifestyles, and prefer stable housing because they tend to be embedded in the local community. They may be reliant on local services and networks of support through families, friends, neighbours, carers or social groups. The major barrier for older people continuing their tenancies is where there are rent increases that they may not be able to afford as a pensioner, and repairs or modifications that may need to be made to a property. As people age, their individual capacity to maintain the property may become an issue.

For these reasons, older people may prefer and benefit from longer term leases.

Single people experiencing poverty

There is a significant group of tenants who are single people (generally men) experiencing poverty, often solely reliant on Centrelink because of a disability or mental health issue. Unfortunately, this group of people can often be extremely socially isolated, and may exhibit behaviours that are eccentric or difficult to live with. However because of their low income they are only able to afford cheaper, shared housing options such as rooming houses or sublet rooms which may require a number of lifestyle compromises to live peacefully.

Because of their social isolation, pets can often be a priority when they look for housing and are treated as valued family members.

In our experience, problems tend to arise between housemates or between the tenant and landlord due to personality clashes arising from common tenancy disagreements. Disagreements may quickly become heated and antagonistic because parties may find conflict resolution challenging, and problems occur when neither party is willing to compromise on their position. Both parties may become entrenched in their own position due to their dislike of the other person.

Unfortunately, due to the nature of how low income housing is provided, many people who fit in this tenant profile often find themselves living together, or find themselves with landlords who exhibit similar behaviours.

Why tenancies end

3 What are the main reasons that tenancies end, from both landlords' and tenants' perspectives?

Tenants: Life events

While tenants may have every intention of staying at a property for the long-term (or at least staying to the end of the fixed term tenancy), there may be a number of unexpected life events that will cause tenants to end tenancies earlier than expected. Tenants who meet the TAAP criteria are either reliant on Centrelink or facing financial hardship, which means that there is often no financial buffer when serious life events occur that will affect their ability to maintain the tenancy.

We also note that a tenants' vulnerability will often extend to other parts of their life and across different legal issues which may exacerbate their ability to maintain tenancies and seek assistance about their tenancy. When people are experiencing a crisis – such as family violence, health problems, loss of employment – dealing with their tenancy is usually very low on their list of priorities. However, this is also the period in their lives where having stable accommodation can be crucial to being able to move through and resolve the crisis quickly, eg. a person who has a home will be have an easier time in finding new employment than someone who is homeless.

Separation and Family Violence

Where tenants separate there are a range of complications, especially if they signed the initial fixed term as joint tenants. Even if one person wishes to maintain the tenancy, they will often need to find another housemate because they cannot afford the property on one income. This will often arise as a co-tenancy dispute where one party leaves the property suddenly, and the remaining tenant finds themselves responsible for the property by default.

Where family violence is also involved and people are fleeing violence or being excluded from the home, maintaining and dealing with the tenancy is usually very low on the list of priorities. While there are processes in the RTA for dealing with family violence where there is an intervention order, those sections are limited and do not reflect the complexity of family violence situations. Real estate agents and landlords often do not have a good understanding of family violence or intervention orders and may be unwilling to involve themselves in what they see is as a co-tenant dispute. This is even further complicated if a

respondent is not able to contact or communicate with a protected person under an intervention order.

Case Study

Tenant A and B are joint tenants and partners. Tenant A takes an intervention order out against Tenant B, excluding Tenant B from the premises. Tenant B tries to apply to VCAT to have his name removed from the tenancy agreement, however, cannot serve Tenant A with the documents as this would be in breach of the intervention order (as he cannot only contact Tenant A through a lawyer or a mediator, and cannot otherwise request any other third party to contact Tenant A on his behalf). The police are not willing to assist Tenant B with service of an application. Tenant B eventually approaches the Tenant Advocate for assistance, but several months have passed and Tenant A has begun accruing arrears while living in the property by herself.

Health, disability and injury

A tenant's health may be affected because of an existing issue that has become more serious over time. They may be affected by a completely new health issue or diagnosis, or their health may be affected from living inside the property. A tenant's health issue may prevent them from working or earning a regular income, or it may mean they have the burden of additional medical bills, or that they are difficult to contact while in care at hospital. In some cases tenants' existing mental health issues have been exacerbated by bullying and intimidating behaviour from their real estate agents and landlords. Tenants may not have the time or energy to deal with long legal processes where they are experiencing ill health.

If the option is open to them, many tenants will choose to leave a tenancy and deal with the legal consequences afterwards, choosing to prioritise their health (and their families' health) above all else. Where tenants do not have the means or ability to leave the property, they may spend weeks outside the property staying with friends or family while they wait for a breach or repair to be resolved.

One of the most common complaints about property is mould. There are often allegations that ongoing mould has caused illness, exacerbated asthma or an existing health problem. Sometimes these matters are also supported by doctors' letters or recommendations that the tenant needs to move out of the property for their health. Even where "repairs" are made, often mould is painted over without addressing the root of the problem.

Another issue is where modifications need to be made to the property to accommodate for the tenants' disability or injury. Using bathroom facilities or simply moving around the

property can sometimes be difficult, and without the proper modifications a tenant may not be able to make the full use essential facilities inside the house, or will require ongoing assistance from family or carers to complete everyday tasks.

We also have experience where ongoing repair issues have caused tenants significant injuries, such as broken bones from falling, and this is especially concerning where older tenants are involved. Many real estate agents make the repair after the injury, however, we note that the injury could have been avoided in the first place had the repairs been made in the first instance where the tenant complained.

Loss of employment

A loss of employment is one of the prime reasons that cause tenants to struggle financially and accrue rent arrears. Likely the tenant is also behind in their other bills and they may also struggle with everyday living expenses.

We note that there are often long wait times to receive welfare benefits and that most welfare benefits barely cover the average rent, much less living expenses in addition. A tenant with a job can be in a vastly different financial position than a tenant who is not employed. An affordable tenancy can quickly become unaffordable, but a tenant may be trapped by a fixed term tenancy and unable to pay for the costs of moving and/or breaking the lease.

Vulnerable tenants are also often in employment arrangements that are informal, unstable and legally precarious. They may be self-employed independent contractors and have difficulty pursuing clients for payment, or be casual workers who have fluctuating shifts and be paid cash-in-hand “off the books”. These are also often the same clients who are afraid of voicing issues about underpayment, poor and dangerous working conditions and excessive hours because they are afraid they will lose their job.

Neighbourhood disputes

Lastly, a tenant may end a tenancy because of ongoing issues with neighbours or the geographical area. These may include ongoing noise, violence and abuse or excessively litigious and antagonistic neighbours. While issues may begin with something relatively minor these may lead to ongoing personality clashes, and cause the tenant to feel unsafe in their own home. Many times the problem neighbour is “known” for their problem behaviour by people living the area, but also landlords and real estate agents usually know about these issues from previous tenancies. However, the tenant is rarely notified of the issue before they move in.

We have had experiences with serious threats and assaults from neighbours where the police have become involved and intervention orders needed to be made. In our experience most tenants will manage minor disputes themselves, but major disputes can affect their feelings of safety in the home.

Tenants: Problems in the property

As with life events that can occur, tenants often intend to stay in a property, but sometimes issues within the property mean that they feel can no longer live there.

Lack of repairs

This can be related to the health of the tenant such as in the case of mould and sometimes (broken) asbestos. However, ongoing repair issues can include anything within the property including essential facilities such as cooking, bathrooms, heating/cooling, locks and security, leaking, etc. We have had cases where essential appliances such as stove-tops have never worked for the entire year of a tenancy and tenants were forced to cook from electric grillers.

Many tenants do not have the ability to pay for the repairs themselves, and nor are they guaranteed to be reimbursed if they do. Even where there are real estate agents involved who understand the obligations under the Act, sometimes nothing can be done if the landlord refuses to pay for the repair.

Most tenants try to resolve this informally at first by calling and emailing the landlord, and do not necessarily seek legal advice about issuing notices of repair or for breaches of the Act. In fact, most tenants have spent months trying to resolve the issue through negotiation before contacting a tenant advocate.

In many cases, tenants do not want to deal with the troublesome and time-consuming VCAT process because they know they will face a similar uphill battle if further repairs need to be made later in the tenancy. It is easier for many tenants to move out to another property.

Breakdown of relationship with the landlord and real estate agent

A good relationship between the tenant and a landlord/real estate agent is based around trust and mutual respect. However, many tenants complain of poor and unprofessional conduct by their landlords and real estate agents which can include bullying and threatening the tenant, attending the property without notice or the consent of the tenant, the refusal to make repairs, etc. One of the primary complaints is that real estate agents and landlords feel like they can dictate the terms of the relationship completely, and that they are slow to communicate or act where the tenant has issues but demand an immediate response when they want a particular outcome.

We also note that there is imbalance of information where landlords and real estate agents will have the address and personal contact details for tenants, but rarely the other way

around. Tenants have complained about both real estate agents and landlords attending the property without any notice, and entering the property with their own keys without any consideration of who may be inside and what they may be doing. In one particular case, a tenant was asleep and believed the real estate agent to be an intruder or criminal inside the home. The tenant subsequently underwent counselling for the experience. While we do not condone harassment from any party, we note that real estate agents and landlords would be unlikely to engage this kind of harassment and bullying if their personal details were disclosed to the tenant.

We have also had countless cases of real estate agents and landlords with extremely poor communication skills. This can include a lack of response to any emails from the tenant, inadequate explanations and/or information about the tenancy situation or representations that could be highly misleading. For example, in one case the tenants only found out that the house was being sold and about the “open inspection” days through the board that was erected in the front yard, having no communication from the real estate agents at all.

There are also many real estate agents who have little or no knowledge of the Act, and much less their obligations under the Australian Consumer Law (the ‘ACL’) (as incorporated into Victorian law by the Australian Consumer Law and Fair Trading Act 2012 (Vic)). While this is more understandable for layperson landlords, licensed real estate agents should be held to a high professional standard with knowledge about the applicable law and the industry. We have had experiences with real estate agents intentionally misleading the tenant, engaging in conduct that attract penalty provisions under the Act, inserting and attempting to enforce “special conditions” into tenancies that contradict the provisions in the Act, to name just a few examples.

Case Study

The tenants of a shared household wish to end their periodic lease but they have found a new house much earlier than anticipated, so they ask the real estate agent whether they are able to end their tenancy earlier, acknowledging that the usual period is 28 days. The tenants are able to give the full 28 days’ notice and take their time with the move, but assessed that it would be cheaper for them to leave quickly rather than pay double rent.

The real estate agent agrees that they can move out 14 days earlier, but is completely silent about any extra costs. The tenants therefore believe the real estate agents have consented to an early termination date. After the tenants have vacated the property, the real estate agent attempts to pursue the tenants for the extra 14 days rent. The tenants had originally been willing to give the full 28 days’ notice, but the agent misled them into believing that he had consented to an early termination, a breach of section 18 of the ACL.

At the VCAT hearing, the agent still asserted they had a right to the 14 days of rent and had no knowledge that they were bound by the ACL. The VCAT member made an order for the bond in favour of the tenants.

Rent increases

While many tenants understand and are able to bear reasonable rent increases, any rent increase can be particularly frustrating to tenants who have ongoing repair issues, or where the landlord and real estate agent are unresponsive to issues raised by the tenant. This may further damage the relationship and cause a tenant to move out of a property.

There are also a small but not insignificant number of cases where rent increases jump suddenly because of changes in the rental market, or because landlords have not increased the rent in some time. These jumps in rent are often initiated by a change in landlords or management of the property, and often occur where tenants have lived in the property for a long period of time.

Disputes with housemates and co-tenants

Lastly, as outlined in our consultation paper submission, there is a large gap in legislation where joint tenancies are involved. For example, a single tenant cannot issue a notice of intention to vacate to the landlord if the other tenants remain in the property. Nor can a landlord issue a notice to vacate against a single tenant who may be disrupting the whole house. This often leads to the whole household leaving and breaking leases, or eviction proceedings being issued against the remaining tenants for arrears. Often these situations can be avoided if VCAT had the jurisdiction to hear certain types of co-tenancy disputes.

Case Study

Tenant A and B are a couple studying at university, and placed an advertisement for a new housemate to share the rent because they were having financial hardships. Tenant C was officially placed onto the tenancy agreement and bond, and the household ran smoothly for the first 2 months. However, then Tenant C started drinking more frequently, and became aggressive towards the other tenants; picking fights, and yelling racial slurs at Tenant A and B. On one occasion, they were forced to call the Police because of his abusive behaviour, and they believed he may have caused damage by punching the walls of his room.

Tenant A and B began to feel fearful about staying in the house, and only returned to the property to sleep, frequently staying with friends and eating at restaurants to

avoid conflicts with Tenant C. They contacted the real estate agent about Tenant C's behaviour, and the real estate agent told them Tenant C was not their problem, but they would still be legally liable for the house for as long as their name was on the lease.

Tenant A and B sought advice about their dispute with Tenant C. They would prefer to stay in the property because it was close to their university, but were also willing to sign over the tenancy to Tenant C to resolve the dispute. But Tenant C refused to leave or sign any paperwork that would let the other tenants leave as he could not afford the rent himself.

Tenant A and B felt trapped. Even if they applied to VCAT to have their names removed, they do not have the money to pay double rent to live in another property in the meantime. They are also afraid that Tenant C would cause more damage to the house if they moved out while still being named on the lease. They cannot evict Tenant C themselves. Their only option is to negotiate with Tenant C directly who can be extremely volatile.

Recommendations

- ♦ VCAT to have jurisdiction to determine co-tenancy disputes as well as liability between co-tenants in joint tenancies.
- ♦ For the Act to take into account circumstances where individual tenants of joint tenancies may issue notices and be issued notices from the landlord.

Landlords

While we do not have direct instructions from landlords about their reasons for ending tenancies, in our experience tenants usually give an accurate account of the “real” reason why the landlords issue notices to vacate.

Non-payment of rent

We have already outlined a number of life circumstances whereby the tenant may find themselves in an unexpected difficult financial position, and no longer be able to afford the property. In those cases, tenants may be able to resume regular payments when their situation has stabilised, eg. when they have found a new job. Many tenants who have accrued arrears honestly intend to pay back the landlord when they are able to afford the debt. Unfortunately, it is not always certain about when they will return to a stable financial position.

However, sometimes tenants accrue arrears because of a one-off unexpected expenses (such as repairs after a car accident), and may be able to resume regular payments immediately afterwards, including extra money to pay off the arrears in instalments. While some real estate agents are forthcoming in negotiating payment plans, we note that other real estate agents will take steps to evict a tenant immediately even though the likely outcome at VCAT will be that the Tribunal imposes a payment plan for arrears anyway.

Lastly, we note that many non-payments of rent arise from a misunderstanding that tenants may withhold rent where repairs are not completed. As noted in the above submissions about lack of repairs, tenants often negotiate with the landlord for an extended period of time before they seek advice and some use this tactic as a last resort. Many of these tenants would also be owed compensation for the loss of amenities from the failure to make timely repairs, and they see withholding rent as a quick resolution to these cross-claim – essentially offsetting one claim against the other as would occur in a VCAT compensation claim. Unfortunately, tenants taking this approach do not realise that withholding rent gives the landlord a right to begin an eviction process, and they must apply for rent to be placed in the Rent Special Account at VCAT for this tactic to be a valid response to repair issues.

Selling the property

We note that selling a property with vacant possession makes sense where the purchaser intends to live in the property personally, but that many purchasers also buy property for the purposes of investment and intend to rent the property anyway. There is often little to no communication with the tenant with respect to the sale, or any negotiations about the possibility of selling the property tenanted which may benefit all parties involved.

Repairs and renovation

Where a tenant is asked to move out due to repairs under section 255, there is no provision that required the landlord to specify how long repairs will take, and especially to negotiate with the tenant if they can resume the tenancy after the repairs have finished.

This also leads to a reluctance of tenants to report major issues with the property because their tenancy could be at stake if the repairs require them to vacate, or in some cases, if the entire house is required to be demolished. Often the tenants who live at these properties cannot afford to live elsewhere, and have no choice but to live in substandard properties.

Recommendations

- ♦ Where a notice to vacate is issued under section 255, the notice must specify an estimate of how long repairs will take, and offer the tenant the option of moving back into the property after repairs are completed.

Breakdown of relationship with tenant

We note that many of the 'no reason' notices to vacate (ie. notices under both section 261 and 263) are given to tenants because a breakdown in the relationship between a landlord and tenant. While this is similar to a reason given by tenants for leaving the property, those tenants only leave when have secured a new property to move into. Tenants who do not have the resources to move will usually endure a strained and sometimes abusive relationship from the landlord or real estate agent where they have nowhere else to go. In this case, landlords are issuing notices to vacate to tenants on the basis of personality clashes, but these tenants may become homeless as a result.

We note that this also occurs where tenants are seen to raise too many issues about the property/repairs or have had some difficulty in paying rent on time due to their life circumstances, even if arrears have been paid off or are not significant. Some landlords only need to feel slightly inconvenienced to evict a tenant and because of the difference in power, the landlord can easily find a new tenant to take over the lease. Outgoing tenants will have a much more difficult time finding a new property.

Retaliation against the tenant

Giving a notice to vacate in response to the tenant exercising their rights is forbidden for 'no reason' Notices under section 266(2), but many landlords and real estate agents give 'no reason' notices for this reason anyway. While many tenants who seek advice from us have successfully challenged these notices at VCAT, other tenants will move out of the property because they do not realise that the notices are invalid at law, and others because they feel intimidated by VCAT processes.

We also note that this principle of retaliation is not universally applied to all reasons. We have had experiences of landlords giving notices to vacate under section 255 (repairs), 258 (occupation by landlord or their family) and 259 (sale of property) immediately or very soon after tenants have issued notices for breaches or repairs.

Notices to vacate

13 What issues are there regarding the way in which terminations provisions in the Act affect security of tenure?

14 How much notice would be appropriate for the tenant to give the landlord when providing a notice of intention to vacate?

16 What are the reasons why landlords use the 'no specified reason' notice to vacate?

17 Rather than relying on a notice to vacate for 'no specified reason', how could the Act cater for landlords with legitimate grounds for terminating a tenancy for reasons that are not otherwise prescribed?

18 What options or initiatives could be used to encourage landlords to choose to maintain tenancies rather than issuing a notice to vacate?

19 What would be the impact of removing the notice to vacate for 'no specified reason' from the Act?

It is our view that a 'no reason' notice would be more accurately described as an 'unstated reason' notice. There is always a reason why the landlord wishes to evict the tenant from the property, some of which we have already discussed, and unfortunately 'no reason' notices are primarily used in retaliation against tenants for asserting their rights, or for arbitrary reasons that do not justify evicting a tenant from their home.

We have also had cases where tenants are given the 'no reason' notice at the same time as signing a fixed term tenancy agreement in order to put the landlord in a better bargaining position with the tenant at the end of the lease. In that case, the real estate agents gave the tenant an ultimatum to sign another 12-month fixed term (which did not suit the tenant) or to be evicted on the basis of the 'no reason' notice.

Even in serving notices with a specific reason, landlords and real estate agents are not obliged to provide any documentation to support their reasons – for example, building permits or statutory declarations – and many tenants will move out of the property on the basis of receiving a notice alone, because they are unwilling to attend a hearing or because they do not realise they can.

Further, tenants then bear the onus of monitoring the property for up to 6 months afterwards and applying for a compensation claim if they have been illegally evicted, in accordance with section 264. At this point, many tenants are no longer interested in compensation and would've preferred not moving in the first place. We believe that these situations can be avoided by placing the onus back on the landlords and real estate agents to provide legislated, documentary evidence of the reason at the initial notice stage.

Between 'no reason' notices and the low bar required to issue other notices to vacate, this makes the initial step for an eviction too easy, and increases the large discrepancy of power between landlord and tenant. Where giving a notice to vacate simply involves filling out a form and sending a copy to the tenant this allows the landlord to simply "shop" for tenants rather than resolve issues with the existing tenants in the property.

We believe that eliminating 'no reason' notices would not cause a significant impact on a landlord's rights, as in our experience most of these notices are being to "punish" tenants for speaking up about repairs and issues surrounding the property. Even so, if the landlord has a legitimate reason to evict the tenant, we would suggest that reasons outside of those covered by the Act should be approved by Consumer Affairs Victoria or VCAT, using a process that weighs the hardship of the landlord to that of the tenant similar to section 234.

Where long term tenants are involved, such as tenants who have been in the property for more than 5 years, we would support giving those tenants increased notice periods at a sliding scale that increases with time at the property. A tenant who has not been in the rental market for a decade is at a significant disadvantage: they have usually also accumulated a large amount of personal property at the house, they are unfamiliar with dealing with the current rental market, and sometimes are not financially prepared for rent and bond at a new property.

Another measure that would discourage landlords to issuing notices is if the reduced period for notices of intention to vacate under section 237 were expanded to allow tenants to issue 14 day intention to vacate notices within a fixed term period. We have had multiple cases with landlords requiring the tenant to immediately vacate the property after the end of the fixed term. However, if the tenant finds another property and vacates before that date they will be liable for lease breaking fees, even though the landlord initiated the end of the legal relationship. It is impractical that tenants must find a suitable property that is available in short window of time before the end of the fixed term, and then be able to move out immediately on the termination date of that fixed term. If a reduced notice of intention to vacate for fixed term period were introduced, landlords would be more likely to negotiate on a mutually beneficial termination date, as the house would otherwise potentially be untenanted for months if a tenant finds a new property immediately.

Recommendations

- ♦ 'No reason' notices to vacate (section 261 and s263) to be removed from the Act.
- ♦ Remaining notices to vacate to require supporting documents with evidentiary requirements being legislated targeted to that particular reason.
- ♦ Additional section that allows landlords to make applications to VCAT if they wish to issue a notice to vacate for reasons outside the Act. A requirement for VCAT to determine that the landlord's hardship must outweigh the tenants' hardship for such a reason to be valid.
- ♦ Increased periods of notices to vacate for tenants who have been in a property long-term (5 years and more).
- ♦ Section 237 to be expanded to allow tenants to give a valid 14-day notice of intention to vacate within a fixed term tenancy where they have been served with a notice to vacate unrelated to the tenants' conduct.

Long fixed term leases

7 What are the obstacles in the rental market for tenants who prefer longer tenure from achieving this?

8 What are the obstacles to tenants and landlord entering long leases?

9 How do industry practices influence lease terms and the duration of tenancies more generally?

As identified in the Security of Tenure Issues Paper, section 6 of the Act states that the Act does not apply to fixed term tenancy agreements exceeding 5 years. While this provision can be quickly amended, this does not mean that tenancies exceeding 5 years will be offered, or if so, that they will be fair agreements for tenants. We note, for example, that while tenancy agreements up to 5 years are currently available, the current industry standard for a fixed term tenancy is 12 months, and occasional periods of 24 months and 6 months.

In reality, many tenants do not think to negotiate on the tenancy period and are reluctant to do so for fear of losing the tenancy to another candidate. When tenants do attempt to negotiate the fixed term, some real estate agents are willing to even consider the option.

Most tenants lack bargaining power at the beginning of the tenancy, and real estate agents are able to simply offer the property to another person if they do not like the tenant's proposal. While we believe that longer tenancies can benefit both parties, many landlords and real estate agent often do not see the benefits of longer leases, especially if they know they can easily find a new tenant if the current tenant moves out. Many landlords also like the freedom of being able to issue a 'no reason' notice at any time during a periodic tenancy.

Real estate agents also rarely have an incentive to match up long term tenants with landlords. Many real estate agents charge the landlord significant fees when a property is relet, so it is in their interests to have shorter fixed terms. Additionally, many real estate agents do not want the extra work of seeking instructions from their landlord about the type of tenancy, and will not want to do the additional work of negotiations for the duration of fixed terms between the tenant and landlord, especially when they are unlikely to benefit from a longer term.

10 What role would long (five to ten year) leases play in strengthening security of tenure?

11 What factors or circumstances would make longer leases attractive to tenants and landlords?

12 If long term leases were provided for in the Act, what protections (if any) would be required for tenants who are seeking only short term leases?

At the moment long-term tenancies are still possible under current legislation; they are simply not fixed term tenancies. Long leases are defined in the Issues Paper as leases lasting 5 – 10 years, but we have had clients who have been tenants at the same property for 20 years or more. These tenancies usually begin as 12-month fixed terms, and then continue as periodic leases as the arrangement has continued to suit both the landlord and tenant.

In many long-term tenancies, tenants have developed strong relationships with their landlords, and treat the house as their own. They may make improvements to the property at no cost to the landlord (eg. paying for new paint, curtains, security doors, etc) or have a number of informal arrangements with the landlord (eg. the landlord attending the property to mow the grass every month). However, we note that this is probably the side-effect of both parties choosing to continue the tenancy relationship rather than a fundamental by-product of a long tenancy period. Indeed, a binding long fixed term tenancy may not have the same result as an ongoing periodic tenancy where each party is free to leave at any time.

From the tenant's perspective, a longer lease may provide them with more stability and certainty. Tenants are more likely to invest time in a property that they know they will be living in for several years, which also benefits landlords. Rent increases are also likely to be fixed and predictable under longer fixed terms.

However, as outlined at the beginning of this submission, there may be many life events that could affect a tenant's ability to continue with a tenancy, and their financial situation over 5 years (or more) is very likely to change. We believe that long term tenancies would primarily increase security of tenure for those tenants with stable incomes and lifestyles but would not suit many of the vulnerable clients that attend our service.

It is therefore important that tenants in long term tenancies are able to easily exit fixed term tenancies where they are no longer able to continue them, as many currently cannot even afford lease breaking costs in 12 month fixed terms. Furthermore, the processes for lease assignments, and the costs for breaking a lease are not clearly defined in the Act, resulting a large amount of uncertainty for all parties involved. We believe it would be important to clarify how assignments and lease breaking should occur in both the legislation and the tenancy agreement, and ideally landlords and real estates should be required to disclose this information before entering into a long fixed term tenancy.

The Act also currently allows tenants to apply for a reduction of a fixed term tenancy on the basis of hardship under section 234, however also allows VCAT to order compensation to be paid to the landlord on a discretionary basis if the reduction of the fixed term is made. As stated earlier in this submission, many tenancies end due life events that cause financial hardship to the tenant. Tenants who can afford to break a lease will simply negotiate to pay lease breaking costs and compensation to the landlord. However, tenants who cannot afford those lease breaking costs have little to no redress under the Act.

For the reasons we have already outlined, we believe that long-term leases may be useful to a particular demographic of tenant, and that the option should be made available, but parties entering long term leases may be the exception rather than the norm. The option of having longer leases would also be more effective where a process for assignments, lease breaks and any compensation to the landlord be more clearly articulated in the Act, and that information be passed to the tenant upon signing the tenancy agreement.

We suggest that, rather than relying on long fixed terms which can be inflexible, focus should be placed back on stricter requirements for giving notices to vacate and rent period in order to assist tenants to retain tenancy, as we have outlined elsewhere in this submission.

Recommendations

- ♦ Section 6 be removed to allow for long fixed term tenancies
- ♦ Clear, legislated process for assigning fixed term tenancies in the Act
- ♦ Predictable or capped method to determine costs upon breaking a fixed term lease in the Act
- ♦ Compensation to be limited and only allowed in exceptional circumstances under section 234 for a reduction of a fixed term tenancy

Rent increases

20 What issues are there regarding the way in which provisions for rent increases in the Act affect security of tenure?

21 What would be an appropriate alternative to the current frequency of allowable rent increased of no more than one every six months?

22 What would be an appropriate alternative notice period for rent increases to the current 60 days?

23 What would be an appropriate arrangement for rent increases during fixed term agreements to provide both tenants and landlords with certainty and choice?

As discussed earlier, most rent increases are reasonable, and most tenants are able to afford the reasonable increases. However, we submit that any increases (for both fixed and periodic tenancies) should only occur once every 12 months to be consistent with increases under the industry standard of a 12 month fixed term tenancy, and as well as to be consistent with housing and council rates changes per annum. While mortgages do fluctuate throughout the year, we note that landlords may increase rents when interest rates increase, but that a tenant never sees the benefit of reduced rent when interest rates decrease.

A notice of rent increase should also allow the tenant to serve a reduced notice of intention to vacate under section 237. Rent increases may mean that the property is no longer affordable for the tenant. A notice of rent increase is a change to the contract initiated by the landlord, and the tenant also ought to be given more flexibility in looking for a new property. We also believe that this would improve the tenant's bargaining position if the landlord wished to keep the tenant in the property, and also reduce the number of increases where the landlord does not genuinely believe they can justify the increase on the market.

Recommendations

- ◆ Frequency of rent increases to be changed to once every 12 months
- ◆ Notice of rent increase allows tenants to give a reduced notice of intention to vacate as under section 237

Repairs

24 What issues are there regarding the way provisions for repairs, maintenance and modifications in the Act affect security of tenure?

Previous parts of this submission have discussed the issue of repairs and how this can cause or exacerbate existing health problems for tenants. Even tenants who are otherwise in good health can experience severe stress and deterioration of their mental health where they must deal with ongoing issues of repairs and maintenance within a property. Most tenants will prioritise their health over maintaining a tenancy, so many will move if they have the ability and means to do so.

Also previously discussed is the issue where many tenants withhold rent as a last resort, and out of frustration with the lack of repairs from the landlord. While withholding rent is not sanctioned at law, this tactic changes the economic incentives for landlords to make repairs and is reflected in section 77 which allows VCAT to make an order for rent to be held in trust until repairs are completed.

Unfortunately, there are few incentives for landlords to make repairs in a timely manner, which then causes tenants to leave tenancies. VCAT rarely uses their powers under section 77, and by the time repair claims are heard at VCAT it is often many months since the issue was first raised. We believe that a quicker way for tenants to pay rent into the Rent Special Account under section 77 would assist in a quicker resolution of repairs. We recommend that CAV Inspectors be given powers to allow rent to be paid into trust where they believe it is warranted after an inspection of the premises.

In our recommendation the tenant would continue to pay rent, but rent would only be released to the landlord after repairs are completed. Some landlords have claimed they are not able to carry out repairs without access to a rental income, therefore, we also recommend additional powers for CAV and VCAT to order payment of third parties and tenants from the Rent Special Account. This could be used to pay for repairs by contractors, and could equally reimburse the tenant for paid repairs, and any compensation due to a loss of amenities.

Lastly, delays and disputes about repairs often occur with respect to ambiguity in the law on who is responsible, and what are the acceptable standards of repair in the property. While standards change depending on the property, we believe a list of minimum standards for tenancy agreements – similar to the minimum standards for rooming houses – would assist all parties in these disputes. Many of these disputes occur in older, cheaper property that landlords avoid fixing for as long as possible.

Case Study

The tenant had repeatedly asked for the installation of a smoke detector from the real estate agent over a period of 6 months and had sent numerous emails about the issue. Although this is not strictly a breach of the RTA, it is in breach of building regulations and makes the property unsafe if there were a fire. Fortunately, there were no incidences of fire during this time.

Action was not taken until the tenant advocate contacted local council about the building breaches, as well as the director of the real estate agent company. In an ideal situation, a real estate agent should take immediate action upon the tenant alerting them of the situation, rather than forcing the tenant to report the agents to external authorities.

Recommendations

- ♦ CAV Inspectors to be given powers to order rent be paid into the Rent Special Account after an inspection of the property
- ♦ CAV Inspectors and VCAT to be given powers to order payments from the Rent Special Account to the tenant and third parties
- ♦ Minimum standards for properties under tenancy agreements, similar to minimum standards for rooming houses

Rooming houses

25 What issues are there regarding the way in which security of tenure is provided for rooming house residents under the Act?

26 How can the needs for security of tenure for residents be appropriately balanced with the need to protect other residents' rights to peaceful enjoyment of shared spaces in rooming houses?

27 Do the currently prescribed reasons and notice periods to terminate a rooming house resident's residency rights strike the right balance for security of tenure and if not, what alternatives are appropriate?

Rooming house residents are some of the poorest and most socially isolated clients that use our service, and often live in rooming houses because there are no other affordable housing options open to them. For these reasons, it is important that the provisions around rooming houses have clear, fair and flexible processes for eviction, repairs and rent increases.

Unfortunately, there is a lack of legislative clarity regarding the operation of rooming house provisions, especially under section 94 and how tenancy agreements may interact with rooming house provisions. For example, it is not clear whether the tenancy agreement applies to just the resident's room and rooming house provisions apply to shared areas, or whether it applies to the whole of the rooming house. This means where there is a breach or a repair it is unclear which type of breach of duty notice should be provided to the rooming house operator. This can have a significant impact as the time periods for compliance vary a great deal between the rooming house provisions and the tenancy provisions.

Furthermore, it is counterintuitive to require the resident to issue different notices depending if the breach occurs inside the room or in shared areas, and nor it is not always clear which area the breach would cover. For example, breaches of quiet enjoyment might occur outside the resident's room but affect the resident's quiet enjoyment within their room.

Similarly, where a fixed term tenancy within a rooming house ends, it is not clear whether those people become periodic tenants or rooming house residents. The periods for giving notices to vacate and notices of intention to vacate also vary a great a deal.

While we support and believe there are clear benefits to rooming house residents to enter tenancy agreements, the operation of this section needs to be specifically legislated in detail to provide clarity to all parties.

There are also several discrepancies within the legislation for tenancies and rooming house agreement that make retaining housing for rooming house residents more difficult, and also add to the confusion about the interaction between these two areas.

Under section 169, the rooming house provisions impose an additional duty onto residents to pay rent on time; a provision that does not exist for tenants. While we accept that landlords and rooming house operators are entitled to rent, a number of factors as discussed at the beginning of this submission can influence a tenant's ability to pay rent on time. Unfortunately, even if a rooming house resident pays the rent owed a couple of days after it is due, if this occurs more than twice then the rooming house operator can issue a notice to vacate under section 283 for multiple instances of the same breach. Given the financial difficulties for many residents we believe this section is unduly harsh and removing this provision would enable greater security of tenure for residents.

For the same reasons, section 281 should also be updated to bring it into line with the tenancy provisions. In its current state, a resident can be issued a notice to vacate after being 7 days in arrears. However, we note that many residents receive Centrelink payments that are paid out fortnightly, and that if residents are given the chance, many may be able to pay off their arrears and retain their tenancy if given extra time to find the money. We therefore recommend that a 14 day arrears notice would be more suitable for rooming house residents.

Recommendations

- ♦ Provide clarity surrounding the operation of section 94, and how tenancy agreements interact with rooming house provisions.
- ♦ Remove section 169 that allows rooming house operators issue a breach of duty notice for late rent, and subsequently evict tenants for multiple breaches.
- ♦ Change time periods under section 281 so rooming house operators may only issue a notice to vacate for arrears after 14 days.

List of Recommendations

Tenants

1. VCAT to have jurisdiction to determine co-tenancy disputes as well as liability between co-tenants in joint tenancies.
2. For the Act to take into account circumstances where individual tenants of joint tenancies may issue notices and be issued notices from the landlord.

Notices to Vacate

3. Where a notice to vacate is issued under section 255, the notice must specify an estimate of how long repairs will take, and offer the tenant the option of moving back into the property after repairs are completed.
4. 'No reason' notices to vacate (section 261 and s263) to be removed from the Act.
5. Remaining notices to vacate to require supporting documents with evidentiary requirements being legislated targeted to that particular reason.
6. Additional section that allows landlords to make applications to VCAT if they wish to issue a notice to vacate for reasons outside the Act. A requirement for VCAT to determine that the landlord's hardship must outweigh the tenants' hardship for such a reason to be valid.
7. Increased periods of notices to vacate for tenants who have been in a property long-term (5 years and more).
8. Section 237 to be expanded to allow tenants to give a valid 14-day notice of intention to vacate within a fixed term tenancy where they have been served with a notice to vacate unrelated to the tenants' conduct.

Long fixed term leases

9. Section 6 be removed to allow for long fixed term tenancies
10. Clear, legislated process for assigning fixed term tenancies in the Act
11. Predictable or capped method to determine costs upon breaking a fixed term lease in the Act
12. Compensation to be limited and only allowed in exceptional circumstances under section 234 for a reduction of a fixed term tenancy

Rent Increases

13. Frequency of rent increases to be changed to once every 12 months
14. Notice of rent increase allows tenants to give a reduced notice of intention to vacate as under section 237

Repairs

15. CAV Inspectors to be given powers to order rent be paid into the Rent Special Account after an inspection of the property
16. CAV Inspectors and VCAT to be given powers to order payments from the Rent Special Account to the tenant and third parties
17. Minimum standards for properties under tenancy agreements, similar to minimum standards for rooming houses

Rooming Houses

18. Provide clarity surrounding the operation of section 94, and how tenancy agreements interact with rooming house provisions.
19. Remove section 169 that allows rooming house operators issue a breach of duty notice for late rent, and subsequently evict tenants for multiple breaches.
20. Change time periods under section 281 so rooming house operators may only issue a notice to vacate for arrears after 14 days.