SUBMISSION BY EASTERN COMMUNITY LEGAL CENTRE

Options Discussion Paper

Residential Tenancies Act Review

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Introduction

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 816 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'). 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 148 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.

This submission is informed by the experiences of our clients from TAAP and the Deakin University program.

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

Navigating the Submission

We have directly addressed questions raised in the Options Paper in areas where we believe the Centre's and clients' experience will add value in considering reforms. We have listed the topics and questions addressed below.

Subletting and AirBnB

46. Would option 5.10 capture arrangements that are not properly characterised as commercial short-term accommodation, or other arrangements that should not require consent?

The decision in *Swan v Uecker*[2] was made because of the characteristics of one particular AirBnB arrangement. The decision explicitly states that the case should be confined to its facts and that other AirBnb arrangements may not amount to sub-tenancy[3]. To prohibit all AirBnB arrangements or to limit the arrangements to strict, prescribed circumstances therefore legislates beyond the parameters of current case law. While prescribed circumstances for AirBnB could provide greater clarity to both tenants and landlords as to what is allowable, option 5.10 does not provide that clarity.

The differences between the proposed option and current legislation is to use "parting with possession for consideration" as a test rather than "sub-letting" under section 81 of the current RTA. It is unclear how and whether "sub-letting" and "parting with possession for consideration" would be interpreted differently, although the new test emphasises "consideration" and the exchange of money. ECLC is therefore concerned that this option may be interpreted to affect licensees, or anyone who stayed at the property "for consideration".

On the other hand, if there is no intended difference between current legislation and proposed option, ECLC submits there is no reason to change the wording for this section.

In the *Swan v Uecker* decision, the landlords were entitled to serve a Notice to Vacate for short (five day) "tenancies" that would not be covered by the RTA by virtue of section 9. As such, ECLC envisages situations that were previously regarded as licenses by virtue of section 9 (such as house-sitting and pet-sitting arrangements where the sitter may contribute some money to rent or utilities ("consideration")) may now be considered "tenancies" under this proposed option.

Other such examples that the proposed option may prohibit are:

- Where a new tenant moves into a sharehouse to replace an outgoing tenant, pays rent, but is yet to be placed on the lease
- Where a tenant's partner stays in the house for long periods of time, is not placed on the lease, but contributes some money towards utilities
- Where victim of family violence has fled their home and stays in a tenant's rented property temporarily, and pays some money towards rent and utilities

We note that these are a few examples of informal shared living arrangements that we routinely encounter at ECLC and are extremely common.

In previous submissions to the RTA Review, ECLC discussed the rise in shared living arrangements due to the cost of renting, and the many difficulties that informal sharehouse

[2] [2016] VSC 313

[3] Swan v Uecker [2016] VSC 313 at [80]

arrangements presented for determining legal liability under a license or sub-lease[4]. There, ECLC wrote:

> Under current Victorian legislation, there is significant legal uncertainty with respect to shared housing arrangements, specifically around licensees, subtenants and rooming house residents. Licensees who are not named on the lease and do not have exclusive possession are not covered under the RTA. However, it is often difficult for advocates to give advice about whether a renter has exclusive possession of a room in specific cases, and the renter's legal standing will be significantly different if the RTA does not apply to them. Where trained advocates and lawyers find this area of law extremely difficult, it can be almost impossible for the layperson renter to understand.
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> Although licensees are not named on leases, the large majority are still nonetheless living in the rental property as their primary place of residence, and in our experience, are often some of the most vulnerable renters in the system. Licensees are often not named on leases because they do not have a rental history or do not have enough income to be accepted on a lease. Some licensees have recently arrived in Australia, do not understand much English or come from a country with significantly different approaches to renting. As a result, they enter into informal and often unenforceable agreements with landlords from the same cultural community. If they are evicted, many of these renters do not have access to a safety net of family or friends for housing.

The *Swan v Uecker* decision has not simplified these issues, and may have further complicated the problem by considering some very short term arrangements to be tenancies, but tenancies that fall outside the current scope of the RTA.

ECLC's previous submission proposed that all renters should be covered under the RTA if they regard the property as their principal place of residence, but that changes should be made to subtenancy laws in order to enable informal arrangements to continue to occur[5].

As this is not a current proposed option, ECLC submits that it is incredibly important that tenants and renters are not punished for entering informal arrangements, especially when these renters are often the most vulnerable members of our community, and the ones most at risk of homelessness. While option 5.10 may have the intention to target AirBnB listings and commercial use of residential properties using "consideration" as a test may render this type of commercial use indistinguishable from other uses that ECLC has listed, and that ought to be protected under the RT

47. How should the arrangements in options 5.10 be defined, and should the reference to consideration be confined to monetary consideration?

The language of the Act should not be altered from its current form to avoid misinterpretation and confusion.

[4] ECLC Submission to Consultation Paper: Laying the Groundwork, pp 7-9.
[5] ECLC Submission to Consultation Paper: Laying the Groundwork, pp 7-9

The decision in *Swan v Uecker* means that at least some AirBnB arrangements will be considered a subtenancy under the current language of the Act. ECLC submits that adding "consideration" or "monetary consideration" only confuses the issue further, and the emphasis on the consideration could lead to interpretations of the Act where many tenants could be restricted from freely using and living in the property for everyday purposes.

Where landlords provide a property/tenancy interest under a contract, they in fact provide the tenant with exclusive possession of the property under common law. Tenants should therefore be free to house guests in the property without interference, regardless of whether those guests are paid or not. Whether those guests are in fact subtenants must first meet a test of exclusive possession, which is already embodied in the current RTA.

48. What are the risks and benefits of permitting a fee for consent to parting with possession for consideration, as outlined in option 5.11?

One view from landlords and landlord groups are that tenants are unfairly profiting from their properties through AirBnB listings, and should therefore be entitled to a fee for this use. However, those landlords have always been able to list their properties on AirBnB if they believed there was a large disparity between a regular long term rent income and providing short-term accommodation. AirBnB listings also require additional labour to furnish and clean the property, and to attend to any issues with guests.

In the same way that a landlord is not entitled to extra money if tenants conduct a home business under section 7 of the RTA, landlords should not have the right to charge extra money for other legitimate uses of the property that allow tenants to earn a profit. We also note that many home businesses may require regular attendances of paying clients/guests – such as small businesses for music lessons, consulting, tutoring, tailoring, health and physical therapy, etc. It has not been suggested, that these tenants should seek permission from the landlord for these activities, or that they are somehow improperly using or profiting from the landlord's property, even where this is their primary place of business.

We question the assertion that landlords would bear "increased wear and tear and security risks"[6] due to AirBnB guests, especially where tenants on the lease will ultimately be responsible for any damage or nuisance caused. If a house is able to accommodate 3 people, it will not increase wear and tear whether those 3 people are fixed occupants or a rotation of guests.

There is therefore very little additional risk or cost to landlords where properties have been listed on AirBnB. There is therefore no financial disadvantage or other reason why a landlord would need to impose a fee for consent, especially when other profit-making activity would not attract a fee. ECLC is particularly concerned that this section has the ability to encroach onto a tenant's legitimate right to and enjoy the property leased to them.

In addition, a frequent complaint about landlords is including using arbitrary fees in the additional terms of a tenancy agreement. In one notable case we encountered, a provision in a tenancy agreement required the tenant pay the landlord $200 for two days during which

[6] Options Paper p 34

her parents visited and stayed at the property. Other common charges include charging tenants extra money every month for using heating and air conditioning (where utilities are not separately metered), and charging tenants a flat "advertising fee" rather than for costs incurred during a break lease situation. We believe this change will increase the number of landlords and agents to attempt to charge for licensees. In many cases, tenants pay these additional fees because they are not aware of the law or are too intimidated to attend VCAT. We have reason to believe that any fee for "parting with consideration" or "sub-letting" would likely lead to an increase of disputes over such fees.

We also note that landlord's concerns about anonymity of guests are mitigated, again, due to the tenants taking responsibility and risk for any guests. We note the disparity between this view and the landlord's relative anonymity when using an agent covered under options 4.8A and 4.8B.

184. How effective would provisions for parting with possession for consideration without consent be in clarifying that use of the property for financial or other form of gain is grounds for termination, as under option 11.23?

As discussed in questions 46-48, the addition of "financial gain" or any other gain focuses attention on consideration, not possession. For that reason, this language may lead many landlords and agents to believe they can evict tenants for having guests stay at the property "for consideration", without a further assessment about possession. As discussed in previous submissions, one of the issues with the RTA is that in practice, there is a power imbalance between tenants and landlords.. Tenants who are ignorant of the law or too intimidated to attend VCAT will often leave upon being given a notice to vacate, even if that notice would not be valid under law.

The current test under sub-section 221(a) is "the tenant is not in possession of the rented premises because the tenant has sub-let them". As there is already a reference to parting with possession in the current legislation, there is no reason to change to language to make these sections more confusing, and likely, more detrimental for vulnerable tenants.

ECLC also reiterates our previous points from the answer to question 48:

- AirBnB listings require additional labour to furnish and clean the property and attend to the needs of guests.
- Many tenants run businesses from home, and may require the regular attendances of paying clients/guests. Small businesses located inside a residential home such as music lessons, consulting, tutoring, tailoring, health and physical therapy "for financial gain" are not subject to similar concerns or provisions around damage or wear and tear.
- There's no proof of increased wear and tear or damage from short-term accommodation. If a house is able to accommodate 3 people, it will not increase wear and tear or damage whether those 3 people are fixed occupants or a rotation of guests.
- As the responsibility of the property, including damage and nuisance, will be borne by the named tenant we believe this risk is mitigated. It is noted that recovering large sums of compensation for damage from a tenant will always be a risk, regardless of

whether or not the damage is due to use as a short-term accommodation, but that no investment is risk-free. ECLC notes the disparity between this view and the landlord's relative anonymity when using an agent covered under options 4.8A and 4.8B.

185. What are any alternative options are there to achieve this outcome?

As discussed in the previous question, the current language under section 221(a) already achieves this outcome, and the decision in *Swan v Uecker* already directly applies to current legislation.

186. What circumstances could arise that could put a tenant at risk of wrongful eviction as a result of provisions for parting with possession for consideration without consent?

Please see our answer to question 46 for more detail. Part of that response is copied below:

In ECLC's previous submissions to the RTA Review, we discussed the rise in shared living arrangements due to the cost of renting, and the many difficulties that informal sharehouse arrangements presented for determining legal liability under a license or sub-lease[7]. There, ECLC wrote:

> Under current Victorian legislation, there is significant legal uncertainty with respect to shared housing arrangements, specifically around licensees, subtenants and rooming house residents. Licensees who are not named on the lease and do not have exclusive possession are not covered under the RTA. However, it is often difficult for advocates to give advice about whether a renter has exclusive possession of a room in specific cases, and the renter's legal standing will be significantly different if the Act does not apply to them. Where trained advocates and lawyers find this area of law extremely difficult, it can be almost impossible for the layperson renter to understand.
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> Although licensees are not named on leases, the large majority are still nonetheless living in the rental property as their primary place of residence, and in our experience, are often some of the most vulnerable renters in the system. Licensees are often not named on leases because they do not have a rental history or do not have enough income to be accepted on a lease. Some licensees have recently arrived in Australia, do not understand much English or come from a country with significantly different approaches to renting. As a result, they enter into informal and often unenforceable agreements with landlords from the same cultural community. If they are evicted, many of these renters do not have access to a safety net of family or friends for housing.

[7] ECLC Submission to Consultation Paper: Laying the Groundwork, pp 7-9.

The *Swan v Uecker* decision has not simplified these issues, and may have further complicated the problem by considering some very short term arrangements to be tenancies, but tenancies that fall outside the current scope of the RTA.

Our previous submission proposed that all renters should be covered under the RTA if they regard the property as their principal place of residence, but that changes should be made to subtenancy laws in order to enable informal arrangements to continue to occur[8].

As this is not a current proposed option, we submit that it is incredibly important that tenants and renters are not punished for entering informal arrangements, especially when these renters are often the most vulnerable members of our community, and the ones most at risk of homelessness. While option 5.10 may have the intention to target AirBnB listings and commercial use of residential properties using "consideration" as a test may render this type of commercial use indistinguishable from other uses we have listed, and that ought to be protected under the RTA.

[8] ECLC Submission to Consultation Paper: Laying the Groundwork, pp 7-9

Termination Orders

151. What are the potential benefits and risks of introducing a termination order process to the RTA?

The proposed termination orders would have a far more detrimental impact to security of tenure for tenants compared to the current process for possession orders under the RTA.

A purpose of the termination order process cited by the options paper is to impose better scrutiny of NTVs where they have been given improperly. We note that scrutiny is only to be applied at a VCAT hearing, and tenant attendance at VCAT is notoriously low; anecdotally, it seems the majority of matters are undefended. Where the majority of applications are landlord applications, this can create a systemic issue.

In one case, ECLC acted for co-tenants applying for a VCAT review of a hearing they were never notified of. As a result of that review, a compensation order made by VCAT in the original undefended hearing was reduced from over $5000 to just under $2000, a reduction of more than half the original claim.

ECLC believes the termination order process will be used to threaten tenants, and in reality, would do very *little* to address the issue of improper NTVs. The threat of attending VCAT in the first instance may be used to bully tenants into moving out, as no scrutiny is applied to the application stage. Nor would applying to VCAT increase the quality of NTVs – ECLC have sighted and received numerous poor VCAT applications by agents and landlords that are proved unmeritorious at the hearing. However, it is ECLC's experience that many vulnerable tenants will not feel confident in attending VCAT to make such a challenge.

To quote ECLC's earlier submission:

> While the Residential Tenancies List at VCAT is much less formal than the Magistrates' Court, for many tenants this will be their first experience with a legal claim and a court-like setting. Many tenants are apprehensive about attending and applying to VCAT due to ignorance of the law, not knowing how to present their evidence and being required to speak in front of a judge-like figure. Many tenants believe they will inevitably lose cases against real estate agents because agents are familiar with the law, the Tribunal and its processes. Some agents will also threaten tenants with "costs" for their appearance at VCAT, despite the fact each party bears their own costs in almost all cases[9].
>
> Many of the tenants expressing these beliefs are well-educated, and native English speakers who feel intimated by the process; it is therefore unsurprisingly that more marginalised tenants from CALD backgrounds, with disabilities or mental health issues may find the thought of attending VCAT to be much more of a struggle.[10]

[9] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) at s 109

[10] ECLC Submission to Dispute Resolution Paper, pp 12-13

A secondary concern is that the termination order process will place further strain on VCAT hearing wait times and contribute to over-listing.

152. What alternative options are there to provide an appropriate level of checks and balances in cases of at-fault evictions with creating undue burden or barriers to legitimate tenancy terminations for landlords?

ECLC prefers the current system of issuing a NTV for arrears then an application for a possession order over the proposed termination order process.

153. What are the potential benefits and risks of expanding VCAT discretion to make possession orders and requiring a pre-eviction checklist as under option 11.2?

ECLC supports VCAT taking into account additional factors when deciding to make possession orders. Often when a possession order is required at VCAT, there has been a complex history of conflict between the landlord and agent. ECLC refers to this example from our previous submission:

> …many non-payments of rent arise from a misunderstanding that tenants may withhold rent where repairs are not completed... 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.[11]

As a result of sighting a number of poor VCAT applications with inadequate information, ECLC supports a pre-eviction checklist that provides a more detailed explanation about the arrears or reasons for eviction so the tenant can prepare their response before attending VCAT.

154. What alternative options are there to ensure VCAT decisions regarding possession adequately take into account the reasonableness of the termination and the hardship of the tenant?

VCAT currently takes into account hardship of the tenant under section 234 for applications of reductions of fixed term tenancies and where VCAT grants postponements of a possession warrant under section 352. However, without a broad application of the "retaliation" provisions under section 266(2), this means that landlords can find excuses to end a tenancy. For example, they may choose to make repairs to the house that require the tenant to vacate (section 255), or move family into the property (section 258) in circumstances where the change in use is not urgent and are done in part for the purposes of moving the tenant out. An alternative option is therefore to expand section 266(2) to apply to *all* NTVs.

[11] ECLC Submission to Security of Tenure Paper, p 16

Security of Tenure Models

209. Which of the models most effectively provides an appropriate balance of protections to the tenant against unfair termination of their tenancy, while also providing the landlord with adequate confidence that they can manage the risks associated with letting the property?

210. What alternative models could provide a more appropriate balance?

Please find the response to questions 209 and 210 below:

Property investment, like other financial investments such as shares, always come with some risk of loss. While landlord risk should be managed by the RTA, this should not come at the expense of the tenant's right to safe and secure housing. We note that landlords have alternatives ways of managing their risk outside changes to the RTA, for example, by taking out landlord insurance, whereas tenants solely rely on the RTA.

We believe the most detriment impact of these models comes from the proposes termination orders and have outlined our concerns under questions 151 and 152. We understand termination orders are intended to apply to all models.

Our next area of priority is the broadening of all at-fault terminations. We have addressed our concerns about the changes to the 3-strikes system and terminations for the late payment of rent in our answers to questions 28, 29, 32 and questions 172-176.

We therefore advocate most strongly for Model 1, sans the termination order process. However, alternative models that keep the model 1 "at fault terminations" changes, but contain a mix of other options may be feasible. Please read below for our summaries of the options in each model.

<u>No reason and end of fixed term NTVs</u>

Options 11.25A and 11.27D for removing these two notices are the most preferable as they are the NTVs used most often for improper purposes. As suggested in ECLC's previous submissions, the landlord could apply to VCAT to issue a NTV for a reason not covered under the RTA, and this would ensure the notice is not retaliatory, and still allow the landlord to evict tenants for reasons not covered.

However, if the notices are kept, option 11.25B should also be available under both Model 2 and 3, as an increase in the time period for notices does not prevent landlords from issuing NTVs in retaliation to tenants raising issues with the landlord. The addition of option 11.37 to models 2 and 3 is also highly beneficial as this would give the tenant increased flexibility to find a new property, and place the tenant in a more equal bargaining position with the landlord, especially since it is the landlord initiating the end of the agreement.

Change of Use NTVs

Option 11.28 should be implemented across all change of use NTVs, because this does not conflict with other systems in a model. If a change of use is genuine and not retaliatory, then providing supporting documentation to the tenant will not be onerous.

Under model 2 and 3 it states "Retain ability to challenge notices to vacate for change of use". ECLC assumes that this references section 319(d) and the decision in *Smith v Director of Housing*[12] whereby a NTV is invalid if it does not enter into a sufficient degree of detail. Although option 11.28 is preferred, ECLC submits that if this current provision is kept, the legislation ought to codify the case law so landlords understand a high level of detail that is required in a NTV, rather than assuming that giving the statutory section as a reason is enough.

ECLC supports an increase of notice periods for all tenants under option 11.30A over 11.30B which only applies to longer tenancies.

Again, the addition of option 11.37 is also highly beneficial as this would give the tenant increased flexibility to find a new property, and place the tenant in a more equal bargaining position, especially since it is the landlord initiating the end of the agreement. We believe that option 11.37 should be applied to model 1 as well, especially since change of use notices can be served during a fixed term and may result in rigid timelines that cause tenants difficulty in finding a new property.

At fault terminations

Please refer to ECLC's submissions about termination orders in questions 151-154.

ECLC supports option 11.15 as codifying what is currently being done in practice. It ensures landlords attempt to resolve arrears with tenants instead of immediately moving towards an eviction. ECLC believes this should be applied to all models, as it does not conflict with other suggested options.

After the termination orders process, our next area of priority is the broadening of all at-fault terminations. ECLC has addressed concerns about the changes to the 3-strikes system and terminations for the late payment of rent in answers to questions 28, 29, 32 and questions 172-176.

We are strongly in favour of the changes to at fault terminations under model 1 as this would have the most impact in keeping tenants housed, and prevent abuse of the process by landlords.

[12] [2005] VSC 46

Successive Breaches of Duty

28. Which option is preferable in terms of process for successive breaches of duty, and why?

29. What are the risks, if any, of unintended consequences arising with the measures proposed in options 5.2A, 5.2B and 5.2C?

The most preferable option is 5.2C or to keep the system in the current Act.

Notices relating to breaches are not vetted independently, and notices may be given for trivial breaches, a misunderstanding over the meaning of "reasonably clean" or instances where there is no breach. For example, in one case ECLC assisted a tenant who was being pursued by their agents for not having mowed the grass, despite the fact that the grass was located on common property.

With respect to option 5.2A, we are concerned about landlords and agents using breach of duty notices for minor matters as a way to exercise power and micro-manage tenants. During a period of 12 months there may be 3 separate, minor issues (such as mowing the lawn, vacuuming and cleaning the oven for example) that the tenant addresses after each notice is given, but together would allow VCAT to terminate the tenancy. Improved VCAT oversight regarding possession applications of this nature, similar to factors covered under option 11.29, could potentially strike a better balance to ensure tenants are not evicted for trivial matters.

With respect to option 5.2B, breach notices would lack predictability, as any breach notice would give rise to possibility or threat of a VCAT application. Instead of applying to VCAT to remedy the breach, landlords may choose to terminate a tenancy instead.

32. Should the RTA differentiate between a breach of duty and a breach of contract, and what should be the remedy and process for enforcement in each instance?

It is essential that the RTA keeps the differentiation between breaches of duty and breaches of the contract. Non-CAV tenancy agreements commonly contain a wide range of unenforceable or otherwise highly unfair contractual terms that would be prohibited under Australian Consumer Law. Some of these terms include:

- Prohibition on using temporary hooks or blu-tak on walls
- Fee per day for any friends or family that stayed over in the property
- Additional fees for using heaters or coolers
- Penalty provisions for breaking a lease or paying rent late

Usually this is due to both agents and landlords being ignorant of provisions under the RTA and ACL that govern the content of tenancy agreements. Removing the distinction between a breach of duty and a breach of contract could mean that notices are served to tenants for "breaches" of contract that are contrary to law.

Late rent payment

172. What is the period of time following the due date for rent payment that would be appropriate before action can be taken to negotiate a repayment plan or to terminate a tenancy for non-payment of rent?

The current timelines for NTVs for arrears are appropriate. A repayment plan can currently be negotiated at any time but in practice is usually not negotiated until after an NTV has been served, or at the possession hearing. Ideally, if a tenant knew they would not be able to afford their rent for the next month in advance, we believe it would be beneficial for a repayment plan to be negotiated before arrears even accrued, as this would give certainty to both tenants and landlords. However in the current climate, tenants are reluctant to disclose financial hardship and landlords are unlikely to accept payment plans at an early stage.

173. What alternative options are there to incentivise or facilitate timely payment of rent?

Option 7.7 which requires landlords to accept Centrepay payment would help facilitate and ensure regular rent payments from vulnerable tenants, and ECLC has received positive feedback from tenants who use this service. Tenants may also benefit from the ability to negotiate the payment period, for example, per fortnight or even per week, depending on their pay cycle.

174. What are the potential benefits and risks to removing payment of rent as a duty from rooming houses and applying the relevant protections via the provisions for assessing application for possession?

175. What are the potential benefits and risks of including repeated late payment as grounds for termination on application to VCAT?

Please find the response to questions 174 and 175 below:

Payment of rent as a duty should be removed and repeated late payment should not be a breach provision. Payment of rent as a duty and repeated late payment for the basis of a termination amount to the same thing, as landlords are able to issue a NTV on a third repeated breach of duty.

Landlords have the ability to terminate a tenancy (or a rooming house residency) where the tenant has accrued 14 days of arrears (or 7 days). At this point, if a NTV is issued and the tenancy cannot be saved, the bond will cover the amount owing in arrears in most cases. The landlord's risk and financial loss is therefore minimal.

On the other hand, there may be a wide variety of life circumstances for why a tenant cannot pay their rent on time. In previous submissions ECLC has discussed life events that may cause a tenant to end their tenancy, such as family violence, health and injury, separation

and loss of employment[13]. However, some of these events can also amount to a temporary hardship and tenants may be able to resume regular rent payments after the hardship has passed.

ECLC notes that these issues can be compounded for already disadvantaged clients, and family violence especially can also lead to poor health and injury, separation, disruption of employment further down the track- all causing late rent payments.

Many tenants may be on unstable incomes, such as independent contractors or casual workers. Their pay cycles may not necessarily line up with when rent is due (for example, fortnightly wages and Centrelink payments when rent usually occurs per calendar month), or they may also have legal problems relating to non-payment of wages.

In these cases, where tenants pay off arrears and the landlord suffers no or minimal disadvantage, it is unfair to allow landlords to evict tenants, potentially making them homeless and exacerbating their disadvantage, due to their life circumstances. Measures to evict tenants for late rent payments (as opposed to arrears) would exacerbate problems with security of tenure, not reduce them.

[13] ECLC Submission to Security of Tenure Paper, pp 8-10

Landlord information

21. Is option 4.8A or option 4.8B fairer for all parties, and why?

Knowing the identity of the other party in a contract is a requirement for the creation of a contract, as contract requires certainty and an intention to create a legally enforceable agreement. As this goes towards the validity of the tenancy agreement, Option 4.8A should be chosen.

ECLC has also addressed the issue of fairness in previous submissions:

> Where a real estate agent is used, a landlord is not required to disclose any additional personal contact details. However some real estate agents have taken to only providing the last name and first initial of the landlord, with others refusing to disclose the landlord's name at all. Not only does this affect the validity of the contract's intention to create legal relationships, but it makes it much more difficult for the tenant to assert their rights. Where landlords discontinue using a real estate agent and move to another, it may be very difficult for the tenant to enforce rights against the landlord if they cannot be contacted or found, and they may need to pursue the extra step of having VCAT order the personal details of the landlord be provided, as real estate agents rarely provide the information voluntarily.
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> Furthermore, as a Community Legal Centre that has been operating for more than 40 years, it is often difficult to undertake a comprehensive conflict check without the landlord's full name, and tenants must be referred to other services where there is a possible conflict of interest, which occurs with common surnames. [14]

Landlords having full knowledge of both the identity and the address of the tenant without a reverse obligation to disclose their own details contributes to the power imbalance between the two parties. Unless the real estate agent company itself is able to be held directly liable, option 4.8B codifies what currently occurs and is fundamentally unfair.

[14] ECLC Submission to Consultation Paper: Laying the Groundwork p 10.

Assignment fees

49. Is option 5.12A or option 5.12B preferable and why?

ECLC believes that current legislation should be maintained, where landlords can only claim for costs in relation to a written assignment[15]. It is noted, for example, that private landlords do not generally charge assignment fees because they do not prepare a written assignment or if they do, any financial loss or charge is minimal.

Where keeping current legislation is not possible, then option 5.12A is preferable if there is a standard assignment document that must be completed, and where agents and landlords are able to justify and provide receipts of their expenses to the tenant. It would require a landlord or agent to provide an itemised record of costs, or that the costs would otherwise be borne by a landlord under their contract of service.

ECLC believes these qualifiers are necessary because of the proliferation of flat assignment fees for upwards of $200 written into tenancy agreements, but in practice agents only complete a RTBA tenancy transfer form, and send this to the RTBA, and there is no further documentation regarding the assignment. For this reason, it is ECLC's experience that it is very rare for private landlords to charge an assignment fee because signing the RTBA forms are a quick, simple matter.

Completing a written assignment document is also essential, as ECLC has had cases where VCAT has decided an assignment did not take place because proper documentation was not completed.

Under option 5.12B most real estate agents and landlords will simply charge the maximum fee cap every time. While this may resolve assignment disputes more quickly, ECLC's support is dependent on the amount of the assignment fee, how it would be calculated and reviewed.

50. For option 5.12B, what would be an appropriate cap for a fixed assignment fee?

It is noted that this fee would be charged after a landlord has already agreed to the assignment, and the fee would cover for reasonable expenses around the assignment itself. We note, therefore, that any costs surrounding checking a new tenant for references should not be included in this calculation as the landlord has presumably already agreed to the new tenant being placed on the lease.

There should be different fixed caps depending on the paperwork that landlords and agents are required to complete. For example, filling out an RTBA transfer should attract a different fee to preparing an assignment document to preparing a completely new tenancy agreement.

[15] *Residential Tenancies Act 1997* (Vic) at s84.

Compensation and lease breaking

51. What other principles around compensation could be considered under option 6.1 to be codified into the RTA, to give greater guidance around reasonable lease break fees?

ECLC regularly encounters both landlords and agents who claim compensation by "estimating" costs rather than providing receipts for advertising, repairs or cleaning. Compensation should be calculated around actual financial loss, and the RTA should include that the applicant needs to provide *supporting documents* for their claim.

52. How can fixed lease break fees strike a balance between acknowledging the commitment of the lease that has been broken, and compensation for the actual loss incurred by the landlord?

Any "acknowledgement of the commitment of the lease that has been broken", beyond actual financial loss, may enter into the realm of a penalty provision. Penalty provisions are prohibited under section 23 and 25(c) of the Australian Consumer Law.

Conclusion

ECLC appreciates the opportunity to be able to respond to the suite of papers in relation to review of *Residential Tenancies Act 1997* (Vic). Please do not hesitate to contact ECLC should you have queries about any issues raised in this submission.