

Residential Tenancies Act Review
Consumer Affairs Victoria
GPO Box 123
MELBOURNE VIC 3001

By email: yoursay@fairersaferhousing.vic.gov.au

10 February 2017

Dear Sir/Madam

**Response to Options Discussion Paper
'Heading for Home' - Residential Tenancies Act Review**

We write this submission in response to the Residential Tenancies Act Review Heading for Home – Options Discussion Paper (**Options Paper**). Inner Melbourne Community Legal (**IMCL**) welcomes the opportunity to contribute to the review of the *Residential Tenancies Act 1997* (Vic) (**the Act**).

IMCL is a not-for-profit community legal centre that provides legal assistance to people experiencing disadvantage in the City of Melbourne area, including the CBD, Docklands, West Melbourne, North Melbourne, Carlton and Parkville. IMCL has been assisting clients in Melbourne's inner northern suburbs for almost forty years.

This engagement includes maintaining strong relationships with local organisations who also provide services to these priority clients. Critically, our work involves co-locating lawyers in partner organisations to ensure that we are accessible to those clients most in need of our legal assistance.

As a generalist service, IMCL provides legal advice and representation in a range of areas, including tenancy law and the application of the Act. As an organisation that provides assistance to the most vulnerable members of our community¹, we are well placed to observe the ways that the Act and regulation can at times fail our clients, resulting in unsafe and unsecure accommodation and a lack of legal recourse.

IMCL has provided two responses to this review by way of submission on 5 August 2015 and 11 August 2016. We welcome CAV's approach to consult broadly on the important issues raised by this review and provide stakeholders with an opportunity to respond to the Options Paper.

IMCL's submission primarily focuses on the issues that have the greatest capacity to impact upon the lives of our clients. In this response, we have prioritised those issues most relevant to them. Our ultimate aim is to assist in improving the rights afforded to our clients under the Act in a way which is both just and fair.

¹ Financial disadvantage and other vulnerabilities such as family violence, homelessness, substance abuse, disability, mental health issues, limited English proficiency

Rights and responsibilities before a tenancy

Unlawful discrimination against applicants and tenants (*consultation questions 13 & 14*)

IMCL is supportive of including an information statement about unlawful discrimination in application forms as proposed in option 4.1. In addition to the information about what a tenant can do if they experience unlawful discrimination,² we suggest that information be provided to tenants and landlords which specifies what protected attributes are so that parties are clear as to what amounts to unlawful discrimination. In our experience, many clients, particularly those from CALD backgrounds, are unaware of the protected attributes under discrimination laws and therefore are unable to recognise then there may be unlawful discrimination. While all protected attributes should be included, in particular we would encourage a statement specifically outlining that landlords cannot refuse to rent to tenants on the basis of race or age, as these are the most common concerns raised by our clients.

Rights and responsibilities during a tenancy

Processes for breach (*consultation questions 27-29*)

In respect of consultation question 28, IMCL submits that option 5.1 is preferable, as it would be more reflective of the actual loss suffered by parties. In response to consultation question 27, we are concerned that an immediate timeframe for compliance may be impractical in some circumstances. For example, if an order is made that a tenant must stop their dog from barking, it would be very difficult for the tenant to immediately comply with this order. If they are unable to do so, they would then need to find an alternative home for their dog where it does not disturb neighbours. Obviously all of the above cannot be done immediately. By contrast, an order that a tenant must stop playing music after 10pm could be complied with immediately. Our preference would be to give VCAT discretion to determine an appropriate timeframe as part of their orders and that the time period for compliance be set depending on the nature of the compliance order made.

IMCL is not supportive of options 5.2A and 5.2B as they risk further entrenching a pattern of homelessness for those in our community who are experiencing disadvantage, such as tenants with significant mental health issues. For example, a tenant with mental health issues might stop taking medication and inadvertently cause nuisance to their neighbours by moving furniture in their property late at night, only to cease this behaviour once they receive appropriate medical and/or mental health treatment. Options 5.2A and 5.2B would make it much easier to evict people and would allow little leeway to people who unknowingly do not comply with their duties. This is particularly the case in new apartment buildings, which are frequently not well soundproofed.

In addition, IMCL does not support the proposal in option 5.2A as a tenant might make three relatively minor unrelated breaches in a twelve month period and then be evicted. For example, they might change the locks upon moving into a property and forget to give the landlord a copy of the key; they might then put a picture hook into the wall to hang a painting and not realise that they first need to ask for the landlord's consent; and finally they may fail a three monthly inspection on the basis that the property wasn't reasonably clean as the tenants three year old child had left dirty hand marks on the walls which they hadn't been able to clean as both parents work or study full time and

² Set out on page 36 of the Options Paper

they had only been give 24 hours' notice of the inspection. In such circumstances, a broadening of the three strikes rule would be harsh and result in tenants risk losing stable housing for relatively minor breaches of the Act.

In relation of termination for breaches of compensation/compliance orders, IMCL's preference of the three options is option 5.2C, which would abolish notices of termination for successive breaches and maintain the existing process of compensation/compliance orders as this process provides opportunities for parties to comply and rectify problems when ordered by VCAT, thereby provided for increased security of tenure for tenants and comfort for landlords that tenants will comply, failing which they could risk eviction for breach of a VCAT order.

Rights of entry (*consultation questions 40 and 41*)

In respect of consultation question 40, IMCL is supportive of option 5.5 and recommends that seven days' notice should be given for both general inspection and valuation. Given the non-urgent nature of general inspections and valuations, it is reasonable that more notice be given to tenants. Seven days' notice would allow tenants more time to prepare for such events as often tenants wish to do extra cleaning before a general inspection. We note that many landlords already give more than 24 hours' notice in practice, so this change would not be a significant departure from what is already done in practice. The change in notice period would therefore encourage landlords to advise tenants of planned inspections when they become aware of the required inspection rather than waiting until the last minute.

IMCL is also supportive of option 5.6 being specifically legislated. In our view, there is no reason that a landlord should not be liable for loss to the tenant's goods while exercising rights of entry and such a provision would encourage landlords to take care during inspections. While we note that it may already be possible to claim under the existing legislation, we encourage specific legislation on this issue.

Subletting and assignment (*consultation question 49*)

IMCL is supportive of option 5.12B rather than option 5.12A given the excessive assignment fees which tenants are often currently asked to pay in order to assign a tenancy. In our view, and in keeping with the decision of *Jupp v Chambers (Residential Tenancies)* [2010] VCAT 36, no more than 1-2 hours work should be required to complete a transfer. We consider it appropriate that a 'charges scale' be set by regulations. In our view, it is unreasonable for real estate agents to charge in excess of \$300 for a transfer which would take approximately 1-2 hours work. We consider such excessive charges to be exploitative in nature as tenants find it very difficult to negotiate on price, as agents can simply refuse to complete the transfer. While as per *Jupp v Chambers* it is open to tenants to apply to VCAT to challenge this amount after the fact, there is no certainty that they will recover the amount even where an order is made by VCAT.

Rights and Responsibilities at the End of Tenancy

Lease break fees (*consultation questions 51-55*)

IMCL supports codifying common law compensation principles for lease break so that it is clear to

parties what their responsibilities are.³ IMCL assists many international students and workers who need to end a tenancy early for a range of reasons, including unexpected changes to their visas, and there is currently uncertainty in the law as to their liabilities for lease breaks. Further, codifying the common law compensation principals in the Act may assist with resolving disputes about lease break costs, as both parties will have a clear expectation of what to expect should a lease be broken.

In relation to lease breaks, we submit that any amendment to the Act should include the basis upon which prospective new tenants following a lease break may be rejected by a landlord – that is only if the proposed tenants could not reasonably be expected to comply with the duties of a tenant under the tenancy agreement. We suggest that it be specified that any other basis for rejecting applicants follow a lease break be deemed unreasonable and the landlord bear the cost of the rent onwards from the invalid rejection. IMCL is not supportive of option 6.2 as it would not allow for lease break fees to be reflective of the actual loss suffered by a landlord or allow VCAT to take relative hardship of parties into account.

Severe hardship (consultation questions 56 & 57)

IMCL is supportive of allowing VCAT to consider hardship regardless of whether the tenancy is on foot or not.⁴ It is a strange anomaly that VCAT is currently unable to consider hardship to parties once a tenancy has come to an end. It is also counterproductive to both landlords and tenants as it discourages minimizing the loss suffered to both parties as tenants may feel they should not relinquish the keys to allow for new tenant's as they would lose the right to seek a reduction on the basis of hardship.

In respect of consultation question 57, IMCL welcomes a compensation cap of two weeks rent, provided that it is applied as a cap and not a standard amount of compensation.

Lease breaking in special circumstances (consultation question 58)

We are pleased to see the inclusion of option 6.5 and encourage its adoption in the RTA. We are particularly encouraged by the inclusion of family violence as one of these special circumstances. IMCL is of the view that it is inappropriate to award compensation to the landlord when a party is seeking to terminate a lease due to family violence. While we understand that unfortunately the landlord may suffer a financial loss, we consider that this is effectively a commercial risk, not unlike any other unexpected expense for a rental property such as storm damage. We encourage the introduction of apportionment of liability in circumstances where there is family violence, so that the landlord may seek to recover loss from the perpetrator where possible.

We also suggest that a significant or severe illness that has resulted in the tenant or the tenant's immediate family member being hospitalised for a significant period of time be an additional ground on which a tenant can end a tenancy without compensation. IMCL provides legal advice at the Royal Women's Hospital and the Royal Children's Hospital, and we have seen firsthand that tenants who are either unwell or have children in hospital and are already suffering both emotionally and

³ Option 6.1 - Codify common law compensation principles for lease break fees

⁴ Option 6.3 – VCAT can take landlords severe hardship into account when awarding compensation after a lease is broken

financial are extremely concerned about termination fees. While in practice some real estate agents or landlords may agree to waive lease break fees in these circumstances, we consider that the Act should include severe illness as a ground on which a tenancy can be terminated without compensation to the landlord.

Property Conditions

Condition reporting – measuring changes in a property’s condition (*consultation questions 75-81*)

IMCL would be pleased to see the introduction of option 8.1, namely broadening the circumstances in which a condition report is required. It is IMCL’s view that MCAT’s (maintenance charges against tenant) in Office of Housing tenancies are largely due to the lack of condition reports. By requiring that a condition report be done at the start of every tenancy, including public housing, it will be clear if damage to the property noted at the end of the tenancy was pre-existing.

In respect of the proposal that a condition report be prepared after an incident of family violence causing damage to the property, IMCL is concerned about victims of family violence having their quiet enjoyment interfered with at a time of significant distress, and would recommend that condition reports only be completed upon the landlord being notified of an incident involving family violence where the affected family member consents.

IMCL is also supportive of option 8.4 that a tenant may complete a condition report if one is not provided. It is our view that it is important for both the landlord and the tenant to have an accurate record of the property at the start of the tenancy.

IMCL is supportive of options 8.5 and 8.6 as we consider that they promote a better understanding of the rights and responsibilities of both landlord and tenants in the wider community.

Condition of vacant property at the start and end of a tenancy (*consultation questions 82-84*)

While we agree that guidelines for what amount to cleanliness and good repair are needed to provide certainty and guidance to tenants and landlord, we disagree with the proposal set out in option 8.8 that tenants should be required to professionally steam clean carpets upon vacating a tenancy where they have been professionally steam cleaned at the commencement of the tenancy. We are concerned by this proposal on the basis that steam cleaning may be an unnecessary step to ensure the property is clean at the end of the tenancy, despite it having been required to ensure cleanliness at the start of the tenancy. The cost of professional steam cleaning is an unnecessary burden on tenants of limited financial means, especially where the carpet is reasonably clean. We consider it necessary to steam clean carpets where the carpet is otherwise unclean, but not for any other purpose.

IMCL supports the proposal that tenants be provided with an opportunity to carry out repairs and cleaning within a 5 day period on vacating should the landlord be unsatisfied with the state of the property.⁵ This would be of assistance to both landlords and tenants, as it would mean that tenants could go back and rectify any problems raised by the landlord. It would also assist tenants in situations where the bond is in dispute, as they would have the opportunity to fix any issues raised rather have the matter proceed straight to VCAT. This would also be of assistance to victims of

⁵ Option 8.10 – Opportunity to repair or clean premises after vacating

family violence, who sometimes have to immediately leave their homes due to concerns for their own safety and are therefore unable to promptly clean the property. In this situation both the tenant and landlord would benefit from the tenant having the opportunity to either go back themselves or have someone else go in and clean the property.

Health safety and amenities standards at point of lease (consultation questions 88-94)

We are greatly encouraged to see the inclusion of an option for minimum standards in rental properties. It has been a long-standing issue for tenants on a limited income, who have little option but to live in substandard accommodation, sometimes without basic amenities such as a functioning toilet or heating and cooling system. We are concerned that without legislative reform, this problem will only get worse as the housing affordability crisis continues. We therefore consider it essential that minimum standards be introduced to protect vulnerable tenants. As outlined in our earlier submissions, we are supportive of basic standards being introduced as suggested in table 8.1 on page 100 of the Options Paper. Our preference would be for option 8.13D - that is at the start of any tenancy the property must meet minimum standards in order for it to be available to lease. This would set a trigger for works to be done and maintain proposed standards set out in this Option Paper at table 8.1 as mentioned above.

In relation to remedies for sub-standard properties, IMCL prefers option 8.15B, as we consider that option 8.15A might allow landlords to tell tenants to move in and promise to rectify the problem but never rectify the outstanding issues. Option 8.15B on the other hand offers far more incentive for landlords to comply with the legislation, as it is in their best interest to get tenants into the property as soon as possible by complying with the minimum standards.

IMCL is of the view that the majority of properties would already meet the minimum standards, with the exception of cooling in the main living area and having window coverings in bedrooms and living areas. We cannot ignore the importance of cooling as a minimum standard. It can be dangerous to be residing in property without cooling, particularly for young children and the elderly. This is particularly the case for Office of Housing tower buildings where windows can only be opened a small amount and there is no cooling. As a result these properties get exceptionally hot on warm days during summer.

We do not consider that significant changes would need to be made to the vast majority of properties in order to meet the standards. Properties requiring significant work to reach minimum standards should not be rented in their present state. The percentage of such properties is likely to be small and to rent them would likely involve taking advantage of vulnerable tenants, who have few other options. We do not consider that the introduction of minimum standards will significantly increase prices.

Resolving disputes about repairs (consultation questions 109-110)

IMCL is supportive of options 8.35 and 8.37 as we consider that they would encourage landlords to respond promptly to a request for repairs.

We advise many clients whose landlords do not carry out repairs as ordered by VCAT. From our experience this reluctance often seems to be on the basis that the landlord does not want to spend

money on the property as they have little to gain from carrying out repairs. Further, in practice it is known that VCAT will not penalise parties for being in contempt. We encourage amendments that strengthen the mechanisms to ensure repairs are carried out. We consider that options 8.35 and 8.37 will make it far less feasible for the landlord to simply ignore a tenant's requests for repairs.

Quality of decision-making by VCAT (consultation questions 145-147)

The Options Paper recognises that stakeholders are concerned about the consistency of decision making in VCAT and lack of accountability and IMCL shares those concerns. In respect of the alternative options to address this, IMCL considers that option 10.4A is preferred as we consider that option 10.4B is less transparent and would not address the concerns in respect of quality of decision making as it is unclear what the result of peer review would be for a tenant.

IMCL is supportive of the introduction of a re-hearing process for all residential tenancy cases. In respect of consultation question 146, we consider that the features of the re-hearing process proposed in the options paper are appropriate and would address the concerns regarding quality of decision making, however we consider that there should be an opportunity for a fee waiver in the case of financial hardship or where a tenant is represented by a Community Legal Centre or Victoria Legal Aid, to ensure that financial disadvantage is not a barrier to review.

Terminations and Security of Tenure

Processes for termination (consultation question 151)

IMCL considers that there are a number of risks of introducing a termination order process to the RTA. In particular, IMCL is concerned that it may shorten the eviction process. Currently, if a tenant refuses to leave, a landlord must apply to VCAT in order to get an order for possession after the notice to vacate period has expired. The introduction of termination orders would remove this step in the process. In doing so it would afford tenants less time to make alternative arrangements with regards to rental arrears or find alternative accommodation. IMCL is concerned that a shortened eviction process in combination with the current housing affordability crisis may contribute to the growing homelessness crisis in Victoria.

Damage (consultation question 155)

IMCL considers it inappropriate to include injury to landlord or agent in the definition of damage. There are appropriate remedies under criminal and other civil laws regarding injury offences (such as personal safety intervention orders), and we submit that amending damage to include injury and enable termination as a result is inappropriate.

Danger (consultation question 158)

IMCL does not endorse the removal of the requirement that the danger be continuing or likely to continue as we consider it to be an important safeguard in place to protect vulnerable tenants. Particularly for tenants who many have mental illness and act in a way which is a 'one off'. This similarly applies to tenants who may be experiencing significant crises or a traumatic event which causes them to act uncharacteristically. For example, a person with undiagnosed schizophrenia might become unwell and take out the batteries in a common stairwell to a smoke alarm during a

psychotic episode. Arguably this causes a danger to the occupiers of neighboring premises but with adequate medication and support is unlikely to occur again.

A further risk of removing VCAT's discretion to make possession orders based on the likeness of a reoccurrence is to victims of family violence. A victim of family violence whose abusive partner causes a danger to her/his neighbours or damages a property could face eviction if a strict interpretation is taken – even if they have since sought an intervention order excluding the perpetrator from the property. Allowing VCAT discretion to consider if the behaviour is likely to occur again would allow VCAT to keep the victim of family violence in the property as steps have been taken to exclude the violent perpetrator.

As suggested in relation to notices to leave (see below), IMCL would welcome the introduction of a 'fact sheet' for tenants who are issued with a notice to vacate for danger or damage and that that fact sheet outline the available support services in their area – i.e. to assist with housing, mental health and substance abuse.

Termination by a notice to leave (*consultation question 165 & 166*)

We support the inclusion of notices to leave providing practical information for the suspended resident, as often tenants who are given notices to leave are highly vulnerable and may not fully understand the effect of the notice to leave.

Non-payment of rent (*consultation questions 172-176*)

IMCL encourages the adoption of an option for a tenant to negotiate a repayment plan where seven days rent owed as we consider it to be positive for both tenants and landlords. It assists tenants to avoid eviction and repay arrears to landlords at an earlier stage before they become unmanageable which in turn is positive for landlords to avoid financial loss.

IMCL also supports option 11.6 which requires that the repayment of arrears invalidate the termination process. Eviction due to rent arrears is to ensure that the landlord can minimise their loss suffered due to non-payment of rent. If the rent has been paid, we consider it unnecessary to evict the tenant as the landlord is no longer suffering a financial loss. We stress that housing is a human right and accordingly possession should only be granted where all other avenues have been exhausted.

IMCL does not support the introduction of legislation which would enable VCAT to make a termination order for repeated late payment of rent. This disproportionately impacts low income tenants who are living 'pay to pay' and where rent falls due just before they receive a pay. For example, a tenant who receives a Centrelink income one or two days after rent is due would be at risk of eviction even if the rent is consistently paid within 2 or 3 days of the rent being due and always before the 14 day notice to vacate period. In such a situation there may be very little or no financial risk to the landlord. We submit that the important issue for landlords in repeated late payment is if it causes them to be at risk of mortgage default. We oppose the introduction of such a provision but submit that if it is to be introduced that it be on the basis that the repeated late payment of the tenant has caused the landlord significant financial hardship and not just mere annoyance or inconvenience.

Use of premises for illegal purpose (consultation questions 181 & 182)

IMCL supports the introduction of a requirement that a conviction be in place before a notice to vacate can be used to evict a tenant for an illegal purpose (option 11.22A). As the burden of proof is the balance of probabilities in a civil proceeding, it is quite possible a tenant could be evicted from their housing on the basis of illegal use but then later be found not guilty in criminal proceedings of any illegal activity. Given the serious consequence of eviction, we consider a conviction must be in place before a notice to vacate can be issued.

Antisocial behaviour (consultation questions 187-188)

As explained above, IMCL is concerned about the increased risk of eviction for tenants with mental health issues. We believe one of the risks of expanding the grounds for termination for antisocial behaviour is increased eviction for tenants experiencing mental health problems. While antisocial behavior is concerning, the Act already provides protections to landlords in circumstances of damage, danger, nuisance and illegal use, and we do not consider that an expanded definition is necessary. Further we note landlords or agents who wish to terminate on the basis that a tenant is engaging in anti-social behaviour can issue a tenant with a 120 day notice to vacate at the end of the fixed term.

Family Violence (consultation question 216)

Of the alternative options proposed in respect of consultation questions 216, IMCL supports option 12.1C as we would like to see as many victims of family violence covered by the legislation as possible. By reading the legislation broadly we could capture tenants who have not yet obtained a final intervention order. VCAT would still act as a gatekeeper to ensure that orders were only made where appropriate to do so. IMCL also supports standalone options 12.2 and 12.3. Option 12.2 is particularly important to ensure that family violence matters are heard quickly to reduce the risk to the tenant from both a physical and financial perspective.

* * *

Please do not hesitate to contact our Chief Executive Officer, Dan Stubbs on 9328 1885 if you have any questions at all regarding this submission.



Melanie Dye
Principal Lawyer