

19 August 2015

Residential Tenancies Act Review – Fairer Safer Housing

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

Dear Sir / Madam,

Submission of the Barwon Community Legal Service to the Fairer Safer Housing Review.

Barwon Community Legal Service (BCLS) provides free legal advice and specialist casework services to people who live in the Geelong, Bellarine Peninsula, Surfcoast and Colac Otway regions. BCLS also provides limited services to people who live in Corrangamite, Moyne, Warrnambool, Glenelg and Southern Grampians shires. Our catchment region consists of over 360,000 people with many pockets of extreme disadvantage.

We also provide community education and training directly to the community and to other community sector staff and government. We run community awareness campaigns and provide education that gives people the knowledge to self manage their situation and assert their rights. We also contribute to policy and law reform work.

Introduction

The *Residential Tenancies Act 1997 (Vic)* (“RTA”) is the central legislation that governs the rights and obligations of tenants, landlords, rooming house residents, rooming house owners, Caravan park residents, Caravan park owners, site residents and site owners. For ease of reading the groups will be collectively referred to as landlords and tenants and the provisions of standard tenancy agreements used. The submission of BCLS will focus on a range of matters that this legislation covers or could potentially cover if amended.

1. Security of Tenure

The social, emotional and economic cost of moving home is great. With no breach or other wrongdoing on their part, tenants may be expected to pick up their life's belongings, find new accommodation, ask friends to help them move and find the funds to do so after being sent a Notice to Vacate for no specified reason. These notices give a tenant 120 days and can only be challenged on limited grounds, that is the notice is incorrectly filled out and hence invalid or if it was given in response to the exercise, or proposed exercise, by the tenant of a right under this *Residential Tenancies Act 1997*.

120 day notices to vacate do not assist a tenant with any security of tenure. We submit these notices should be removed from the legislation. In the alternate if it is considered not appropriate to remove them the grounds upon which they can be challenged should be expanded. Furthermore a prohibition, for an extended period of time, on issuing a further no reason notice should be implemented if a tenant successfully challenges a no reason notice as been retaliatory.

2. Bonds: Automatic return / landlord contribution.

Currently a bond claim, by a tenant, can take over a month to resolve if it is not by consent. A landlord must lodge a claim against the bond within 10 business days of a tenancy ending. If a claim is made by the landlord or a bond refund form is not signed a tenant can be faced with having to find additional funds to pay a second bond whilst waiting for VCAT to deal with the original bond. If the original bond was from the Department of Housing Bond Loan, a tenant is normally not able to access a second loan until the original is repaid.

To reduce demand on VCAT's limited resources and to speed up the return of bond process we submit the legislation should be amended to automatically return a bond to a tenant when notice is given to the Residential Tenancies Bond Authority ("RTBA") of the end of a tenancy. Once notice has been given the RTBA can notify other interested parties and if no claim is made against the bond, by the landlord, in the following 10 business days the bond is paid out. These provisions could be similar to those contained in the *Residential Tenancies and Rooming Accommodation Act 2008 (QLD)*, sections 136.

Further to these amendments it would be our submission that landlords should also be required to pay a bond. This would allow VCAT to make order against these monies in relation to repairs and / or matters of compensation to a tenant.

To overcome any financial burden to current landlords these changes could be introduced in a staggered manner starting with new leases. The bond should be an amount sufficient to be able to address the majority of valid claims. The landlord bond should, of course, also return automatically to the landlord unless a claim is made.

3. Minimum standards; Non-urgent repairs

The quality of a rental property is not always the same. Normally a tenant pays higher rent for a better location or more amenities however this should not have an affect on the safety of a property.

There are currently no minimum standards for the majority of rental premises. It is noted rooming houses now have minimum standards the help address safety related issues.

It is further noted, in the building industry, there are minimum standards to ensure that new dwellings are of acceptable quality. This helps ensure tenants, or more broadly any occupier of the new dwelling has some insurance as to quality and safety. It however does not address existing dwellings.

It is our view that minimal standards should be applicable to all rental properties; that is, at the commencement of any tenancy agreement the property must be of a minimum standard in terms of structure, fixtures and appliances. This would ensure that a new tenant did not inherit problems which would necessitate immediate applications to VCAT to 'raise' the property to an acceptable level or a tenant having to live in a property that is inadequate for most people's needs.

We also note that in its current form the legislation can cause significant delays in urgent repairs being completed where there is no agreement between the parties. By introducing penalty provisions and having these acted upon by the Director (Consumer Affairs Victoria), landlords should, as the majority already do, ensure that properties are kept in a good state of repair. The penalty provisions should enable the Director to issue infringements based on the finding of a VCAT Order where there has been a valid claim and no reasonable excuse for the delay in repairs being completed.

4. Jurisdiction of Magistrates' Court – FVIO matters

In 2014 BCLS acted in over 500 family violence cases.

In Geelong there has been a staggering 122 percent increase in the number of family violence incidents per 100,000 in the last five years. Worse still is the Colac area with a staggering 340 percent increase in family violence incidents. This is compared to a 72 percent increase across Victoria. This reflects the huge issue our region is faced with. Both Geelong and Colac form part of the catchment area in which BCLS assist with tenancy matters.

A delay of up to 8 weeks or more can occur between the time a person makes an application for a intervention its conclusion. Presently a lease can only be changed, under the family violence provisions, by VCAT on the basis of a final Order being made. Our view is that the Magistrates' Court should be empowered to deal with leases under the family violence provisions of the RTA. This would allow the lease to be dealt with at the first hearing of the intervention order application. It would ensure applicants do not have to make multiple applications to deal with the family violence and its related impacts, including changing a lease agreement due to fleeing the rental property or having another tenant excluded.

The RTA could further expand / change its definition to ensure either the Courts or VCAT have the power to consider applications to change a lease at an earlier stage, prior to a final intervention order being made. These provisions could be similar to those contained in the *Residential Tenancies and Rooming Accommodation Act 2008 (QLD)*, sections 245 and 246.

5. Extension of 14 day notice provision

Section 237 of the RTA allows a tenant to give a reduced notice period of their intention to vacate in certain circumstances. This presently does not include when a tenant has been issued a notice to vacate under s261, being an end of fixed term notice. We submit these notices should attract the same reduced notice period right. What complicates this matter, and not solely in relation to notice under s261 is that a reduced notice period of an intention to vacate can only specify a date that is on or after the end of the term of the tenancy agreement where the tenancy is still subject to a fixed term tenancy agreement. It would be rare for an appropriate property to become available and a new lease negotiated to commence on exactly or even close to the date on which the old fixed term would expire. To secure a property the tenant would sometimes be forced to enter a new lease before the old lease was ends, meaning double rent and a double bond would need to be paid. If a property were not found in time, the tenant must find temporary accommodation in the interim, with multiple moving costs and other inconveniences which would flow. By amending and expanding s237 to allow a tenant to give a reduced 14 day notice period of their intention to vacate, both during a fixed term or periodic tenancy, after they have been served a notice to vacate by the landlord the above situation and hardship towards a tenant can be alleviated.

We submit the detriment to a landlord's financial interests would be reasonably small when balanced against these factors. We submit that it is appropriate that a 14-day right should arise allowing the tenant to survey the market and if necessary, terminate the lease before the end of fixed term date in order to avoid paying double rent from the time when a new property was found.

6. Lease Break costs

Lease break costs may only be claimed on a pro rata basis reflecting the landlord's actual loss quantified in terms of the amount of the lease remaining. Despite this, it is reasonably common for agents to attempt to claim a full lease break fee. Our view is that lease break costs should be addressed in legislation; including the standard form lease to outline any lease break cost is payable pro rata. This is necessary because the majority of tenants do not apply to VCAT in relation to a demand for a full lease break fee but would simply pay it, with agents accepting a ruling against them at VCAT in the very few instances they were challenged. There should be a strong disincentive against unfounded claims and a penalty provision could be an appropriate way to provide that.

7. Equity of access.

The Residential Tenancies list at VCAT is almost entirely used by landlords against tenants with 95% of matters on the tenancies list being landlord initiated. 80% of all landlord initiated matters are undefended.¹

We believe that vulnerable and disadvantaged tenants are reluctant to assert their rights under the Act for fear of landlord retribution (ie) may lead to a loss of housing. It would be beneficial to tenants that any Notice of Hearing in the Residential Tenancies List be accompanied by a referral list of local tenancy advice providers or alternatively some further information about rights and Consumer Affairs Contact details (who fund a lot of tenancy advice providers).

There has also been some procedural issues with both the VCAT online and RTBA online facilities only been available to landlords or their agents. It is noted steps are being taken to address access issues for tenants in regards to VCAT online.

¹ Justice Kevin Bell, One VCAT President's Review of VCAT (30 November 2009) VCAT, 25
www.vcat.vic.gov.au/resources/document/transforming-vcat-one-vcat-presidents-review-vcat-november-2009 quoted in Home Sweet Home – Act for the house not the tenant, Footscray Community Legal Centre Inc 2013, Jane Berry at page 4

8. Extension of lease in certain circumstances

End of fixed term, repair, demolition and no reason Notices to Vacate, amongst other, if valid, bring the tenancy agreement to an end. There may be a range of reasons why this could cause hardship to a tenant, some of which are outlined throughout this submission. We submit the legislation should include a balancing test, similar to that VCAT used in determining if a postponement of the issue of warrant should be made under s352. This change which allows a tenant to put a hardship case to the VCAT and the tenancy agreement extended for a short period of time. VCAT would have to consider the reason the notice was given, any hardship that may be incurred by the landlord and the hardship faced by the tenant if no extension is given.

9. Disputes between co-tenants / Expansion of Residential Tenancies List jurisdiction

The RTA should be amended to allow tenants to make an application to the VCAT for a determination of disputes between co-tenants. Presently there are limited options available to tenants when these disputes arise.

The Dispute Settlement Centre of Victoria offers mediation, but requires voluntary consent of both all parties. There are limited services, beyond paid legal service, that can offer advice. The Residential Tenancies List of VCAT is an appropriate jurisdiction to deal with matter of this nature. It already deals with tenant v tenant disputes in a limited capacity through the intervention order provisions of the RTA.

Presently the only enforceable jurisdictions that can hear these matters are the Courts, most commonly the Magistrate's Court. The majority of tenant v tenant disputes are over limited monetary amounts. An amendment to allow this nature of dispute would still be subject to the Residential Tenancies List \$10,000.00 limit, however for smaller claims is substantially more accessible than the Courts. The Court has higher costs, in regards to filling fees, and considerable more formalities.

If the Residential Tenancies List was able to hear these matters, evidence and burdens of proof would also be very similar to those already relied upon. Balancing some of the disadvantages, including an increase on the limited resources of VCAT would need to be considered.

The Residential Tenancies List could further be expanded in its jurisdiction to deal with all matters relating to rentals, including those of licences and home stay arrangements which can face similar jurisdictional issue to tenant v tenant matters.

10. Creation of a public Landlord/Estate Agent reputation database

There are some instances of poor conduct by landlords and agents, just as there are bad tenants. Our view is that a landlord/agent database should be established and maintained where records of non-compliance with or breach of the RTA can be publicly accessed as a guide for tenants seeking good landlords or agents.

Once one tenant has had to deal with various, sometimes ongoing, problems with a landlord or agent, they often vacate the rented premises with the problems outstanding, and a subsequent tenant moves in to face the same problems.

Many tenants are scared to pursue their rights for fear of being given a Notice to Vacate or not being able to secure another rental property due to a bad reference. A database system could be along the lines of those that presently exist for listing tenants. The basis of a listing might be, for example, if a tenant is awarded compensation as the landlord has failed to comply with a VCAT repairs order.

By listing both landlords and agents an additional incentive would be created for agents to have the correct authorities to be able to undertake repairs when a landlord is refusing the delays or not contactable. Any database system could run alongside existing complaint mechanisms regarding real estate agents.

Databases would have to be free or of low cost to tenants who wish to list a landlord or agent, and freely accessible to all potential tenants. Proper checks and balances would need to be put in place before a listing is approved, for example a copy of a VCAT order.

11. Recovery of monies owed under a VCAT order

A simple, streamlined approach is required to allow recovery of monies owed under a VCAT Order. The current process is cost prohibitive and generally not viable given the amount that may be recovered. This can relate to when either a tenant or a landlord has an order made in their favour.

One approach to this, in regards to when a tenant has an order made in their favour, is on the provision of a statutory declaration to support a VCAT order, rent from rental property may be paid to the tenant. This may involve a Order that can be directed towards subsequent tenants or property managers. It would have a similar effect to a garnishee order obtained through the Magistrates Court.

Some of the issues with recovery are outlined in the case study below.

Conclusion

All legislation should be subject to ongoing review. The submissions, suggested above, could be introduced gradually but any suggestion introduced would be good step forward.

Case study: Eviction, repairs

Lisa* is a young single parent with one child, aged 2.

The tenancy

In October 2012, Lisa rented an old, unmaintained house in Corio, a Northern suburb of Geelong for \$240 per week. Corio was recently identified as one of Victoria's most significant areas of disadvantage.² It soon became apparent that the house needed various, urgent repairs, however the landlord had failed to complete them. Additionally, the landlord gained entry to the house without giving notice and regularly sent abusive text messages to Lisa. Then the notices to vacate and possession order applications started coming in. In February 2013, Lisa contacted Consumer Affairs Victoria (CAV) for assistance. CAV identified Lisa as being a vulnerable and disadvantaged client and referred her to Barwon Community Legal Service (BCLS) for advocacy. CAV advised that the landlord refused all attempts to negotiate with CAV.

Repair issues

Lisa advised the roof was leaking. This interfered with Lisa's ability to use lights in the home due to the electricity shorting out. Lisa had to empty a bucket full of water several times during both the day and night time. Lisa did not use the electricity at night as if she turned a light switch on the whole house shorted out. Furthermore, the hot plates were not connected and the stove had never been correctly fitted by a qualified electrician therefore Lisa had not been able to use the oven for cooking. Lisa arranged for a friend to install the stove but the stove top remained not connected.

Quiet enjoyment

Lisa advised that the landlord contacted her by phone and text several times during the day and night in relation to the payment of her rent. Often the texts would be abusive in nature, such as threats to report Lisa to DHS or Centrelink. The landlord had a spare key to the property and would gain access whenever he chose.

² <https://www.documentcloud.org/documents/2169407-dropping-off-the-edge-report.html>

Chronology of key events

1. On 13 October 2012, the tenancy commenced.
2. Between 5 November and 24 December 2012, Lisa received 3 notices to vacate for varying reasons including a 120 day notice for no specified reason. We deemed all notices to be invalid.³
3. On 12 February 2013, Lisa was referred to BCLS for advocacy. We sent a notice to landlord for repairs.
4. On 4 March 2013, CAV performed a repairs inspection and found the house to be unsafe. Urgent repairs were needed for the safety and wellbeing of Lisa and her child.
5. On 15 March 2013, we brought an urgent repairs proceeding at the Victorian Civil and Administrative Tribunal (VCAT). The Tribunal ordered repairs to be made by 10 April 2013. An order restraining the landlord from contacting or harassing the tenant was also made.
6. On 26 April 2013, the tenant brought further VCAT proceedings as the repairs remained outstanding. The tenant was awarded \$1,388 in compensation and rent was to be paid to the Rent Special Account. We requested the Tribunal order the compensation be converted into rent on account, however this request was refused. The Tribunal member suggested we could negotiate that outcome privately.
7. On 29 April 2013, the landlord served the tenant with a notice to vacate for rent arrears.
8. On 30 April and 6 May 2013, BCLS wrote letters of demand to the landlord for compensation. The landlord refused to negotiate.

³ On 5 November 2012, Lisa received a notice to vacate for no specified reason (section 263), on 14 December 2012, Lisa received a notice to vacate for repairs (section 255) on 24 December 2012, Lisa received a notice to vacate for rent arrears (section 246)

9. On 12 May 2013, the landlord sent a further notice to vacate.
10. On 20 May 2013, we advised VCAT that all repairs had been made.
11. On 3 June 2013, the landlord applied to VCAT for possession. The matter was struck out for failure to comply with the Residential Tenancies Act (RTA).
12. On 7 June 2013, the landlord sent another notice to vacate for rent arrears. We wrote to VCAT to request an amendment to the order of 26 April 2013 so that the rent Lisa owed to the Rent Special Account be deducted from the order of compensation.
13. On 25 June 2013, VCAT denied our request.
14. On 5 August 2013, the landlord was granted a possession order. Our requests to repay the arrears by payment plan or postpone the warrant due to hardship were refused.
15. On 16 August 2013, Lisa was evicted from the property. Lisa attempted to remove her belongings from the property, however the landlord was obstructive and removed them, storing them at his home in Melbourne, 114kms away. Lisa advised most of her furniture was leased from a rental store.
16. On 28 August 2013, CAV conducted a goods left behind inspection. CAV determined the value of the remaining goods to be worth approximately \$900. The costs of storage and removal of vehicle were approximately \$2500. As a result, CAV gave a dispose and destroy order for the goods. BCLS attempted to negotiate an outcome for the release of Lisa's goods with the landlord however he refused until Lisa paid the storage and removal costs.

Legal Assistance

BCLS spent over 170 hours assisting Lisa pursuing repairs under the RTA and defending numerous eviction notices at VCAT. If a private law firm was engaged to undertake this work the costs, at a conservative \$300/hour would have been \$51,000. The resources

incurred by the tenant and her advocate were substantial. Ultimately, Lisa was evicted. This case study illustrates some problems faced by a vulnerable and disadvantaged client who lived in sub-standard rental premises with urgent repairs needed between October 2012 and May 2013 (8 months). Even once BCLS initiated the repairs process, it took 4 months for urgent repairs to be completed.

Conclusion

There was no significant penalty imposed on the landlord for refusing to maintain the property. The landlord showed little regard for the RTA or VCAT system. He failed to make timely urgent repairs. He refused to negotiate with our service or CAV. He continued to harass and intimidate a vulnerable and disadvantaged client contrary to the law. The burden to bring about repairs and keep the property maintained lay with the tenant with no incentive or significant penalty to the landlord but for a short period of one month where the rent was directed to the Special Rent Account. Furthermore, the order for compensation awarded to the tenant remains unpaid. In any event, the landlord ended up with various orders for rent arrears and compensation for storage and removal costs against the tenant. It is our view that this case study shows that by following the processes outlined by the RTA, the tenant was not ensured sustainable, secure or safe housing.

*Names have been changed for privacy