

## Alternate forms of tenure

### Submission to the Residential Tenancies Act Review

21 September 2016

## Civil Justice Program – Victoria Legal Aid

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**Disclaimer.** This submission includes case examples based on the stories of our clients. For some case examples VLA obtained the consent of the client and de-identified the content to protect their identity and the identity of others involved in the matter. Other case examples are composite examples, which illustrate the story of many VLA clients but do not refer to a particular individual.



## About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA lawyers provide phone advice, in person advice and duty lawyer representation to tenants. We prioritise tenants who are homeless or at risk of eviction, living with disability, including mental illness, or who are otherwise socially and economically disadvantaged. We provide duty lawyer services daily in the residential tenancies list at the Victorian Civil and Administrative Tribunal (VCAT) in Melbourne and if able to do so on an as needs basis around the state. We also provide limited casework services for eligible tenants with ongoing hearings at VCAT and occasionally assist people seeking judicial review in the Supreme Court. VLA is represented on the VCAT Residential Tenancies User Group and the Federation of Community Legal Centre's Tenancy Working Group.

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## 1. Executive summary

VLA supports reforms to the *Residential Tenancies Act 1997* (RT Act) to ensure more sustainable, secure and safer housing for Victorians. This submission focuses on reforms relating to alternative forms of tenure, including parks, rooming houses and other shared rental arrangements. This submission is structured in accordance with the topics raised in the Issues Paper. As VLA set out in its 'Laying the Groundwork' paper, VLA submits that the Review should focus its attention on reforms which assist in:

- maintaining tenancies;
- preventing arbitrary and unreasonable evictions; and
- improving VCAT decision making.

In VLA's experience, it is relatively rare for residents at premises regulated by Part 4 and Part 4A of the RT Act to seek assistance in resolving concerns and disputes in relation to their residency rights. VCAT does not provide a breakdown in housing types, in its annual report figures as to the operation of the Residential Tenancies List. An overarching concern which VLA has, as the statutory authority with responsibility for access to justice in Victoria, is whether the most disadvantaged Victorians are being given meaningful access to advice, assistance and dispute resolution to realise their rights to safe and secure housing.

## 2. Summary of recommendations

In addition to the recommendations made by VLA in its previous submissions to the RT Act Review, VLA makes the following recommendations in respect of alternate forms of tenure.

### Caravan and residential parks

#### **Recommendation 1: Ban commissions on the sale of dwellings**

Amend the RT Act to prevent site owners from charging a commission on the sale by a site tenant of a dwelling.

#### **Recommendation 2: Guidance on reasonableness of rules**

Amend the RT Act to require rules to be approved by VCAT before coming into effect, and to set out clear criteria against which the reasonableness of rules is to be assessed.

#### **Recommendation 3: Harmonise rental arrears notice periods**

Amend the RT Act to harmonise the period of arrears before a notice to vacate may be issued to a resident, increasing the period to 14 days.

#### **Recommendation 4: Harmonise tests for notices to vacate based on damage**

Amend the RT Act so that a notice to vacate may be issued to a resident for damage only where they have 'maliciously' caused damage.

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## Rooming houses

### **Recommendation 5: Guidance on reasonableness of rules**

Amend the RT Act to require rules to be approved by VCAT before coming into effect, and to set out clear criteria against which the reasonableness of rules is to be assessed.

### **Recommendation 6: Harmonise rental arrears notice periods**

Amend the RT Act to harmonise the period of arrears before a notice to vacate may be issued to a resident, increasing the period to 14 days.

### **Recommendation 7: Harmonise tests for notices to vacate based on damage**

Amend the RT Act so that a notice to vacate may be issued to a resident for damage only where they have ‘maliciously’ caused damage.

### **Recommendation 8: Repeal section 94**

Repeal section 94 of the RT Act to remove the ability of rooming house owners and residents to enter into tenancy agreements in respect of the occupation of a room in a rooming house.

### **Recommendation 9: Prevent notices to vacate being issued for breach of a compliance order where the order was made in relation to rent arrears**

Amend sections 282, 307 and 317ZA of the VCAT Act to state that a notice to vacate cannot be issued under these sections where the compliance order made by the Tribunal related to a breach of the duty to pay rent under sections 112, 169 and 206ZK.

## **3. Caravan and residential parks**

When the *Residential Tenancies Amendment Bill 2010* (which introduced caravan park regulation into the RT Act) had its second reading, it was noted that the number of caravan park residents in Victoria had increased, and that security of tenure was a major concern for them.<sup>1</sup> As the issues paper notes, caravan parks can be a form of accommodation used as a last resort for people unable to secure other accommodation, and are often used as emergency or crisis accommodation for people at risk of homelessness for various reasons.

## **Sale of dwellings**

The RT Act sets out, at s 206ZZH(3), that a site owner may charge a commission to a site tenant for selling a dwelling on behalf of the site tenant. The only restriction on this is that the “scale or amount” of the commission must be disclosed to the site tenant as part of the site agreement. This

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<sup>1</sup> Victoria, Parliamentary Debates, Legislative Assembly, 12 August 2010, 3307 – 3318 (Tony Robinson).

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can mean that residential park residents face large transaction costs, and thus a substantial impediment to mobility and choice in terms of their housing, if they wish to sell their dwelling.

### **Catherine's story**

Catherine has lived in a residential park since 2001. She owns a Part 4A dwelling valued and insured for \$130,000. In 2016 Catherine decided that she wanted to sell her dwelling as she wished to move to Queensland. When Catherine advised the park owner that she intended to sell her dwelling Duncan referred her to a clause in her site agreement which stated that Duncan was entitled to a 20% commission on the sale of her dwelling. Duncan also referred Catherine to a term in her site agreement that gave Duncan 'absolute control' over the sale of the dwelling including unfettered ability to interview prospective purchasers, refuse them and negotiate with them about the purchase price for the dwelling. Following a dispute over gas mains repairs at the park and the sale of the dwelling Duncan gave Catherine a 356 day no reason notice to vacate. This means that Catherine is potentially selling a Part 4A dwelling which may be unlogged to any site agreement.

Duncan's interference with the sale of Catherine's dwelling and the insecurity posed by the 356-day notice to vacate has caused Catherine to lower her price to \$35,000.

Following receiving legal advice from Victoria Legal Aid Catherine is now determined to apply to VCAT to challenge the validity of the terms of her site agreement and restrain Duncan's behaviour. In a geographically remote area with no legal services able to assist her, Catherine risks considerable financial hardship and loss over her most valuable asset and investment.

### **Recommendation 1: Ban commissions on the sale of dwellings**

Amend the RT Act to prevent site owners from charging a commission on the sale by a site tenant of a dwelling.

### **Living issues**

A significant feature of caravan parks and residential parks is the obligation on residents to comply with rules made by the operator (under s 185 and s 206ZQ of the Act respectively). A failure to comply with the rules has the same effect as a failure to comply with a duty owed by the resident, and in certain circumstances breaches of park rules can lead to the termination of the residency right. While there is a requirement that rules must be reasonable, operators are not required to seek approval of rules, nor is there any guidance provided as to what constitutes a 'reasonable' rule. In VLA's experience, there are strong incentives for residents not to challenge the reasonableness of rules, for fear of retributive conduct on the part of operators.

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## **Recommendation 2: Guidance on reasonableness of rules**

Amend the RT Act to require rules to be approved by VCAT before coming into effect, and to set out clear criteria against which the reasonableness of rules is to be assessed.

### **Termination of residency rights**

A number of the issues raised by VLA in previous submissions responding to issues papers in the review of the RT Act, in relation to termination of tenancies, apply also to the termination of residency rights under Part 4 and 4A of the RT Act. VLA refers to the following, in particular:

- As VLA recommended in its Security of Tenure submission (Recommendation 1), ‘no reason’ notices to vacate should be abolished, or at least their use should be limited to private landlords, with a lengthier notice period applying.
- As VLA recommended in its Security of Tenure submission (Recommendation 2), a reasonableness test should be introduced so that a legal entitlement to seek possession is not exercised in a disproportionate and unfair way.
- As VLA recommended in its Security of Tenure submission, reforms should be made to the process for seeking possession for rent arrears, to make for a fairer and more efficient system (Recommendation 3).
- As VLA recommended in its Rights and Responsibilities submission, changes should be made to the ‘illegal use’ provisions to make fairer the process by which possession is sought on this basis (Recommendations 13 and 14).

As noted above, the housing position of many residents at caravan parks is precarious. In that regard, it is anomalous, and adverse to the interest in ensuring secure accommodation for disadvantaged people, that a person may be served with a notice to vacate a caravan park after falling into 7 days in arrears on rent. There is no sound reason to hold these residents to a higher standard than tenants, who must fall 14 days behind in rent payments before they can be evicted for rent arrears. A 7-day period means that a brief financial disruption in a resident’s life, or an oversight, might have the catastrophic consequence of consigning the resident to homelessness.

## **Recommendation 3: Harmonise rental arrears notice periods**

Amend the RT Act to harmonise the period of arrears before a notice to vacate may be issued to a resident, increasing the period to 14 days.

The RT Act is also inconsistent in the standards it applies to the loss of accommodation because of damage. A tenant may only be issued with a notice to vacate where they ‘maliciously’ cause damage to rented premises. By contrast, a caravan park or residential park resident may be issued with a notice to vacate on the basis of having ‘intentionally or recklessly’ caused serious damage

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(see s 302 and s 317X of the Act). There is no good reason to hold these residents to a higher and different standard than tenants.

#### **Recommendation 4: Harmonise tests for notices to vacate based on damage**

Amend the RT Act so that a notice to vacate may be issued to a resident for damage only where they have ‘maliciously’ caused damage.

## **4. Rooming houses**

The Rooming House Standards Task Force Chairperson’s report pointed out the myriad social and other problems which characterise the experience of people entering rooming house accommodation.<sup>2</sup> In the 2<sup>nd</sup> reading speech for the *Residential Tenancies Amendment Bill 2010*, the Attorney-General accepted that “some of the most vulnerable members of our community” live in rooming houses. In VLA’s experience, rooming house residents have often experienced significant periods of homelessness, and also often experience other forms of disadvantage including significant mental health issues or a history of family violence. VLA’s submissions on reforms to provisions in relation to rooming houses should be seen against this background: it is frequently the most profoundly disadvantaged who seek out rooming house accommodation to prevent, or to alleviate, homelessness.

### **Living issues**

A number of the issues raised by VLA in previous submissions, in relation to the conditions on tenancies and residency rights, are relevant here:

- As VLA noted in its submission on Rights and Responsibilities (Recommendation 12), insufficient protection is given for tenants who live with assistance animals and pets, including but not limited to situations in which tenants are experiencing family violence.
- There are large and longstanding problems, as VLA has noted in its submission on Security of Tenure (Recommendation 8), in relation to the enforceability of restraining orders, affecting the extent to which disadvantaged rooming house residents are able to meaningfully enforce the duties owed to them by rooming house operators.

As for caravan and residential parks, the obligation to comply with rules made by the rooming house operator presents a significant risk of eviction. A failure to comply with the rules is a failure to comply with a duty owed by the resident, and in certain circumstances can lead to the termination of the residency right. While there is a requirement in each case that rules must be reasonable, operators are not required to seek approval of rules, nor is there any guidance provided as to what

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<sup>2</sup> Rooming House Standards Taskforce, Chairperson’s Report, September 2009, p9.

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constitute a 'reasonable' rule. In VLA's experience, there are strong incentives for residents not to challenge the reasonableness of rules, for fear of retributive conduct on the part of operators.

### **Elena's story**

Elena was living in a rooming house in Melbourne. The rooming house was the first stable accommodation she had after six months of sleeping rough.

Elena received a notice to vacate for failing to comply with the house rules. Her landlord had specified that there is to be no alcohol in the house. Elena kept some wine in her room and sometimes liked to have one or two glasses in the common area with another resident.

VLA advised Elena that she may be able to challenge the notice to vacate on the basis that the house rule is not reasonable. However, Elena said that she could not deal with the stress of going to VCAT and opted to leave the rooming house.

### **Recommendation 5: Guidance on reasonableness of rules**

Amend the RT Act to require rules to be approved by VCAT before coming into effect, and to set out clear criteria against which the reasonableness of rules is to be assessed.

## **Termination of residency rights**

A number of the issues raised by VLA in previous submissions, in relation to the termination of tenancies, are also relevant to the question of the rights of termination of residency rights in rooming houses:

- As VLA recommended in its submission on Rights and Responsibilities (Recommendation 8), the RT Act should be amended to confirm that the protections in s 289A apply where a tenant has operated a rooming house without the consent of the landlord.
- As VLA recommended in its Security of Tenure submission, notices to leave should be abolished, given their potential for abuse (Recommendation 4).
- As VLA recommended in its Security of Tenure submission, 'no reason' notices to vacate should be abolished, or at least their use should be limited to private landlords, with a lengthier notice period applying (Recommendation 1).
- As VLA recommended in its Security of Tenure submission, a reasonableness test should be introduced so that a legal entitlement to seek possession is not exercised in a disproportionate and unfair way (Recommendation 2).
- As VLA recommended in its Security of Tenure submission, reforms should be made to the process for seeking possession for rent arrears, to make for a fairer and more efficient system (Recommendation 3).

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- As VLA recommended in its Rights and Responsibilities submission, changes should be made to the 'illegal use' provisions to make fairer the process by which possession is sought on this basis (Recommendations 13 and 14).

As noted above, the housing position of many rooming house residents, like residents at caravan and residential parks, is precarious. The fact that rooming house residents can be served with a notice to vacate after falling only 7 days in arrears places highly vulnerable people at significant risk of eviction and therefore homelessness. There is no sound reason to hold these residents to a higher standard than tenants, who are at risk of losing possession of rented premises only after falling 14 days in arrears.

### **Recommendation 6: Harmonise rental arrears notice periods**

Amend the RT Act to harmonise the period of arrears before a notice to vacate may be issued to a resident, increasing the period to 14 days.

The RT Act is also inconsistent in the standards it applies to the loss of accommodation because of damage. A tenant may only be issued with a notice to vacate where they 'maliciously' cause damage to rented premises. By contrast, a rooming house resident may be issued with a notice to vacate on the basis of having 'intentionally or recklessly' caused serious damage. There is no good reason to hold these residents to a higher and different standard than tenants.

### **Recommendation 7: Harmonise tests for notices to vacate based on damage**

Amend the RT Act so that a notice to vacate may be issued to a resident for damage only where they have 'maliciously' caused damage.

## **Signing tenancy agreements in rooming houses**

Section 94 of the RT Act is confusing, and it is the experience of VLA lawyers that most rooming house residents do not understand the consequences of signing a tenancy agreement in a rooming house. Most rooming house residents are accustomed to providing two days' verbal notice of intention to vacate when they want to leave the house. Those that have signed a tenancy agreement generally do not understand that they can no longer provide that flexible notice until a rooming house owner explains that a resident will be breaking the lease if they do so. Duty lawyers attending VCAT are commonly approached by rooming house residents explaining that they are 'stuck' in a rooming house, or seeking advice in relation to a claim against their bond by an owner alleging lease breaking, when the resident believes they have given the required two days' verbal notice.

While there is no data on the number of tenancy agreements taken up in rooming houses, or how many residents have increased their security of tenure by the use of such agreements, it is the experience of VLA that most residents require the flexibility of being able to give two days' verbal

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notice. This is in part due to a resident having no control over who is permitted to occupy other rooms in the house, the offer of more attractive accommodation being made or due to the frequently chaotic lifestyles of disadvantaged people occupying rooming houses. While fixed term agreements would appear to provide residents with greater housing security, on balance being bound to such agreements tends to cause residents greater financial harm as the agreements are commonly breached.

Moreover, the protections provided to a resident by the fixed term tenancy provisions are limited as they preclude eviction during the fixed term only when a landlord's circumstances are the cause of the eviction. Section 266 of the RT Act stipulates that, during the fixed term, a landlord is prohibited from serving a notice on the basis that they want to renovate, demolish, sell or allow themselves or a family member to occupy the property. While these are common reasons for a landlord to evict a tenant, therefore increasing the desirability of a fixed term lease for a tenant, it is VLA's experience that it is extremely rare for a rooming house owner to seek to evict a resident due to one of the above changes in circumstances of the owner.

Notices to vacate that allege tenant fault, such as danger, damage, non-payment of rent, breach of compliance order, illegal purpose or sub-letting without consent are not invalidated by the existence of a fixed term tenancy agreement.

Two further complications commonly arise in respect of s 94. The first is the type of agreement envisaged by s 94(2), as VCAT generally considers that any fixed term agreement ought to be construed as a tenancy agreement. The second is that, in the event that a tenancy agreement is entered into, the rooming house provisions apply to the common areas, but not the room itself. This often results in residents being unsure as to which part of the RT Act they must rely on when attempting to exercise rights to prevent a breach of duty by the owner.

### **Recommendation 8: Repeal section 94**

Repeal section 94 of the RT Act to remove the ability of rooming house owners and residents to enter into tenancy agreements in respect of the occupation of a room in a rooming house.

### **Compliance orders and rent arrears**

The RT Act sets out a mechanism for landlords to recover possession where a tenant or resident does not pay rent. This typically involves the giving of a notice to vacate for non-payment of rent or site fees. For Part 4A residents, however, a park owner will need to issue successive breach of duty notices (relying on the duty to pay rent under section 206ZK) and then issue a notice to vacate under section 317ZB for successive breaches of the duty to pay rent. Critically, each of these processes of seeking possession attracts the operation of section 331 of the RTA, giving the

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Tribunal a discretion not to make a possession order where satisfactory arrangements can be made to ensure that there is no further financial loss to the landlord.

For Part 3, 4 and 4A residents, however, the Act imposes a statutory duty to pay rent, creating an alternative method of eviction for rent arrears which does not attract the Tribunal's discretion under section 331. That is, a rooming house owner or park owner could instead issue a breach of duty notice for the resident's non-payment of rent, and then obtain a compliance order from VCAT. If the resident remains in rent arrears after the compliance order is made it would be possible to issue the resident notice to vacate for breach of a compliance order. As discussed in VLA's Security of Tenure submission paper,<sup>3</sup> section 332 of the Act provides an extremely rigid test which makes it difficult for residents to avoid eviction for breach of a compliance order. Section 332 provides that VCAT must make a possession order unless it is satisfied that that: (a) the breach of the compliance order was trivial or has been remedied, *and* (b) there will not be a further breach of duty *and* (c) the breach of duty is not a recurrence of a previous breach of duty. If the tenant is unable to persuade the Tribunal on all of these factors, VCAT must make a possession order. In the context of a compliance order made for non-payment of rent, this could result in situations where VCAT would be required to make a possession order even where satisfactory arrangements can be made to ensure the no further financial loss to the landlord.

Tenants do not have an equivalent duty to pay rent. This means that owners of Part 3, 4 and 4A tenures are given an additional mechanism for evicting a resident which is unaccompanied by the safeguard of the discretion reposed in the Tribunal by section 331.

VLA would support amendments to the Act to prevent notices to vacate for breach of a compliance order being issued where the breach related to a breach of compliance order to pay rent.

**Recommendation 9: Prevent notices to vacate being issued for breach of a compliance order where the order was made in relation to rent arrears**

Amend sections 282, 307 and 317ZA of the VCAT Act to state that a notice to vacate cannot be issued under these sections where the compliance order made by the Tribunal related to a breach of the duty to pay rent under sections 112, 169 and 206ZK.

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<sup>3</sup> *Victoria Legal Aid's Submission on the Security of Tenure Issues Paper*, p. 14-15.