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18 December 2019

Mr Simon Cohen
Deputy Secretary – Regulation
Department of Justice and Community Safety

Dear Mr Cohen

Submission on the Residential Tenancies Regulations 2020

Victoria Legal Aid (**VLA**) welcomes the opportunity to contribute to the current public consultation process regarding the proposed Residential Tenancies Regulations 2020 (**regulations**) that accompany Victoria's updated *Residential Tenancy Act 1997* (Vic) (**Act**).

Through our work with approximately 100,000 Victorians each year (see **Annexure 1**), we see how important these regulations are for delivering increased safety, security of tenure and privacy for private, public and community renters. Delivering these things will improve the lives of millions of Victorians and create benefits for rental accommodation providers, the Victorian economy and healthy local communities.

We congratulate the government on the substance of the regulations. We consider that they have the potential to significantly increase the safety and quality of housing for Victorian renters. We have focused our submission on a number of areas where we think there could be changes that would benefit clients who are experiencing economic and social disadvantage, family violence or discrimination in the housing market. These include:

- Minimum standards to improve the health and safety for Victorian renters
- Rental provider consent to safety modifications for victims of family violence
- Preventing discrimination in the rental market
- Compensation for the stress and inconvenience of open house inspections
- Lack of clarity about the obligation to have a property professionally cleaned
- Narrowing the information which must be disclosed to residents and renters about drugs of dependence
- Improvements to the proposed Notice to Vacate and Notice to Leave.

We would welcome the opportunity to discuss these recommendations further and look forward to working with you and your team as the crucial changes to the Victorian rental landscape are implemented next year.

Victoria Legal Aid and our work with Victorian renters

In 2017–18, VLA provided 4,296 information services, 2,372 advices, opened 79 files and appeared in 301 hearings in the Victorian Civil and Administrative Tribunal (**VCAT**) in residential tenancy matters.

VLA provides information and advice to renters and rooming house residents through our Legal Help contact centre. Where renters or residents are at risk of eviction based on allegation of fault, we provide further advice, casework or duty lawyer assistance.

VLA staffs a duty lawyer service at VCAT in Melbourne every day and one day a week at the Neighbourhood Justice Centre. In these venues, our lawyers provide representation in priority matters involving risk of eviction, family violence, or unreasonable conduct by rental providers and rooming house operators.

We also provide legal assistance to renters and residents across regional Victoria, including from our Bendigo, Ballarat, Mildura, Warrnambool, Morwell, Bairnsdale, Geelong, Horsham and Shepparton offices.

It is this work with thousands of renters and residents across Victoria that informs our ongoing contribution to rental reform in Victoria.

Minimum standards to improve the health and safety for Victorian renters

VLA strongly supports the proposed minimum standards. Through our duty lawyer service we regularly assist renters who have problems with:

- Faulty locks or insecure premises
- Insufficient, faulty or sub-standard kitchen facilities
- Premises that are not structurally sound, or not weatherproof due to gaps or holes in the roof or walls, broken windows and structural faults
- Significant mould and damp that resist remedial action
- Inability to moderate external temperature extremes due to lack of heating, insulation and ventilation.

These occur most regularly with clients experiencing social and economic marginalisation, and who have limited bargaining power in the market. In our experience, these conditions contribute to our clients' social isolation and amplify poor mental and physical health outcomes. They are unacceptable in a modern housing market.

For this reason we strongly support all of the proposed minimum standards. We make two further comments.

Application of minimum standards to long-standing tenancies for community housing providers and the Office of Housing

We understand that the transitional provisions only require newly leased properties to meet the minimum standard requirement. For long-standing community housing and Office of

Housing tenancies the minimum standards requirements will not apply until renters vacate. We consider it essential that all public or community housing comply with these standards. In our experience there is a significant range in quality of community and Office of Housing properties, particularly in regional areas. We are concerned there are some properties that would not meet the standard, particularly where community housing providers have taken over old Office of Housing stock. We would welcome a commitment by the government to require these providers to comply with these standards in all properties within three years.

Ventilation, mould and respiratory health problems

We consider that adequate ventilation should be included as a minimum standard prescribed by the regulations. It is an important measure for the prevention of damp and mould, and managing temperature, and note that "adequate ventilation" is included as part of both the Tasmanian[1] and South Australian[2] minimum standards. VLA recognises the significant health risks mould and damp pose to renters, as an atmospheric condition which can cause or exacerbate asthma or respiratory tract infections. Adequate ventilation ensures that rental properties will be hygienic and safe for those with disability, children and others in the community at risk from the potential respiratory effects of mould and damp. It also assists to moderate temperature extremes in properties.

Rental provider consent to safety modifications for victims of family violence

VLA supports the considerable efforts made by the Department of Justice and Community Safety (**the Department**) to implement the recommendations of the Royal Commission into Family Violence (**RCFV**). VLA acknowledges that the Department, in its Regulatory Impact Statement (**RIS**), identified and took into account recommendation 116 of the RCFV[3] which suggests amendment be made to tenancy laws to prevent rental providers from unreasonably withholding consent to renters' requests for safety modifications.

We are concerned that the proposed regulations relating to security modifications do not provide sufficient scope for simple modifications that could quickly increase the safety of those at risk of family violence. Changes that ensure a person's safety, including the installation of a security system, can only be made with a rental providers' consent. If that consent is unreasonably withheld, then an application can be made to VCAT.

As it stands, the modifications that a renter can make without the permission of the rental provider include permanent wall fixtures, but do not allow for the installation of home security or other security measures such as sensor lights. We consider that where a renter requires basic security features in their home to quickly prevent or stop family violence from occurring there should be a pathway to take this action quickly without the residential rental provider's consent.

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[1] *Residential Tenancy Act 1997* (Tas), section 36O.
[2] *Housing Improvement Regulations 2017* (SA), regulation 15(d).
[3] Recommendation 116 includes a recommendation that as part of the Department of Justice and Regulation's review of the *Residential Tenancies Act 2006* (Vic) it consider amending the Act to prevent a rental provider from unreasonably withholding consent to a request from a renter who is a victim of family violence for approval to reasonably modify the rental property in order to improve the security of that property.

As the RCFV identified, a period of separation where a partner is excluded from the home is a time of heightened danger for victims, where the potential for violence by the excluded partner is likely to escalate.[4] Requiring a renter to seek the rental provider's consent in these circumstances will delay the renter improving the security of their home, at a time when security is needed most.

The policy justification set out in the RIS for limiting the ability to make these changes is that:

> " … such modifications may penetrate the building structure and/or infringe on the privacy of neighbours, particularly in class 2 buildings and community housing."[5]

We note that regulation 26 allows for modifications that penetrate the building structure without the rental provider's consent in other circumstances, such as to install picture hooks. We also note that there is a specific requirement in regulation 28 that security systems do not impact on the privacy of neighbours. We consider that the regulations could be amended to facilitate simple security modifications without the need for rental providers' consent.

We note that Tenants Victoria have proposed a definition of "safety measure" to cover a set of modifications that might be capable of being made without the consent of the rental provider. We agree that there would be a benefit in setting out particular modifications under the definition of "safety measure" that can be made or installed without a rental provider's consent in certain circumstances. We would suggest the definition of "safety measure" specifically refer to a requirement that the safety measure may not interfere with the privacy of neighbours. The definition of "safety measure" could include security cameras, alarm systems, sensor lights, window locks and lockable letter boxes.

We recommend making greater allowance for simple security related modifications by:

- Adopting the approach recommended by Tenants Victoria in defining "safety measures" and considering the above suggestions for what might be included;
- Amending regulation 26(a)(i) so that it allows for "installation of picture hooks, screws for <u>a safety measure</u>, wall mounts, shelves or brackets on surfaces other than brick walls."; and
- Including an additional subsection which allows for the installation of a safety measure on brick walls, so long as it is not permanently attached.

[4] *Royal Commission into Family Violence: Report and Recommendations,* Volume 1, 21.
[5] *Regulatory Impact Statement – Residential Tenancies Regulations 2020,* 91.

Preventing discrimination in the rental market

Protected attributes and application forms

Barriers to the private rental market, including unlawful discrimination, are a significant cause of disadvantage for many Victorians. As the Department recognises, the Victorian Equal Opportunity and Human Rights Commission's report *Locked out: Discrimination in Victoria's Private Rental Market* analysed the findings of survey results of 165 people who sought accommodation.[6] The report found that:

- Survey participants had experienced discrimination in the private rental market based on characteristics which are protected under the *Equal Opportunity Act 2010* (Vic) (**EO Act**), including race and disability
- Participants reported that rental agents and landlords made decisions about their suitability as tenants based on myths and stereotypes
- It is difficult to prove discrimination as rental agents give other reasons for the refusal
- There appears to be a general lack of awareness among consumers about their rights
- Discrimination has wide ranging consequences for individual health and wellbeing.

In VLA's practice experience, tenants report facing discrimination based on their age, race, gender, family responsibilities and disability. Many renters are of the view that protected attributes influence decision-making by rental providers and real estate agents about who to rent properties to. It is very difficult to prove such discrimination to a standard sufficient to bring a claim under the EO Act.

The standard application form for rental applications usually includes information by which real estate agents and prospective rental providers can identify protected attributes under the EO Act.

In the RIS, it is noted that it is difficult to distinguish between legitimate purposes and secondary discriminatory purposes, and that it is not proposed to prohibit a relevant question where there could be a legitimate reason for requesting the suggested information. In our view, the request for such information should be discouraged unless it is necessary. For example, it is difficult to see how information about an adult's age could be sought for any other reason but to decide their application based on assumptions about their capacity to comply with their obligations under the Act.

We reiterate our view that that the information available to rental providers when deciding on suitable renters should be limited where it involves the disclosure of protected attributes.

Given the preferred approach taken in the RIS, we recommend that regulation 15 be amended so as to only allow the request for disclosure of that information where a reason for the disclosure is identified.

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[6] Victorian Equal Opportunity & Human Rights Commission, *Discrimination in Victoria's Private Rental Market* (2012).

We recommend the following be included as further information that should not be required to be disclosed:

> Any question that requires the disclosure of a protected attribute under the *Equal Opportunity Act 2010* (Vic), except for questions relating to an exception, exemption or special measure applicable under the *Equal Opportunity Act 2010* (Vic),[7] and only where the reason the disclosure is necessary is set out in the application form.

Statement of Information for rental applicants

We have also reviewed the draft "Statement of Information for rental applicants" and provided some suggested amendments in mark-up in Annexure 2. These proposed changes have been developed in partnership with our specialist Equality Law Program and they aim to clarify the scope of the protection available under discrimination laws. The proposed changes include amendments to:

- Make sure **indirect discrimination** is also covered
- Remove the reference to "**employment activity**", which in our experience is limited in its definition to making an inquiry about a person's employment entitlements, and would not apply in a rental context. Its inclusion may cause confusion
- Clarify **legislative references**, for example by removing the reference to the *Australian Human Rights Commission Act 1986* (Cth), as it is focuses more on process and the other Acts set out where the contraventions would occur
- Include an example of **discrimination on the basis of race**, which we understand from our practice experience to be a common form of discrimination in the rental market.

Compensation for the stress and inconvenience of open house inspections

Victorian renters commonly seek advice through VLA's duty lawyer service about their rights and options in relation to open house inspections. They report feeling stressed and frustrated about inspections, including because:

- They usually occur outside work hours, and renters are likely to be at home at these times. As such it is most likely to occur whether the use of the property by the renter is at its most intensive, and when the inconvenience for renters and their families is at its highest.
- They usually allow for largely unsupervised access to the renter's home, and may require removal and replacement of personal items both before and after the inspection.
- They require a renter and their family to allow unknown people entry to their home in a way that causes anxiety and interferes with a person's privacy.

[7] The regulations should also note that these exceptions and exemptions could include: information about a renter's parental status if the design or location of the accommodation is inappropriate for occupation by a child, or information about a renter's race if the accommodation is owned by a social housing provider which provides a special measure to Aboriginal and Torres Strait Islander peoples to improve access to suitable housing.

- Properties are required to be "reasonably clean", however renters regularly advise that they are cleaning the property to a standard beyond the "reasonably clean" benchmark set by the Act, either due to feeling self-conscious at large numbers of strangers entering their home, or because of pressure from the sales agents to make the property "showroom condition", or a mixture of both.

We note that there is reference in the RIS to the case of *Hargans v Rochetti*,[8] where VCAT awarded the renter one day's rent for each day on which an open for inspection was conducted, on the basis that it breached the renter's quiet enjoyment. In the RIS, it was claimed that the circumstances of the renter in that case – who had to both clean in preparation, as well as put away belongings moved by the agent – were atypical. In our experience, the facts in this case are in fact common, and it is an example of the type of situation our clients frequently encounter.

In our view, a day's compensation is an amount that properly balances the inconvenience and stress open for inspections place on a renter and their family, as well as the interference with their contractual and proprietary interest.

Lack of clarity about the obligation to have a property professionally cleaned

VLA acknowledges the Department's efforts to standardise tenancy agreements and commends the continuing commitment to prevent non-standard lease terms which are invalid, harsh and unconscionable, or unenforceable, and result in confusion about parties' legal rights.

We consider that the inclusion of regulation 12 referring to circumstances where there is a requirement for a renter to arrange professional cleaning of a property at the end of an agreement will be a source of confusion and dispute between parties as it is not clear when the obligation will arise. It will also complicate the task of legal services such as ours providing advice to renters that provides them certainty about their obligations and potential liability, particularly in relation to bond disputes.

Our particular concerns with the current wording are that:

- Regulation 12 does not make it clear when the obligation to professionally clean will arise, except by reference to the condition of the property when the renter moved in. How is a renter to determine when they have an obligation to arrange a professional clean? Will the obligation arise for all premises, or just some, and how does one identify when it arises? Does it arise regardless of the renter's efforts to clean the rented premises, so that a renter who has left the property in a reasonably clean condition can still be required to pay for a professional clean? We are concerned that this lack of clarity will lead to unnecessary disputes that will require resolution by VCAT.

- Any term which requires the renter to arrange cleaning of the rented premises to a standard beyond the duty to keep the premises "reasonably clean" creates an obligation that goes beyond the duty of renters under the Act, and should be treated as an invalid or unenforceable term under section 27 of the Act. We do not support

[8] [2015] VCAT 1779.

> a prescribed term that modifies the statutory obligations of the parties in the Act, particularly where its effect is to increase uncertainty for parties about their obligations.

We also note that regulation 12(2) as currently drafted makes a renter liable for the cost of having the property professionally cleaned, regardless of what that cost is. In our view the renter should be liable only for the reasonable cost of any professional clean. For these reasons, we recommend that no regulation be made in relation to this issue. In the event that a regulation is made, we propose an amendment to make clear that professional cleaning services may only be required where a rented premises are not left in a reasonably clean condition, and that only the reasonable costs can be claimed.

We recommend the following wording:

> *The residential rental provider must not require the renter to arrange professional cleaning unless the renter has vacated the premises and at the time the rented premises are vacated, they are not in reasonably clean condition.*

We recommend the following wording for regulation 12(2)

> *If professional cleaning of all or part of the rented premises is necessary because the property is not reasonably clean –*
>
> *(a) the renter must have all or part of the rented premises professionally cleaned;*
>
> *or*
>
> *(b) the renter must pay the reasonable cost of having all or part of the rented premises professionally cleaned.*

Narrowing the information which must be disclosed to renters and residents about drugs of dependence

We note the inclusion of a requirement that a rooming house operator or rental provider must advise prospective residents or renters if the rooming house is known to have been used for storage of a drug of dependence, and in the case of renters, use of a drug of dependence. The definition of *drug of dependence*, is set out in the *Drugs, Poisons and Controlled Substances Act 1981* (**DPCS Act**) and includes a range of substances with legitimate medical uses that have the potential to be found in any home where a person is prescribed medication. As *storage* is not defined, we understand it to have its common usage, meaning to keep a quantity of something available for use. As *use* also adopts the definition in the DPCS Act, it is the introduction of a substance into the body. As such, the disclosure requirement will be engaged by an extremely broad range of every-day circumstances that would not seem to be of any legitimate interest to prospective renters or residents, and would be difficult for rental providers or rooming house operators to comply with. Even where they did comply, the disclosure conveyed would not include sufficient information to make any informed decision about the impact that the activity might have on the residency.

We also consider that knowledge of the presence or use of a drug of dependence on premises in the past is itself not something that is likely to be relevant for a prospective resident, even where the drug of dependence might be an illicit substance. On its own, the presence or use of an illicit substance on the property previously would have no impact on a future resident's enjoyment of the property. Given prospective residents may be able to identify past residents through receipt of mail, the disclosure of this information also seems an unnecessary interference with a person's privacy.

We recommend that reference to storage or use of a drug of dependence be removed on the basis it is currently too broad, and if narrowed, it involves the disclosure of information that has no clear impact on subsequent residents.

Improvements to the proposed Notice to Vacate and Notice to Leave

VLA welcomes the focus on informing renters of their rights in the prescribed form of the Notice to Vacate and Notice to Leave, and the inclusion of appropriate referrals for people to receive legal assistance (at Form 6 of the Schedule to the Draft Regulation). Major providers of tenancy legal assistance in Victoria, Justice Connect Homeless Law, VLA and West Heidelberg Community Legal Centre, have together identified the proposed improvements marked-up in the documents at Annexures 3 and 4.

We support these changes on the basis that they increase clarity for recipients of the notices about their rights, obligations and options for obtaining legal assistance.

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We congratulate the Government on the landmark changes to the Victorian rental landscape. The regulations have an important role to play in making sure the conditions, safety and rights for people renting in Victoria are improved in the way intended by the reforms.

We look forward to continuing to work with you as these significant reforms are implemented in 2020.

Please contact us on [redacted] or [redacted] if you would like to discuss the recommendations in this submission in more detail.

Yours faithfully

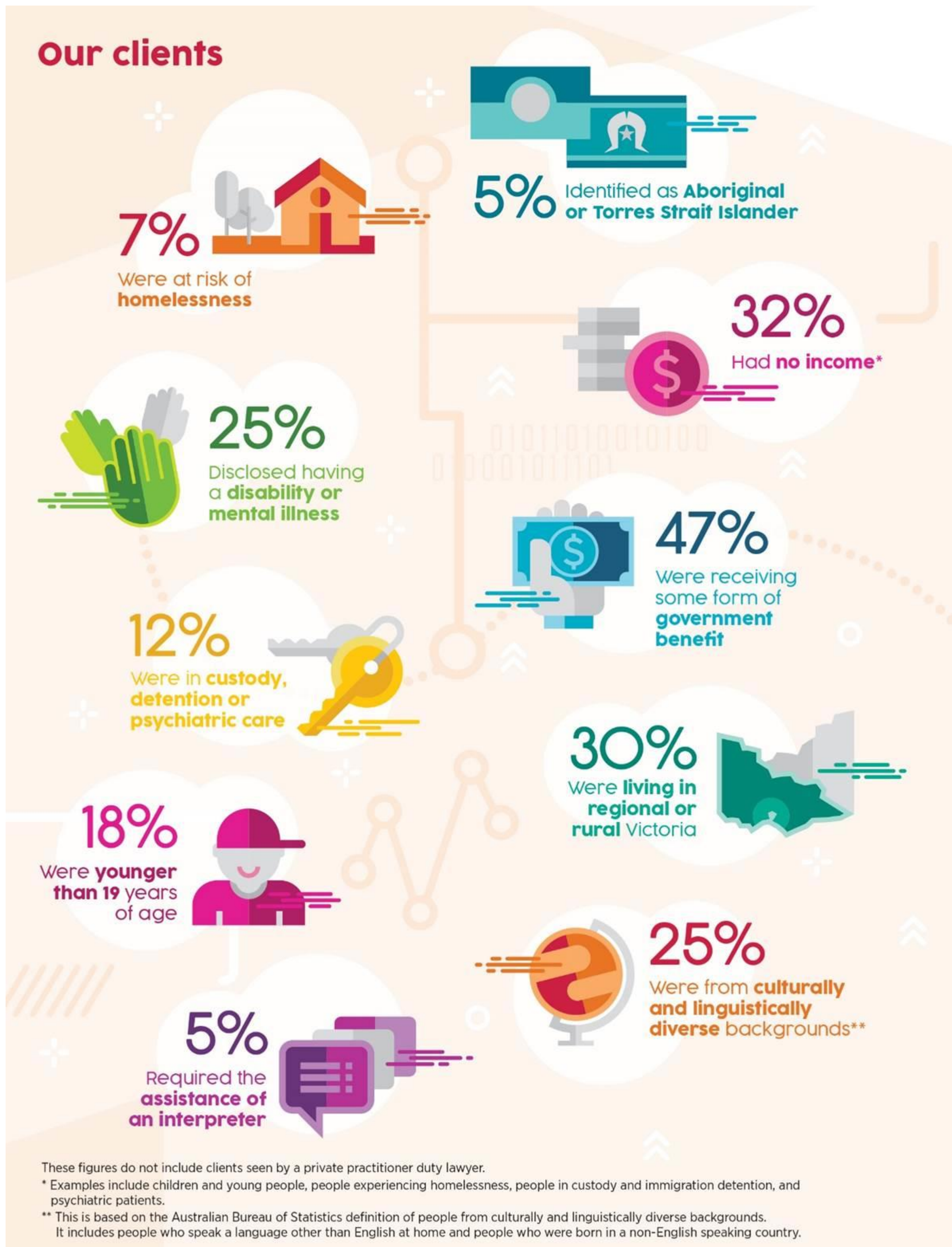
MILES BROWNE

Deputy Managing Lawyer
Economic and Social Rights
Civil Justice Program

JOEL TOWNSEND

Program Manager
Economic and Social Rights
Civil Justice Program

Annexure 1: A snapshot of Victoria Legal Aid's clients



Annexure 2: Marked-up version of proposed “Statement of Information for rental applicants”

Annexure 3: Marked-up version of proposed “Notice to Vacate a Rented Premises”

Annexure 4: Marked-up version of proposed “Form 24 – Notice to Leave”