Residential Tenancies Act Review – *Heading for Home*

Submission in response to the Options Discussion Paper

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With many thanks to James Leckie, Ebony Bake, Michelle Chumbley, and our team of volunteers.

1. Introduction

1.1 About WEstjustice

WEstjustice was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service, and the Wyndham Legal Service. WEstjustice is a community organisation that provides free legal assistance and financial counselling to people who live, work or study in the Maribyrnong, Wyndham and Hobsons Bay areas.

WEstjustice has a particular focus on working with newly arrived communities. More than 53% of our clients over the last five years spoke a language other than English as their first language. Approximately one quarter of our clients are newly arrived, having arrived in Australia in the last five years. Furthermore, our refugee service in Footscray alone has seen approximately 700 clients in the past five years.

1.2 About the WEstjustice Tenancy Program

WEstjustice employs two tenancy lawyers who provide specialist advice, casework and representation to vulnerable and underprivileged tenants who live in the west of Melbourne. In the past five years, WEstjustice's tenancy program has assisted over 1,100 clients with almost 1,800 matters. Accordingly, we form part of the Tenancy Advice and Advocacy Program ('TAAP') agency system of independent third-party negotiation and representation outlined at page 16 of the Issues Paper.

Our catchment area includes suburbs in Melbourne's inner-west (including Footscray, Sunshine, and Braybrook), and Melbourne's outer-west (including the fast growing areas of Werribee, Wyndham Vale, Hoppers Crossing and Melton). Whilst we primarily assist tenants in private tenancies, we also advise tenants who live in rooming houses and residential parks.

Our tenancy program has a particular focus on working with clients from refugee and non-English speaking backgrounds. We work closely with local refugee settlement agencies and community development workers, and almost 60% of our tenancy clients in the past two years were born outside of Australia. Our other measures of vulnerability or disadvantage, reflected in our client base, include:

- Receipt of a Centrelink payment or a low income;
- Indications or disclosure of family violence;
- Intellectual or physical disability;
- Lack of formal education, including a low level of written or financial literacy;
- Mental health issues;
- Young people "couch surfing" and facing precarious accommodation.

1.3 Our Response to this Report

WEstjustice provided extensive responses to each issues paper released to date by the Victorian Government's Residential Tenancies Act Review[1]. We are encouraged to see that recommendations put forward in those responses, and the submissions of other tenancy advice, advocacy and representation stakeholders, have been considered and included in the Options Discussion Paper. We note that that given the balance of stakeholders there are also a number of options that reflect the preferences and concerns of investors in the sector, some of which we respectfully but strongly disagree with.

For the purposes of time and length, we have condensed our priorities in this response to the options and consultation questions we think are of greatest importance to the tenants we see through our service. Each section refers to the relevant options and consultation questions it is intended to address.

While the experience of our client base is not necessarily the experience of *all* individuals who rent in Victoria, we believe it is representative of those who have the most to gain or to lose from changes to the Residential Tenancies Act. Similarly, our client base is most likely to face the risk of homelessness – a significant public expense that falls outside of many discussions of affordability and stability in the rental sector, but one which a recent Australian Housing and Urban Research Institute suggested represents an annual cost to government services of nearly $30,000 per person experiencing homelessness per year.[2] With more than 95,000 Australians recorded as homeless by service groups in 2014-15, this is a cost virtually all sector participants bear in terms of taxation and reduced provision of services elsewhere.

Even beyond the most at-risk tenants, residential tenancy law that fails to include adequate and appropriate measures for security of tenure is law that can have broader social and economic consequences. Between 1994-5 and 2013-4 the number of Australian households that rent increased from 25.7% to 31%.[3] According to the national Choice Australian Rental Market report for 2017, 48% of renters have a personal income of less than $35,000, and over half of renters have moved homes three times or more, including 42% of those aged under 35.[4] Slightly fewer than one in ten renters have moved homes 11 times or more. Crucially, nearly a third of renters indicate that they did not leave their last rental on their own terms.[5]

[1] Our previous submissions to the *Fairer Safer Housing* report can be accessed at http://www.westjustice.org.au/publications.
[2] Kaylene Zaretzky et al, *The cost of homelessness and the net benefit of homelessness programs: a national study,* AHURI Final Report No 205 (2013). Accessed online at https://www.ahuri.edu.au/research/final-reports/218 on 15 February 2017.
[3] Australia Bureau of Statistics, *4130.0 – Housing Occupancy and Costs, 2013-14 – Key Findings.* Accessed online at http://www.abs.gov.au/ausstats/abs@.nsf/mf/4130.0 on 13 February 2017.
[4] Choice et al, *Unsettled: Life in Australia's Private Rental Market*, February 2017, p.4. Accessed online at https://www.choice.com.au/money/property/renting/articles/choice-rental-market-report on 15 February 2017.
[5] Ibid, p. 9.

Moving house is a significant financial imposition on households. The cost of transport and storage may run into the hundreds of dollars per each move. One third of Victorian renters, either by consent or by a Victorian Civil and Administrative Tribunal (VCAT) order, do not get their bond back in full. On a long-term basis, unstable housing brought about through frequent moves has correlated with adverse impacts on children's health and socio-emotional outcomes.[6] Over time, these trends can amount to an erosion of the wealth that people on lower incomes could otherwise use to become homeowners, to meet their household's health and education needs, or to invest or go into business themselves.

[6] AHURI Research & Policy Bulletin No.171, *What Impact Does A Child's Housing Have On Their Development And Wellbeing?* June 2014. Accessed at https://www.ahuri.edu.au/__data/assets/pdf_file/0012/3063/AHURI_RAP_Issue_171_What-impact-does-a-childs-housing-have-on-their-development-and-wellbeing.pdf on 20 February 2017.

2. Executive Summary

WEstjustice has followed the Options Discussion paper in general order of proposed options and consultation questions, but confined itself to those its client base has recurring experience with and that we see as most essential for futureproofing Victorian tenancy legislation.

We welcome the proposed changes to the use of residential tenancy databases to reflect instances of family violence or serious hardship, and suggest that Queensland tenancy law's provisions on the removal of information be partly adapted for Victoria. We note that economic abuse should also be captured when trying to protect victims of family violence from unjust database listing.

We endorse the Option Discussions Paper's proposals for the consistent provision of service details during a tenancy. A landlord's details should always be available to a tenant in the event that an agent ceases to act. A tenant should not be powerless to enforce a VCAT order or seek performance of repairs just because they have no details for a landlord.

We believe a comprehensive standard form lease agreement should be introduced for Victoria, modelled closely on the New South Wales Office of Fair Trading's existing template. This would allow for greater clarity for a tenant at the outset of the tenancy and ensure they enter into an agreement well-informed of their rights and responsibilities.

We continue to believe that the current breach of duty process under the RTA is cumbersome and in some cases unjust. We believe that the 'three strikes' process for terminating a tenancy for successive breaches should be abolished, and the right to seek a compliance order (and enforce it) should be retained. The current breach of duty process creates a confusing secondary process for addressing repairs to a property. We suggest that repairs be removed from the breach of duty process as it stands, and that no additional duties be added.

WEstjustice endorses longer lead-in times for landlords to exercise a right of entry under the RTA, and believes that more intrusive forms of entry, such as open homes and photography for advertising purposes, should be on a consent-only basis.

Due to the large number of tenants we encounter who have broken leases due to significant hardship (and do not have adequate information or opportunity to apply for a reduction of a lease first), we strongly back some form of relief under the RTA for tenants who need to terminate a lease early for reasons beyond their control. There should be an additional uniform right to early termination of a fixed-term lease in a prescribed set of circumstances, such where a tenant needs to go into assisted care.

We favour the removal of the RTA's current 'high value' exemptions for bond and rent in advance, and favour a streamlined process for tenants to retrieve bonds and for landlords to raise disputes where required. We believe provision should be made for amounts of a bond that are not in dispute to be released to a tenant at once. We also strongly endorse the introduction of a maintenance and repair bond on a landlord's behalf, but believe that the Options Discussion Paper's suggestion of a 'pets bond' would create unfair outcomes. We also favour a prohibition on landlords and agents being able to solicit or accept higher rental bids than those advertised.

We believe that condition reports should ideally be completed prior to entering into a lease, and that where such an inspection is not possible, a 'cooling-off' period after signing a lease should apply. We strongly commend and endorse the implementation of minimum health, safety and amenity standards for vacant premises. This would be a hugely beneficial development for Victorian tenants, with benefits to their health, comfort and security of tenure.

With regards to the current processes in place for termination of tenancies, we continue to advocate strongly for the repeal of 'no-reason' termination under the RTA. Ending a tenancy on an 'at will' basis is at odds with other essential protections in tenants' lives, and the current provisions challenging the retaliatory issue of a notice are inadequate. We oppose the proposal to replace the current notice to vacate and possession regime with one of 'termination orders', which we envisage will adversely affect tenants and the administration of VCAT Residential Tenancies List matters. Instead, we believe that notices to vacate be redesigned to better indicate a tenant's rights and responsibilities on receipt.

We oppose the introduction of a broad reason for termination on the basis of 'antisocial behaviour', and recommend that, with amendment, landlords continue to use the bases for termination currently available to them under the RTA. We approve of modifications to the possession process for arrears where landlords and agents make an attempt to arrange a payment plan first, but believe the Options Discussion Paper's proposal for addressing subletting and assignment without consent is too broad. We propose an alternative, holistic basis on which subletting and assignment without consent be evaluated by VCAT.

3. Options Paper Responses

3.1 Residential Tenancy Database Reform

Approve Options 4.4, 4.5, 12.6, 12.7, 12.8

Consultation Questions: 16, 17, 221

The current RTA legislation is prescriptive as to on what basis tenants may be listed on a residential tenancy database, what kind of information may be included, and the steps an individual may take to correct such information.

As Choice's Australian rental market report demonstrated, misunderstanding about how residential tenancy databases operate still persists. One in seven renters do not make a complaint or request a repair out of fear of 'blacklisting' or other adverse consequences – a fear that does not reflect Victorian or other Australian database provisions.[7] Often, our client base also express reluctance to seek repairs, compensation, or challenge a notice to vacate out of the belief they may be entered on a database. On rare occasions, we have seen tenants who have been given inaccurate information by landlords and agents – for example, that *any* possession order and *any* breach of duty notice made against a tenant will result in a database listing.

We believe that tenants' confidence in and understanding of tenancy databases would be enhanced by implementing **Option 4.4**. An entitlement to freely access a copy of a tenant's listing would make it easy for a tenant to establish what information is held about them, and whether it is accurate and appropriate.

We also strongly support **Option 4.5** and **Options 12.6, 12.7 and 12.8**. A general right to apply to VCAT to make an order mandating removal where a database listing is unjust in the circumstances (including family violence and hospitalisation) appears appropriate in light of the similar legislation elsewhere in Australia. We see no compelling reason for Victoria's sector to avoid a similar standard.

For the implementation of Option 4.5, we would recommend an adapted version of section 461 of the *Residential Tenancies and Rooming Accommodation Act 2008 (QLD),* with **additional criteria** that the Tribunal have regard to "the conduct of the landlord or their agent".

This would capture situations where (for example) a possession order is made for rent arrears where the tenant abandons the property or withholds rent following serious breaches of duty by a landlord (for example, failure to complete repairs or permit quiet enjoyment). It is noted that tenants have no right to withhold rent by law no matter the action of a landlord, but we have nevertheless encountered situations in which highly vulnerable (and distressed) tenants have done so and subsequently been evicted. The additional criteria would spare tenants additional hardship or punishment where there were unique aggravating circumstances.

Options 12.6, 12.7 and 12.8, working in tandem, should go a long way to adequately addressing the issue of victims of family violence being listed on tenancy databases and enabling the recommendations of the Royal Commission on Family Violence. We would stress that the

[7] Ibid, p.15.

implementation should also pay heed to instances of **economic abuse** (for example, where an arrears and/or possession listing arises from a perpetrator withholding money at will or exploiting a victim's own financial resources, this should be removed).

3.2 Appropriate Details for Legal Proceedings

Support Option 4.8A
Oppose Option 4.8B
Consultation Question 21

WEstjustice noted in our *Rights and Responsibilities* submission that many landlords provide insufficient information for purposes of legal proceedings.[8] Often, tenants will present with leases that do not list the landlord's name, or list it incorrectly. In the worst cases, we see landlords fail to provide their address for service, or where they cease using an agent, fail to comply with section 66 of the RTA by updating their details.

In effect, this makes it troublesome for tenants to enforce their rights at VCAT, especially when trying to have urgent repairs carried out. Further difficulties arise where tenants attempt to enforce a judgement debt against a landlord in the event of a monetary award at VCAT. The use of an agent's address is simply insufficient not only for service, but for the practicality of Sherriff's warrants being executed in the later stages of enforcement.

WEstjustice advocates for **Option 4.8A** in this instance. We believe that the provision of service details for matters during a tenancy, including notices and legal proceedings, is a matter of fairness, and is central to equity between the contracting parties. We do not believe it is acceptable for landlords to be shielded by anonymity in this sense, not least because all such tenants' details are available for purposes of legal proceedings. Further, it reduces the litigious and costly step of needing a VCAT order, as set out in **Option 4.8B**.

3.3 Standard-Form Lease Agreements

Support Option 4.9, Option 4.11
Consultation Questions 22-26

The response to the *Rights & Responsibilities* paper WEstjustice prepared advocated for a comprehensive, prescribed tenancy agreement to be implemented for all tenancies in Victoria.[9] A prescriptive standard form agreement adds certainty to the tenancy relationship, and removes vague, unfair, misleading or unenforceable terms.

As a model, the lease developed by the New South Wales Office of Fair Trading is the benchmark we believe should be followed in Victoria.[10] It includes a comprehensive set of disclosures, including liability for utilities, taxes and fees, existence of owners' corporation rules where relevant, and the

[8] WEstjustice, *Submission in response to the 'Rights and Responsibilities of Landlords and Tenants' issues paper* p.23. Accessed at http://www.westjustice.org.au/cms_uploads/docs/westjustice-rta-review-rights-and-responsibilities-submission.pdf on 20 February 2017.
[9] Ibid, p.21.
[10] The model lease can be accessed at http://www.fairtrading.nsw.gov.au/pdfs/Tenants_and_home_owners/Residential_tenancy_agreement.pdf.

details of all rights and responsibilities of the parties as set out by legislation. A number of additional terms are also included, where needed, to cover pets, lease break circumstances, swimming pools on the premises, and any applicable by-laws. It is significantly longer and more detailed than the lease produced by Consumer Affairs Victoria, which in our experience is rarely used.

Therefore, we advocate for **Option 4.9** – that standard form leases be used across all tenancies, and the model be expanded significantly in line with the model provided by New South Wales. Further information that should be included in leases that was noted in our *Rights and Responsibilities* paper includes:

- Operating instructions for appliances;
- Meter information, including identifying numbers and meter reads;
- Utility connections;
- Owners corporation rules;
- Any terms of a landlord's insurance that a tenant is required to follow;
- Any other information, rules or conditions that a tenant is required to be bound by.

Ultimately, WEstjustice aims to see greater certainty across tenancies. Option 4.9 makes plain the rights and responsibilities of all parties to agreements, and reduces the likelihood of misleading or unlawful terms, or binding tenants to onerous or impractical terms.

To ensure enforcement of Option 4.9, we advocate that there be an offence provision where a term purports to contract out of the Act, or is otherwise unfair or unconscionable (**Option 4.11**).

3.4 Breaches of Duty and VCAT Compliance Orders

Approve Option 5.1, 5.2C
Oppose Option 5.2B, 5.2C
Consultation Questions 27, 28, 29, 30, 31

As outlined in our response to the *Rights and Responsibilities* Issues Paper, we consider the breach of duty notice system as it stands to be both cumbersome and unfair to tenants for a number of reasons[11]:

- Breaches have no expiry date and their timeframes may be unsuitable or impractical for both tenants and landlords;

- Breaches issued by landlords to tenants demand compensation in the absence of a quantifiable financial loss or damage, and are generally cumbersome for the purposes of compensation;

- Successive breaches of duty leading to termination notices may be misused by either party. There is not a practical way to proactively challenge a notice as the recipient, and tenants may be required to give evidence on the circumstances of alleged breaches from months earlier in the high-pressure context of a possession order hearing;

[11] WEstjustice, *Submission in response to the 'Rights and Responsibilities of Landlords and Tenants' issues paper,* p.32.

- VCAT compliance orders have no default expiry date, and could potentially be relied on for a similar breach years later.

We believe that tailoring remedies for a breach of duty under **Option 5.1** is an appropriate way to make them a more effective tool. In particular, it is appropriate that remedies requiring a party to simply refrain rather than take positive action take effect as soon as is practicable (we believe that having an immediate timeframe to comply may not be practicable).

We would further recommend removing the demand under the breach of duty for compensation and the ability to seek a compensation order under section 209 of the RTA. Often, demands for compensation contained in a breach of duty notice are not substantiated with quotes or evidence, and they are not suitable for estimating the cost of a continuing breach which has not yet been remedied (for example, a landlord continuing to park her truck in a tenant's front yard and affecting access).

This enables the breach of duty notice process to confine itself to compliance. We would then recommend that parties be able to bring their duty-related compensation claims under section 210 of the RTA. **VCAT application forms should be modified** so that an applicant must confirm whether they have attempted to raise the compensation issue with the other party, and what the other party's response was, when lodging the application.

We also note that at present, tenants and landlords effectively have **two** compliance processes for seeking the performance of repairs: the processes set out in sections 72-79 of the RTA and the process in section 209 of the RTA. We have observed that self-represented tenants become very confused by this and may alternate between the two processes for the one matter, in turn finding it difficult to get compliance action from VCAT or CAV on repair issues.

We recommend that the breach of duty process clearly **exclude repair duties** and that landlords and tenants are instead be required to follow the processes set out in 72-79 of the RTA when seeking repairs.

We believe that **no additional obligations of landlords and tenants** should be subject to the breach of duty process. We note that the tenant's obligation not to cause or permit nuisance and to ensure a reasonable level of cleanliness, and the landlord's obligation to take all reasonable steps to ensure quiet enjoyment, are potentially broad duties which may draw on more specific terms of a particular tenancy agreement.

We have misgivings about terms of a particular agreement outside of these broadly agreed-on duties forming the basis of possible termination and eviction processes. Outside the proscribed processes of the RTA for Notices to Vacate and breaches of duty, additional breaches of contract are best dealt with as general application or compensation matters – provided of course that a party can demonstrate a quantifiable loss from the breach.

We also believe that **Option 5.2C** should be adopted and strongly oppose **Options 5.2A** and **5.2B**.

For the reasons outlined above, we believe that even with a 12 month 'three strikes' period, notices to vacate for successive breaches are not appropriate. Parties (particularly tenants, as respondents) facing these notices may be expected to give evidence about instances which may be nearly a year

old. Additionally, three separate minor breaches may be used cumulatively under Option 5.2A may be used to evict a tenant who generally meets their duties, and displays no patter of ignoring or disobeying a particular request of the landlord.

Option 5.2B is particularly harsh, and also appears redundant in light of the notice to vacate procedures that exist for sufficiently serious breaches under the RTA (damage, danger, or illegal use of premises). VCAT should retain the power to make a compliance order in regard to a breach, but not a possession/termination order.

We further suggest that compliance orders made against either party also have tailored time limits. We would suggest a time limit of 28 days by which a party must take positive action to comply with a duty, and a limit of 12 months for a party to refrain from doing something that is a breach (after which time the order expires). This would prevent either party from terminating or attempting to terminate on the basis of a 'stale' order if a similar breach were to occur after 2 or 3 years. VCAT should retain the discretion to adjust these limits and expiry dates where appropriate.

3.5 Balancing Rights of Entry

Support Option 5.5, 5.9B
Oppose 5.8, 5.9A
Clarification needed on Option 5.7
Consultation Questions 40-45

Rights of entry must necessarily be balanced with a tenant's right to quiet enjoyment. As we noted in our *Security of Tenure* submission, the concept of a tenant's home is fundamentally important, and must be protected by the law.

To that end, we believe that 24 hours is an unnecessarily short notice period, especially where the reason for entry is a routine inspection under Section 86(f) of the RTA, or where the premises is listed for sale, which could otherwise have been planned well in advance. In such instances, landlords demand that the property is available at very short notice, and that the property be clean and tidy. We have seen instances of tenants being significantly inconvenienced in such situations, needing to take time off work, make alterative arrangements for children, and even see family members suffer deterioration in their mental health and wellbeing.

In this sense, we advocate that **Option 5.5** be implemented, demanding 7 days notice be provided for routine inspections, and entry for valuation purposes and during periods of sale.

WEstjustice is particularly concerned with the level of inconvenience tenants are put through during open houses and inspections, the level of cleanliness the landlord demands, and the level of imposition and loss of privacy inflicted on tenants. Furthermore, we are concerned about the use of photographs in advertising material. Some tenants have raised to WEstjustice their belief that this represents a gross invasion of privacy. The RTA does not address this issue, in contrast to Queensland, where it is prohibited to use photographs of a tenant's belongings in an advertising campaign without prior consent.

Many tenants and landlords choose to negotiate a schedule of open houses and inspections, in return for compensation for the loss of quiet enjoyment during this period. This often takes the form

of reduced rent. Our organisation has assisted a number of clients who find themselves in this situation. However, where this negotiation has not happened, or has resulted in a fundamentally unfair outcome for the tenant. Our primary concern in these instances is that inspections are often pushed on tenants with little notice, with potentially large numbers of people coming through the house, with an unfair rate of compensation paid for the loss of quiet enjoyment, if any at all.

WEstjustice believes that the RTA should be amended to be more in accordance with Queensland's tenancy law provisions, whereby along with the taking of photographs, the conducting of open houses and auctions would be prohibited without the consent of tenants.[12] Further, tenants should be compensated at the ordinary daily rate of rent for a whole day, irrespective of how long the open house was. This is because the imposition on tenants extends well beyond the immediate inspections, and goes some way to compensating the need to make alternative arrangements and attend to cleaning. We advocate that **Option 5.9B** be implemented as it better balances the tenant's right to quiet enjoyment and a reasonable degree of privacy.

We do not believe that **Option 5.8** reasonably balances the rights of tenants with the desire to show prospective buyers through. We believe that 48 hours' notice for a tenant to make premises available, often in an impeccably clean condition, is insufficient.

Option 5.7 must ensure that the tenant's house does not become overrun by extensive inspections. To that, we reiterate that the notice required for such inspections should be 7 days, and that compensation be payable at a rate of one day's rent for each day that an inspection is conducted.

3.6 Lease Break Fees and Early Termination

Approve Options 6.1, 6.3, 6.5, 11.38
Oppose Option 6.2
Clarification needed on Option 6.4
Consultation Questions 51-58

WEstjustice has seen a rapidly growing number of lease break or early termination of fixed-term agreement situations in the past 18 months. Reasons and circumstances have included:

- Family violence, where the tenant no longer feels safe in the property;
- Health or family reasons requiring a move at short notice;
- Tenants no longer being able to afford rent due to life events who have not yet received a notice to vacate despite being in arrears;
- Tenants who have been given a notice to vacate at the end of their fixed-term agreement but receive an offer of new housing before the termination date.

We note that the process under section 234 of the RTA is presently under-utilised. Both tenants and landlords/agents are often unaware of it. While some landlords and agents may (rightly) inform a tenant they need to go to VCAT to break a lease early, others simply warn the tenant they are breaking the lease and may face a claim for lost rent.

[12] *Residential Tenancies and Rooming House Accommodation Act* 2008 (QLD), s. 203-4.

In a context where leases will likely continue to be broken, we strongly favour **Option 6.1** over **Option 6.2**. VCAT members generally apply many of the principles set out in page 63 of the Options Paper, but further guidelines will be of particular use to unrepresented parties and allow them greater certainty and predictability in a break lease circumstance.

We would suggest clarifying the common law compensation law principles as follows:

- Confirming, per *Craig v Mitchell* [2015] VCAT 597, that tenants should not be held liable for advertising costs or the refund of the letting fee if they are breaking their second or subsequent fixed-term lease.
- Keeping the requirement to mitigate loss general, beyond the specific expectation that the property promptly be placed back on the market. If the property was already overvalued due to its condition, for example, it may not be appropriate to have a fixed rule that the property must be re-advertised at the same price.

Conversely, we oppose the presence of a fixed lease break fee in a prescribed tenancy agreement as suggested under Option 6.2. We consider that this would result in higher lease breaking fees than many tenants currently pay, either because they act promptly to help find replacement tenants or because of high rental demand when the property is re-advertised. Compensation for a lease break should remain tied to actual loss of rent – ultimately, the risk of economic loss is an appropriate incentive for landlords to find new tenants promptly.

We welcome the introduction of **Option 6.3**, but seek clarification of **Option 6.4** in its current form. Option 6.3 appears to duplicate the process available to tenants to end a fixed-term tenancy early while that tenancy is on foot. We believe that the availability of this option would have made a material difference to tenants facing the sort of unforeseen hardships we outlined above, though we submit that qualifying 'hardship' further by requiring 'severe hardship' sets an unnecessarily high threshold, and may invite too much subjectivity from VCAT.

While we agree to Option 6.4 in principle were it to apply in conjunction with Option 6.3 (that is, where a lease is already broken), we oppose it being introduced for landlord or tenant applications to terminate a lease early (before it is broken).

A prescriptive limit may not always reflect the circumstances of both parties. We have assisted tenants for break-lease where the following circumstances apply:

- Tenant has given landlord substantial advance warning of a likely need to terminate early due to unforeseeable change and severe hardship, but landlord refuses to do so;
- VCAT takes a long time to list the matter on tenant's application (up to five weeks' in one case);
- Landlord does not use the interim period to advertise the property to interested parties despite exiting tenants' willingness;
- Tenant has already stayed in house and paid rent for longer than they had hoped to by the time an application is heard.

In these situations, where the hardship is proven and the landlord has had ample time to mitigate risks of an early termination, it should be possible for an agreement to be brought to a close without further liability for lost rent accruing to the tenant.

We support **Options 6.5** and **Options 11.38**, which allow for a reduced period of notice in fixed-term and periodic agreements without liability for lease break fees in certain special circumstances. We believe that special circumstances of this nature will continue to be rare, but that it will avoid particularly severe hardship for the most vulnerable tier of tenants (those requiring special or personal care or fleeing family violence).

3.7 Bonds

Tenants' Bonds

Support: Option 7.1C, 7.2, 7.3C
Oppose: Option 7.1A, 7.1B, 7.3A, 7.3B
Consultation Questions 63-67, 33-34, 109-110

We support the implementation of **Option 7.1C** under the current arrangement for bonds in Victoria. Our experience is that bonds are a significant financial commitment for our client base, and that tenants are sometimes asked to pay for more than the equivalent of a month's rent. The higher bonds tend to reflect the higher rent in a gentrifying or high demand area (such as the inner West) rather than the presence of luxury fixtures or features to the property that make it notably 'high-value'.

We consider that Option 7.1C would continue to provide an appropriate protection for landlords in terms of arrears, provided that landlords acted promptly to contact tenants where rent falls behind and take VCAT action if necessary. For unusual or unique circumstances, the VCAT exemption remains available.

We favour **Option 7.2** and **Option 7.3C** as the most appropriate model for the return of bonds and resolution of disputes. We believe that Option 7.3C offers the most protections and fewest barriers for tenants – where they cannot get the landlord's consent or response in an appropriate amount of time, they will not be required to proceed to VCAT. The requirement for evidence to be provided on application and not simply on the day of a hearing in a Summary of Proofs will also be a marked improvement for tenants, and for the administration of VCAT matters overall.

Clarification is needed about whether this combination of options would allow for partial reconciliation of bonds. As noted on page 75 of the Options Paper, "in cases where only part of the bond is in dispute, there is no process for the part of the bond which is not in dispute to be paid out to the tenant".

We suggest that under Option 7.3C, where the RTBA is notified that an application to VCAT has been made, it returns the amount of any bond not in dispute, and holds the remainder until a decision has been made.

While it is outside the scope of the paper, we note that an ever-increasing number of landlords rely on landlord insurance, and that this offers a greater scope for protection against loss than a bond or rent in advance arrangement may. Future assessment of the residential tenancy landscape in Victoria should consider whether bonds remain the most appropriate way to manage landlord risk, or whether there should be freedom for landlords and tenants to make alternative arrangements

under the landlord's insurance (for example, payment or part-payment by the tenant of a landlord's premium).

Pet & Maintenance Bonds

Support: Option 8.35
Oppose: Option 5.3A

We oppose the implementation of an optional pet bond under **Option 5.3A**. There is a risk that a pet bond would become the expected requirement for tenants who wish to keep pets. This would mean the imposition of an additional financial barrier on those who may not be able to afford it.

In our submission to the *Fairer, Safer Housing – Rights & Responsibilities Issues Paper* we wrote that "many Victorians place great value in having pets for companionship and wellbeing".[13] Without some equivalent of the Victorian government's present bond loan scheme, we do not believe that pet bonds can be introduced without effectively creating two tiers of tenants.

However, we believe that the introduction of a landlord repairs and maintenance bond, as suggested under **Option 8.35**, would be an excellent idea for both tenants and landlords, with the ancillary benefit of reducing the administration of repair applications at VCAT.

It is rare that we encounter tenants who have the savings or disposable income to fund urgent repairs at short notice themselves, or who are confident they will get prompt payment from the landlord for the repair services they have paid for (we note that even if a tenant is due compensation from a landlord, this does not mean the tenant may withhold rent). Securing approval for repairs can also be challenging for agents who may act as intermediaries between an anxious tenant and a hard-to-reach landlord.

Beyond quarantining a proportion of the landlord's finances for repair and maintenance, we also believe that the introduction of a repair and maintenance bond as proposed would reinforce the sense of mutual obligations under the law, and foster a positive, balanced, and non-adversarial culture between parties.

3.8 Rental Bidding

Support: Option 7.8A
Oppose: Option 7.8B
Consultation Questions 72-74

From the outset, the Residential Tenancies Act review process has made it clear that rent restrictions controls would not come into the ambit of discussions – particularly given that issues of home and rental affordability are a nationwide and not a Victorian issue, and given that national-level strategies and solutions to deal with either are still in flux.

However, as rents increase across the board, otherwise equal candidates for a tenancy should not be able secure an advantage which prices out tenants who could otherwise afford a property. It is

[13] WEstjustice, *Submission in response to the 'Rights and Responsibilities of Landlords and Tenants' issues paper*

concerning that a significant minority of tenants have offered bids or had bids requested or suggested.

For the additional protection of agents, we recommend **Option 7.8B** over **Option 7.8A**.Option 7.8A could create a situation where tenants subsequently claim a higher offer was recommended to them, rather than freely made.

A total prohibition on soliciting or receiving rental bids would create clarity for landlords and agents, and would not unfairly restrict an individual tenant's rights to apply for property. We note in particular that tenants should never have to feel like they have to enter into rental bidding to overcome bases on which they may be discriminated. For this reason, we believe an effective implementation of **Options 4.1** and **4.2** is also warranted.

3.9 Condition Reports and Property Deterioration

Approve: Option 8.1, Option 8.5
Consultation Questions 75-81

WEstjustice have noted a number of issues relating to condition reports, their usage, and completion by tenants and landlords. We submit that **Option 8.1** expands the utility of condition reports, which we see as a positive step, though it must be used in conjunction with **Option 8.5**. We have noted that many tenants will simply disregard condition reports, misunderstand their importance, or in fact not be given one at all.

We also believe that tenants should be provided with the condition report prior to signing the lease. This allows a proper assessment of the condition of the property by tenants. Focus should be on inspection when the premises are vacant. We have advocated previously for cooling-off periods to be implemented into lease agreements.[14] This would cover situations where tenants do not have the opportunity to inspect the premises prior to signing the lease. We have also advocated for an increased timeframe for returning condition reports – five days, rather than the present three, goes some way to addressing the current problem that is a very short turnaround for reports to be returned.

3.10 Minimum Standards

Approve: Option 8.13D, Option 8.13B, Option 8.14A, Option 8.15A
Oppose: Option 8.13A, Option 8.13C
Consultation Questions 88-94

WEstjustice advocated strongly for the implementation of some minimum rental standards in its previous submissions to the Residential Tenancies Act review. In our August 2016 Issues Paper response on Property Conditions, we wrote:

"*The condition of a property is fundamentally important to tenants for a number of reasons. Firstly, poorly maintained premises can lead to adverse health effects, both physical and mental, and detract from a person's overall wellbeing. The World Health Organisation has found that where an occupier enjoys adequate, secure housing, this leads to better health outcomes of the inhabitants. Secondly,*

[14] Ibid, p.26.

where premises have poor thermal efficiency, the basic heating (and cooling) of a premises can result in financial pressure, and in worst cases, financial distress that may lead to serious outcomes such as rent arrears and utility disconnection. This is sometimes referred to as 'energy hardship' and is exacerbated by Victoria's mostly cool climate that is prone to extreme heat conditions in summer. It has been noted that private renters constitute the largest segment of occupiers who cannot afford to heat their homes, or pay their bills on time. Finally, property standards impact on security of tenure, and the degree to which tenants feel renting, whether by necessity or choice, is seen as a legitimate long-term housing option."[15]

For this reason, we welcome the options set out in Part 8.5 of the Discussion Paper, which appear to envisage the creation of a basic floor of required property standards at point of lease. Though it is understood that houses across the rental market will vary in overall amenity, comfort, and convenience, these recommendations mean that basic measures of health, sanitation and safety that virtually every Victorian would see as essential to human decency are enshrined in law.

Our preferred option for minimum standards would be that set out at **Option 8.13D**. It prescribes a basic and appropriate set of standards for residential tenancies. We favour this option over **Option 8.13A**, which is too broad, and may allow for sub-standard living circumstances that still fall short of a property being classified as 'unfit for habitation'. Similarly, **Option 8.13C** lacks detail until the social housing reletting standards (presently under review) are finalised. We would make an aside, however, that we do not believe that there should not be a disparity between the minimum standard of social and private housing stock.

Although the rooming house standards set out at **Option 8.13B** include a number of appropriate minimum requirements, it appears some measure of adaptation would be required to turn them into a set of requirements that were relevant to residential tenancies. Ultimately, it may be that tailoring a set of similar but particularised standards for residential tenancies produces a set of minimum standards for letting that resembles Options 8.13B and 8.13D combined. We note for the purposes of Option 8.13B that access to a vermin-proof rubbish bin has been a sticking point for some of our clients in the past. Tenants are dismayed to find no appropriate and hygienic way of taking their rubbish out, and are told by landlords or agents that they must do this at their own cost.

We support a staggered implementation of minimum standards, as under **Option 8.14A**. We believe that a flat transition date (proposed under **Option 8.14B**) has the potential to disrupt a large number of existing ongoing tenancies at once. We also recommend that early compliance is incentivised. As noted in our submission on Property Conditions, NZ's introduction of certain minimum standards provided an earlier deadline to complete works on uninsulated properties and benefit from a national subsidy. A number of councils also offered flexibility, with loans for retrofitting investment properties that were then recouped as an increase on rates.[16]

We endorse **Option 8.15A** over **Option 8.15B**. Practically speaking, it may take longer than expected for all landlords to be compliant with all standards. In the meantime, tenants are likely to still find

[15] WEstjustice, *Regulation of Property Conditions in the Rental Market – Minimum Standards and Improving Property Conditions Across Victoria*, p. 10. Accessed at http://www.westjustice.org.au/cms_uploads/docs/westjustice-rta-review-property-conditions-submission.pdf on 20 February 2017.
[16] Ibid, p.17.

themselves in urgent or high-need situations where they need to take the first available property. Option 8.15A provides landlords and tenants with the freedom to offer and accept rental accommodation that only meets some core standards, but with the protection of the law in terms of demanding remaining mandatory improvements. It should be noted that Option 8.15B's standard of a complete prohibition on letting non-compliant properties is likely to involve significant resources in practice, and that a formalised version of Option 8.15A is both more realistic in terms of landlord/tenant behaviour and regulatory oversight.

3.11 Security of Tenure – No Reason Notices

Approve: Option 11.27D
Oppose: Options 11.27, 11.27B, 11.27C
Consultation Questions 193-198

The ability to terminate a tenancy at will with a 120-day "no reason" notice is one of the most concerning powers under the current RTA. When compared with other fundamental forms of protection and sustenance in a household - the right to work, the right to receive social security – the ability to revoke the protection of housing for no given reason appears both antiquated and capricious. The analogy is particularly striking compared to Australia's legislative decision to restrict no-reason dismissal from employment in most cases – compared to a business employing labour, rental income is relatively passive and requires less management – but it remains easier to remove someone from a home than from a job.

We frequently encounter tenants who have been subject to 120-day notices. Some are genuinely at a loss for what has justified the decision to issue a notice. Others encounter notices to vacate immediately after querying a rent increase or demanding repairs. Still others may simply have displayed odd behaviour in their communications with a landlord or an agent.

No reason notices are often issued with blatant regard for the RTA's provisions against retaliatory action. As we prepared this response, a client of our organisation received a 120-day notice the day after we had represented them in VCAT against an unfounded compensation/breach of duty claim by their landlord. The clients may yet challenge this notice, but the long-term effect is chilling. Success in arguing that a notice is retaliatory is not guaranteed, and clients learn that to raise legitimate issues in a tenancy is to court the risk of homelessness, or an expensive or unexpected move.

Since WEstjustice prepared its response to the review's Security of Tenure paper, we have noted some of the limitations in challenging a 120-day Notice as retaliatory.

- Landlords or agents who are unsuccessful with the first notice on the basis it is retaliatory will bide their time until the earliest possible point they can issue a second. This second Notice will often be successful as it is not proximate to the exercise of a particular RTA right by the tenant.
- Tenants who request additional amenities that are not a 'right' under the RTA cannot challenge a 120-day notice to vacate. In 2016, a client of ours faced eviction after she had asked her landlord's agent several times whether he could install air conditioning in the property, which became very hot in the summer and caused distress to her disabled child.

- It is common for us to see tenants with mental health issues receive 120-day notices on the basis of their correspondence with landlords or agents. Behaviour that falls well short of being intimidating or threatening (anxious, erratic, or distressed calls, visits or emails) comes shortly before a 'no reason' notice. This seems to be a form of discrimination that the RTA in its current form is not suited to recognise. These tenants are the most likely to struggle to find new accommodation.

We are strongly of the view that **Option 11.27D should be implemented**. The other options elide the fact that there is a path to terminate any tenancy for appropriate cause, and with appropriate evidence, in the law at present. We further note that Western European countries, with few exceptions, disallow 'no reason' notices, in both public and private tenancies.[17] The 120-day notice is no longer a justifiable feature of Victorian tenancy law.

3.12 Security of Tenure – Antisocial Behaviour

At 4.7, we emphasised our opposition to the discriminatory impacts of 120-day Notices. For similar reasons, WEstjustice strongly opposes a significant expansion of the current range of options available under the RTA at present.

As set out in Table 11.2, there are a number of justifiable or appropriate ways on which a tenancy can be terminated – chief among them credible and continuing danger by tenants to neighbours, malicious damage by tenants to premises, and use of the premises for an illegal purpose. We would suggest that the notice to vacate for danger is presently too limited and that it should be amended to include a wider class of people who a tenant may cause danger to while on their property (including landlord, agents, or contractors).

Anti-social behaviour, via one action or a course of conduct that is "likely to cause the other person alarm, distress, nuisance or annoyance", appears to be a different quality of behaviour to the kind which justifies the immediate issue of a notice to vacate for danger. Nuisance, in particular, is dealt with as a breach of duty (which may in itself lead to a VCAT possession order, though not a notice to vacate). It is unclear how nuisance might lead directly to an application to VCAT for possession in some cases and how it might lead to a Breach of Duty in others.

The wording described that could be adapted from the Scottish tenancy legislation, were it to capture the full gamut of behaviours that can cause "alarm, distress, nuisance or annoyance" to a person, is likely to overwhelmingly lead to adverse consequences to tenants with mental illness or intellectual disabilities. While it is indeed possible for someone to engage in a pre-mediated course of conduct designed to harass and intimidate, people with mental illness or intellectual disabilities face interactions day-to-day where even their manner or means of address will provoke distress, nuisance or annoyance in others. The stigmatising effect of this should not be compounded with the stress factors of potential homelessness, or sudden moves away from community and support services.

[17] Nathalie Wharton & Lucy M. Craddock. (2011) *A comparison of security of tenure in Queensland and in Western Europe.* Monash University Law Review, 37(2), p. 16. Accessed at http://eprints.qut.edu.au/53441/1/Wharton-Cradduck_(Final_as_submitted)_28.06.2012_LC_done.pdf on 20 February 2017.

While we would support the existing provisions and processes for anti-social behaviours under the RTA being defined to also include those individuals who might lawfully access the property, we do not believe the scope for possession orders for anti-social behaviour should be expanded or expedited. We therefore strongly oppose **Option 11.24**.

Of the existing anti-social behaviour provisions in the RTA, we have the most reservations about disruption (in rooming houses, caravan parks, and Part 4A parks). As noted in our *Alternate Forms of Tenure* submission, the RTA creates an additional form of instantaneous notice to vacate that applies to rooming house residents and not to tenants, and that can be misused against individuals with mental health issues and behaviour or intellectual disabilities.[18] We believe that residents should face a breach and compliance order process, similar to what tenants face for nuisance, rather than face a possession order.

If disruption remains a ground of termination under the RTA, we believe that the standard notice period should be at least 14 days (**oppose Option 11.12 in its present form**). VCAT should retain the ability to form an assessment of whether or not disruption will be repeated – in our experience, Members are very capable of assessing the evidence of both sides fairly and reaching a judgment on whether disruption will recur. This means we also **oppose Option 11.13.**

We oppose **Option 11.14** for the same reasons that we oppose the implementation of all direct termination orders. Our reasoning follows in the next section.

3.13 The arrears process and termination orders

Approve: Option 11.2, Option 11.16, Option 7.7
Oppose: Option 11.1, Option 11.5, Option 11.17
Consultation Questions: 151-154, 172-176

We oppose the proposal at **Option 11.1** for the introduction of a process for 'termination orders' under the RTA.

At page 171, the Options Discussion Paper cites a concern that WEstjustice and others have raised that Notices to Vacate can lead to tenants unnecessarily leaving a tenancy, and in some cases becoming homeless. We believe that this is not a fault of a two-stage notice to vacate/possession order process, but a fault of the current notice to vacate format. We argue that notices to vacate should include a clear disclaimer that:

- Tenants *cannot* be evicted on a notice's termination date, or any date thereafter, without a possession order from VCAT;
- Tenants have a right to legal advice before making any decision about whether to stay or go.

We believe this would be particularly beneficial in the case of short-deadline notices to vacate.

At the other end of the spectrum, we note that some notices to vacate do not end up require testing or scrutiny before VCAT at all, including those we advise our clients on:

[18] WEstjustice, *Submission in response to the 'Alternate Forms of Tenure' Issues Paper*, p.24. Accessed at http://www.westjustice.org.au/cms_uploads/docs/westjustice-rta-alternate-forms-submission.pdf on 20 February 2017.

Example

Ming was on a 12-month fixed-term tenancy with his young son. When he met the landlord at the beginning of the lease he was told that the tenancy would not be longer than a year because he intended to demolish the premises and develop the section. After one year, Ming received a 60-day Notice to Vacate with relevant permits attached and came to us seeking slightly more time to arrange to move. We spoke to the landlord on his behalf, who was completely obliging in giving Ming an additional two weeks to finish vacating.

We believe that many legitimate no-fault terminations do not need to come before VCAT, and that to place a requirement that possession matters all be processed and scrutinised this way would put considerable administrative pressures on VCAT.

Additionally, the current notices to vacate/possession order process gives many tenants an appropriate lead-in time to prepare a case, get advice, and make arrangements (including negotiations with a landlord for a payment plan). If notices to vacate are amended as described, and the requirements of section 319 of the RTA on a notice to vacate's content are followed correctly by the issuing landlord/agent, we believe they will continue to be fit for purpose.

We endorse **Option 11.2**, which would require a VCAT consideration of reasonableness in making possession orders. However, we note that such considerations of reasonableness are already a factor in many at-fault terminations that reach VCAT. Through its own case law, VCAT has assessed how to most fairly interpret instances of danger, disruption, damage, illegal use, or breaches of its orders. The mechanisms of the RTA that prescribe how VCAT may decide to adjourn a possession order for rent arrears could also be said to set reasonableness parameters. At 4.10, we address termination for assignment or subletting without consent, an area we are concerned creates an 'absence of fault' test that the Tribunal may not have scope to assess reasonableness under.

For notices to vacate for rent arrears in particular, we also strongly endorse the adoption of a pre-eviction checklist that details a landlord's good faith efforts to communicate with the tenant, identify the circumstances of the arrears and try and enter an appropriate payment plan. We believe this is a more appropriate and less prescriptive process than that suggested under **Option 11.15**. Rarely, in our experience, are arrears ever the result of wilful non-payment. In practice, many landlords will be seeking to address arrears when they are only a week late already, and will have started the process detailed above before the 14-day mark for arrears.

We also endorse **Option 11.16**, which requires that a termination process be invalidated if rent has been paid in full or a payment plan fully complied with. If this is to take place after a possession order is made, additional training will need to be provided to sheriff or police offices who deal with the execution of warrants, as it would depend on the good-faith disclosure of repayment by landlords or agents.

We strongly oppose **Option 11.17**, which would enable VCAT to terminate a tenancy for repeated late payment of rent. In its current form, this option gives no apparent protection to small, but repeated instances of slightly late payment (for example, payment often coming one or two days late). Without clarification or modification, we would consider this an incredibly draconian measure with extremely adverse consequences for security of tenure.

We note that tenants who are habitual erratic payers can already face consequences on the rental market. Many landlords and agents who seek references about prospective tenants will ask about how regularly rent has been paid, and if there are frequent delays, these will be disclosed. Frequent but relatively minor delays in rent are therefore not consequence-free, and we believe further punitive action against such tenants (who may display intersecting vulnerabilities) are not warranted.

Lastly, we repeat our recommendation that there be a requirement for real estate agents and property management companies to accept Centrepay as a form of rent payment and endorse **Option 7.7**. We are of the view that Centrepay encourages reliable rent payments at very little cost to landlords and agents.

3.14 Assignment, subletting, and possession for consideration

Oppose Option 11.23
Consultation Questions 184-186

The test case of *Swan v Uecker*[19] appears to have raised major considerations for how Victorian tenancy law factors in in the increasing popularity and market penetration of Airbnb, and the reality that some Victorian renters may be technically subletting without consent by listing their rented properties on the online marketplace.

As WEstjustice noted in its *Rights & Responsibilities* submission, the nature of assignment and subletting in a modern tenancy is already vexed. We cited two models of modern rental living that appear to habitually fly in the face of the RTA – sharehouse living, particularly among younger renters, and households that may take in family or community members in time of need. We were concerned that either model held itself open to a 14-day notice to vacate and possession application under the RTA.[20]

In its attempt to clarify the Airbnb situation, the proposals in the Options Discussion Paper potentially cause more risk for tenants with the very broad term 'consideration'. At common law, consideration may denote anything of value promised to another when making a contract. Where a head tenant is paid for letting out a room in a share house, this is clear consideration. But familial and friend-based arrangements may develop elements of consideration too, which do not necessarily have to be of fair market value for the service provided.

Example

Deanna has her sister Rayna come and stay with her after an incident of family violence. "Stay as long as you want," Deanna tells her. "All I ask is that you help me a little with groceries". True to her word, Rayna gives Deanna $50 each week towards the household shopping as consideration for her accommodation.

We believe that arrangements like the example above are a crucial social buffer, that likely does a lot to manage the levels of acute homelessness in Victoria at any given time. Legislative wording should

[19] *Swan v Uecker* [2016] VSC 313 (10 June 2016)
[20] WEstjustice, *Submission in response to the 'Rights and Responsibilities of Landlords and Tenants' issues paper*, p.35.

not inadvertently turn them into a terminable breach of tenants' duties. On this basis, we oppose **Option 11.23**.

Alternatively, we suggest that the current process for termination of a tenancy for assignment and subletting without consent include a set of considerations the Tribunal is required to take into account before making a possession order. These may include:

- The relationship between the tenant and the assignee/sublessor;
- The nature of the assignment/sublet (what consideration, what duration, what portion of the rented premises);
- The reasonable expectations for use that landlord and tenant would have had, given the nature of the initial tenancy agreement.

This may do more to distinguish Airbnb/'for profit'-style sublets and assignments from share house/familial arrangements. For example, where a lease for a 5-bedroom Collingwood house is signed with two 20-year-old students on the tenancy agreement, it is reasonable to expect that they envisaged that other individuals would live in the property and contribute to rent.

We note that all forms of assignment and subletting – indeed, all forms of access by invited guests - are an assumption of risk for a head tenant. They risk liability for damage beyond ordinary wear and tear to the property by allowing other individuals into the rented premises. Given that the landlord will generally have recourse to that head tenant, we question the modern need for punitive measures terminating a lease in the case of subletting or assignment.