justice connect
Homeless Law

There's no place like home: Submission to the Residential Tenancies Act Review

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About Justice Connect Homeless Law

Justice Connect Homeless Law (**Homeless Law**) is a specialist legal service for people experiencing or at risk of homelessness.

Homeless Law staff work closely with pro bono lawyers to provide legal advice and representation to over 400 people experiencing or at risk of homelessness each year. Our services are outreach based and client centred, and our two staff social workers allow us to respond to clients' legal and non-legal needs.

In 2014–15 Homeless Law prevented the eviction of 139 clients and their families through legal representation and social work support.

Homeless Law also runs a specialist women's program, the Women's Homelessness Prevention Project (**WHPP**). In its first 12 months of operation, the WHPP has provided 62 women with 102 children in their care with a combination of legal representation and social work support. Of these 62 women at risk of homelessness, 95% had experienced family violence. Of the completed matters, 81% resulted in women maintaining safe and secure housing or resolving a tenancy legal issue (eg a housing debt) that was a barrier to accessing housing.

Since August 2014, Homeless Law has assisted 84 Victorian prisoners, including 53 via appointments at Port Phillip Prison through the Debt and Tenancy Legal Help for Prisoners Project. Thirty-one of these clients were facing eviction and of the 20 eviction matters that have been finalised, 100% of evictions have been prevented. Through this work we have built a stronger, better informed understanding of the common reasons that prisoners lose their tenancies while in prison and the barriers to finding housing upon release.

Acknowledgements

In preparing this submission, Homeless Law conducted detailed interviews with five people who had faced eviction and, in some cases, been evicted. We sincerely thank these people for their time in sharing their stories and insights with us. Their names and identifying details have been changed.

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Finally, thank you to our pro bono lawyers whose casework continues to generate positive outcomes for our clients and to inform our recommendations for a safer, fairer residential tenancies system.

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1. Executive summary and 11 key recommendations

Justice Connect Homeless Law welcomes the opportunity to contribute to the Victorian Government's Residential Tenancies Act Review and to respond to the *Laying the Groundwork Consultation Paper* (**Consultation Paper**). We commend the Government for its commitment to 'a modern and dynamic rental market in which tenants are safe and secure, and which meets the current and future needs and expectations of tenants, landlords and their property managers'.

As a specialist legal service for clients who are homeless or at risk of homelessness, Homeless Law sees the impact of a regulatory framework that has failed to keep pace with a changing housing landscape.

As the Consultation Paper recognises, the rental market is no longer a stepping stone on the path to home ownership. It is the place people turn for the safety, stability, security and community that a home provides. In a housing environment that is tough on tenants – including a lack of affordable housing options, soaring waiting lists for social housing, and homelessness services that are overwhelmed with demand – we need modern legislation that makes evictions into homelessness a last resort.

While in some ways homelessness is the 'pointy end' of rental regulation, Homeless Law notes that 40% of our clients facing eviction into homelessness are residing in private rental, some have jobs, many have children and all have an acute shortage of options if their tenancy is brought to an end.

While the ability for landlords to terminate tenancies is undeniably an essential feature of a viable rental market, if Victoria is genuinely committed to fairer, safer housing, it is time to recalibrate the legal, policy and procedural framework for ending tenancies.

The personal, social and financial costs of preventable evictions have become too significant to ignore.

In 1997, when the *Residential Tenancies Act* 1997 (Vic) (**RTA**) was introduced, Lynne Kosky, as the member for Altona, said:

> *The role of tenancy legislation should be to ensure on the one hand a balance between market imperatives for investment and return and on the other social and consumer protection, particularly in relation to secure, appropriate and affordable housing. This bill does not find that balance.*[1]

Eighteen years on, the current housing market means that this balance has come further off kilter and tenants are in a precarious, insecure and unequal position. This means that the current regulation is not working as intended: tenants are not exercising their rights, they are open to discrimination or retaliation and there are limited safeguards against evictions that should be preventable.

Informed by the evidence-base from running 304 tenancy matters last year, including 219 eviction matters, as well as the insights of five consumers who have been through the eviction process, Homeless Law makes the following 11 recommendations for a fairer, safer, more accountable and more sustainable rental sector.

11 RECOMMENDATIONS FOR FAIRER, SAFER, MORE ACCOUNTABLE AND MORE SUSTAINABLE RENTAL SECTOR	
Updated and appropriate principles and objectives	1. **Modernise the purposes and objectives underpinning the RTA.** The current purposes of the RTA do not recognise its important role in providing social and consumer protection in relation to secure, appropriate and affordable housing. The RTA should state that its purpose is to ensure that tenants have appropriate rights and protections and to encourage fair and efficient practices for residential renting.
Preventing avoidable evictions: evictions as a last resort	2. **Abolish no reason notices to vacate.** The ability of landlords to evict tenants for no specified reason in Victoria creates an imbalance between landlords and tenants, which makes it less likely that tenants will exercise their rights or that landlords will meet their obligations. These notices create a high risk of retaliatory, discriminatory or arbitrary evictions and they remove any role for VCAT to oversee procedural or evidentiary safeguards. They are no longer an appropriate or justifiable feature of the Victorian residential tenancy landscape and they should be removed from the RTA. Specifically, sections 263, 288 and 314 of the RTA, and related provisions, should be repealed.

[1] Lynne Kosky, Member for Altona, *Hansard*, Residential Tenancies Bill Second Reading Speech (18 November 1997) 1178.

	3. **Time limited compliance orders.** Broad, indefinite compliance orders are open to misuse and can create a perpetual risk of eviction for vulnerable tenants. Compliance orders should be worded as specifically as possible, and should be limited to a period of six months before lapsing. VCAT members should be given more flexibility when determining whether a tenant should be evicted for breach of a compliance order.
	4. **Framework for negotiation and mediation.** A focus on early resolution of disputes would reduce the burden on VCAT and has significant potential to achieve better outcomes for both tenants and landlords. Landlords should be required to attempt to negotiate: • A repayment plan with tenants prior to making an application for a possession order on the basis of rental arrears; and • Resolution of compliance-based disputes prior to making an application for a compliance order or a possession order on the basis of non-compliance.
	5. **Improved notices and information for tenants.** The misleading term 'notice to vacate' should be changed, the form of notices of hearing should be modernised and these documents should provide tenants with referral information to encourage engagement with their tenancy issue and attendance at VCAT. Low rates of attendance in the VCAT Residential Tenancies List result in poor outcomes for tenants, including evictions that should be avoidable.
	6. **Legislative and procedural safeguards to prevent unnecessary evictions into homelessness**. To make sure that evictions from both social and private tenancies only ever occur as a last resort, Homeless Law recommends: • Law reform to give VCAT jurisdiction to consider the human rights compatibility of eviction decisions by social landlords; • The introduction of a 'reasonableness' requirement for all evictions under the RTA, to give VCAT members discretion to avoid eviction where they are not satisfied it is reasonable in the circumstances; and • Development of a pre-eviction checklist for landlords to satisfy before applying to VCAT for a possession order.
	7. **Internal appeal of residential tenancies decisions**. Allowing for internal appeal from decisions made in the Residential Tenancies List would improve the consistency, predictability and quality of decision-making and strengthen protections for tenants against evictions that should be avoided.
Removing barriers to accessing safe housing	8. **Clear mechanism for apportionment of liability in compensation claims against tenants who are victims of family violence.** This will avoid victims of family violence being held liable for damage or debts caused by a perpetrator who was or is a co-tenant. It will reduce one barrier victims of family violence face when leaving violent relationships, by removing the fear that they will be legally responsible for damage they didn't cause and rent arrears that were accrued after they had fled.
	9. **Regulation of residential tenancy databases ('black lists') to allow victims of family violence to prevent their personal details from being listed and to remove existing listings where the relevant breach or damage occurred in the context of family violence**. These amendments to section 439 of the RTA will reduce the barriers victims of family violence face when seeking to re-enter the private rental market after leaving a violent relationship. It will contribute to a reduced risk of homelessness and shorter periods in crisis or refuge accommodation.
	10. **Minimum standards for rented premises**. Minimum standards should be introduced to protect the safety, security, amenity and privacy of tenants, which can be enforced by a third party (most likely Consumer Affairs Victoria) that has power to investigate breaches, issue fines and prosecute landlords for systemic non-compliance.
Making sure unlawful evictions aren't ignored	11. **Training and policies to improve Victoria Police's understanding of their role in enforcing VCAT restraining orders**. To ensure that tenants' rights are being upheld, there should be clearer processes for (1) applying to VCAT for a restraining order under the RTA; (2) enforcing those orders; and (3) enforcing penalties against landlords that breach restraining orders.

2. Renting, housing and homelessness in Victoria

2.1 The changing context of renting in Victoria and the prospect of homelessness

The data and statistics regarding housing affordability and homelessness in Victoria are increasingly well recognised:

- A recent snapshot of private rental properties showed that less than 0.1% of rental properties in Metropolitan Melbourne were affordable for single parents relying on the single parenting pension and 0.8% were affordable for these families in coastal or regional Victoria.[2]
- 99,892 people sought assistance from specialist homelessness services in Victoria in 2013–14.[3]
- There are currently 34,464 people on the state-wide public housing wait list, including 9,798 who are eligible for 'early housing' due to urgent needs.[4]
- There are approximately 22,789 Victorians experiencing homelessness. Of those, almost half are women and one-sixth are children under the age of 12.[5]
- 20,070 applications for possession orders were made to VCAT in 2013–14.[6]
- Specialist homelessness services in Victoria currently turn away 92 people each day because of overwhelming demand.[7]

As the Consultation Paper recognises, '[a]t the same time that a significant number of households are renting for longer terms, private rental is becoming less affordable, particularly for low income households'.[8]

It is in this context that Homeless Law provides legal representation and social work support to Victorians facing eviction into homelessness. In the 2007–08 financial year, tenancy matters formed 10% of Homeless Law's work and this figure has steadily grown to 67% of our matters in 2014–15. Two-hundred and nineteen of these clients were facing eviction.

The assistance Homeless Law provides to clients with tenancy issues includes:

- providing legal advice in relation to the rights and obligations of tenants under the RTA;
- negotiating and advocating with landlords to avoid unnecessary evictions;
- where social landlords are involved, negotiating and advocating in relation to obligations under the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (**Charter**);
- representing clients at VCAT in relation to applications for possession or compliance orders; and
- providing non-legal support, including in relation to housing, health, family violence and brokerage, through our two in-house social workers.

Falling behind in the rent is the most common factor putting Homeless Law's clients at risk of homelessness: 150 of our clients facing eviction were at risk of losing their tenancies due to rental arrears. This was 68% of the total eviction matters. Other reasons that clients found themselves facing eviction into homelessness, included: breach of compliance order (7); danger or illegal use (15); no reason (10); abandonment (5); property being sold or the landlord or their family moving in (11); end of fixed term tenancy (4); and illegal sub-letting (2).

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[2] On 11–12 April 2015, less than 0.1% of private rental properties in metropolitan Melbourne were affordable and appropriate for a single mother of two children who relies on a parenting pension: Anglicare Australia, *Anglicare Australia Rental Affordability Snapshot* (2015) (**Anglicare Snapshot**) 88. See also Department of Health and Human Services, *Rental Report December Quarter 2014* (**DHHS Rental Report**): just three in 100 two-bedroom rental lettings in the December 2014 quarter were affordable to a single parent reliant on Centrelink.
[3] Australian Institute of Health and Welfare, *Specialist Homelessness Services: 2013–2014* (2014) (**AIHW Report**).
[4] Department of Health and Human Services, *Public Housing Waiting and Transfer List June 2015* (**Public Housing Waitlist**).
[5] Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2011* (12 November 2012) 12 (**Census 2011**).
[6] Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2013–2014*, 8 September 2014, 24 (**VCAT Annual Report**).
[7] See AIHW Report, above n 3, 'Table VIC 5.5: Daily average unmet requests for assistance, by type of service requested and sex, 2013–14, adjusted for non-response'.
[8] State Government of Victoria, *Residential Tenancies Act Review: Laying the Groundwork – Consultation Paper* (June 2015) (**Consultation Paper**).

Through a combination of legal representation and social work support, Homeless Law prevented the eviction of 139 clients and their families in 2014–15.[9] Approximately 48 of Homeless Law's clients were evicted.[10]

Data, case studies and consumer insights from this direct service provision have informed the recommendations in this submission. Any legislative and regulatory reforms should be considered in the environment in which they are taking effect i.e. a highly competitive, deeply unaffordable rental market that is relied on by over 525,000 tenants to provide a safe and stable home.[11]

2.2 The personal, social and financial costs of eviction in the current environment

As we increasingly rely on the private market to meet the needs of low income tenants who are unable to get to the top of lengthy waiting lists for social housing, the RTA reform needs to contemplate the true impact of weak regulation of residential tenancies.

Set out below are case studies of two Homeless Law clients who were both tenants in the private rental market. Both fell behind in their rent and were ultimately evicted into homelessness. Neither has subsequently found secure, ongoing housing.

Work injury and mental health issues result in eviction from private rental

Henry lived alone in a rental property. He suffered a work related injury. He also developed depression, which he believed was a result of the impacts that the injury had on his day-to-day life. WorkCover did not acknowledge the link between the injury and his mental health and therefore it began effecting his employment. This in turn impacted his finances, his work hours dropped down to two days a week and his rental became less affordable. Henry fell in to arrears.

Henry's landlord discussed the arrears issues with Henry before proceeding to VCAT where the member granted a payment plan. Unfortunately, he was not able to meet this plan and defaulted resulting in his eviction. His bond was withheld to pay for the arrears, which then put him in debt to the Office of Housing who he had loaned the bond from originally. Until paid, this debt will prevent him from obtaining any further rental bonds.

Henry had nowhere to go once leaving his rental property. He returned to share housing, moving from place to place over the ensuing months. He is still not securely housed and has found the share housing market problematic with its lack of regulation. His privacy has been violated and he has no protections from being asked to leave. He has not been asked to sign rental agreements and no one will give him receipts for his rental payments.

Because of this, he is keen to return to independent living and an environment where there is an agreement in place that protects both him and the person collecting the rent. Unfortunately, as a single adult male on a low income, this has been very difficult to find.

[9] This means that clients either retained their property or the eviction was postponed and new housing was secured.
[10] In a number of these cases the Homeless Law file was closed after a possession order was made, so it is not known whether the client was evicted after this point. There is some chance an eviction was prevented through post-possession order agreement. Note that the remainder of Homeless Law's eviction matters were ongoing at the time of collating these figures.
[11] Consultation Paper, above n 8, 16 citing *ABS Customised Census Report* (2015).

Single mother evicted from private rental into homelessness

Olivia is a single mother. She has a primary school aged daughter. She works when she can and her income is supplemented by Centrelink payments. She suffers an autoimmune disease that can take its toll particularly in times of stress. A history of family violence has also left her with anxiety and post-traumatic stress. She is trying hard to make a life for herself and her daughter.

Olivia had been living in a private rental but fell in to arrears when her tight budget blew out due to unexpected costs and her illness preventing her from working consistently. By the time the landlord issued a notice to vacate the arrears had grown to around $1500. She found out about an application for possession that her landlord had made to VCAT while seeking help for rent from a local support service. Having not received the information in the post she was not aware the matter had progressed quite so far.

Olivia went to VCAT where the member granted a further three weeks before a warrant could be executed. Whilst the property only cost $250 per week, Olivia couldn't pay back the arrears on her tight budget so worked at getting out of the house and trying to find new accommodation. Despite trying to clean and move in an orderly way, the warrant was on the cusp of execution and she couldn't find alternative accommodation so she did what she could before the locks were changed.

Having fled domestic violence she had no family or friends she could stay with locally. This meant she was dependent on support services to help with accommodation. She didn't get her bond back and money was still owed to the landlord, which obstructed her access to further private rental. A bond loan from the Office of Housing had to be paid back before she would be considered for public housing.

As a result, months after the end of her tenancy she was still living in rooming house accommodation. Despite Olivia being very protective, emergency accommodation had exposed her and her daughter to things a child should not have to witness. Ironically, at $280 per week, the rooming house where they ended up cost more than her private rental and all they got was a small room to share. She had to give up work as managing the day-to-day, the exacerbation in her illness and the appointments to try and get her finances and housing back on track was too difficult. Olivia continues to work with a support worker to try and establish new housing.

These two case studies show the impact of an unaffordable rental market on low income tenants who are living so close to the edge financially that an unexpected expense or illness can quickly lead to eviction. The case studies also highlight the personal toll of eviction on individuals and families, and touch on the broader financial cost of homelessness for Victoria. Both Henry and Olivia's ability to work was impacted by their eviction, their health deteriorated, they became more reliant on services and found themselves in unsafe and unsuitable housing.[12]

In talking about her eviction and inability to secure alternative housing, Olivia said:

> *Because of the timeframe it took for me to get out, I wasn't able to leave the property in a state, to be able to get my bond returned even though I'd fixed anything that needed to be fixed … I didn't get my bond back which has affected me in getting [new houses] because it hasn't been repaid … I understand there are people out there that deserve it [to have their bond withheld] but when you are in a situation like myself and you want to rebuild your life and not have a bad mark against your name when you are trying your best to survive.*
>
> *…*
>
> *The anxiety and the depression behind it escalated, the panic attacks, the feeling of being helpless you have just got everything ripped out from underneath you. You have no control you don't know where you are going or what you are doing. You are basically lost. It impacted a great deal, I was always getting sick … it made me want to quit.*

[12] See also Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigang Wei, Reiny Iriana & Stephanie Ramsey, Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: legal need in Australia* (2012) (**LAW Survey**), which found that people who are homeless or in basic/public housing are at significantly increased risk of experiencing three or more legal issues. The LAW Survey found that people experiencing homelessness had a greater prevalence of legal problems of any type and a significantly higher number of problems. Specifically, it found that: 85% of people experiencing homelessness experienced at least one legal problem, compared to 54% of those in basic or public housing; 50.5% of those who identified as homeless experienced three or more legal issues, compared to 22.8% of those in basic/public housing, and only 15.7% in other types of housing; and people who were experiencing homelessness lived with multiple disadvantages having an average of 2.2 types of disadvantage compared to people in basic/public housing (1.9 types), and those in non-disadvantaged housing (1.1 types).

Olivia also described the impact on her primary school aged daughter:

> *My daughter, the impact on her, her behaviour change, the lashing out, the instability from being moved from places in motels where … I won't even go into the stories, things she witnessed that she shouldn't have to have witnessed.*

Olivia's comments are consistent with the findings of Dr Angela Spinney in her research for the Australian Housing and Urban Research Institute (**AHURI**), which discussed the long term impact of homelessness on children and noted:

> *[We] know that children who become homeless, whether through domestic violence or other events, frequently suffer the trauma of disrupted schooling and friendships and that homeless families almost always experience financial disadvantage*.[13]

In addition to the personal toll on individuals and families, evictions into homelessness come with financial costs to the State. By way of example:

- A 2013 AHURI study identified that people experiencing homelessness had higher interaction with health, justice and welfare systems than people with stable housing and estimated that an individual experiencing homelessness represents an annual cost to government services that is $29,450 higher than for the rest of the Australian population. Of this increased cost, $14,507 related to health services, $5,906 related to justice services, and $6,620 related to receipt of welfare payments.[14]
- A 2006 Victorian Government paper identified a potential cost of over $34,000 per year to support a tenant evicted from public housing through homelessness services. This was compared to approximately $4,300 in service costs per year for a household in public housing.[15]

Using the AHURI figures, Homeless Law's prevention of the eviction of 139 people into homelessness in 2014–15 represents a cost saving of approximately $4.1 million.

In formulating the appropriate balance between market imperatives for investment and social and consumer protection, it is important to recognise that no-one in the community benefits from allowing people to slip into homelessness where these evictions – and the hardship and social dislocation that comes with them – can be prevented. Victoria needs a regulatory and services system that makes evictions into homelessness a last resort.

Recommendation 1: modernise the purposes and objectives underpinning the RTA

The current purposes of the RTA do not recognise the important role of the RTA in providing social and consumer protection in relation to secure, appropriate and affordable housing.

The RTA should state that its purpose is to ensure that tenants have appropriate rights and protections and to encourage fair and efficient practices for residential renting.

[13] Angela Spinney et al, *Homelessness prevention for women and children who have experienced domestic and family violence: innovations in policy and practice*, AHURI Final Report No 196 (2011) (**AHURI Homelessness Prevention**).
[14] Kaylene Zaretzky et al, *The cost of homelessness and the net benefit of homelessness programs: a national study*, AHURI Final Report No 205 (2013) 4.
[15] Department of Human Services, *Support for High Risk Tenancies Strategic Project* (October 2006) cited in Department of Human Services, *Human Services: The case for change* (December 2011).

3. Reconsidering the ease of eviction in Victoria: legislative safeguards and fairer processes

Over 10 years ago, AHURI published a study, *Evictions and Housing Management*, which identified that 'eviction is a major problem for the providers of public housing assistance and for the public sector as a whole'.[16] After interviewing 150 'evictees', the report concluded that 'evictions generate a number of challenges for the public sector', including:

- A percentage of evictees ending up in high cost hospitals or other institutions;
- Children separated from their parents;
- The education of children disrupted;
- Additional demands placed on the public housing sector, as well as emergency housing; and
- The majority of evicted persons ending up homeless, with a small proportion experiencing the worst forms of primary homelessness.[17]

These findings are consistent with what Homeless Law sees through our work, with what our clients tell us and with what the current data regarding housing and homelessness shows.[18] It is in this context that Homeless Law recommends that the RTA, and accompanying policies and practices, are amended to reduce unnecessary evictions into homelessness and to minimise the personal hardship and financial costs that accompany these evictions.

This part identifies six reforms that would effectively reduce preventable evictions in Victoria:

- Removing the ability to evict for 'no specified reason';
- Introducing timeframes and discretion in relation to compliance orders and evictions for breach of compliance orders;
- Improving engagement of tenants and attendance at VCAT when their tenancy matters are being determined;
- Conferring VCAT with jurisdiction to consider the compliance of a social landlord with section 38 of the Charter in tenancy matters;
- Incorporating a consideration of reasonableness into VCAT's determination of applications for possession; and
- Creating an avenue for internal appeal of VCAT decisions.

3.1 Evicting without justification: no reason notices to vacate

3.1.1 No reason notices to vacate in a changing housing environment

Under section 263 of the RTA, a landlord can give a tenant a notice to vacate without specifying a reason for giving the notice. The notice must specify a termination date that is not less than 120 days from the date of the notice.[19] The RTA commentary on these provisions recognises: 'A landlord will of course normally actually have a reason for giving the notice. The point is that the reason need not be specified in the notice to vacate'.[20]

The rationale for the no reason notice is to provide flexibility to private landlords in managing their properties.[21] The four month notice period acknowledges that tenants should be given a reasonable notice period when being evicted without a clear or

[16] Andrew Beer, Michele Slatter, Jo Baulderstone and Daphne Habibis, Australian Housing and Urban Research Institute, *Evictions and Housing Management*, AHURI Final Report No 94 (June 2006), Executive Summary (**AHURI Evictions Report**).
[17] Ibid.
[18] See above part 2.
[19] See *Residential Tenancies Act* 1997 (Vic) ss 263, 288 and 314 for tenancies, rooming houses and caravans respectively.
[20] John Billings, Jacquellyn Kefford, Alan Vassie, *VCAT Annotated Residential Tenancies Act* (2015) [263.01] (**Annotated RTA**).
[21] See, eg, Minister Knowles, *Hansard*, Residential Tenancies Bill Second Reading Speech (20 November 1997) 717: 'Consultants reviewed the draft provisions in accordance with competition policy and recommended a number of amendments to ensure that anti-competitive elements were removed. The most significant of these were: the removal of any restriction on the period between rent increases, while maintaining mandatory notice periods; and the reduction of the notice period for a notice to vacate for no reason from six months to three months'.

articulated reason. As has been made clear throughout this submission, however, for low income tenants, even a four month period will not necessarily be adequate to secure alternative appropriate housing.

In addition to creating a risk of arbitrary evictions and homelessness, the no reason notice to vacate creates significant inequality in the relationship between the tenant and the landlord. This inequality and lack of transparency can make tenants reluctant to act on their rights, including in relation to maintenance or quiet enjoyment of their homes.

These concerns were flagged in Parliament at the time of the Second Reading Speech for the RTA (the *Residential Tenancies Act* 1980 (Vic) had provided that eviction for no reason required six months notice; the RTA reduced this to 90 days and this was subsequently increased to 120 days by the *Residential Tenancies (Amendment) Act* 2002 (Vic)):

> *Disreputable landlords will be able to bypass serving notice for specific reasons and will not have to argue their cases in the Residential Tenancies Tribunal if there has been a breach of the tenancy agreement. The security of tenure for tenants will become very precarious. They will be unlikely to raise legitimate concerns about maintenance or improvements that need to be made on a property for fear of being served with a 90 day notice to vacate for no specified reason. Fair and reasonable legislation must ensure that tenants are judged only by tenancy performance and not by imputed characteristics. The change to the legislation will allow for that discrimination to occur.*
>
> *...*
>
> *As I have already said of the changes: there is no need for them given that the Real Estate Institute of Victoria considers the current act to be fair and equitable; they will discriminate against people and allow landlords to remove people to whom they have taken a personal disliking; they will affect the affordability of the private rental market, which is already incredibly expensive; and they will establish an unequal relationship between landlords and tenants.*
>
> *I repeat also that the proposal will discourage tenants from raising legitimate concerns. Given that it costs $1000 to relocate to another property and in the current environment it is difficult to find rental premises, tenants will be reluctant to rock the boat. The proposed changes favour landlords and work against tenants -- they do not strike a balance and will lead to severe discrimination against tenants at the low end of the market, which is where the most vulnerable tenants are likely to reside.*[22]

In 2002, the notice period was extended in recognition of the risks created by the no reason notice to vacate:

> *The bill provides that this notice period will increase to 120 days. This amendment is intended to deter property owners from using the no reason notice to vacate inappropriately. This is an important provision that will increase the security of tenure for tenants and residents; however, it does not limit landlords' proprietary rights, as the act provides a series of specific-purpose notices to vacate as an alternative to the revised 120-day notice. This is a balanced and even position, supported by key stakeholders, that places Victoria at the forefront of reform in this area.*[23]

The risks that were identified in 1997 and 2002 are even greater in the current environment where low income tenants have extremely limited options for securing alternative housing. In this environment, the personal and financial consequences of eviction are harsher and the disadvantage of tenants relative to landlords is greater, such that it is no longer possible to suggest that being able to evict tenants for no reason is a fair and balanced feature of the regulatory scheme for residential tenancies.

3.1.2 The problems with no reason notices to vacate and their impact

Homeless Law has three key concerns with no reason notices to vacate:

1. **Open to misuse for retaliatory or discriminatory reasons**. The lack of transparency or accountability means that no reason notices are susceptible to misuse, including for retaliatory or discriminatory reasons. As identified by the Victorian Equal Opportunity and Human Rights Commission, discrimination in the private rental market is widespread and '[i]f private rental is to be a viable, long-term housing option for people leaving public housing, or an alternative for those seeking public housing, it is crucial that barriers to the private rental market, including unlawful discrimination, are also removed'.[24] The no reason notice to vacate makes it difficult to tackle or reduce discrimination in the private rental market, because there is no oversight or accountability and it is very easy for the real reason for the eviction to go undetected. The landlord is in a position where their concerns with the tenant's race, religion, sexuality, mental illness or social status, for example, can be 'legitimately' acted upon by way of the no reason notice. In addition to discriminatory reasons, landlords are well positioned to use the no reason notice to avoid acting on a tenant's requests for maintenance

[22] Lynne Kosky, Member for Altona, *Hansard*, Residential Tenancies Bill Second Reading Speech (18 November 1997) 1180.
[23] Bronwyn Pike, Minister for Housing, *Hansard*, Residential Tenancies (Amendment) Bill Second Reading Speech (14 May 2002) 1399.
[24] Victorian Equal Opportunity and Human Rights Commission, *Locked out: Discrimination in Victoria's private rental market* (August 2012).

or for peace and quiet in the property. While there is some recourse in the RTA to challenge these notices, it is often difficult to prove that the notice was issued 'in response to' the exercise of rights under the RTA as required under section 266 of the RTA.[25] On top of this, a challenge on the basis of retaliation relies on people seeking out legal advice, rather than leaving the property in response to the notice to vacate.

2. **Fear and insecurity amongst tenants can prevent them from exercising their rights**. The no reason notice to vacate is one of the strongest examples of an imbalance in favour of landlords in the current RTA. When considered in the context of a highly competitive and unaffordable housing market, including the costs and personal disruption of relocation and the risk of homelessness, the risk of eviction deters tenants from exercising their rights. Tenants may be reluctant to 'rock the boat' by requesting repairs or peace and quiet in the property because of the risk that landlords will choose to terminate the tenancy rather than adhere to their obligations.[26] As the case study in part 4.3 below sets out, tenants who have the least alternative accommodation options if evicted are also more likely to be forced to rely on repair rights during their tenancy (because they are more likely to be renting older properties in worse condition). This reluctance to assert their rights can leave tenants and their families living in substandard accommodation, which distorts the obligations under the RTA because landlords are not accountable for complying with their responsibilities.

3. **VCAT is a rubber stamp and there are no safeguards to prevent arbitrary, unfair or avoidable evictions**. As flagged in the commentary to the RTA, it is often the case that the landlord does have a reason for giving the notice, but the reason is not specified. In this way, the no reason notice to vacate can be used in response to concerns about compliance, for example nuisance, danger, hoarding or illegal use, but no details or evidence of these concerns are provided. The RTA provides clear mechanisms for landlords to deal with concerns regarding tenant non-compliance, which require that the tenant is notified of the landlord's concerns or allegations. These provisions, including compliance proceedings and evictions for cause, allow the tenant to understand and respond to the allegations and provide procedural and evidentiary safeguards to prevent unfounded or disproportionate evictions.[27] As discussed in part 3.5 below, there is room for VCAT's discretion regarding eviction decisions to be improved, but even the limited oversight VCAT currently has in the form of checking that the legal and evidentiary requirements are met, are set aside when the no reason notice to vacate is used. It means that tenants have no ability to defend the proceeding; it also means that they don't have any opportunity to understand or rectify the conduct. The tenant has no insight about whether the notice to vacate is legitimate or not because there is no transparency, there are limited options for resolving disputes or concerns. In short, these notices close the door to any potential for negotiation; they don't contemplate alternatives to eviction; they make eviction inevitable and turn VCAT into a rubber stamp.

As this case study sets out, the consequences of eviction for no reason for tenants are increasingly harsh in a competitive and unaffordable rental market. For Sandra, these consequences included deteriorating mental health, severe stress as a result of fear she and her daughter would be homeless during her daughter's year 12 exams (she made approximately 30 applications for alternative housing) and an increased reliance on housing services, financial counselling and legal services.

[25] See Dr Nathalie Wharton and Dr Lucy Cradduck, 'A Comparison of Security of Tenure in Queensland and in Western Europe' *Monash University Law Review* 37(2), which discusses the analogous provision, s 291(3) in the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) and identifies that it is ineffective in protecting tenants from being abusively evicted.

[26] See also Tenants' Union of Queensland, *Avoidable Evictions … Our Next Move* (2012) 28 (**TUQ Report**): '[U]nder the Act, there is no requirement for specific reasons to be provided and the lessor can simply record "without ground" on the notice. This provision can result in evictions in all manner of circumstances including unreasonable circumstances … This provision can also undermine tenants' willingness to pursue other tenancy rights, such as, repairs and their right to quiet enjoyment, due to their concerns over losing their home and tenancy as well as potentially jeopardising future tenancies'.

[27] See, eg, *Smith v Director of Housing* [2005] VSC 46 (unreported), which identified that for a notice to vacate to be valid it must, on its face, have identified with a sufficient degree of particularity and precision the facts said to constitute the alleged breach (in that case danger under s 244 of the RTA). The Annotated RTA notes that this requirement 'should be complied with when preparing a notice to vacate under any section that states a breach by a tenant or resident and under any section that states an intention of the landlord or owner to use the premises for a purpose incompatible with the continuation of the tenancy' [319.03].

Single mother and daughter finishing year 12 evicted for no reason

Sandra is a single mother. She is university educated but has been dependent on Centrelink payments for income since her last job ended and she had some physical health issues that limited her ability to work.

She has two children, one of whom was completing year 12. The last few years for Sandra have been difficult, and have included a traumatic relationship break down, physical health issues and a subsequent change in her income.

She had lived in her private rental property for about two years and she had been a reliable tenant. Occasionally she made her rent payments two or three days late but she would always inform the real estate agent if there were any issues. The month prior to receiving a 120 day no reason notice, she found herself in a situation where she attempted to pay her rent via credit card but due to systems issues at the real estate agent, the payment did not process for three weeks. Shortly after this issue, she was sent a 120 day no reason notice. She had heard rumours that the house was going to be sold but the notice was not issued for this reason. Without a stated reason, she believed that the notice had to do with the more recent rent issue.

Sandra had no way to defend herself against the notice, she attempted to negotiate with the real estate agent for more time because the move would land right in the middle of her daughter's crucial exam period. The real estate was uncompromising. Shortly after the notice was issued, the landlord moved his business from one real estate agent to another. The matter went to VCAT by which time Sandra had sought advice and representation. At VCAT the member agreed to a 30 day postponement of the warrant, pushing out the eviction to allow the family to remain until exams were over.

Sandra managed to move in to a new rental property with a different real estate agent just days before the eviction date. She had applied for upwards of 30 properties. To add to her stress, after leaving the property the landlord applied to withhold some of the bond for cleaning and repairs despite Sandra spending over $600 on services to get the property clean following her departure. Feeling she had done everything she could to be a good tenant, between the no reason notice and the bond issue she reflects 'it is extremely difficult for a tenant to fight the whole thing … I find that really frustrating.'

During Homeless Law's consultation with Sandra, she made the following comments about the no reason notice to vacate process:

- *"I thought it was serious but I thought there would have been ability to negotiate. I did try and negotiate myself … then I rang VCAT … they said there was nothing that could be done".*
- *"The 120 day notice appeared and that was the first time there had ever been a delay [in rent] … so I feel it was mainly because of that issue where I could have paid it day one had they been set up for it … I think that was why we got moved out of there".*
- *"I didn't feel it was fair because I wasn't behind in my rent, I'd only had that one issue [with rent]".*

Sandra described the impact of receiving the notice to vacate and the risk of homelessness:

> *I am not stupid, I have a university education, it was horrendous to go through [the previous issues] … it was no picnic I can tell you. I have suffered from depression, this [the tenancy issue] just put me in a bad place, I felt extremely vulnerable. I started applying for houses. They said when I went to court that I hadn't applied for enough [properties] … [My current real estate agent] wouldn't allow me anything … they manage the majority of the rentals in my area … so I was going to open homes and it just wasn't happening … If I didn't go to 40 open homes I'd be surprised. I might've put 30 applications in. I know being single, I mean someone said to me once two incomes will be taken over one … It got very close; I was quite scared that we would have nowhere to go. I had a friend that had said to me that I could go there but you know I was really starting to cry, I was really starting to feel it because I felt that we would end up homeless.*

The tenancy issue was financially disruptive as she lost some of her bond and had to outlay to clean the old house, get a removalist and pay for the new property. In addition to the psychological stress of the move, Sandra's recovery from her physical

health issues was set back an estimated four months by the stress of the move and exacerbation of the injury. Her daughter also got sick around the time of the move.

3.1.3 No reason evictions from community housing

It is not only in the private rental market that no reason notices to vacate can lead to avoidable evictions. Community housing providers also use no reason notices to manage their tenancies, including:

- Issuing 120 day notices at the commencement of a transitional tenancy; and
- Using no reason notices to evict tenants where they are reluctant to use the cause-based provisions in the RTA (for example, regarding danger, breach of compliance order, illegal use or successive breaches).

Prior to the Court of Appeal's decision in *Director of Housing v Sudi* (**Sudi**), VCAT members were considering whether or not a social landlord had complied with section 38 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) when determining applications for possession and, in *HomeGround v Mohamed*, [28] Member Perlman considered the common practice of transitional housing providers using the no reason notice to vacate as a mechanism for managing their limited supply of short-term accommodation. Member Perlman found that in making the decision to issue the no reason notice to vacate under section 263 of the RTA, the landlord had not given proper consideration to the tenant's right not to have his home or privacy unlawfully or arbitrarily interfered with and that the decision was unlawful under section 38 of the Charter.

This VCAT decision, although not binding, made it clear to many organisations who engaged in similar practices that blanket application of policies is not an appropriate mechanism to meet the needs of vulnerable clients and was unlikely to be permitted under the Charter. This VCAT decision drew attention to the fact that this practice risked pushing people into a revolving cycle of rough sleeping and emergency accommodation and, gradually, social housing providers stopped issuing tenants with no reason notices to vacate as standard practice.

The problems with the use of no reason notices to vacate by transitional housing managers were also recognised in the 2010 Inquiry into the *Adequacy and Future Directions of Public Housing in Victoria*, which recommended that the 'Victorian Government reviews the Transitional Housing program to determine its effectiveness in the context of extensive waiting times to access public housing and in context of broader changes to social housing provision'.[29]

In Sudi, the Court of Appeal held that, in determining an application for a possession order, VCAT does not have jurisdiction to consider whether the public authority landlord has complied with section 38 of the Charter in making its decision to proceed with eviction.[30] As a result, these questions must be raised via judicial review in the Supreme Court, which is a costly, complex, daunting and inaccessible forum for both tenants and social landlords. There is therefore no accountability for Charter compliance as part of eviction proceedings at VCAT.

Post-Sudi, some social housing providers have re-commenced the use of 120 day no reason notices to vacate to manage tenancies and residencies. While they will not always act on these notices and may choose to 'roll over' to a new 120 day tenancy, the fact that an instrument called a notice to vacate, the first step in the eviction process, is issued to tenants at the commencement of their tenancy and can then be acted on by the social landlord if they choose to is a problematic mechanism for managing social housing.

Homeless Law also notes that these notices are not just being used to manage short-term tenancies, but are also used by social housing providers to deal with fraught tenancies where landlords are reluctant to use the compliance-based mechanisms under the RTA. Some community housing providers indicate that they are unable to use compliance or breach provisions in the RTA because these notices have a higher evidentiary threshold and certain procedural requirements (such as identifying the reason for the notice to vacate with a sufficient degree of particularity to enable the tenant to understand and respond to the allegations),[31] which can be difficult to satisfy at VCAT. In some cases, community housing providers indicate that they are unable to gather sufficient evidence of breaches, danger or illegal use because witnesses are fearful of giving evidence.

In addition, by issuing a 120 day no reason notice at the beginning of a tenancy, a community housing provider who is not satisfied with a tenant's behaviour can then apply for a possession order after the 120 day period expires. In these circumstances, a tenant is unable to challenge the 120 day no reason notice as retaliatory, as it was issued prior to any disputed conduct occurring. In this

[28] *HomeGround Services v Mohamed* [2009] VCAT 1131 (6 July 2009).
[29] Family and Community Development Committee, *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria* (September 2010) xxxiii.
[30] *Director of Housing v Sudi* [2011] VSCA 266 (**Sudi**): Warren CJ [43]; Maxwell P [62]–[63]; Weinberg JA [284]. Their Honours held that, when exercising original jurisdiction, VCAT has no power to undertake a collateral review of the Director's purported administrative decisions on judicial review grounds. Warren CJ stated: 'VCAT should treat relevant purported administrative decisions as being valid unless and until set aside by a court of competent jurisdiction'.
[31] *Smith v Director of Housing* [2005] VSC 46.

way, some community housing providers are able to use the 120 day no reason notice as a way of controlling tenants' behaviour, in circumstances where that behaviour would not be sufficient for the landlord to issue a different type of conduct-based notice to vacate.

Homeless Law appreciates the challenging role of social housing providers in managing complex tenancies with limited resources, but we reiterate that these situations are where accountability is essential. The below case study provides an example of the use of a no reason notice to vacate in response to concerns about conduct. It highlights the importance of procedural safeguards and oversight in these matters.

Using no reason notices to vacate to deal with compliance

Zoe lived in a rooming house managed by a community housing provider. She received a 120 day notice to vacate for no specified reason. Zoe's landlord applied to VCAT for a possession order and Zoe approached Homeless Law for assistance.

Zoe was on the priority list for transitional housing with her partner Brett, but she had not been able to find suitable accommodation. Zoe is on the disability support pension and suffers from health issues and post-traumatic stress disorder. Zoe believed that she was being evicted because her partner Brett regularly came to visit her at the property and sometimes let himself in, using Zoe's key. Brett had also been accused of threatening and abusing two other residents and did not get along well with one of Zoe's neighbours.

Homeless Law attempted to negotiate with the landlord to find an alternative to evicting Zoe, however the landlord refused to negotiate and insisted that the matter be heard at VCAT. Homeless Law represented Zoe at the VCAT hearing, but there was no ability to defend the application for possession because the notice to vacate was given for 'no reason'.

On Zoe's instructions, Homeless Law asked the VCAT member to adjourn the application on the basis that Zoe would make any undertakings required to address any of the landlord's concerns. The landlord was unwilling to accept this offer. The VCAT member was unwilling to order an adjournment on the basis that there was nothing incorrect about the issuing of the notice to vacate. An order for possession was made, with Zoe given 30 days before a warrant for possession could be executed.

Homeless Law acknowledges the need for community housing providers to manage conduct and to balance the safety and comfort of other tenants or residents. Homeless Law's firm view, however, is that concerns about conduct should be managed via the breach and compliance mechanisms or the cause-based eviction provisions (such as danger, illegal use, successive breaches or breach of compliance order) set out in the RTA. These mechanisms clearly identify the alleged breach and give the tenant or resident an opportunity to address it. If the matter does proceed to VCAT, there are procedural and evidentiary requirements that the landlord must satisfy and the tenant has an opportunity to defend the possession application. As Zoe's case highlights, when landlords use no reason notices to vacate this element of transparency and accountability and the accompanying safeguards against arbitrary eviction are lost.

3.1.4 Removing eviction for no specified reason from the RTA

We encourage the Government to look to other jurisdictions in considering the recommendation to remove evictions for no specified reason as a feature of Victorian tenancy law. The following examples may be helpful:

- **Tasmania**: the *Residential Tenancies Act* 1997 (Tas) does not allow landlords to terminate tenancy agreements without reason. Section 42, which lists the potential reasons available for a lessor to serve a notice to vacate, does not include a 'no reason' provision (despite being amended on 5 March 2004, 6 May 2005 and 1 October 2014 to include additional grounds for eviction).[32]
- **France**: tenancy law is governed at a national level by the *1989 Tenancy Act* 8541. Article 10 of the *1989 Tenancy Act* provides that where the landlord is an individual, tenancies must generally be made for a minimum duration of three years (absent special circumstances), and on expiration of the term, the tenancy must be renewed for the same period if it has not been terminated by the parties in the meantime. Article 15 provides that the contract can only be terminated

[32] See Wharton and Cradduck, above n 25.

for a 'serious and legitimate ground', such as the tenant having breached the tenancy agreement, or a close family member will be living on the premises. There is no provision for termination on no grounds. Article 15 also provides:
  - if the tenant is over the age of seventy and has limited resources, the landlord cannot terminate the tenancy unless the landlord is over sixty or has a low income; and
  - no evictions can take place during the winter months (from 1 November to 15 March). [33]
- **Ontario, Canada**: the *Residential Tenancies Act* 2006 does not allow landlords to terminate tenancies for no cause. Even where the tenancy is a fixed term tenancy, a tenant can continue to occupy the premises until:
  - the tenant decides to leave and gives notice; or
  - the landlord and tenant agree to end the tenancy; or
  - the landlord has a specified ground to terminate (e.g. overcrowding, persistent late payment of rent).

The removal of no reason notices to vacate from the Victorian residential tenancy landscape may be resisted on the basis that it will be a disincentive to property investment. As the Consultation Paper recognises, however, evidence regarding the factors influencing individuals' decisions to buy and sell rental properties does not identify the ability to evict for no reason as a relevant consideration. Factors identified include investor age and retirement status, the needs of family members, inheriting money, changing personal circumstances, attitudes to risk and saving and 'to a lesser extent, the market environment'.[34] It is important that any potential impact that removal of this mechanism would have on the decision-making of investors is not exaggerated when considering this reform. On balance, in the current environment, it is difficult to justify retaining an ability to evict without a clear and transparent reason for doing so.

Recommendation 2: remove no reason notices to vacate from the RTA

The ability of landlords to evict tenants for no specified reason in Victoria creates an imbalance between landlords and tenants, which makes it less likely that tenants will exercise their rights or that landlords will meet their obligations. These notices create a high risk of retaliatory, discriminatory or arbitrary evictions and they remove any role for VCAT to oversee procedural or evidentiary safeguards.

They are no longer an appropriate or justifiable feature of the Victorian residential tenancy landscape and they should be removed from the RTA. Specifically, sections 263, 288 and 314 of the RTA, and related provisions, should be repealed.

3.2 Broad and indefinite compliance orders and the perpetual risk of eviction

3.2.1 Compliance orders and the eviction process

Where a tenant breaches a duty provision, the landlord may give a breach of duty notice to the tenant under section 208 of the RTA.

If a breach notice is not complied with or the breach is not remedied within the timeframe, the landlord may apply to VCAT for a compensation order or a compliance order.[35] If VCAT is satisfied that the landlord was entitled to give the breach of duty notice and it was not complied with, VCAT may make an order requiring the tenant to remedy the breach and/or require the tenant to refrain from committing a similar breach.[36]

[33] See ibid for a detailed discussion of French tenancy law.
[34] Consultation Paper, above n 8, 38 citing Gavin Wood and Rachel Ong, Australian Housing and Urban Research Institute, *Factors Shaping the Decision to Become a Landlord and Retain Rental Investments*, AHURI Final Report No 142 (February 2010) 1, 24, 27–8, 30.
[35] *Residential Tenancies Act* 1997 (Vic) s 209.
[36] *Residential Tenancies Act* 1997 (Vic) s 212.

Under section 248 of the RTA, the landlord may give the tenant a notice to vacate if the tenant fails to comply with a compliance order and, if the tenant fails to vacate, the landlord may apply to VCAT for a possession order.[37] VCAT *must* make the order if it is satisfied that the landlord was entitled to give the notice to vacate.[38] VCAT *must not* make an order if it is satisfied that:

- The failure to comply with the order was trivial or has been remedied as far as possible; and
- There will not be any further breach of duty; and
- The breach of duty is not a recurrence of a previous breach of duty.[39]

In Homeless Law's experience, compliance orders are commonly used by landlords to regulate tenant behaviour by requiring them to refrain from breaching one of the following duty provisions:

- A tenant must not cause nuisance or interference;[40] or
- A tenant must keep rented premises clean.[41]

Homeless Law sees that the use of compliance orders under the current legislation places a significant burden on tenants, because of the often indefinite risk of eviction once a compliance order is made. This is particularly the case for tenants who are more likely to be alleged to have breached their duties, including tenants: living in close proximity to neighbours, with children, experiencing family violence, or dealing with mental health or substance dependence issues. In addition to being more likely to be the subject of a compliance order, these tenants are also at greater risk of homelessness in the event of eviction.

The two key features of the compliance process under the current legislation which place tenants at risk are:

- There is no requirement for VCAT to specify a timeframe on a compliance order, or to state that it lapses after a period of compliance. Tenants can be indefinitely subject to these orders, which can place tenants at perpetual and ongoing risk of eviction and reduce their stability and security in their homes; and
- Compliance orders are a stepping stone in the eviction process. When making a decision to evict a tenant based on breach of a compliance order, VCAT has limited discretion to consider the tenant's circumstances and vulnerabilities, and no discretion to consider whether the eviction is a reasonable option and justified given the circumstances of the breach.

3.2.2 The risks of broad and indefinite compliance orders

The RTA does not specify that compliance orders should be time limited, either by requiring VCAT to set a timeframe when making a compliance order or by prescribing a period that compliance orders remain in effect for. It is common that compliance orders made by VCAT have no fixed timeframe so last the entire length of the tenancy, and are so general that a wide range of behaviours could be suggested to breach the order.

The ability to evict on the basis of an alleged breach of a broad and indefinite compliance order can impose particular hardship on tenants in social housing who may have experienced periods of homelessness, have often waited extended periods for their housing and had hoped to have ongoing tenancies where they could establish a safe and stable home.

The way in which compliance orders can be misused when relationships with neighbours break down – and the severe stress and anxiety that this can cause for tenants – is apparent from the two case studies below.

[37] *Residential Tenancies Act* 1997 (Vic) s 322.
[38] *Residential Tenancies Act* 1997 (Vic) s 330.
[39] *Residential Tenancies Act* 1997 (Vic) s 332(1).
[40] *Residential Tenancies Act* 1997 (Vic) s 60.
[41] *Residential Tenancies Act* 1997 (Vic) s 63.

Young man with history of homelessness faces eviction for dog barking and playing music

After years of homelessness and a traumatic childhood and adolescence characterised by periods in state care and foster homes, Zac was finally securely housed in an Office of Housing property. He had been waiting a long time for a home and shared his apartment with his two cats and dog.

After years in the property and without his knowledge, a neighbour started complaining to the Office of Housing about his dog barking and his music being up too loud. Despite being open to feedback from neighbours, none was given directly to him, instead he was asked to a meeting with housing staff, which he didn't attend. Before he knew it, he found himself in VCAT, unrepresented, alone and unaware of what was about to unfold. He felt, for the most part, the complaints were unfounded. The start of the hearing went well but when the witnesses provided their evidence he became upset, felt targeted and 'ganged up on' and left the hearing. A compliance order was granted.

Zac admits to intentional non-compliance with the order in the days following the hearing, as he was hoping this might provide Office of Housing impetus to act on a request for a transfer. He was seeking a transfer because he had been experiencing discrimination from other tenants on the basis of his sexuality. They would yell offensive names at him, spit at him and throw things through his window. He quickly learnt that despite his desire to move, non-compliance was not a solution and only increased the risk of him being evicted. With this realisation, he started complying and made significant changes to ensure that he couldn't be breached and wouldn't be at risk of having a possession order made against him.

Despite these changes, the other tenant kept complaining. The Office of Housing acted on these complaints and threatened to evict Zac but before applying for a possession order, they offered the opportunity for mediation with the tenant making complaints. Zac attended and felt it went well. He was able to take a support person and the mediation was completed by an independent party. He has maintained his housing but is still hopeful to be able to move out of the property so he can live peacefully with his animals elsewhere.

During Homeless Law's consultation with Zac, he said didn't feel like he was given fair opportunity to share his side of the story, or for the issue to be remedied outside of VCAT. In terms of the pressure that Zac felt once a compliance order had been made he said:

> *It just meant that basically I have been creeping around in my own home. I have been so strict on my dog. Because the complaints haven't ceased even when I have been making huge changes in not only my own personal lifestyle but also my home environment.*
>
> *I am anxious here all the time … it takes me ten minutes to psych myself up before I even walk out the door.*

Zac made the following comments about the compliance order process:

- *"I think there could have been a lot more investigation in terms of the legitimacy of complaints … there has to be a fine line – what is a warranted complaint and something people just need to get told … You've all got to live in a small environment, so you are all going to do things that aren't going to sit well with each other every now and then …"*
- *"I am not unreasonable and if you've got a problem just come and talk to me. Don't call the police, don't call housing, come and talk to me."*
- *"If he had come to me and I had refused to turn it [the music] down, I would say warranted complaint, but he's never even spoken to me about it, so I don't understand why that legitimises the complaint – if you don't tell people how can they know?"*
- *"I didn't realise … when the hearing happened that the resident [who had made the complaints] would be there … that he would bring his partner … and … that she would basically tarnish my character … I totally felt like I had walked in to a trap and they were manipulating the situation."*

Single mother with two children who has experienced family violence and homelessness facing eviction for dog barking and children making noise in the backyard

Amy is a single mother with two children. Having fled a violent relationship, she became homeless. Since that time she has spent a number of years trying to recover from the impacts of the violence with the assistance of services and supports. She was finally offered more permanent accommodation through the Office of Housing.

Shortly after moving in to the property with her two children, one neighbour quickly began having issues with her. She was not fully aware of what his complaints were, her only indication was yelling over the fence at her children playing in the backyard or at the dog when it was barking. He didn't approach her to speak about it or explain why this upset him.

She received breach notices for things like playing the music too loud and excessive noise. She spoke with her landlord about these notices citing her concern that the landlord had not actually witnessed the alleged behaviour and querying the extent of the issue. Amy also had some evidence that during some of the times that the alleged breaches were taking place, she was not home. She felt it was unfair that she was simply issued with written notices and then expected to remedy the behaviour when it was her sense that she was doing nothing wrong. She would have also liked the neighbour to approach her to speak about it rather than complain to her landlord. She had had tenancies before and they were uneventful, and even at this property she was surrounded by five houses yet only one neighbour appeared to have an issue.

Despite making some attempts to remedy the issue by restricting her children's time in the backyard and removing the stereo from her house, before long, Amy ended up in VCAT facing a compliance order. Rather than issuing the order, the member ordered mediation but the neighbours declined to participate.

Amy's case study highlights that the compliance order process at VCAT escalates issues very quickly, which are often neighbour disputes that can't be effectively remedied with a compliance order. In her case, the VCAT member ordered mediation which is unusual but an approach that Homeless Law encourages. It was clear for Amy that her neighbours who were the complainants were not interested in resolving the issues, which reinforced her sense that the complaints were vexatious and unwarranted.

Amy made the following comments about the compliance order process:

- *"I don't think it's fair that they send you out a bunch of notices … as your breach and then you just have to deal with it and go to court. There needs to be a process before, whether it be mediation with the neighbour or whoever is complaining."*
- *"It's not fair. My daughter was asking me permission to go in the backyard. That's our home, she doesn't need permission to go in the backyard. If she wants to go in the backyard, she is allowed to go in the backyard when she wants."*
- *"There needs to be a better process. You can't just go from an owner or someone making a complaint to going to VCAT because it's all one way there. The person in [public] housing doesn't feel like they have a leg to stand on. I don't think it is very fair."*

Amy would have been homeless again if the issues had escalated and she was evicted from the property. She couldn't afford a private rental property and, although she had applied for a transfer to remove herself from this situation, transfers take years in public housing.

3.2.3 VCAT's decision-making when evicting for non-compliance

Both Amy and Zac felt persecuted, anxious and uneasy in their social housing properties, which were intended to provide them with safety and stability after periods of trauma and homelessness. The allegations against them were not serious and were arguably realities of day-to-day living in close proximity to others. For both Amy and Zac, the complaints that made them the subject of compliance proceedings emanated from one neighbour and both felt that there were factors other than genuine breaches contributing to the complaints (in Zac's case his sexuality and in Amy's her neighbour's general dislike of public housing tenants).

In other cases, for example Jessica's, there will be genuine concerns regarding compliance, but it will be clear that eviction is not an appropriate or proportionate response.

Hoarding, mental health and imminent eviction for breach of compliance order

Jessica contacted Homeless Law and instructed that her landlord, a community housing provider, had recently obtained a possession order from VCAT, and would soon be purchasing a warrant for her removal from the premises. Jessica's landlord was concerned about the condition of the premises, and in particular, the accumulation and cluttering of personal items at the property which had become an issue for several neighbours. Jessica was being evicted for breaching a compliance order.

Jessica had previously told her landlord that clutter was a symptom of her mental illness and that she was continuing to see medical professionals to assist with this. Jessica instructed that her previous housing manager was aware of her mental health issues and had not sought to evict her as a result of the clutter. Her new housing manager, however, had decided to take legal action against Jessica for breach of a compliance order. Without local family supports or other long-term accommodation options, Jessica was fearful of losing her housing as the instability of homelessness would significantly exacerbate her mental health issues.

Homeless Law assisted Jessica by negotiating with her landlord not to purchase a warrant to remove her from the property. Homeless Law's negotiation encouraged the social housing provider to explore other options that might help to address their concerns. Homeless Law asserted that, as a provider of low-cost housing to vulnerable tenants on behalf of the government, the community housing provider was a functional public authority under the Charter. Under section 38 of the Charter, the housing provider was required to give proper consideration to Jessica's Charter rights, particularly the right to privacy, and to act compatibly with those rights.

As a result of the negotiations, a detailed agreement was entered into between Jessica and her landlord. The agreement allows Jessica to remain in the premises provided that she continues to engage with relevant support services, and to make efforts to address her landlord's concerns in relation to the premises.

Jessica has kept her housing and this stability has allowed her to continue engaging with relevant support workers to improve her health and address the clutter that had accumulated at her property.

As the RTA currently stands, there is limited room for the complexities behind compliance proceedings to be considered either in the compliance process or in subsequent eviction proceedings. As mentioned above, when VCAT is determining an application for a possession order based on breach of a compliance order, it must not make the order when it is satisfied that:

- The failure to comply with the order was trivial or has been remedied as far as possible; *and*
- There will not be any further breach of duty; *and*
- The breach of duty is not a recurrence of a previous breach of duty.[42]

The requirement to cumulatively meet these criteria makes it difficult to satisfy VCAT that a possession order cannot be made under section 332 of the RTA.

Further to this, there are no formal steps that landlords or tenants are required to take to resolve or mediate any issues that have led to compliance proceedings. This means that often, the tenant will not have had any opportunity to discuss the behaviour or concerns which may have led to the complaints, breach notices, and subsequent compliance order proceedings. This process at VCAT can be daunting for tenants, particularly where they have not had an opportunity to discuss the circumstances which lead to the allegations outside the Tribunal room. As outlined in Zac's case study, this can be problematic because even if a tenant has made an effort to change their behaviour, it may not prevent them from having complaints made against them and feeling victimised and at a loss in terms of secure housing.

While Amy and Zac were both offered mediation (discussed further in part 3.3), in Homeless Law's experience, it is rare that mediation is initiated by the landlord or ordered by VCAT. As was the case for Jessica, while her mental illness was clearly contributing to her conduct and she was working with a support team to address these issues and remedy her non-compliance, VCAT made a compliance order and subsequently a possession order i.e. the limited discretion under section 332 was not

[42] *Residential Tenancies Act* 1997 (Vic) s 332(1) (emphasis added).

sufficient for VCAT to decline to make a possession order. It was only through robust negotiation with the landlord that Jessica's eviction into homelessness was able to be prevented.

3.2.4 Improving compliance mechanisms under the RTA

In designing reforms to the compliance regime, the Government should consider the following jurisdictions:

- **Australian Capital Territory**: the ACT Civil and Administrative Tribunal (**ACAT**) is empowered, in relation to an application about a tenancy dispute or occupancy dispute, to make an order requiring performance of a residential tenancy agreement or occupancy agreement.[43] If the tenant breaches an order, the landlord may apply to ACAT for a termination and possession order. ACAT may make an order if it is satisfied that it made the order, that the order was breached and that the breach justifies termination.[44] However, ACAT has discretion to refuse to make a termination and possession order, if it is satisfied that:
  - It is appropriate and just to do so; and
  - The tenant:
    - has remedied the relevant breach; or
    - undertakes to remedy the breach within a reasonable specified period and is reasonably likely to do so.[45]

- **Scotland**: the Scottish model is discussed in more detail in part 3.5 and the Annexure, but in brief, as part of Scotland's commitment to homelessness prevention, the *Housing (Scotland) Act* 2001 provides that for certain types of tenancy agreements, the court must be satisfied that the landlord has a statutory ground for the recovery of possession and that 'it is reasonable to make the order' for possession. The reasonableness test incorporates consideration of the nature, frequency and duration of the action by the tenant leading to the application to evict, the degree which the tenant is responsible for the eviction proceedings, the effect of the tenant's conduct on others and whether the landlord has considered other possible courses of conduct.

Compliance orders which are broad and often indefinite in length can place tenants at perpetual risk of eviction. They are susceptible to misuse in disputes between neighbours, and can be a blunt tool for dealing with complex circumstances of tenants who need support to meet their obligations and whose vulnerabilities will be significantly exacerbated if they lose their housing.

In an environment where eviction of vulnerable people carries a significant risk of homelessness, the compliance regime under the RTA should be revisited to minimise the risk of arbitrary, unreasonable or avoidable evictions.

[43] *Residential Tenancies Act* 1997 (ACT) s 83(b).
[44] *Residential Tenancies Act* 1997 (ACT) s 48(1)(b).
[45] *Residential Tenancies Act* 1997 (ACT) s 48(2)(a). Alternatively, ACAT can suspend a termination and possession order (for a maximum period of 3 weeks) if the tenant would suffer significant hardship if it was not suspended (s 48(2)(b)).

Recommendation 3: compliance orders should be time limited and eviction for breach should be subject to a reasonableness requirement

Compliance orders should be worded as specifically as possible, and should be limited to a period of six months before lapsing. Only where subsequent orders are needed should there be discretion for them to be extended for a period of up to 12 months.

VCAT members should be given more flexibility when determining whether a tenant should be evicted for breach of a compliance order, including:

- Amending section 332(1)(b) of the RTA so that each of the subsections are alternative bases on which a possession order can be refused; and
- Giving VCAT members discretion to consider whether eviction for non-compliance is reasonable in the circumstances (which includes consideration of the nature, frequency and duration of the action by the tenant leading to the application to evict, the degree which the tenant is responsible for the eviction proceedings, the effect of the tenant's conduct on others and whether the landlord has considered other possible courses of conduct).

3.3. Mediation and dispute resolution: reducing reliance on VCAT and generating negotiated outcomes

3.3.1 Effective but underutilised

Alternative dispute resolution (**ADR**) has been recognised by VCAT as:

> *a more cost-effective and flexible alternative to traditional Tribunal hearings and can be less stressful for the people involved. It gives parties greater control over the outcome of their disputes and can often lead to successful outcomes not achievable with traditional methods of dispute resolution*.[46]

ADR, including mediation and compulsory conferences, has been used by VCAT since 1988.[47] VCAT has the power to order a proceeding, or any part of a proceeding, for mediation, with or without the consent of the parties.[48] The VCAT Act refers to payment of a fee in section 88 but to date no fee for mediation has been prescribed.[49]

VCAT has in place a range of options for facilitating mediation, including a specialist panel of mediators, VCAT members who are accredited as mediators and accredited staff mediators. In 2013–14, there were 79 VCAT members and staff who were accredited mediators and a specialist panel of 26 mediators.[50] There are purpose- built mediation facilities at VCAT's King Street premises.[51]

VCAT currently runs a Short Mediation and Hearing (**SMAH**) program, whereby parties are required to attend a brief mediation conducted by a staff mediator, generally prior to the hearing. According to VCAT, '[t]he mediator helps parties reach an agreement that both parties find acceptable, thereby avoiding the potential stress of a public hearing. If the matter does not settle at the short mediation, the parties are given a hearing on the same day. Feedback from parties who have tried SMAH suggests they feel more in control of their case and appreciate the opportunity to develop their own solutions.'[52] Around half SMAH mediated cases were resolved without a hearing.[53]

Currently there is no mechanism requiring ADR in the RTA. A small number of matters have been mediated at VCAT, with encouraging results in terms of resolving matters prior to final hearing. In 2013–14, 30 matters in VCAT's Residential Tenancies

[46] VCAT Annual Report, above n 6, 14.
[47] Ibid.
[48] *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) s 88.
[49] Jason Pizer, *Pizer's Annotated VCAT Act* (4th ed), 2012, 380.
[50] VCAT Annual Report, above n 6, 7.
[51] Ibid 14.
[52] Ibid 15.
[53] Ibid.

List were referred to mediation, 18 of which were resolved through mediation. A further three matters were resolved prior to final hearing.[54]

Despite its proven effectiveness, mediation and other forms of ADR are underutilised in Victorian tenancy matters. In most tenancy matters run by Homeless Law, the landlord has sought for the matter to be resolved by VCAT at a hearing. This is the case even where a payment plan has been negotiated prior to the hearing date and orders of consent have been agreed to by both parties. The heavy reliance upon a VCAT hearing can be problematic for a number of reasons, including:

- VCAT hearings can be stressful for both parties, and although VCAT is regarded as an informal jurisdiction, the hearings can involve complex processes such as calling evidence from witnesses; and
- The volume of matters heard by the Residential Tenancies List (with over 61,126 applications made during 2013–14)[55] places VCAT under strain and can be an inefficient way of resolving matters that could have been resolved at an earlier stage.

3.3.2 The benefits of mediation and negotiation

The benefits of mediation from a tenant perspective were identified by Zac, whose case study is in part 3.2 of this submission:

> *I was given the option of doing mediation [by the landlord] with the other tenant, which I did and … it was an amicable meeting. We were both present with case managers and the people at the actual mediation made sure that both parties were given fair chance to get their points across. It was done really respectfully. I think we both sort of saw things from a different point of view … For the time being we ended on a handshake and everything has gone back to pleasant.*

As highlighted in part 3.2 above, compliance proceedings are a key area in which tenants, landlords and VCAT could benefit from mediation and its potential to resolve matters to the satisfaction of both parties before escalation and without the need for a VCAT hearing. Homeless Law also identifies rental arrears matters as an area in which mediation has significant potential to reduce unnecessary reliance on VCAT and to improve outcomes for both landlords and tenants.

Olivia, whose case study is in part 2 of this submission, was not offered the opportunity to participate in a mediation prior to her VCAT hearing for arrears:

> *I didn't receive the VCAT notice and I found out through the support services when I was trying to sort out the issue, there was no other avenue to go back … before proceeding to VCAT… [to] have an opportunity to see if we can sit down and work out an arrangement … I think a mediation and finding other support avenues or to be able to take the issues rather than leaving us homeless and having a timeframe to move out with no support. This should come before [the] VCAT [hearing] … [having] an opportunity to sit down and maybe even a support worker there that can educate both, or work out an arrangement that can work for both parties before it goes to VCAT.*

Furthermore, of the 62 clients Homeless Law has represented through the Women's Homelessness Prevention Project (**WHPP**), 42 women (68%) were facing eviction due to rent arrears. Of these 42 women, 24 were living in private rental, 11 were living in public housing, four were living in community housing, two were living in transitional housing, and one woman was living in a private rooming house. The average amount of arrears owed amongst this group of 42 women at the time of their first appointment was $2177, with the lowest amount owed being $70, and the highest amount owed being $7,700.

At the 12 month mark, 33 of these 42 matters had finalised, with 76% of women able to maintain their tenancy through the negotiation of payment plans, including lump sum payments from Homeless Law's brokerage fund. Of this group, however, 76% of women were still required to attend a VCAT hearing prior to their matter being finalised. These figures indicate that landlords are often too quick to resort to VCAT to resolve disputes over rent arrears, rather than negotiating with tenants and their representatives before commencing proceedings. This reliance on the Tribunal places an unnecessary resource burden on VCAT, in circumstances where the parties are capable of resolving the matter to their mutual satisfaction at an earlier point.

3.3.3 Piloting mediation in residential tenancies matters

In considering different frameworks for mediation in tenancy matters, the following models may be of interest:

- **Australian Capital Territory:** the ACT Civil and Administrative Tribunal has to power to require parties to attend mediation if it considers the application before it to be suitable for, and reasonably likely to be resolved by, mediation.[56]

[54] Ibid 17.
[55] Ibid 11.
[56] *ACT Civil and Administrative Tribunal Act* 2008 (ACT) s 35.

- **New South Wales:** in New South Wales, the Civil and Administrative Tribunal may require parties to use resolution processes, such as alternative dispute resolution, and adjourn proceedings to any time and place for the purpose of enabling the parties to negotiate a settlement.[57]
- **Scotland:** since 2003, landlords and mortgage lenders in Scotland have been required to give notice to the local authority[58] (eg a local council) in which the property is situated when initiating proceedings to evict a tenant.[59] This requirement was introduced with the *Homelessness etc (Scotland) Act* 2003 which had the objective of giving local authorities 'the opportunity to intervene early in order to prevent homelessness occurring.'[60] A 'Code of Guidance' states that the local authority 'should take as pro-active an approach as possible to prevent homelessness' and encourages making 'initial contact with all households involved.'[61] In April 2013, Crisis, a Scottish homelessness charity, reported that '25 out of 32 of Scotland's local authorities offer free [mediation] services'.[62]

Recommendation 4: a framework for negotiation and mediation should be introduced for tenancy matters

A focus on early resolution of disputes would reduce the burden on VCAT and has significant potential to achieve better outcomes for both tenants and landlords.

Landlords should be required to attempt to negotiate:

- A repayment plan with tenants prior to making an application for a possession order on the basis of rental arrears.
- Resolution of compliance-based disputes prior to making an application for a compliance order or a possession order on the basis of non-compliance.

3.4 Improving engagement and attendance at VCAT

VCAT plays a central role in regulation of residential tenancies as the primary statutory body responsible for determining disputes between landlords and tenants, including eviction proceedings and applications for compliance, compensation or repairs orders. However, available evidence suggests that many tenants are not attending their VCAT hearings or engaging with VCAT's processes, including where important issues affecting their housing rights are being determined.

As a service targeted at people experiencing or at risk of homelessness, Homeless Law frequently assists tenants who have had a VCAT possession order made against them in their absence. In many instances, Homeless Law clients were either unaware that a hearing was taking place, or were otherwise unable to attend the hearing due to a range of circumstances outside their control (eg incarceration, illness or caring obligations).

Based on our casework and the experiences of our client group, Homeless Law recommends a range of measures to improve tenant attendance at VCAT, including:

- Changing the terminology and information associated with the current notice to vacate; and
- Changing the form and information provided with VCAT's notices of hearing for residential tenancies matters.

These measures would go a significant way towards increasing tenant attendance rates at VCAT, which will result in more efficient resolution of disputes and associated resourcing benefits for VCAT.

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[57] *Civil and Administrative Tribunal Act* 2013 (No 2) (NSW) ss 37, 1 and 59.
[58] *Housing (Scotland) Act* 1987 c 26, s 338.
[59] *Homelessness etc (Scotland) Act* 2003 asp 10, s 11.
[60] Policy Memorandum, *Homelessness etc. (Scotland) Bill* 2002, 5 [21] <http://www.scottish.parliament.uk/S1_Bills/Homelessness%20etc.%20(Scotland)%20Bill/b63s1pm.pdf>.
[61] Scottish Executive, *Code of Guidance on Homelessness*, May 2006, 16 [2.73] <http://www.gov.scot/Resource/Doc/53814/0012265.pdf>.
[62] Crisis, Submission to Scottish Parliament, *Better Dispute Resolution in Housing: Consultation on the Introduction of a New Housing Panel for Scotland*, April 2003, 3 <http://www.gov.scot/Resource/0042/00421179.pdf>.

3.4.1 The extent of tenant non-attendance at VCAT

Within VCAT's 15 distinct lists, the Residential Tenancies List is busiest, accounting for almost 60% of VCAT's entire case load in 2013–14.[63] VCAT members sitting in the Residential Tenancies List determine a range of different matters, but most commonly determine applications by landlords for possession and compensation orders due to rent arrears.[64] Once made, these orders allow landlords to purchase warrants to evict tenants, and to be compensated for financial loss out of a tenant's bond.

Available data from VCAT's 2013–14 annual report confirms that landlords use VCAT far more often than tenants, with more than 92% of the 61,126 applications received by the Residential Tenancies List in 2013–14 being initiated by landlords, and only 6% by tenants. Similarly, the most recent available information about the rates of tenant attendance at VCAT indicates that in 2010, up to 80% of hearings were unattended by tenants.[65]

This data suggests that there are currently significant numbers of possession and compensation orders being finalised in the absence of affected tenants. Although the issue of tenant non-attendance has been formally acknowledged by VCAT in 2010, apart from than the introduction of SMS hearing notifications in 2009 there have been no significant steps taken to increase tenant attendance rates at VCAT for over five years. Homeless Law is also not aware of an evaluation of the effectiveness of the SMS hearing reminder model, or any revised tenant non-attendance rate since the 2010 figures were published.

3.4.2 The benefits of increasing tenant attendance at VCAT

Homeless Law routinely assists tenants who have missed VCAT hearings by helping them lodge applications for review, which often leads to the underlying VCAT order being revoked and varied under section 120 of the VCAT Act. The most common example of this occurs when Homeless Law assists a tenant to apply for a possession order for rent arrears to be re-opened and replaced with a negotiated payment plan. This outcome gives the tenant a chance to avoid eviction with a plan in place to prevent the landlord from incurring financial loss.

The importance of tenant attendance: 10 eviction decisions reversed

As discussed above, in the first 12 months of Homeless Law's Women's Homelessness Prevention Project (**WHPP**), 62 clients were assisted and 33 finalised outcomes were recorded for clients at risk of eviction for rent arrears. Of this number, 25 women were able to maintain their existing tenancy. In 10 of these cases, the Homeless Law lawyers lodged a review application in relation to a possession order that had been made in the client's absence. All 10 review applications were accepted by the Tribunal, which prevented further action being taken to end the tenancy.

These results indicate that for many tenants facing eviction proceedings, attendance at VCAT can significantly alter the outcome in their favour, and provide an important opportunity to avoid eviction and work towards repaying their rent arrears.

In addition to playing a critical role in avoiding unnecessary evictions into homelessness, from VCAT's perspective, ensuring tenants can access appropriate legal advice and assistance as early as possible when eviction proceedings are commenced is likely to result in fewer VCAT hearings being required, because:

- There is an increased likelihood that matters will resolve by consent, which may obviate the need for a VCAT hearing; and
- There is a decreased likelihood that tenants will fail to appear at their initial hearings and subsequently submit applications for review after obtaining information about their legal options after the hearing.

[63] VCAT Annual Report, above n 6, 20. In this period, VCAT's Residential Tenancies List finalised 58,962 cases.
[64] Ibid.
[65] The Hon Justice Iain Ross, *Transforming VCAT* (Discussion Paper, VCAT 2010) 9.

3.4.3 Changes to notices to vacate

In Homeless Law's view, there are a number of ways that the current terminology and content of notices to vacate could be improved to increase tenants' awareness of their rights and the likelihood that they will engage with VCAT hearings relevant to their tenancy.

- **Amending the misleading title**: the term 'notice to vacate' is misleading as it creates the impression of finality, rather than identifying that it is only the initial step in an eviction process that in many cases is avoidable for a tenant. Homeless Law staff routinely provide advice to tenants who have received a notice to vacate from their landlord, and have interpreted it as a finalised order to vacate their home by the specified termination date. Many of these tenants are initially of the belief that failure to comply with the notice will result in penalties being imposed, or additional costs being incurred. For this reason, they are more likely to vacate a premises prematurely, and less likely to attend any subsequent VCAT hearings to present their case or defend the eviction proceedings. In our view, by replacing the term 'notice to vacate' with something that more accurately reflects the legal status of the notice (eg 'request to vacate' or 'notice of intention to end tenancy agreement'), fewer tenants would be likely to prematurely vacate their premises, and would be more likely to attend relevant VCAT hearings without fear of penalties being imposed for failure to comply with a request.

- **Providing information on notices to vacate about legal services that can assist tenants**: the lack of any referral information for tenants on the notice to vacate represents a missed opportunity to encourage tenants to engage with their rights and subsequent VCAT processes. Currently, the prescribed form of a notice to vacate set out in the regulations does not require any referral information to be included with a notice to vacate, other than a notation that a tenant can contact VCAT if they wish to challenge the validity of a notice to vacate.[66] In practice, most notices to vacate that Homeless Law sees do not contain this notation, and instead refer tenants to Consumer Affairs Victoria for assistance. This is true of notices to vacate issued by private landlords, real estate agents, and the Director of Housing in relation to public housing properties. While representatives of both VCAT and Consumer Affairs Victoria may be able to provide initial assistance to tenants who have received a notice to vacate, neither of these organisations will be able to provide legal advice or ongoing casework to tenants, and would need to refer tenants elsewhere for that type of assistance. In Homeless Law's view, the prescribed form of a notice to vacate rented premises could easily be amended so that contact details and websites of relevant legal services (eg Victoria Legal Aid, Tenants Union Victoria, Homeless Law and local community legal centres) are instead included on these notices.

These changes would increase tenants' ability to understand their options and to obtain legal advice and representation at the earliest stage in the eviction process. This has significant potential to increase the number of negotiated outcomes and potentially avoid the need for a VCAT hearing. It would also reduce the need for urgent review applications to be lodged where tenants have missed VCAT hearings and are seeking legal advice in the final stages of the eviction process when they are at imminent risk of forced removal from the rented premises.

3.4.4 Changes to the VCAT notice of hearing

Once a party has made an application to VCAT and a hearing date has been set by the Tribunal, a notice of hearing must be sent to all parties, notifying them of the time, date and location of hearing, along with other information deemed relevant by VCAT. [67] Notices of hearing for matters in the Residential Tenancies List (both initial hearings and hearings to determine an application for review under s 120 of the VCAT Act) are presented as a double-sided folded and sealed document that, until opened, provides a recipient with no indication that details of an upcoming VCAT hearing are contained inside.

There are a number of ways that the current VCAT notice of hearing could be improved to better engage with tenants and encourage their attendance at the Tribunal.

- **Review the form of the notice of hearing**: the physical form of the notice of hearing is confusing, difficult to open and provides no indication of the importance of the enclosed information. Tenants could mistake the notice for junk mail and

[66] Residential Tenancies Regulations sch 1 sets out form of the notice to vacate.
[67] *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) s 122.

discard or ignore it. Homeless Law understands that VCAT has continued to use these difficult to access notices of hearing because of technological limitations, but given the ongoing issue of tenant non-attendance and the increased likelihood of preventable evictions that this presents, we strongly recommend that a newer and more accessible form be introduced.

- **Review the content of the notice of hearing**: the information contained on VCAT's notice of hearing does little to assist people to understand their rights in relation to an upcoming VCAT hearing, and where they might seek legal assistance in relation to it. Notably, in 2010 then-President of VCAT Justice Bell acknowledged this widespread feedback in relation to the notices of hearing, along with the need to ensure that relevant information was presented in plain English.[68] Despite this consistent feedback, VCAT's notices of hearing for Residential Tenancies List matters do not provide any information for tenants about legal or other services that can assist them prior to their hearing. As outlined above in relation to the current prescribed form for a notice to vacate, inclusion of this information would be straightforward and could lead to a significant increase in tenant attendance, as well as a reduction in matters proceeding to VCAT, and an increase in matters that do proceed to hearing being resolved by consent. In addition to this referral information, the detail provided in the current notice of hearing for residential tenancies matters could be better targeted towards tenants, and include: a clearer step-by-step process for making adjournment requests; email contact information for the residential tenancies registrar; and information about the right to apply for VCAT ordered payment plans for rent arrears evictions. Targeting the information towards tenants in this way would be appropriate given that the vast majority of applications in VCAT's Residential Tenancies List are made by landlords against tenants, and it is therefore more likely that landlords will already be cognisant of their rights and options.

Recommendation 5: Amend the existing notice to vacate and VCAT notice of hearing to better engage with tenants and improve attendance rates at VCAT hearings

Homeless Law recommends:

- Amending the RTA to change the term 'notice to vacate' to prevent tenants interpreting these notices as a final requirement to leave.
- Amending the current prescribed form for notices to vacate to include referral information for relevant legal services that may be able to assist tenants.
- Changing the physical form of the VCAT notice of hearing to ensure the information provided is reaching as many tenants as possible.
- Changing the information provided in VCAT notices of hearing for Residential Tenancy List matters to provide relevant information for tenants, including referrals to legal services that can assist them pre-hearing.

[68] See, eg, The Hon Justice Kevin Bell, *One VCAT – President's Review of VCAT* (25 February 2010) 23: 'The need to redesign forms and correspondence in plain English was frequently emphasised' (**One VCAT Review**).

3.5 VCAT on the frontline of tenancy outcomes: strengthening discretion and improving decision-making

Through Homeless Law's eviction prevention work, we see that it is currently too easy for Victorian tenants to be evicted into homelessness.

While the RTA provides VCAT members with discretion not to make a possession order in limited circumstances (for example, rent arears evictions where financial arrangements to avoid loss to the landlord can be made)[69] and, when making a possession order, VCAT members can postpone the eviction by up to 30 days if they are satisfied that the tenant would suffer hardship without the postponement and that this hardship would be greater than the landlord's hardship,[70] ordinarily the RTA provides that VCAT members *must* make an order of possession if the landlord proves they were entitled to serve a notice to vacate.

As the statistics in part 2 make clear, even with an extension of 30 days, it can be extremely difficult to locate alternative affordable housing for low income Victorians. Also, where tenants do not attend the VCAT hearing or are not represented and are unable to present a case for remaining in the property or having additional time, the VCAT member will ordinarily make an order for their removal from the premises and allow the warrant to be purchased immediately.

In light of this, in addition to the strengthening services and programs that are highly effective at preventing evictions into homelessness,[71] Victoria needs a legal, policy and cultural framework to make sure evictions into homelessness are only occurring as a last resort.

To that end, this section focusses on:

- Effective use of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (**Charter**) when making eviction decisions and the role it can play in balancing competing obligations for public and community landlords; and
- The potential for a 'reasonableness test' in eviction decisions and for tools such as a 'pre-eviction checklist' to help make evictions a last resort.

3.5.1 Considering human rights when making eviction decisions

In addition to their rights and responsibilities under the RTA, public and community landlords (together, social landlords) also need to comply with section 38 of the Charter when making decisions about evictions. Section 38 requires them to:

- Act in a way that is compatible with human rights; and
- When making a decision, give proper consideration to relevant Charter rights.[72]

The decision to take steps to evict the tenant (for example, by issuing a notice to vacate, applying to VCAT for a possession order or purchasing a warrant), potentially engages the following Charter rights:

- Section 13(a) – A person has the right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with';
- Section 17(1) – 'Families are the fundamental group unit of society and are entitled to be protected by society and the State'; and/or
- Section 17(2) – 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.

There is a built in mechanism for balancing competing priorities under section 7(2) of the Charter, which sets out factors to be taken into account to determine if any limitation on rights was reasonable and 'demonstrably justified' in the circumstances.[73]

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[69] *Residential Tenancies Act 1997* (Vic) s 331.
[70] *Residential Tenancies Act 1997* (Vic) s 352.
[71] See, eg, *Joint Submission to the Royal Commission into Family Violence on Housing, Homelessness and Family Violence* (May 2015) endorsed by 129 organisations, which sets out recommendations for investment in services to prevent evictions into homelessness: (1) Strengthening programs such as Safe at Home responses, costed at $7.6 million to provide Safe at Home measures to 1521 households ($5000 per package); (2) Extending funding for the Social Housing Advocacy and Support Program (SHASP), costed at $3 million to provide an additional 1500 case management episodes per year; (3) Continuing and extending legal representation for women facing eviction, costed at $1.8 million to provide 500 women at risk of eviction with legal representation and social work support, based on the WHPP model that has assisted 62 women in 12 months at an annual operating cost of $220,000; (4) Increasing private rental brokerage schemes, costed at $1 million to double existing private rental brokerage packages to approximately 600 packages in total; and (5) Establishing a rapid re-housing program to assist women and children escaping family violence to be quickly re-housed with appropriate supports in place, costed at $10 million per year to provide over 1000 women and their children with support to search for properties and medium term rental subsidies to ensure rent remains affordable.
[72] *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 38.
[73] *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 7(2).

Using the Charter in housing matters

For clients living in public or community housing, Homeless Law frequently engages in Charter-based negotiation with social landlords with a view to preventing the eviction of vulnerable tenants into homelessness. This is often on the basis that, in taking steps to evict the tenant, the landlord has not have given proper consideration to, or acted compatibly with, the tenant's rights under the Charter.

The Charter provides a helpful framework for making difficult decisions. It encourages consideration of a tenant's individual circumstances, including their family, any health problems and their risk of homelessness, and allows these considerations to be balanced against the competing obligations of social landlords (including, for example, the safety or comfort of other tenants). It encourages proper consideration of alternatives to eviction.

Prior to the Court of Appeal's decision in *Director of Housing v Sudi* [2011] VSCA 266 (**Sudi**), VCAT members were considering whether or not a social landlord had complied with section 38 of the Charter when determining applications for possession. VCAT members were balancing human rights considerations against the competing obligations of social landlords in making their decisions about whether to make a possession order. In Homeless Law's experience, this accountability (i.e. the knowledge that VCAT would consider Charter compliance in eviction proceedings) provided a compelling incentive for social landlords to consider the client's circumstances and to contemplate reasonable alternatives to eviction.

In Sudi, however, the Court of Appeal held that VCAT does not have jurisdiction to consider whether a social landlord has complied with its obligations under section 38 of the Charter in proceeding with an eviction, and that any questions about Charter compliance in eviction matters must be considered by the Supreme Court.

Since Sudi, Homeless Law has witnessed less accountability for human rights compliance, which presents a greater risk of eviction for vulnerable tenants.

In our experience, social landlords are less motivated to try to comply with human rights obligations because there is little consequence of not doing so. Although social landlords still have an obligation under section 38 of the Charter to act compatibly with human rights and to give proper consideration to human rights in decision-making, it is unlikely that tenants have meaningful recourse in the event of non-compliance given the costs associated in challenging the decisions of social landlords in the Supreme Court.

Restrictive timeframes for Charter-based challenges

In addition to the impact of Sudi, the recent decision of the Supreme Court in *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 (**Burgess**) has further limited vulnerable tenants' options for seeking judicial review of the eviction decisions of social landlords. While Burgess is a powerful decision in terms of confirming the Director of Housing's obligation to consider the Charter when deciding whether to evict tenants, one unfortunate result of this decision is that tenants are now required to commence judicial review proceedings in relation to Charter unlawfulness:

- After the Director has made the decision to issue the notice to vacate but before VCAT has made a possession order; or
- After the Director has made a decision to purchase a warrant but before the locks are changed.

This further limits the accessibility of a mechanism for ensuring the human rights compliance of social housing providers in eviction proceedings. It is undesirable for low income tenants who may have a range of other vulnerabilities to have to make a decision to commence proceedings in the Supreme Court prior to exhausting the no cost, much less onerous avenue available to them in VCAT.

To overcome these barriers to meaningful consideration of human rights in the decision-making of social landlords, Homeless Law recommends legislative amendments which give VCAT jurisdiction to consider Charter compliance in eviction proceedings brought by social landlords.[74]

VCAT is a more accessible forum for both tenants and landlords and its ability to consider the human rights compatibility of evictions would play a significant role in making sure evictions of vulnerable tenants into homelessness only ever occur as a last resort.

For social housing tenants, this amendment would be a genuine safeguard against preventable evictions.

[74] For more detailed submissions on the legislative amendments required to give effect to this recommendation, see Justice Connect Homeless Law, *Charting a Stronger Course: Submission to the Eight Year Charter Review* (June 2015).

3.5.2 Making sure evictions are 'reasonable' and a last resort

Approximately 40% Homeless Law's clients facing eviction in 2014–15 were living in private rental properties and, for these clients, legislative amendments that provide VCAT with the jurisdiction to consider the Charter will not minimise their risk of eviction.

For these tenants, the RTA is the only layer of legal protection against eviction into homelessness. As mentioned above, while the RTA does provide VCAT members with discretion not to make a possession order in limited circumstances (for example, rent arears evictions where financial arrangements to avoid loss to the landlord can be made), ordinarily the RTA provides that VCAT members must make an order of possession if the landlord proves they were entitled to serve a notice to vacate.

There is no overarching requirement in the RTA that a landlord's eviction of a tenant must be reasonable in the circumstances. In Homeless Law's view, this is an area where the legislation could be improved to give VCAT greater powers to prevent evictions where the Tribunal cannot be satisfied that the eviction is reasonable in the circumstances.

The Scottish model: A commitment to homelessness prevention

As part of Scotland's commitment to homelessness prevention, the *Housing (Scotland) Act* 2001 provides that, for certain types of tenancy agreements, the court must be satisfied that the landlord has a statutory ground for recovery of possession and that 'it is reasonable to make the order' for possession.

The reasonableness test incorporates consideration of:

- the nature, frequency and duration of action by the tenant leading to the application to evict
- the degree to which the tenant is responsible for the eviction proceedings
- the effect of the tenant's conduct on others
- whether the landlord has considered other possible courses of conduct.

As part of its commitment to homelessness prevention, Scotland also introduced a legislated 'pre-eviction checklist' of requirements for landlords to satisfy before proceeding with evictions, which was reported to have reduced evictions by 33% in its first year in operation.

A more detailed case study of Scotland's homelessness prevention model is set out in the **Annexure**.

Legislative amendments of a similar nature in a Victorian context would give an additional layer of discretion to VCAT members who are confronted with applications for possession that, while legally valid, are otherwise unreasonable and inappropriate given the circumstances and background of the matter.

The guidelines or checklist for landlords before taking steps to evict could include requirements that the landlord has spoken to the tenant, or made attempts to speak with them, about the issue the eviction proceedings relate to, and attempted to understand the impact of eviction on the tenant, along with exploring alternatives to eviction and linking the tenant with advice or supports wherever possible.

For vulnerable tenants, the inclusion of a reasonableness requirement in the RTA would provide an additional layer of legal protection that might give them an opportunity to stabilise their tenancy and avoid entering homelessness. The introduction of a set of pre-eviction criteria for landlords to satisfy prior to commencing eviction proceedings would also help to encourage the use of eviction as a last resort.[75]

[75] See, eg, *Housing (Scotland) Act* 2001 (UK) s 16. See also Chris Povey, *Investigating Tenancy Sustainment Programs and Approaches in relation to Clients at Risk of Homelessness* (The Winston Churchill Memorial Trust of Australia) (September 2011) for a more detailed discussion of the Scottish model.

Recommendation 6: Legislative and procedural safeguards to prevent unnecessary evictions into homelessness

To make sure that evictions from both social and private tenancies only ever occur as a last resort, Homeless Law recommends:

- Law reform to give VCAT jurisdiction to consider the human rights compatibility of eviction decisions by social landlords;
- The introduction of a 'reasonableness' requirement for all evictions under the RTA, to give VCAT members discretion to avoid eviction where they are not satisfied it is reasonable in the circumstances; and
- Development of a pre-eviction checklist for landlords to satisfy before applying to VCAT for a possession. order.

3.6 A mechanism for internal appeal of residential tenancies decisions

In addition to being unable to have the human rights compatibility or reasonableness of an eviction considered, there is currently no provision under the VCAT Act or the RTA for internal review of decisions made in the Residential Tenancies List. The only option for parties to a tenancy proceeding is to apply for leave to appeal to the Supreme Court of Victoria on a question of law.[76] As discussed in part 3.5, the Supreme Court is not an accessible forum for tenants or, in many cases, landlords.

The absence of a mechanism for a matter to be reconsidered or re-opened by VCAT once an order has been made limits the consistency and quality of VCAT decisions, and leaves tenants dealing with harsh consequences, including eviction.

In a 2010 review of VCAT, then-President of VCAT Justice Bell noted:

> *There was widespread criticism of the tribunal's current limited capacity for internally rehearing and reopening cases and with the lack of an internal appeal tribunal. There was widespread support for such a system, although many were concerned about how added costs and delay could be minimised.*[77]

As this case study illustrates, even where an appeal to the Supreme Court has reasonable prospects of success, it is a daunting jurisdiction for clients, which carries a risk of adverse costs and protracted proceedings. For many tenants, it is simply not an option to pursue their appeal in this forum.

[76] *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) s 148.
[77] One VCAT Review, above n 68, 23. Justice Bell recommended that the VCAT Act be amended to: establish an appeal Tribunal within VCAT; and provide the Tribunal with a general power of reconsideration subject to sensible limits, whether or not an appeal Tribunal is established (at 5).

Client unable to appeal potentially flawed VCAT decision because too disheartened by the result at VCAT

Mabel is a public housing tenant who received a number of breach of duty notices over the past few years. More recently, she had been issued a breach notice for causing a nuisance to her neighbours.

Mabel sought Homeless Law's assistance after learning that, in her absence, the Office of Housing had obtained a compliance order from VCAT, based on allegations she had caused a further nuisance after receiving the recent breach notice. Mabel hadn't known about the VCAT hearing due to issues with receiving her mail. Homeless Law helped Mabel to apply for a review, and obtained a copy of the Office of Housing's application to VCAT, which had included only a copy of the recent breach notice Mabel had been given.

At the VCAT review hearing, however, the Office of Housing sought to lead evidence about all the previous breach notices Mabel had been given over the years. When Homeless Law's lawyers objected to this on the basis that it was procedurally unfair because the application to VCAT had not referred to any of this historical evidence, the VCAT member disagreed and allowed this evidence to be led. Ultimately, the VCAT member confirmed the previous compliance order. When the Homeless Law lawyers requested written reasons for the member's decision, this request was denied.

Mabel was disappointed with the VCAT member's decision, and Homeless Law obtained an opinion from a barrister who confirmed it was likely that the decision could be successfully appealed to the Supreme Court as a number of errors of law could be identified. Homeless Law offered to assist Mabel with an appeal, but she was so discouraged by what had occurred that she became disengaged and did not return calls before the 28 day period to lodge an appeal had expired.

For Mabel, the availability of an easily accessible review mechanism within VCAT might have provided her with a more appropriate forum for clarifying the VCAT member's decision, without placing additional strain and pressures on an already struggling tenant.

Homeless Law recommends legislative amendment to allow for internal appeal of VCAT decisions. Models that provide guidance include:

- **Queensland**: the Queensland Civil and Administrative Tribunal (**QCAT**), which hears a range of disputes, including residential tenancy disputes brought under the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld), has an internal appeals process, including for tenancy disputes. If the original QCAT decision was made by a non-judicial member (a senior member or ordinary member who is not a judge, or an adjudicator),[78] a party wishing to appeal the decision may appeal to QCAT's Internal Appeal Tribunal.[79] Parties do not require leave to appeal a question of law.[80] Leave of the Internal Appeal Tribunal is required to appeal a decision of fact, or a decision of mixed law and fact.[81] A hearing by the Internal Appeal Tribunal involves a reconsideration of the original evidence. If a party is dissatisfied with a decision made by the Internal Appeal Tribunal, the party can apply for leave to appeal to the Court of Appeal on a question of law.[82]
- **New South Wales**: the *Civil and Administrative Tribunal Act* 2013 (NSW) (**C&A Act**) provides a limited 'internal appeal' right for certain decisions made by NCAT in certain circumstances.[83] Parties generally have a right to appeal a question of law without needing to seek leave. Parties can seek leave to bring an internal appeal on 'any other grounds' (other than a question of law) to the Appeal Panel.[84] The Appeal Panel may 'permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance', to be given in the new hearing as it considers appropriate in the circumstances.[85] Parties need to seek and obtain leave before bringing fresh evidence before NCAT in an internal appeal.

[78] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) Schedule 3.
[79] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) Part 8 Division 1.
[80] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 142(1).
[81] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ss 142(1), (3)(b).
[82] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 150.
[83] *Civil and Administrative Tribunal Act* 2013 (NSW) s 32.
[84] *Civil and Administrative Tribunal Act* 2013 (NSW) s 80(2)(b).
[85] *Civil and Administrative Tribunal Act* 2013 (NSW) s 80(3)(b).

- ***Guardianship and Administration Act* 1986 (Vic):** if VCAT makes an order in relation to an application under the *Guardianship and Administration Act* 1986 (Vic), other than an interim order or a temporary order, a party or person entitled to notice of the application may apply to the Tribunal for a rehearing of the application (if the exemptions do not apply).[86] Upon receiving an application for a rehearing, the Tribunal must rehear the matter.[87] The Tribunal has all of the functions and powers that it had with respect to the matter at first instance. The Tribunal may affirm, vary or set aside the order of the Tribunal at first instance and make another order in substitution of it.[88]

In response to potential concerns about the costs or complexities associated with introducing an internal appeal mechanism, Homeless Law reiterates the comments of Justice Bell:

> *That more parties might appeal is not a persuasive reason not to have an appeal tribunal at VCAT. The present system is less accessible than it should be. I am concerned that some parties with legitimate grounds are not pursuing an appeal because of these restrictions. This is not consistent with the principle of equal access to justice, which should embrace an appropriate appeal system*.[89]

A process for internal appeal would ensure that parties had an affordable and accessible right of appeal and that the quality of VCAT decision-making is monitored and maintained. Given the magnitude of the consequences for tenants of decisions made in the Residential Tenancies List, such an avenue for appeal has significant potential to reduce arbitrary evictions and to build trust and confidence in the decisions of the Tribunal.

Recommendation 7: Allow internal appeal of residential tenancies decisions

Allowing for internal appeal from decisions made in the Residential Tenancies List would create an accessible mechanism of oversight, improve the consistency, predictability and quality of decision-making and strengthen protections for tenants against evictions that should be avoided.

4. The RTA's barriers to accessing safe and secure housing

While the majority of Homeless Law's tenancy legal representation is focussed on eviction prevention, we also assist clients with legal issues that are preventing them from accessing safe and secure housing.

This section considers three aspects of the RTA, which make it more likely that low income tenants who may also experience other forms of disadvantage will find themselves unable to exit homelessness or access safe housing. The main source of Homeless Law's evidence base on these issues is the Women's Homelessness Prevention Project (**WHPP**) and, accordingly, the recommendations are particularly focussed on reducing barriers to accessing safe housing for victims of family violence (95% of the WHPP's clients in the first 12 months had experienced family violence).

[86] *Guardianship and Administration Act* 1986 (Vic) s 60A. There are some exemptions to the right to a rehearing: an order made by the Tribunal constituted by the President, with or without others, cannot be the subject of a rehearing application; there are restrictions on applying for rehearings on applications relating to medical or dental treatment; and a person cannot apply for a rehearing of a rehearing, or for leave to apply for a rehearing (ss s 60B(6)(a), (b) and (c)).
[87] *Guardianship and Administration Act* 1986 (Vic) s 60C(1).
[88] *Guardianship and Administration Act* 1986 (Vic) s 60C(2)(a)-(c).
[89] One VCAT Review, above n 68, 58.

4.1 Housing debts as a barrier to accessing housing

Victims of family violence living in rental accommodation, either public or private, are often burdened with compensation claims and debts that limit their ability to obtain safe alternative housing.

In Homeless Law's experience, these compensation claims are most commonly brought under the RTA against victims of family violence in one of the following two ways:

- A landlord claims compensation against all co-tenants in relation to damage caused by a single co-tenant who is the perpetrator of family violence; and/or
- The landlord claims compensation for rent arrears that accrued after a victim of family violence fled the premises and a perpetrator remained in possession.

These claims are normally made against co-tenants after the tenancy agreement has terminated. Claims for rent arrears are most often made at the same time as the landlord initiates eviction proceedings due to rent arrears in order to formally end the tenancy.[90]

These compensation claims or debts can prevent people being allocated a public housing property,[91] and prevent people from obtaining a private rental property because their name appears on the tenancy database or 'black list'.[92]

The following case study provides an example of how such claims arise.

Elaine (part 1): compensation claim against co-tenants in the context of family violence

Elaine is a 21 year old woman with an 11 month old baby. In late 2013 she entered a 12 month fixed term lease with her ex-partner who is the father of her child. Elaine's ex-partner used family violence against her, which escalated when he became addicted to ice and his behaviour became increasingly erratic.

There were numerous instances where Elaine was forced to call police to the property due to threatening and abusive behaviour, and in some of these instances damage was caused at the property. After six months at this premises, a serious incident took place which led Elaine to flee the property back into her family home.

After fleeing, Elaine's ex-partner remained in the premises but was not contributing any rent. For two months, Elaine paid all of the rent at the property to prevent him being evicted. Eventually, Elaine obtained an IVO against her ex-partner as he continued to harass her after she had fled the premises.

When Elaine couldn't afford to pay the rent anymore, the landlord applied to VCAT for a possession order and compensation of $8000 for damage caused at the premises, and rent arrears that had accumulated. The claim was made against both Elaine and her ex-partner as co-tenants. Elaine hadn't spoken to her ex-partner in months, and was told by the real estate agent that he had not left a forwarding address and hadn't contacted them.

4.1.1 Relying on apportionment under the Wrongs Act

The default position under the RTA is that a landlord seeking an award of compensation can make their claim against any or all of the co-tenants to the lease agreement. This is due to the principle of joint and several liability which provides that any one or all of the co-tenants can be pursued for any loss or damage that the landlord suffers as a result of a breach of the tenancy agreement or the RTA by any one of the co-tenants.

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[90] In this section, 'tenant' also refers to rooming house residents, caravan park residents, and occupants of moveable dwellings under part 4A of the RTA. This is because apportionment of liability between co-tenants/residents/occupants, applies across all types of accommodation covered by the RTA. Similarly, there is no reason why the commentary in section 210 of the Annotated RTA, which refers to relevant provisions of the *Wrongs Act* 1958 (Vic), would not also apply to compensation claims bought against rooming house and caravan park residents under section 452 of RTA.

[91] See, eg, OOH Allocations Manual, chapter 8 'Special Housing Needs' (**OOH Allocations Manual**), which provides that offers of housing cannot be made to applicants with special needs unless outstanding debts are addressed (available here: http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/allocations-manual/special-housing-needs).

[92] Issues with residential tenancy database listings are discussed in greater detail below in part 4.2.

Except in limited circumstances, the RTA makes no distinction between co-tenants to a lease agreement.

This default position is altered to some extent as a result of Part IVA of the *Wrongs Act* 1958 (Vic) (**Wrongs Act**), which provides scope for apportionment of claims between concurrent wrongdoers where the claim relates to economic loss or damage to property arising from a failure to take reasonable care.[93] Various parts of the commentary in the Annotated RTA indicate that it is within VCAT's power to apportion liability for compensation between co-tenants in accordance with the Wrongs Act principles,[94] and VCAT members hearing disputes will generally consider this commentary provided it is brought to their attention.

However, as the provisions of the Wrongs Act and the commentary in the RTA both make clear, there are limitations and issues with applying the Wrongs Act provisions to assist a victim of family violence against whom a compensation claim has been made.

For example:

- A breach of the Residential Tenancies Act that does not involve a failure to take reasonable care, which would ordinarily include failure to pay rent, will not attract the operation of the Wrongs Act provisions. This means a victim of violence who fled a property will ordinarily be liable for subsequent arrears that accrue unless she can show the tenancy was legally varied after she fled.[95]
- The power to apportion responsibility only exists against a 'concurrent wrongdoer', and therefore it may not be possible to apportion responsibility where one co-tenant is the sole wrongdoer and the other co-tenant is a blameless victim of family violence.
- In relation to the above, it is inappropriate for a victim of family violence to be forced to assert that she is a 'concurrent wrongdoer' in order for the beneficial provisions of the Wrongs Act to apply in a compensation claim.
- In Homeless Law's experience, many landlords and real estate agents are unfamiliar with the annotated version of the RTA which references the relevant Wrongs Act provisions, and are therefore unlikely to settle disputes outside of VCAT where arguments of apportionment are put by a tenant or their advocate.

In practice, it is Homeless Law's experience that compensation claims by landlords are usually made against all co-tenants, and a party must then argue at VCAT for apportionment of liability. The second part of Elaine's case study highlights the issues with this approach, and the way in which some VCAT members look outside the Wrongs Act provisions in order to achieve a fair outcome in apportionable compensation claim matters.

Elaine (part 2): relying on consent rather than apportionment under the Wrongs Act

When Elaine learned of the $8000 compensation claim that had been made against her, she sought assistance from Homeless Law. Homeless Law obtained a copy of the IVO and other relevant evidence to demonstrate that Elaine had fled the property long before the VCAT possession order was made. They also obtained police reports that supported Elaine's instructions that most of the damage at the property was caused by the other co-tenant.

The Homeless Law lawyers tendered written submissions at the compensation hearing and argued that the member could apportion liability in accordance with the Wrongs Act provisions. Given the commentary in the RTA and wording of the Wrongs Act provisions, there was uncertainty as to whether the VCAT member would agree to apportion the arrears that had accrued after Elaine fled the property.

After reviewing the written submissions, the member advised that they would prefer to resolve the matter by consent if possible, and urged the landlord to consent to an apportionment of liability so that Elaine was not liable for any aspect of the claim arising after she had fled the premises. The landlord consented to this arrangement, and the original claim of $8000 was reduced to $4500, with only $900 payable by Elaine.

[93] *Wrongs Act* 1958 (Vic) ss 24AF and 24AH.
[94] See, eg, *Annotated Residential Tenancies Act* 1997 (Vic) [3.03] and [210.08].
[95] See *Annotated Residential Tenancies Act* 1997 (Vic) [3.03]. This is not a straightforward process. The commentary in the Annotated Residential Tenancies Act notes that whether or not a co-tenant can give notice of intention to vacate a joint lease is unclear and will depend on the particular facts of each case.

While the consent-based outcome was fair and appropriate in this case, it will not always be possible for a victim of family violence to obtain the landlord's consent to apportion claims in this way. Further, if the other co-tenant and perpetrator of family violence is also in attendance at the hearing, it is highly unlikely such a negotiated outcome would have been reached.

This case study highlights the deficiencies in the Wrongs Act provisions and the need for legislative reform to clarify how VCAT members can apportion liability in claims against co-tenants, without requiring the consent of the parties to a dispute.

4.1.2 Clear mechanism for apportioning liability

Homeless Law recommends that the RTA is amended to provide VCAT members with a clearer method for apportioning liability between co-tenants in the context of family violence. The proposed amendment would directly assist victims of family violence in the following ways:

- Ensuring that victims of family violence are not held legally liable for compensation claims and debts that are properly attributable to perpetrators who are or were their co-tenants.
- Reducing one barrier to victims of family violence leaving violent relationships, by removing the fear that they will be legally responsible for damage they didn't cause, and rent arrears that were accrued after they had fled.
- Encouraging landlords and their agents to settle and/or withdraw compensation claims against victims of family violence outside of VCAT, where it can be shown that the victim will not be held liable for that claim at a hearing.

Homeless Law also acknowledges that there are situations other than those involving family violence where increased clarity regarding apportionment of liability would lead to fairer outcomes for blameless co-tenants. For example, individuals who are forced to flee a rented premises due to the criminal actions of a co-tenant (eg assaults or other threatening behaviour) or individuals who are not home or not involved when accidental damage is caused to the property (eg through a fire), would also be disadvantaged if they were forced to rely on the existing legal framework to avoid liability for damage and loss attributable to a co-tenant who is at fault.

Homeless Law recommends that further consideration be given to the appropriate framework for apportionment between co-tenants outside the family violence context. As with the proposed amendment designed to assist victims of family violence, a more general regime would help to encourage resolution of claims against blameless co-tenants prior to any VCAT proceedings taking place, and would add clarity to VCAT members' powers in determining apportionment claims.

Recommendation 8: Amend the RTA to allow clear apportionment of liability in compensation claims against tenants who are victims of family violence

Homeless Law recommends that this could be achieved by amending section 211 of the RTA, '[m]atters which may be considered by [the] Tribunal' when assessing compensation claims, to provide that the Tribunal may take into account:

> *211(aa) "In the case of a claim against multiple tenants in respect of the same tenancy agreement, and where the Tribunal is satisfied that some or all of the damage or compensation sought has arisen as a result of family violence perpetrated by one party against another, whether any amount or amounts of the claim should be apportioned between the parties to take into account their respective responsibility for the damage or loss caused …*

In addition to the specific recommendation in relation to victims of family violence, Homeless Law recommends that the Government also considers a more general legislative amendment to allow for apportionment of liability between co-tenants.

4.2 Regulation of residential tenancy databases or 'black lists'

Part 10A of the RTA provides a legislative framework for the maintenance of residential tenancy databases by private companies, referred to in the legislation as 'database operators'. These provisions enable landlords and database operators to make listings on databases, often referred to as 'black lists' because many landlords and real estate agents generally avoid leasing rented premises to tenants with a listing on the database.

The current framework provided by part 10A of the RTA unfairly impacts victims of family violence by providing them with limited opportunities to object to a listing being made or to have a pre-existing listing removed in circumstances where a debt has accrued as a result of family violence.

Homeless Law recommends that the existing legal framework in part 10A of the RTA be amended to ensure that victims of family violence are able to prevent their personal details from being listed in a database, or to apply to have an existing listing removed, in circumstances where the relevant breach and debt owed to a landlord is attributable to family violence.

4.2.1 How database listings can arise for victims of violence and their impact

A database listing can be made where one or more tenants have breached their tenancy agreement or certain provisions of the RTA, and the landlord is either owed more than the bond will cover, or VCAT has made a possession order in respect of the rented premises.[96] The listings themselves can include tenants' personal details as well as opinions about them, and the content of these listings can then be released to third parties, usually for a fee. Relevantly for victims of family violence, the types of breach that can result in a database listing include failure to pay rent, and damage to premises,[97] both of which may be partially or wholly attributable to a perpetrator.

Victims of family violence are often forced to urgently leave rented properties, sometimes at the insistence of police officers who have attended the property in response to a reported family violence incident. For many, the weeks and months that follow are spent in crisis and refuge accommodation, where there are strict rules against disclosing the address of the premises to any outside parties, and requirements that women contribute financially towards the costs of their accommodation. The victim's departure from a rented premises will often result in the tenancy being terminated via a legal process with a VCAT order,[98] for example because of unpaid rent, and a victim may be left with housing related debts to the landlord.

This can then mean the victim's personal details are recorded for three years on a database that future prospective landlords and real estate agents may rely on when assessing their applications for private rental properties.

These database listings can create a significant barrier for victims of family violence who are trying to access the private rental market, including those seeking to transfer out of crisis and refuge accommodation.

4.2.2 How the current regime disproportionately impacts on victims of family violence

The two main ways in which the existing provisions in part 10A of the RTA present difficulties for victims of family violence are set out below.

Notification issues

Prior to listing personal information on the database, a landlord or database operator must provide the tenant with 14 days notice in order for them to object to the information being listed if it is inaccurate, incomplete or ambiguous. However, for the reasons set out below, the notification requirement is unlikely to apply to many victims family violence who have fled the premises into crisis or refuge accommodation, or into homelessness, because:

- A landlord or database operator is not required to notify a tenant about a potential listing and their right to object if that tenant cannot be reasonably located, or the information contained in the listing is otherwise available on a publicly available order of VCAT;[99] and
- Victims of family violence who flee to crisis and refuge accommodation are prohibited from revealing their address, which means they cannot be reasonably located, and are also unlikely to become aware of or attend a compensation or possession order hearing at VCAT.

[96] *Residential Tenancies Act* 1997 (Vic) s 439E sets out the relevant breaches that may allow a landlord or database operator to list a tenant's details on a residential tenancy database.
[97] *Residential Tenancies Act* 1997 (Vic) s 439E.
[98] VCAT members can make orders of possession pursuant *Residential Tenancies Act* 1997 (Vic) s 330. Once a possession order has been made, a landlord can apply to VCAT for a warrant of possession to physically take back possession of the premises.
[99] *Residential Tenancies Act* 1997 (Vic) ss 439F(4)–(5).

For these reasons, many victims of family violence will not have the opportunity to object, and may not find out about a listing until they subsequently apply for a new private rental property.[100]

Application to VCAT to remove a listing

Where a tenant learns that information about them is listed on a database, and they believe this information is inaccurate, incomplete or ambiguous, they may be able to apply to the VCAT to have the listing removed or amended.

However, under the current legislative framework, it may be difficult for a victim of family violence to successfully apply to VCAT for the removal of a database listing where the relevant breach is attributable to a previous co-tenant and perpetrator of family violence. This is because:

- Most landlords and their agents seek VCAT orders in relation to compensation owed by tenants after the termination of a tenancy agreement, as well as a possession order in cases where rent arrears have accrued and the landlord seeks a formal order ending the tenancy;
- The default position in the RTA is that co-tenants are jointly and severally liable for each other's actions, and in the absence of argument and other evidence that liability should be apportioned, most VCAT orders for compensation or possession will not specify which co-tenant is in breach;
- If a co-tenant who is the victim of family violence cannot be reasonably located prior to a database listing, then the only grounds upon which they can subsequently apply to the VCAT for removal or amendment of a listing is if they can show the information is inaccurate, incomplete or ambiguous;[101] and
- It will be difficult to argue that the information listed is inaccurate, incomplete or ambiguous where there is a VCAT order for compensation or possession that lists the tenant's name along with information about the breach and/or amount owed.

In practice, a victim of family violence seeking to show that a listing is inaccurate, ambiguous or incomplete when a previous VCAT order has been made may need to first apply for review of the VCAT order,[102] and successfully argue that liability for the relevant breach should be appropriately apportioned between the parties.

This places a significant burden on the victim, and depending on how long ago the VCAT order was made, an application for review may not be accepted.[103] Even if it is accepted, there are currently significant limitations to the current regime for apportionment of liability as outlined above in part 4.1.

4.2.3 Preventing or removing listings

Homeless Law recommends amending the RTA to address these issues, to assist victims of family violence who have previously fled rented premises to re-enter the private rental market independently.

[100] *Residential Tenancies Act* 1997 (Vic) ss 439D–E require landlords to advise tenants when a residential tenancy database is used to assess prospective tenancy applications, and to advise tenants when a listing appears on the relevant database search.
[101] *Residential Tenancies Act* 1997 (Vic) s 439L.
[102] *Victorian Civil and Administrative Tribunal Act* 1996 (Vic) s 120 provides that a party can seek review of an order made at a hearing where they were not present or represented.
[103] See, eg, Victorian Civil and Administrative Tribunal Rules 2008 (Vic) r 4.19, which generally requires applications to re-open an order to be lodged within 14 days of a party becoming aware of the order.

Recommendation 9: Amend the RTA to allow victims of family violence to prevent their personal details from being listed on residential tenancy databases and to remove existing listings where the relevant breach or damage occurred in the context of family violence

Homeless Law recommends that the RTA is amended as follows:

- Inserting into section 439F a stand-alone basis for a tenant to object to their personal information being listed where the relevant RTA breach occurred in the context of family violence and can be attributed to the perpetrator of that violence.
- Inserting into section 439L a stand-alone basis for a tenant to apply to VCAT for the removal of their personal information from a database where it can be shown that the relevant RTA breach occurred in the context of family violence and is attributable to the perpetrator of that violence.
- Inserting into section 439M a stand-alone power for VCAT to remove and amend listings where it is satisfied that the relevant breach is attributable to a perpetrator of family violence.

4.3 Legislated minimum standards for rented premises

Homeless law often assists tenants at risk of eviction living in rented premises that are in poor physical condition. In a context where there are no clear minimum standards that apply to rented premises, tenants are forced to rely on the urgent and non-urgent repairs processes in the RTA, and must demonstrate that their complaint fits within that existing framework.[104]

While Homeless Law does not assist clients whose sole legal issue is repairs related, we do occasionally assist tenants with repairs issues when these arise as ancillary matters in the context of eviction proceedings. We also regularly refer clients with repairs issues to legal services who can provide advice to assist them to assert their rights, including Victoria Legal Aid and the Tenants Union of Victoria.

Through our exposure to tenants who have repairs issues in rented premises, we see that many vulnerable, low income renters experience trepidation about exercising their repairs rights under the existing RTA framework, often due to fear that they will be evicted or face a retaliatory increase in rent. In addition, many tenants are unclear about the extent to which the RTA's repair provisions can be used to address pre-existing defects at the property which weren't detected prior to the tenant taking possession, and may be otherwise deterred by the long wait times, particularly in relation to non-urgent repairs requests.[105]

The provision of clear minimum standards for rented premises with the creation of associated obligations and enforcement powers in the RTA would provide much needed clarity in this area. These reforms would assist all parties to a tenancy agreement to better understand the obligations of a landlord to provide and maintain rented premises that meet basic repair and amenity requirements.

These standards could address the lack of clarity tenants face in relation to the existing repairs processes, and would also improve the quality of rented premises at the time they are advertised for lease. In addition to improving the health and quality of life of tenants, this would likely lead to a reduction in the levels of disputes that arise once a tenancy has commenced. The introduction of minimum standards would also provide an opportunity to create a more streamlined and efficient process for addressing repair issues in rented premises, which would prevent tenants experiencing the delays often associated with more general repairs processes currently set out in the RTA.

[104] See also National Association of Tenant Organisations, *A Better Lease on Life – Improving Australian Tenancy Law* (2010); Jane Berry, Footscray Community Legal Centre Inc, *Home Sweet Home – Act for the House Not the Tenant* (2013); Victorian Council of Social Services, *Decent Not Dodgy. 'Secret Shopper' Survey* (2010).

[105] A non-urgent repairs notice gives a landlord 14 days to rectify the issue. If no action is taken in this period, a tenant must then apply for an inspection by Consumer Affairs Victoria, which may take up to an additional week. After this inspection, if a landlord still won't remedy the issue, a tenant must apply to VCAT for a non-urgent repairs order, which can take a further period of time to be listed depending on how busy the Tribunal is.

4.3.1 Power imbalance for low income tenants asserting repair rights

Eviction for rent arrears is the most common reason our clients are at risk of homelessness: it made up 68% of all eviction matters Homeless Law ran in 2014–15. Many Homeless Law clients at risk of eviction for arrears are experiencing rental stress and in some cases severe rental stress (i.e. paying 50% or more of their income toward rent). In addition to making an existing tenancy precarious, this can also severely limit alternative housing options in the event of eviction given the wait times for access to social housing and the increasing unaffordability of private rental properties for low income individuals. This dynamic can contribute significantly to the power imbalance between tenants and their landlords, and can be a barrier to these tenants asserting their rights in relation to repairs required at the rented premises.

For some tenants, the risk that a repairs request will result in their landlord deciding to terminate a tenancy agreement rather than investing resources to rectify the repairs issues can be a major deterrent from exercising their rights under the current RTA repairs framework. In addition, it is more likely that rental properties targeted at lower-income tenants will require upgrades, or be fitted with lower-quality fixtures and components, which increases the likelihood that a tenant may need to rely on their repair rights. In this way, the tenants who have the least alternative accommodation options if evicted are also more likely to be forced to rely on repair rights during their tenancy.

The following case study provides an example of the ways in which vulnerable tenants can face retaliatory action when seeking to assert their repair rights, as well as the way in which effective legal representation can help to correct the power imbalance that becomes apparent in these situations.

Single mother of five avoids eviction for rent arrears but faces retaliation due to repairs requests

Nicola is a 38 year old woman with five children in her care. She lives in a private rental property and her only source of income is Centrelink payments. She had recently experienced family violence which led to a large child care bill being incurred whilst she was in hospital and unable to look after her children. This contributed to rent arrears as Nicola prioritised her child care bill over her rental obligations.

When Nicola came to Homeless Law for assistance, a VCAT possession order had already been made against her due to rent arrears and she was at immediate risk of eviction. Nicola also told the Homeless Law lawyers that soon after moving in she'd realised the dishwasher didn't work, and that there were other repair issues at the premises. Despite repeated requests over several months, the landlord was refusing to replace the dishwasher until the arrears were repaid. Nicola had been issued with a 120 day no reason notice to vacate when she came to Homeless Law, which she thought was in retaliation to her repairs requests.

The Homeless Law lawyers assisted Nicola to re-open the VCAT possession order for arrears and got a payment plan in place for her to repay the outstanding rent arrears. The lawyers also obtained a VCAT order that urgent repairs be conducted at the premises, and lodged a pre-emptive challenge to the no reason notice to vacate on the basis that it had been issued in retaliation to Nicola's repair requests.

As the matter progressed, the landlord continually failed to comply with the VCAT repairs order and ultimately, the Homeless Law lawyers lodged a compensation claim with VCAT that exceeded the amount of arrears the client owed. By consent, Nicola was able to move out of the property at a convenient time, into more affordable housing that Homeless Law's social worker helped her to obtain, and with the landlord paying her more than $1000 compensation due to faults at the premises. Homeless Law's social worker helped source brokerage to clear an existing bond loan debt, which helped Nicola transition into a more affordable private rental property.

Unless Nicola had been facing imminent eviction for arrears, she may not have sought legal advice or representation in relation to the repairs issue or the no reason notice to vacate. Without the intensive support of Homeless Law's social worker, Nicola and her five children may not have been in a position to secure alternative housing and would likely have faced homelessness after being evicted from a substandard property.

4.3.2 A model for enforceable minimum standards in rented premises

The risks and uncertainty many tenants face when seeking to enforce their repair rights under the RTA could be addressed by introducing clear regulations containing minimum standards for rented premises that are enforceable under the RTA.

These minimum standards should set out basic requirements in relation to the premises, which if not met or maintained during the course of a tenancy, would give tenants a clear right to initiate legal proceedings to ensure compliance and seek compensation where appropriate. The relevant minimum standards should also include parallel offence provisions in the RTA giving enforcement powers to a third party agency, most likely Consumer Affairs Victoria (**CAV**), who would be able to respond to reports from tenants and investigate non-compliance with minimum standards, and impose penalties where appropriate.

An analogous framework already exists in Victoria in relation to the 15 minimum standards that address safety, security, amenity and privacy for residents in rooming houses. Together with these minimum standards, infringement notice provisions for owners who fail to comply with the standards were introduced and CAV is able to investigate alleged breaches of the minimum standards on behalf of residents, and impose penalties against rooming house operators where an alleged breach is proven.[106] CAV's 2013–14 Annual Report indicates that as a result of their minimum standards compliance program, 99% of registered rooming houses in Victoria are now compliant with the minimum standards, and there have been a range of infringement notices issued for non-compliance as well as court proceedings initiated against certain rooming house operators for systemic non-compliance with the minimum standards regime.[107]

These results suggest that a third party enforcement model for minimum standards in rented premises could also prove effective, particularly in circumstances where a tenant experiencing rental stress is reluctant to take personal action to enforce relevant minimum standards against a landlord.

Recommendation 10: Introduce minimum standards for rented premises to improve the safety, security and amenity of rental properties

Homeless Law recommends the introduction of minimum standards to protect the safety, security, amenity and privacy of tenants, which can be enforced by a third party (most likely Consumer Affairs Victoria) that has power to investigate breaches, issue fines and prosecute landlords for systemic non-compliance.

5. Respect for VCAT orders: preventing unlawful evictions

Through our eviction prevention work, Homeless Law has become increasingly aware that the enforcement of non-monetary orders made by VCAT – most commonly orders restraining a landlord from carrying out an unlawful eviction or requiring that a tenant be given re-entry to the property after an unlawful eviction – is an area of tenancy regulation that is not functioning effectively and, accordingly, that is putting tenants at risk.

In Homeless Law's experience, Victoria Police are the authorised officers most commonly called upon to enforce non-monetary orders and offences under the RTA, however, there is a lack of process, understanding and communication between VCAT and

[106] The minimum standards for rooming house accommodation were introduced in 2012 via the *Residential Tenancies (Rooming House Standards) Regulations* 2012 (Vic). Under ss 120A, 142B and 142C of the RTA, rooming house operators who fail to comply with the minimum standards can be investigated by CAV and penalised.
[107] Consumer Affairs Victoria, *Annual Report 2013–2014* (2014) 17.

Victoria Police which means tenant-landlord disputes are regularly dismissed as 'civil issues' that do not warrant police involvement.[108]

In summary, the regulatory framework is:

- **Application**: a tenant can make a general application to VCAT under section 452 of the RTA on the basis that a dispute has arisen under the tenancy agreement or there has been a breach of the tenancy agreement.
- **Order**: under section 472 of the RTA, VCAT can make an order restraining action in breach of a tenancy agreement, including by restraining a threated unlawful eviction or compelling the landlord to allow the tenant re-entry to the property if an unlawful eviction has occurred.
- **Provision to Victoria Police**: VCAT registry staff fax a copy of the order to the local police station, but without any general guidance about the role or powers of Victoria Police in relation orders of this nature. The RTA does not compel VCAT to send the order to Victoria Police.
- **Offence**: section 480(1) of the RTA provides:

  > *Offence to fail to comply with determination of Tribunal*
  >
  > *A person to whom a determination of the Tribunal under this Act applies must comply with that determination.*
  >
  > *Penalty: 20 penalty units and 5 penalty units for each day the non-compliance continues after the time within which the person is required to comply with the determination, up to a maximum of 60 penalty units.*

  The maximum penalty under section 480 of the RTA was increased in 2010 and the Second Reading Speech at the time acknowledged: 'at current levels, penalties for breaches of the [A]ct do not provide an adequate deterrent to illegal action'.[109]

- **Enforcement**: under section 508 of the RTA, proceedings for an offence under the RTA can be brought by a member of Victoria Police or by the Director of Consumer Affairs Victoria (or someone they authorise).

In practice, however, when Victoria Police are called upon to enforce these orders, they regularly state that they do not have a part to play in the enforcement of the RTA, and that tenants are expected to enforce their rights themselves.

This is not accurate. While interactions between landlords and tenants are traditionally considered to be civil matters rather than criminal law issues, members of Victoria Police are empowered to prosecute offences under section 508 of the RTA, and it is a summary criminal offence to breach orders made by VCAT under section 480 of the RTA.

As the two case studies below show, inaction from members of Victoria Police in relation to breaches of restraining orders issued by VCAT puts tenants at risk of unlawful eviction and homelessness.

[108] Under s 510C of the RTA, authorised officers including a member of the Victoria Police force, the Director of Consumer Affairs Victoria, or a person authorised by the Director. In practical terms, Victoria Police are most frequently called upon to enforcement non-monetary VCAT orders with minimal involvement from Consumer Affairs Victoria.
[109] *Hansard*, Residential Tenancies Amendment Bill Second Reading Speech (12 August 2010) 3316.

Refusal to enforce VCAT order leads to woman sleeping rough

After roughly a month of renting, Rachel came home to find that the locks to the property had been changed, and she was unable to access her home and belongings. This had happened without being issued with a notice to vacate, and no possession order had been obtained by the landlord.

Rachel sought recourse through VCAT and a restraining order was made in her favour, which ordered the landlord to grant her access to the property. With this order she attended a police station nearby the residence with the hope that the police would facilitate her access to the property. The police however, stated that the VCAT order wasn't enough, and that a warrant would additionally be required for them to assist in the matter.

As a result of the police's reluctance to enforce the order, Rachel was unable to gain access to her property and she was concerned about her possessions that were still in the property. Rachel called the real estate agent about accessing her possessions and she was informed that her personal property from inside the apartment had been left in the stairwell. When she went to gather her things, they weren't there. At this point, Rachel only had the clothes that she was wearing when the locks were changed, and she has been unable to reclaim any of her possessions.

Despite attending VCAT on three occasions with orders for the landlord to allow her access to the property, no authorised body would enforce the orders on her behalf. She had to use what little money she received from her Disability Support Pension on hotels, and she was forced to shower and eat at homelessness services.

The money she could have used to secure another private rental ran out and she found herself sleeping rough.

Police treat unlawful acts of landlord as a minor dispute

Tammy was a tenant in a private rental with her daughter. As a result of losing custody of her daughter in a Family Court hearing, her income was reduced to a Newstart Allowance and her tenancy became unaffordable. Tammy soon began to fall behind in payments, and she was issued with a notice to vacate for rental arrears, but it was invalidly issued.

When Tammy realised that the tenancy was too expensive to maintain, she started to pack her belongings and prepared to move out prior to the landlord issuing proceedings at VCAT. During this time however, the landlord came the premises without giving the required notice and he attempted to force his way through the front door. He asserted that Tammy needed to be out of the premises by that day, and proceeded to turn the water off and padlock the water metre.

Tammy contacted Homeless Law and we assisted her to apply for a restraining order from VCAT, which was granted. Despite this, the landlord attended the premises on two further occasions and Tammy called the police looking for assistance. In the second instance Tammy feared for her safety and locked herself in her car. Tammy indicates that it took two calls to the police and then another thirty minutes for the police to arrive. They appeared to dismiss the restraining order and the severity of the matter and approached it more like a casual dispute which they were helping resolve, rather responding to a breach which had criminal implications.

Wanting to seek a remedy for the landlord's actions, Tammy successfully applied to VCAT for compensation from the landlord for interfering with her rights to exclusive possession and quiet enjoyment of the property. The slow and unresponsive action by the police had however left her unsure and uncertain about her protection from unlawful eviction.

The uncertainty regarding Victoria Police's ability to enforce non-monetary orders made by VCAT presents a risk these orders will be meaningless and that tenants will have no protection against unlawful evictions or other interference with their rights as a tenant.

Recommendation 11: Training and policies to improve Victoria Police's understanding of their role in enforcing VCAT restraining orders

To ensure that tenants' rights are being upheld, there should be clearer processes for (1) applying to VCAT for a restraining order under the RTA; (2) enforcing those orders; and (3) enforcing penalties against landlords that breach restraining orders.

VCAT's correspondence to Victoria Police should inform police of permitted action in enforcing these orders.

Annexure: A case study of the Scottish model of homelessness prevention

Scotland is an example of a jurisdiction with a demonstrated commitment to preventing homelessness, including through its residential tenancy laws.[110]

Scotland has different legislation in respect of private and public tenancies:[111]

- Private tenancies are covered by the *Housing (Scotland) Act* 1988, which establishes 'Assured Tenancies' and 'Short Assured Tenancies'.[112]
- Social tenancies are covered by the *Housing (Scotland) Act* 2001, which establishes 'Scottish Secure Tenancies' and 'Short Scottish Secure Tenancies'.[113]

Scottish model: Protection for private tenants

During the agreed term of the lease, a private tenant with a 'Short Assured Tenancy' cannot be evicted, provided that the tenant does not breach the conditions of the lease. However, at the end of the agreed term, the landlord has the right to make a no reason application for possession. The tenant can remain on the property until the court grants the landlord an order for possession.[114]

An 'Assured Tenancy' can be terminated by the landlord on the basis of 17 specified grounds. The grounds are set out in Schedule 5 to the *Housing (Scotland) Act* 2001.[115] All grounds require a sheriff's court order. There is no provision for a no reason application for possession. Grounds 1 to 8 are mandatory, where the legislation provides that the sheriff 'must' grant the landlord an order for possession if satisfied that the ground is established. Grounds 9 to 17 are discretionary, where the legislation provides that the sheriff 'may' grant the landlord an order for possession if satisfied that the ground is established. For these discretionary grounds, the sheriff will only make the order for possession if it is considered to be 'reasonable' in the circumstances.[116]

The Scottish private tenancy system is currently undergoing a review by the Scottish Government. This review has involved two recent rounds of public consultation, which have generated extensive discourse and commentary with regard to the current system and the ways in which it can be improved. Among other things, these proposed reforms aimed to modernise and simplify the grounds on which a landlord can obtain an order for possession. With a view to modernising and simplifying these provisions, the initial reform proposal was to reduce the 17 grounds of possession to 8, all of which would be mandatory rather than discretionary. The proposed now grounds for possession are:

- Ground 1: The landlord wants to sell;
- Ground 2: A mortgage lender wants to sell because the landlord has breached the conditions of the loan;
- Ground 3: The landlord or a family member wants to live in the property;
- Ground 4: Refurbishment;
- Ground 5: Change of use;
- Ground 6: The tenant has failed to pay full rent over three months;
- Ground 7: The tenant has displayed antisocial behaviour; or
- Ground 8: The tenant has otherwise breached the tenancy agreement.[117]

In light of public feedback, the Government's second consultation paper contained a revised proposal, whereby grounds 6, 7 and 8 would contain a discretionary element in cases of rent arrears comprising less than one month's rent or arising due to housing benefit delay, less serious forms of antisocial behaviour, and the tenant otherwise breaching a non-mandatory tenancy agreement condition.[118] The Government's response to this round of consultations is expected to be released soon.

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[110] See, eg, Povey, above n 75, 30–4; Scottish Government and the Convention of Scottish Local Authorities, *Prevention of Homelessness Guidance* (June 2009).
[111] Australian Housing and Urban Research Institute, *Secure Occupancy in Rental Housing: Conceptual Foundations and Comparative Perspectives* (July 2011) 106.
[112] *Housing (Scotland) Act* 1988 Schedule 4.11.
[113] *Housing (Scotland) Act* 2001 ss 11, 14, 16.
[114] Scottish Government, *Consultation on a New Tenancy for the Private Sector* (October 2014) 15 (**Scottish Private Tenancy Consultation**).
[115] *Housing (Scotland) Act* 1988 Schedule 5.
[116] *Housing (Scotland) Act* 1988 s18; Scottish Private Tenancy Consultation, above n 114, 17.
[117] Ibid 21.
[118] *Scottish Private Tenancy Second Consultation*, above n 114, 22. Three additional mandatory grounds were also proposed.

Scottish model: Protection for social housing tenants

Security of tenure under 'Scottish Secure Tenancies' for social housing is similar to security of tenure under 'Assured Tenancies' for private rentals. Schedule 2 to the *Housing (Scotland) Act* 2001, which applies only to social landlords, specifies 15 grounds on which the landlord can recover possession. There is no provision for a no reason application for possession. For grounds 8 to 14, the court will only make the order if other suitable accommodation will be available for the tenant when the order takes effect. Grounds 1 to 7 and 15 are discretionary, and the court will only make the order for possession if it is considered to be 'reasonable' in the circumstances.[119] In considering 'reasonableness' in this context, the court has regard, in particular, to:

- the nature, frequency and duration of the conduct giving rise to the ground for recovery of possession;
- the extent to which that conduct is or was conduct of, or a consequence of acts or omissions of, persons other than the tenant;
- the effect which that conduct has had, is having or is likely to have on any person other than the tenant; and
- any action taken by the landlord, before raising the proceedings, with a view to securing the cessation of that conduct.[120]

In 2009, the Scottish Government established a 'Repossessions Group' to consider ways to improve eviction processes. One consideration was whether there should be a pre-action protocol specifying certain steps that a landlord must take before proceeding to eviction for arrears. One perceived benefit of the proposal was that it would be 'a robust safeguard for children, young people and families who are facing problems with their tenancy.'[121]

In 2010 the Scottish Government amended the *Housing (Scotland) Act* 2001 to insert a new section containing a list of 'pre-action requirements for rental arrears'.[122] These requirements only apply to the public 'Scottish Secure Tenancy'. The pre-action requirements do not apply where the landlord seeks possession only for reasons other than rent arrears. However, if there are multiple grounds, including rent arrears, then the pre-action requirements apply.[123]

Before a landlord serves a tenant in social housing with a notice that the landlord is considering court action to recover possession where the tenant is in arrears, a landlord must comply with the following pre-action requirements:

- give clear information about the tenancy agreement and the unpaid rent or other financial obligations;
- make reasonable efforts to give help and advice on eligibility for housing benefits and other types of financial assistance;
- give information about sources of help and advice with the management of debt;
- make reasonable efforts to agree with the tenant a reasonable plan for future payments;
- consider the likely result of any application for housing benefits that has not yet been decided;
- consider other steps the tenant is taking which are likely to result in payment within a reasonable time;
- consider whether the tenant is complying with the terms of an agreed plan for future payments; and
- encourage the tenant to contact their local authority (where the local authority is not the landlord).[124]

On a practical level, these pre-action requirements are reflected in a 'checklist' that the landlord must provide to the tenant.[125] When proceedings are commenced, the landlord must confirm to the court that the pre-action requirements have been met. The pre-action requirements do not replace the court's consideration of whether it is 'reasonable' to make an order for possession.[126]

According to a report on evictions by social landlords in Scotland, in 2010, following the implementation of the pre-action requirements for rental arrears matters, evictions had fallen by 33% and court orders for possession had fallen by 20%.[127]

[119] *Housing (Scotland) Act* 2001 s 16(1), (2).
[120] Ibid s 16(3).
[121] Ibid.
[122] *Housing (Scotland) Act* 2001 s 14A.
[123] Scottish Government, *Housing (Scotland) Act 2001 and 2010: Guidance for Social Landlords on Pre-Action Requirements and Seeking Repossession of Social Housing* (June 2012) 3 (**Guidance on Pre-Action Requirements**).
[124] *Housing (Scotland) Act* 2001 s 14A; *Guidance on Pre-Action Requirements*, above n 123, 2.
[125] *Guidance on Pre-Action Requirements*, above n 123, 19, Annex C.
[126] Ibid 22.
[127] Povey, above n 75, 34, citing Shelter, *Research Report: Evictions by Social Landlords in Scotland 2009–10* (December 2010) 8.