

Western

Community Legal Centre Ltd

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## **Residential Tenancies Act Review**

### **Western Community Legal Centre submission in response to the 'Laying the Groundwork' Consultation Paper**

**August 2015**

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## 1. Introduction

### 1.1 About the Western Community Legal Centre

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

WCLC has a particular focus on working with newly arrived communities. At our Footscray office, for example, more than 53% of our clients over the last five years spoke a language other than English as their first language. Further, approximately one-quarter of our clients during that period were newly arrived, having arrived in Australia in the last five years.

### 1.2 About the WCLC Tenancy Program

WCLC employs three tenancy lawyers who provide specialist advice, casework and representation to vulnerable and underprivileged tenants who live in Melbourne's West. In the past five years WCLC's tenancy program has assisted over 1,100 clients with almost 1,800 tenancy matters.

Our catchment area includes suburbs in Melbourne's inner-West (such as Footscray and Sunshine), and Melbourne's outer-West (such as Werribee, Wyndham Vale and Hoppers Crossing). We also provide a duty lawyer service to assist tenants with on-the-spot advice and representation one day per week at the Victorian Civil and Administrative Tribunal (**VCAT**) in Werribee. Our tenancy service primarily assists tenants in private tenancies, but we also provide assistance to some tenants who live in public and community housing.

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

WCLC also undertakes specialist insurance casework within the context of our tenancy program. This program has focused on the impact of landlord insurance policies on tenants.

WCLC's submission and recommendations are informed by our significant experience in utilising the *Residential Tenancies Act 1997 (Vic)* (**the Act**) in the course of the above casework.

## 2. Summary of recommendations

### **Recommendation 1:**

There should be a review of the factors that are resulting in tenants failing to enforce their rights under the Act.

### **Recommendation 2:**

The Act should be amended to require that landlords to pay a bond to the Residential Tenancies Bond Authority at the commencement of every tenancy.

### **Recommendation 3:**

A database should be created to record breaches of the Act by landlords, including:

- Failure to comply with VCAT orders in relation to repairs;
- Failure to comply with orders for compensation; and
- The commission of any offence under the Act.

### **Recommendation 4:**

There should be a review of the process for appealing decisions in VCAT's Residential Tenancies List to ensure that parties have greater access to appeals.

### **Recommendation 5:**

The review of the Act should include a full review of the operation and practices of the VCAT Residential Tenancies List, with a focus on:

- Strengthening the rules of evidence and procedure;
- Ensuring that decision-making is consistent; and
- Ensuring that parties have a real capacity to seek review of VCAT decisions.

### **Recommendation 6:**

The Act should be amended to include a mechanism for minimum standards to be set for rental properties in Victoria to ensure that all renters have access to secure and safe housing.

### **Recommendation 7:**

120-day 'no reason' Notices to Vacate should be abolished as a means of evicting tenants.

### **Recommendation 8:**

The defence of retaliation contained in section 262(2) of the Act should be extended to apply in relation all Notices to Vacate and at all VCAT hearings in relation to determining whether a possession order should be made.

### **Recommendation 9:**

The Act should be amended to reduce the role of discretion in relation to eviction matters.

### **Recommendation 10:**

There should be a review of the factors that discourage tenants from reporting offences under the Act, with a view to better facilitating complaints by tenants.

### **Recommendation 11:**

The capacity for enforcement of offences under the Act should be increased. This may be done by way of:

- Increasing the enforcement capacity of Consumer Affairs Victoria; and

- Giving VCAT the power to make findings in relation to offences and issue infringements.

**Recommendation 12:**

There should be the creation of new offences under the Act to deter landlords from breaching their obligations under the Act. Additional offences may include (but should not be limited to):

- Issuing a Notice to Vacate in retaliation; and
- Seriously interfering with a tenant's right to quiet enjoyment.

**Recommendation 13:**

The Act should be amended to regulate co-tenancies.

**Recommendation 14:**

There should be a review of the circumstances in which a landlord may be awarded the bond and/or compensation in light of the increasing number of longer-term tenants in Victoria.

**Recommendation 15:**

The Act should be amended to include a mechanism to ensure that the bond is automatically returned to the tenant if no claim is made by the landlord within ten business days of the end of the tenancy.

**Recommendation 16:**

The operation of the Act in the context of family violence should be fully reviewed. In particular, WCLC recommends that:

- Victims of family violence should be allowed to make an application for a reduction of a fixed-term tenancy after they have vacated the property;
- The Act should provide clarity about the circumstances in which compensation will be awarded where a fixed-term tenancy is reduced due to family violence;
- There should be provision for creating a new tenancy where a person is excluded from a property by way of an interim intervention order;
- There should be a mechanism to remove residential tenancy database listings if property damage or rent arrears were caused by family violence; and
- VCAT Members should be given specialist training in relation to family violence.

**Recommendation 17:**

In light of the increasing prevalence of landlord insurance policies, the RTA review should consider the way landlord insurance policies impact on tenants, particularly in the context of compensation claim.

**Recommendation 18:**

That the VCAT application form be amended so that landlords are required to state whether they have made a claim under an insurance policy.

**Recommendation 19:**

The Act should require that VCAT Members consider whether a landlord has made a claim on an insurance policy when determining whether a landlord has suffered loss or damage.

### 3. Why aren't tenants enforcing their rights?

#### 3.1 Barriers to tenants accessing dispute resolution mechanisms

In determining whether the regulatory framework underpinning Victoria's residential tenancy laws is suitable, a key consideration must be the extent to which tenants can, and do, enforce their rights under the current legislation.

The current Act contains a raft of measures designed to allow tenants to apply to the VCAT to protect their rights. For instance, tenants may seek an order that repairs be carried out, that a rent increase is excessive, or that their landlord be restrained from attending the property without appropriate notice. Despite provisions that are designed to protect tenants, statistics appear to reveal that tenants very rarely seek to enforce their rights against landlords. In this context, it is significant that VCAT overwhelmingly adjudicates disputes in which the applicant is the landlord. In the year 2013-2014, for instance, tenants made only 6% of applications to VCAT, with 92% of applications made by landlords.<sup>1</sup> This is consistent with the years 2011-2012 (7% of applications made by tenants) and 2012-13 (7% of applications made by tenants). VCAT's residential tenancies list is ostensibly a landlord's jurisdiction.

The statistics in relation to tenant applications to VCAT may be characterised in two ways. First, the low number of tenant applications may be due to the fact that landlords are complying with their obligations under the Act. The second, and we say most plausible option, is that tenants simply aren't enforcing their rights. A 2013 study by our Service, for instance, showed that 71 out of 100 surveyed tenants said that they required repairs to their rental property. These repairs included 'urgent repairs' as classified under the Act, such as repairs to water systems, door locks, and ovens and stoves.<sup>2</sup> Of the 51 tenants who had reported the need for repairs to their landlord, 48 had been waiting more than two months for the repairs to be carried out.<sup>3</sup>

The low number of tenants seeking to enforce their rights, combined with the general lack of enforceable housing standards, have, in our view, led to an ongoing market failure in the private rental market in Victoria to protect tenants' right to acceptable and affordable housing.

As such, in addition to specific changes to the legislative protections afforded to tenants, it is vital that the review consider why tenants have historically failed to enforce their rights, and whether that failure suggests the need for a fundamental shift in the philosophy underpinning the legislation.

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<sup>1</sup> Victorian Civil and Administrative Tribunal Annual Report 2013-2014 (**VCAT Annual Report 2013-14**), p 21.

<sup>2</sup> Footscray Community Legal Centre, *Home Sweet Home – Act for the House, Not the Tenant* ('**Home Sweet Home report**') 2013, p 6.

<sup>3</sup> Home Sweet Home Report, above n 2, p 26.

WCLC has identified the following factors that may provide a starting point for an assessment of the reasons why tenants are not enforcing their rights:

- **The difficulty of the application process for tenants**

Our experience is that the process of making an application to VCAT is difficult and confusing for tenants. The application form is technical and requires tenants to identify the sections of the Act that they wish to rely upon. Further, at present there is an online portal (**VCAT online**) that is available to landlords, but not to tenants. We consider that the application form and application process should be simplified, and that tenants should be able to apply by way of an online form or a mobile phone application.

- **Access to simple information about tenants' rights**

The experience of our lawyers has been that tenants are often unaware of their rights under the Act. For example, tenants are often unaware of their right to claim compensation against their landlord for a landlord's failure to carry out repairs. The availability of simple information about tenants' rights, in conjunction with a public campaign to educate tenants about their rights, would appear to be necessary to ensure that tenants can enforce their rights.

- **The experience of clients who speak languages other than English**

People for whom English is not a first language have even greater difficulty enforcing their rights. As such, we would like to see information about tenants' rights available in a variety of languages.

- **The fear of retaliatory action by landlords**

As discussed in detail below, the existence of 120-day no reason notices is a significant restraint on the willingness and ability of tenants to exercise their rights under the Act. It is the experience of our lawyers that newly arrived clients with a refugee background are particularly fearful of retaliatory eviction and mostly unwilling to issue proceedings to protect their rights.

- **The impact of VCAT application fees**

In recognition of the fact that low-income tenants are increasingly accessing private rental properties,<sup>4</sup> the review should consider the impact of application fees on the ability of tenants to enforce their rights. For instance, we question the appropriateness of requiring a tenant to pay an application fee for urgent repairs in light of the fact that landlords are not required to pay a fee for an application to claim on the bond. We also note that the interest

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<sup>4</sup> Residential Tenancies Act Review: Laying the Groundwork - Consultation Paper (**Laying the Groundwork Consultation Paper**), 2015, p 17.



from tenants' bonds goes towards funding VCAT,<sup>5</sup> and that as such the Review should consider waiving application fees for tenants.

- **The ability of tenants to access free or affordable legal advice**

While community legal centres such as WCLC provide assistance to a high volume of tenants, we note that the resources currently available through CLCs are inadequate to effectively assist the half a million renters in Victoria. It is imperative that the State Government increase funding to services targeted to people on a low income to ensure that all tenants who cannot afford legal advice are able to access free advice and legal assistance.

- **The ability of tenants to enforce VCAT orders against landlords**

Finally, we note that the inability of tenants to enforce VCAT orders against landlords may contribute to a feeling among some tenants that there is little use in making an application to VCAT.

**Recommendation 1:**

**There should be a review of the factors that are resulting in tenants failing to enforce their rights under the Act.**

## 3.2 Addressing structural inequalities between landlords and tenants under the current Act

There are a number of key structural inequalities that exist between landlords and tenants under the current Act. For example, a number of provisions provide mechanisms to ensure that tenants comply with their obligations under the Act, however no such mechanisms apply to landlords. Essentially, these provisions of the Act seem to assume that there will be non-compliant tenants, but not landlords.

### 3.2.1 Should there be a landlord's bond?

Under the current Act landlords can, and almost always do, require that tenants pay a bond as a precondition of the tenancy.<sup>6</sup> The landlord may then claim this bond if a tenant breaches their obligations under the Act or the lease. For example, a landlord may claim money from the bond for unpaid rent or for damage to the property. In this way, a tenant's bond is intended to be a way to discourage tenants from breaching their obligations and, if there is a breach to ensure compliance with any resulting order for compensation. Indeed, the Act itself defines the bond as 'an amount paid or payable by a tenant to secure his or her performance of the tenancy agreement or any of the provisions of this Act'.<sup>7</sup>

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<sup>5</sup> For more detail see the Tenancy Working Group submission to VCAT Legislation Reform Project, September 2012, available at <https://www.tuv.org.au/wp-content/uploads/2014/04/120914-Submission-to-VCAT-Legislation-Reform-Project.pdf>.

<sup>6</sup> *Residential Tenancies Act 1997 (Vic)*, Part 10. Specifically, a landlord may evict a tenant for non-payment of the bond under s 247.

<sup>7</sup> *Residential Tenancies Act 1997 (Vic)* s 3.

It is concerning then, that there is no equivalent mechanism to ensure landlords' compliance with the Act. Just as a landlord may be entitled to claim compensation from a tenant, tenants may also claim compensation from their landlord.<sup>8</sup> For instance, if a landlord fails to attend to repairs, a tenant may seek compensation for the period that they were living in a sub-standard property.

The fact that landlords are not required to pay bonds has two primary consequences for tenants.

First, there is little to deter landlords from failing to comply with their obligations under the Act. For example, a landlord's bond would give tenants a bargaining tool when requesting repairs.

Second, in the absence of a landlord's bond, tenants have significant difficulty enforcing orders of compensation against landlords. In order to pursue a landlord for compensation, a tenant will need to pursue enforcement in the Magistrates' Court of Victoria. One of the primary hurdles to doing so is that the tenant is required to have the landlord's personal address for service. Where an agent is managing the property, the landlord's personal address will not usually be listed and our experience is that agents rely on privacy laws as justification for refusing to provide a landlord's address.

Further, enforcement proceedings can be time-consuming, costly and difficult for tenants to understand. Finally, the problems with enforcement are significantly compounded where landlords reside interstate or overseas.

Historically, there appears to have been a view that private landlords would act in good faith and would not default on an order of VCAT. However, recent history has shown an increasing number of property investor landlords with inadequate capital backing to meet their obligations under the legislation. There is an increased risk that at least some of these landlords will default on orders from the Tribunal made in favour of tenants. This is something that our lawyers have seen on several occasions.

**Jack: unable to enforce an order for compensation against his landlord**

Jack\* was living in a private rental. Jack's toilet was broken, but Jack's landlord refused to carry out repairs to the toilet for over 12 months. At times, Jack had to use the public toilet down the road. Jack eventually applied to VCAT and was awarded \$1000 in compensation for his landlord's failure to maintain the property. His landlord, however, refused to pay.

Jack attended WCLC for advice about enforcing his compensation order. We advised Jack that he could not start proceedings in the Magistrates' Court without his landlord's personal address; Jack's lease listed his real estate agent's address only. After doing a property title search, we found that Jack's landlord lived overseas. Due to the cost of serving the enforcement documents overseas, Jack could not enforce the compensation order against his landlord and was unlikely to ever recover his \$1000.

**Recommendation 2:**

**The Act should be amended to require that landlords to pay a bond to the Residential Tenancies Bond Authority at the commencement of every tenancy.**

<sup>8</sup> *Residential Tenancies Act 1997 (Vic)* s 209, s 210.

### **3.2.2 Should there be a landlord database?**

Under the current Act, if tenants breach the Act or their lease in certain ways, they may be listed on a residential tenancies database.<sup>9</sup> For instance, a tenant may be ‘blacklisted’ if they are evicted from the property due to rent arrears, or if they fail to pay their landlord compensation that is ordered by VCAT. By creating databases that are searchable by prospective landlords (and thereby affecting a tenant’s capacity to find rental properties in the future) the Act creates a significant deterrent to tenants who may otherwise engage in behaviour that is detrimental to the landlord.

Importantly, though, the residential tenancies databases may only list breaches by tenants.<sup>10</sup> This means that, as discussed above, while there are significant consequences for a tenant who breaches the Act, landlords are not held accountable by the same mechanisms. Further, while prospective landlords can screen tenants by way of the residential tenancy databases, prospective tenants have no way of screening future landlords to assess whether they have, for example, refused to comply with a VCAT order that they carry out repairs.

#### **Aruna: without cooking facilities for four months**

Aruna\* was living in a property in Melbourne’s outer west with her sister and their elderly father. In January, Aruna’s oven and stove stopped working. Aruna’s landlord initially said that they would fix it, but by the end of February the repairs hadn’t been started.

In late February, Aruna applied to VCAT and an order was made that the repairs be carried out within two weeks. The landlord kept promising to do the work, but did not carry out the repairs until late April. Aruna could have renewed the proceedings at VCAT to hurry up the repairs, but she didn’t see the point given that the landlord hadn’t complied with the first order. She was also worried about ruining the relationship with her landlord in case he tried to evict them.

In total, Aruna was unable to use the stove or oven for almost four months. There were almost no consequences for the landlord.

#### **Recommendation 3:**

**A database should be created to record breaches of the Act by landlords, including:**

- **Failure to comply with VCAT orders in relation to repairs;**
- **Failure to comply with orders for compensation; and**
- **The commission of any offence under the Act.**

<sup>9</sup> *Residential Tenancies Act 1997 (Vic)* Part 10A regulates databases, which are run by private companies.

<sup>10</sup> *Residential Tenancies Act 1997 (Vic)* s 234.

## 4. A meaningful review of the Act must also review the operation and practices of VCAT

Under the current Act, VCAT is the primary forum in which tenants and landlords resolve their disputes. VCAT is therefore the primary arbiter of the rights and obligations set out under the Act. As such, WCLC believes that any meaningful review of the provisions of the Act must also consider the operation and practices of VCAT. In particular, there is a view among many tenancy advocacy services that VCAT primarily operates as a landlord’s eviction service that pays insufficient attention to the rights of tenants. We submit that there needs to be a considerable review of the way that VCAT currently operates to ensure that tenants are willing and able to enforce their rights under the Act.

### 4.1 Rules of evidence and procedure

At present, there are very few rules of evidence and procedure that apply to hearings in the Residential Tenancies List of VCAT. VCAT is not bound by the rules of evidence, and may inform itself on any matter as it sees fit.<sup>11</sup>

The result of this is that our tenancy lawyers regularly conduct cases involving real estate agents and landlords who refuse to provide us with the evidence that will be used at the hearing before the day of hearing. In the absence of specific rules of procedure and evidence, our lawyers have little capacity to compel production. Further, given that the legislated aim of the Tribunal is to “determine each proceeding with as much speed as the requirements of this Act... and a proper consideration of the matters before it permit”, we have experienced VCAT Members who request our lawyers to proceed despite them having received new evidence or information during the hearing.

#### **Fidel: unable to obtain copies of the evidence before his VCAT hearing**

WCLC represented Fidel\* in relation to an application for his bond and compensation. On numerous occasions before the hearing, WCLC requested that the landlord provide us with the evidence that they intended to rely upon at the hearing. It was never provided.

The landlord attended the hearing with a large number of photos and invoices that had not previously been provided to us. WCLC raised this as an issue of procedural fairness with the VCAT Member and made a request for a costs order.

The VCAT Member gave WCLC a choice: either we could have five minutes to look at the material and then proceed with the hearing, or else the matter would be adjourned to a later date. The Member stated that there was no basis for making a costs order, citing the general rule that parties bear their own costs.

As we did not feel that we could adequately represent Fidel after having only five minutes to review the evidence, we opted to have the matter adjourned. This meant that Fidel had to lose another day of casual wages, and our Service had wasted significant resources attending VCAT with Fidel only for

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<sup>11</sup> *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* ss 98(1)(b), (c).

the matter to be adjourned. This could have been avoided if there were rules compelling parties to provide evidence to the other parties before the hearing.

This compares unfavourably to the VCAT Civil Claims jurisdiction, where parties are expected to cooperate, provide relevant documentation and attend mediation prior to a hearing in VCAT. In our experience, the lack of procedural requirements on applicants (who are overwhelmingly landlords) has led to a culture of landlords submitting weak applications in the hope that they will not be strenuously tested by VCAT Members. For example, our lawyers report consistently seeing inflated bond and compensation claims by landlords who “try it on” in the hope that the VCAT Member will not require a high level of evidence to support their claim.

**Cate: ordered to pay compensation on the basis of dubious evidence**

Cate\* was living in a private rental. After she vacated the property, her landlord asked her to repair a wall that had been scratched and clean oil stains from the garage floor. As requested, Cate went back to the property and addressed the issues.

Cate was surprised when her landlord nonetheless claimed a substantial amount of compensation from her for repairing the wall and cleaning the garage floor.

At the VCAT hearing, Cate’s landlord relied on photos that were taken prior to Cate carrying out the work. They conceded that Cate had gone in and done the work, but argued that it had not been done to a high enough standard. They did not, however, have any photos that were taken after Cate had carried out the work.

WCLC argued that the landlord could not rely on photos that were not an accurate representation of the condition of the property. The VCAT Member, however, stated that the photos were good enough evidence, and said that Cate had had an opportunity to take photos of her own but did not. Despite Cate’s sworn evidence that she had carried out the works, the VCAT Member accepted an unsworn quote from a tradesperson as evidence that further works were required to be carried out. The VCAT Member awarded the full amount sought by the landlord for repairs to the walls and cleaning of the garage floor.

## 4.2 The ability of tenants to seek review of VCAT decisions

At present, most tenants do not have the capacity to seek review of VCAT decisions in which they believe the presiding VCAT Member has made an error.

Pursuant to section 148 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*, appeals from VCAT must be made to the Supreme Court of Victoria. The need to appeal to the Supreme Court creates the following barriers for tenants:

- The Supreme Court of Victoria is a costs jurisdiction. This means that if a tenant loses their appeal, they may be liable for many thousands of dollars in legal costs;
- The process of making an application to the Supreme Court is complex and requires significant legal expertise; and
- Tenants will require experienced (and costly) lawyers to run an appeal at the Supreme Court.

WCLC’s submission is that, in order to ensure that VCAT Members who make errors are subject to review, the appeals process should be altered so that parties are not required to litigate in the Supreme Court.

**Sam: unable to appeal a bad decision**

Sam\* had been living in a rental property for 22 years. When she left, her landlord made an application against her for compensation that included replacing rusted guttering and replacing carpet. Sam represented herself and VCAT made an order of compensation for \$1,200 against Sam.

Importantly, our view was that there was no legal basis for awarding either of these amounts under the Act:

- The rusted guttering clearly constituted fair wear and tear and the cost should properly have been borne by the landlord.<sup>12</sup>
- Sam advised us that the carpet was at least 22 years old. As such, the carpet had most likely fully depreciated under the Australian Tax Office’s depreciation guidelines.

While it appeared that the Member had erred in their decision, the reality for Sam was that it was not worth appealing. The fees and potential cost risks were too high to justify in relation to an order of \$1,200.

**Recommendation 4:**

**There should be a review of the process for appealing decisions in VCAT’s Residential Tenancies List to ensure that parties have greater access to appeals.**

### 4.3 Ensuring consistent decision-making

It is our experience that decision-making at VCAT can vary greatly according to the Member that hears the matter so that similar cases may have different outcomes.

**Compare Ramesh and Hannah: similar cases with different outcomes**

Hannah\* had lived in a public housing property for ten years. After she moved out, the Director of Housing made a claim for compensation to replace the bench top, which had been damaged by a hot pan being placed on it. At the VCAT hearing, WCLC submitted that as the bench top was ten years old, it had fully depreciated. The VCAT Member agreed and found that while the bench top had been damaged by the tenants, it had fully depreciated according to the Australian Tax Office’s depreciation guidelines. As such, no order of compensation could be made.

Ramesh\* lived in a private rental for six years. Ramesh’s daughter had stained a small part of the carpet with nail polish and the landlord claimed the cost of re-carpeting the whole lounge room. At the VCAT hearing, the real estate agent conceded that the carpet was approximately ten years old. WCLC therefore made a submission that the carpet had fully depreciated and that no award of compensation could be made. The VCAT Member, however, stated that even though the carpet was

<sup>12</sup> In order to claim compensation against a tenant, a landlord must be able to establish that the tenant failed to comply with their duty to take care to avoid damage to the rented premises under section 61 of the *Residential Tenancies Act 1997 (Vic)*. As per paragraph [210.02] of the *Annotated Residential Tenancies Act*, June 2014, the Tribunal should take into account fair wear and tear when determining whether a tenant should be liable to pay compensation.

ten years old, it was “still in good condition” and made an order of compensation for carpet replacement.

It is our submission that the consistency of decision-making is impacted by:

- The lack of rules of evidence and procedure;
- The significant barriers to parties accessing appeals; and
- The discretion conferred on VCAT Members in relation to a number of matters under the Act.

The inconsistency of outcomes reduces confidence in VCAT and means that it can be very difficult to advise clients on the likely outcome of their case. For instance, as demonstrated in Ramesh and Hannah’s case studies above, while depreciation should be considered by the Tribunal in making a decision about compensation, some VCAT Members may nonetheless make an award of compensation where the item has fully depreciated.

It is a central principle of justice that like cases are determined in a like manner. As such, it is our submission that the review should focus on ensuring consistent decision-making by VCAT. In addition to greater access to appeals and tightened rules of evidence and procedure (discussed above), this may also be brought about by:

- The increased publication of practice notes; and
- The publication of detailed statistics on cases by type and outcome.

**Recommendation 5:**

**The review of the Act should include a full review of the operation and practices of the VCAT Residential Tenancies List, with a focus on:**

- **Strengthening the rules of evidence and procedure;**
- **Ensuring that decision-making is consistent; and**
- **Ensuring that parties have a real capacity to seek review of VCAT decisions.**

## 5. The Act's role in providing sustainable, secure and safe housing for Victorians

Whereas renting was once considered to be the realm of students and younger people, renters are increasingly seeking stable, longer-term housing.<sup>13</sup> Factors such as decreasing housing affordability have meant that families are the most common type of household in the private rental sector,<sup>14</sup> while a decline in the rate of social housing has meant that more low-income and vulnerable households are likely to be relying on the private rental sector for housing.<sup>15</sup> Certainly, within our casework we see a high number of vulnerable clients in private rentals. In the last six months, 63% of our clients who lived in private rentals were reliant on a Centrelink payment for income. As such, it is increasingly important that the Act regulates the rental market to ensure that Victorians can access sustainable, secure and safe housing.

### 5.1 The need for minimum standards for rental housing

At present, there are no minimum standards for rental properties in the Victoria. Under the current Act, landlords are only required to *maintain* rental properties, meaning that a tenant can only compel a landlord to carry out repairs to fixtures that were provided from the commencement of the tenancy.<sup>16</sup> This means that in Victoria housing can be rented without basic amenities such as heating, running hot water or a working oven or stove.

#### **Pushpa: living in a rental property without heating**

Pushpa\* lives in a rental property with her partner and their three young children. Before Pushpa rented the property, she went to an open for inspection and saw ducted heating vents. She also confirmed with the agent who was present at the inspection that they worked. Pushpa took the property on the basis that it had heating; two of her children had respiratory illnesses that meant they had to be warm at night.

On the day that Pushpa moved in to the property, she found that the ducted heating did not work. She asked her managing agent to have it fixed, but the agent told her that the heating had never worked and that it would not be fixed.

WCLC helped Pushpa make an application for urgent repairs to VCAT. At the hearing, VCAT found that the condition report (which was given to her on the day she moved in, one week after she signed a 12-month lease) stated that the ducted heating vents weren't connected. VCAT therefore found that Pushpa was put on notice that the property was not provided with heating, and her application for repairs to the heating was dismissed.

Pushpa and her young family had to stay in the property until the end of the 12-month lease without heating.

<sup>13</sup> Laying the Groundwork Consultation Paper, above n 4, p 5.

<sup>14</sup> Ibid, p 18.

<sup>15</sup> Ibid, p 17. Within the overall rental sector, social housing has decreased from 15 % in 1996 to 12 % in 2011.

<sup>16</sup> *Residential Tenancies Act 1997 (Vic)* s 68, and Division 6 of Part 2.



The position in relation to tenancies can be contrasted with rooming houses, in which minimum standards are set out by way of regulations.<sup>17</sup> The relevant rooming house regulations, for instance, prescribe that rooming houses must be provided with a cooktop, power outlets in working order and that an electrical safety check must be carried out every five years.<sup>18</sup>

In light of the current affordable housing shortage in Victoria,<sup>19</sup> WCLC sees large number of tenants who have no choice but to accept rental properties that are in a poor condition. It is therefore our submission that the market has failed to ensure that all renters have access to secure, safe housing that does not jeopardise their health. In light of this, it is our submission that residential tenancy legislation needs to play a greater role in ensuring minimum standards.

**Recommendation 6:**

**The Act should be amended to include a mechanism for minimum standards to be set for rental properties in Victoria to ensure that all renters have access to secure and safe housing.**

## 5.2 Providing greater housing security for tenants

Being evicted has a significant impact on tenants. Of course, tenants will invariably suffer significant stress and financial cost as a result of needing to find an alternative place to live. Importantly, evictions can also result in homelessness for tenants who are unable to secure alternative housing.

Further, statistics that show that private rentals are increasingly being accessed by families, older people and people with disabilities.<sup>20</sup> Through our casework, we have seen that the consequences of eviction are particularly hard on these groups. Families, for instance, are often particularly concerned about potential changes to schooling for children, while people with disabilities may find it difficult to find a new property that accommodates their disability. It is therefore our submission that the increased use of private rental housing by vulnerable Victorians necessitates a shift in the legislative regime in relation to evictions.

### 5.2.1 120-day 'no reason' notices to vacate

As a general premise, the Act requires a landlord to have a valid reason for issuing a Notice to Vacate to a tenant.<sup>21</sup> For instance, a landlord may issue a Notice to Vacate if they intend to sell the rental property, if the tenant is 14 days in rent arrears, or if the rented premises is used for an illegal purpose. Section 263 of the Act, however, allows a landlord to evict a tenant for no reason. It is our

<sup>17</sup> *Residential Tenancies Act 1997 (Vic)* s 142B; *Residential Tenancies (Rooming House Standards) Regulations 2012 (Vic)*.

<sup>18</sup> *Residential Tenancies (Rooming House Standards) Regulations 2012 (Vic)* ss 7,11,20.

<sup>19</sup> 'Affordable Lettings by LGA December 2014', Department of Human Services, Victorian Government, <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/research,-data-and-statistics/rental-reports-2014>. In March 2000 31.2% of Victoria's rental housing was classified as affordable. In December 2014 it was 22%.

<sup>20</sup> Laying the Groundwork Consultation Paper, above n 4, p 16-35.

<sup>21</sup> *Residential Tenancies Act 1997 (Vic)* ss 243-262A.

view that the existence of 120-day ‘no reason’ Notices to Vacate represent one of the most significant impediments to housing security for tenants.

Significantly, the existence of the 120-day Notice can render a tenant’s right to challenge the validity of other types of Notices to Vacate effectively meaningless. For example, if a tenant is issued with a Notice to Vacate for rent arrears that appears to be invalid, the tenant will have the right to challenge that Notice to Vacate at VCAT. However, in these circumstances a prudent lawyer will nonetheless need to advise the tenant of the risk of eviction regardless of the outcome; if the original notice is found to be invalid, the landlord will have the option of issuing a 120-day Notice to Vacate and evict the tenant anyway.

**Thuy: evicted after successfully challenging a Notice to Vacate for arrears**

Thuy\* is a sole parent with five dependent children. The family are reliant on Thuy’s Centrelink payment for income. Thuy has been a good tenant, but had some unexpected expenses and got behind in her rent payments. She was subsequently issued with a Notice to Vacate for rental arrears. By the time the matter was listed at VCAT, Thuy was up to date with her rent payments. As such, the VCAT Member dismissed the landlord’s application for a possession order.

Immediately after the hearing, Thuy’s landlord issued her with a Notice to vacate for no reason. Thuy is looking for a new rental property but so far she has been rejected for everything she has applied for. They have been told that there are very few emergency housing options for a family of six. They are at high risk of homelessness.

The availability of these notices also creates a significant deterrent to tenants who wish to enforce their rights under the RTA. While tenants are theoretically able to challenge notices on the basis that they’re retaliatory, this defence can be difficult to prove, and the issuing of a Notice to Vacate causes a significant period of uncertainty and stress for tenants.

**Connie: too scared to ask for repairs in case her landlord evicts her**

Connie\* and her young daughter have been living in a private rental for five years. Connie came to see WCLC for some advice about her landlord’s right to hold open for inspections at the property. During Connie’s appointment in relation to the open for inspections, Connie told WCLC that her landlord had not done any maintenance to the property while she had lived there, and that the property was in a very poor condition. Connie told us that the back gate lock didn’t work, the door handle on her bedroom had fallen off and the tiles in the bathroom were falling off the wall.

WCLC advised Connie that she had a right to request repairs, and that if they weren’t completed she could apply to VCAT. Connie, however, didn’t want to upset her landlord for fear that he would try to evict her. She desperately wanted stability for her daughter, and she didn’t think she would cope if her landlord tried to evict her.

Pursuant to Division 1 of Part 3 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**the Charter**), the responsible Minister of Parliament must prepare a statement of compatibility that states whether any new residential tenancies legislation is compatible with the human rights set out in the Charter. We also note that Section 13 of the Charter establishes that Victorians have a right not to have their home arbitrarily interfered with. As ‘no reason’ Notices to Vacate allow tenants to be arbitrarily evicted from their homes, it is our submission that a decision to retain them would be

contrary to the rights set out in the Charter.

**Recommendation 7:**

**120-day ‘no reason’ Notices to Vacate should be abolished as a means of evicting tenants.**

**5.2.2 Defences to notices to vacate**

Under the current Act, there are few legislated defences available to tenants who have been issued with Notices to Vacate. It is our submission that the defences available to tenants should be reviewed, with a view to increasing the number of defences and removing the role of discretion in VCAT Members’ decision-making in some circumstances.

In particular, it is our view that there should be a review of the defence of ‘retaliation’. Under the current Act, a Notice to Vacate may be challenged on the basis that it was issued in response to the exercise, or proposed exercise, by the tenant of a right under the Act.<sup>22</sup> However, at present there are two significant impediments to a tenant who believes that the Notice to Vacate was issued in retaliation:

- A tenant may only challenge a Notice to Vacate that is issued at the end of a fixed term tenancy or a 120-day no reason Notice to Vacate.<sup>23</sup> This means that in cases where another type of Notice to Vacate has been issued, tenants are not able to argue the defence of ‘retaliation’ even though, for instance, the Notice may have been issued immediately after a request for repairs; and
- The defence only applies if the tenant opts to launch a pre-emptive challenge to the Notice to Vacate. Time limits apply for pre-emptive challenges.<sup>24</sup>

**Recommendation 8:**

**The defence of retaliation contained in section 262(2) of the Act should be extended to apply in relation all Notices to Vacate and at all VCAT hearings in relation to determining whether a possession order should be made.**

**5.2.3 The role of discretion in evictions**

It is also our submission that the review should consider the role of discretion in relation to VCAT’s decision to issue possession orders. The structure and wording of the current Act means that if a valid Notice to Vacate is issued, and if the tenant is still in possession of the property.<sup>25</sup> The Tribunal then has discretion to dismiss or adjourn the matter in certain circumstances.<sup>26</sup> For instance, if a tenant is 14 days in arrears at the time that a Notice to Vacate is issued, they may still be lawfully

<sup>22</sup> *Residential Tenancies Act 1997 (Vic)* s 262(2).

<sup>23</sup> *Residential Tenancies Act 1997 (Vic)* s 266(2).

<sup>24</sup> *Residential Tenancies Act 1997 (Vic)* s 266(3).

<sup>25</sup> *Residential Tenancies Act 1997 (Vic)* s 330.

<sup>26</sup> *Residential Tenancies Act 1997 (Vic)* s 331.

evicted even though they are up to date with their rent payments on the day of hearing.

Our view is that in order to provide greater certainty and security for tenants it is preferable to reduce the role of discretion in determining whether a tenant should be evicted and instead provide specifically legislated defences to an application for possession. For instance, in relation to an application for possession for rent arrears, it is our view that the Act should be amended so that a landlord's application must be dismissed where the tenant has not attended VCAT in relation to an arrears matter in the past year and is up to date with the rent on the day of hearing.

**Recommendation 9:**

**The Act should be amended to reduce the role of discretion in relation to eviction matters.**

### 5.3 There should be greater enforcement of offences under the Act

The current Act relies on self-enforcement by tenants. As discussed above, WCLC's view is that this system is failing to protect tenants and therefore failing to ensure that Victorians have access to safe and secure housing. In the context of tenants being unwilling or unable to enforce their rights,<sup>27</sup> it is our view that there should be a compliance-based response to the failure of landlords to comply with their obligations under the Act. We submit that the State Government should take an active role by both increasing the range of offences and increasing the rate of prosecution of landlords to ensure a fair market place for tenants. It is our view that to continue to ignore the longstanding inability or failure of tenants to enforce their rights creates a façade of regulation, whereby landlords are not actually required or expected to comply with their obligations.

#### 5.3.1 Increasing the prosecution of landlords

The current Act establishes a range of offences in relation to residential tenancies. For example, it is an offence under the RTA to persuade a person not to exercise a right under the Act.<sup>28</sup> Under the Act, offences are reported to and prosecuted by Consumer Affairs Victoria (**Consumer Affairs**). While we have not been able to access statistics on the number of offences reported to Consumer Affairs Victoria, our casework experience has demonstrated that tenants are generally unwilling to report their landlord to Consumer Affairs. Further, when tenants do approach consumer affairs, there appear to be few prosecutions of offences. For instance, while Consumer Affairs received almost 80,000 tenancy-related inquiries in the 2013-14 financial year, it is concerning that there were only 24 prosecutions by Consumer Affairs in that period.<sup>29</sup>

The greater use of prosecutions and infringements under the Act would be useful in ensuring that landlords comply with their obligations under the Act. For example, as discussed above, tenants currently have little capacity to enforce an order of VCAT that repairs are carried out. If landlords

<sup>27</sup> See discussion at Part 3 above.

<sup>28</sup> *Residential Tenancies Act 1997 (Vic)* Division 1 of Part 13.

<sup>29</sup> Consumer Affairs Annual Report 2013-2014 at <http://www.consumer.vic.gov.au/annual-report/introduction-and-highlights/our-performance>. Further, the statistics on Consumer Affairs prosecutions are not broken down into dispute type, and this figure represents prosecutions across Consumer Affairs generally

were more likely to be prosecuted for their failure to carry out repairs, it would create a systemic incentive for landlords to comply with their obligations under the Act.

It is our view that greater enforcement of offences under the Act could be facilitated in two ways:

1. By providing additional resources to Consumer Affairs for investigation and prosecution of landlords; and
2. By giving VCAT the power to make findings in relation to offences and issue infringements. For instance, where landlords are brought back to VCAT for a failure to carry out repairs that have been previously ordered, it is our view that VCAT should have the power to make a finding that an offence has been committed and issue an infringement.

**Recommendation 10:**

**There should be a review of the factors that discourage tenants from reporting offences under the Act, with a view to better facilitating complaints by tenants.**

**Recommendation 11:**

**The capacity for enforcement of offences under the Act should be increased. This may be done by way of:**

- Increasing the enforcement capacity of Consumer Affairs Victoria; and
- Giving VCAT the power to make findings in relation to offences and issue infringements.

### **5.3.2 Increasing the categories of offences under the Act**

Along with increased rates of prosecution, WCLC also submits that the categories of offences under the current Act should be increased to include other types of landlord behaviour that should be deterred. For example:

- Landlords currently have a ‘free shot’ at evicting a tenant who is trying to enforce their rights under the Act. After issuing the Notice to Vacate, the matter will proceed to the Tribunal. If the Notice is found to have been issued in retaliation, the landlord’s application will simply be dismissed and the landlord’s only loss will be the application fee. It is our view that issuing a Notice to Vacate in retaliation should be an offence, and should be punishable by way of a significant infringement or loss of a landlord’s bond (as discussed above).
- It is not currently an offence for a landlord to interfere with a tenant’s quiet enjoyment by attending the property for inspections without notice. In this instance, a tenant would have to either seek injunctive relief against the landlord or make a claim for compensation. It is our view that there should be an offence created to ensure that landlords do not seriously interfere with a tenant’s quiet enjoyment of the property.

**Recommendation 12:**

**There should be the creation of new offences under the Act to deter landlords from breaching their obligations under the Act.**

Additional offences may include (but should not be limited to):

- Issuing a Notice to Vacate in retaliation; and
- Seriously interfering with a tenant’s right to quiet enjoyment.

## 5.4 The current Act does not regulate co-tenant disputes

At present, the Act provides only for the regulation of disputes between landlords and tenants. The Act does not regulate disputes between co-tenants, and as such the Residential Tenancies List of VCAT does not have jurisdiction to hear these disputes.

### **Tedros: unsure of his options in relation to a co-tenant issue**

Tedros\* found a bedroom to rent on Gumtree. He signed the lease as a co-tenant and moved in with Amy\*, who had already lived in the property for a year. The bond had already been paid in full by Amy, so Tedros gave her the money for half of the bond, but the bond remained in Amy's name.

A year later, Tedros moved out of the property with Amy's consent. However, when he asked her to refund his bond, she refused. She said that she had to clean the property after he moved out.

Because the bond was not in his name, Tedros could not claim the return of the bond from his landlord. Tedros wanted to make a claim against Amy at VCAT, but because she was not his landlord, the Residential Tenancies List did not have jurisdiction to hear the dispute because they do not hear inter-tenancy matters. The only option for Tedros was to attempt to recover his bond as a civil claim against Amy.

While the proportion of group households within the overall rental sector has declined slightly since 1996, we note that there has been an overall rise in the real numbers of group households since that time, and that group households still make up approximately one in seven rental households.<sup>30</sup>

As such, we consider it unsatisfactory that the Act fails to regulate these types of residential tenancies.

### **Recommendation 13:**

**The Act should be amended to regulate co-tenancies.**

## 5.5 Protecting tenants from unfair bond and compensation claims

Under the current Act, a landlord may make a claim for any loss incurred as a result of a tenant's rent arrears, damage to the property or failure to keep the property in a reasonably clean condition.<sup>31</sup> Our concerns in relation to bond and compensation claims are as follows:

- Claims for the bond and/or compensation by landlords take up a significant amount of resources of both VCAT and tenancy advocacy services. In 2013-14 these cases represented 27 percent of applications to VCAT<sup>32</sup>, and in the past two years have represented approximately one-quarter of WCLC's tenancy casework;

<sup>30</sup> Laying the Groundwork Consultation Paper, above n 4, p 19. In 2011 group households made up 14% of private rentals.

<sup>31</sup> *Residential Tenancies Act 1997 (Vic)* s 417-419.

<sup>32</sup> VCAT Annual Report 2013-14, above n 1, p 21.

- Our lawyers regularly observe landlords making vastly inflated bond claims that lack merit. It appears that landlords make a large claim in the hope that they will succeed in obtaining at least part of their claim. It is our experience that this risk is higher where tenants are from refugee or non-English speaking backgrounds. Where our Service provides representation, it is rare for the landlord to recover the full amount claimed. For instance, an audit of six bond and compensation claims from October to December 2014 shows that of a total of \$13,383.59 claimed, the landlords were only awarded \$1,060.29 at VCAT. However, it is concerning that the outcome is likely different where tenants are unrepresented or an order is made in their absence;
- In light of the increase in longer-term renters in Victoria, there is a need to limit the circumstances in which landlords can claim the bond and/or compensation against tenants. For instance, under the current Act, a tenant who drills a picture hook in a wall may liable for the cost of removing the hook, patching the wall, and painting the whole wall (if not the whole room where a paint match is said to be unavailable) in order to remedy their breach of the duty not to damage the property; and
- While bond claims are to be made within ten business days of the tenant vacating under the current Act, WCLC routinely sees claims that are made and allowed outside of this period.<sup>33</sup> In order to provide greater certainty for tenants (who are required to pay the bond at the next property before they take possession), it is our view that a mechanism should be created whereby a bond is automatically returned to the tenant if no claim is made by the landlord within 10 business days.

**Mahli: pressured by a VCAT Member to settle the landlord's bond claim**

Mahli\* was living in public housing. At the end of her nine year tenancy, the Director of Housing applied to VCAT for compensation of \$16,000. Most of this amount represented renovations to the property, for which Mahli could not be held liable.

Before the VCAT hearing, the Director of Housing rightly reduced their claim to under \$3,000. However, a number of the items within the \$3,000 claim were still problematic. For instance, WCLC's view was that some items were not the result of damage caused by Mahli but were maintenance items (such as cleaning out electrical sockets), and none of the claimed amounts had taken into account depreciation.

At the start of the hearing the VCAT Member asked if there was any agreement in relation to the claim. When WCLC said that there was no agreement, the Member appeared to be annoyed. She said that as the Director of Housing had been good enough to drop their claim from \$16,000 to \$3,000 that she hoped that the tenant would have come to the party and agreed to settle. WCLC insisted that there was no basis on which to make an offer of settlement and made submissions in relation to each item at the contested hearing. The outcome was that only one of the claimed items out of 9 was awarded in full. The rest were reduced or dismissed. The tenant was ordered to pay \$1,000 in compensation.

<sup>33</sup> S 417 of the *Residential Tenancies Act 1997 (Vic)* requires landlords to make claim within ten business days of the tenant delivering up vacant possession. However, s 126 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* allows VCAT to waive compliance with any time limit.

**Recommendation 14:**

There should be a review of the circumstances in which a landlord may be awarded the bond and/or compensation in light of the increasing number of longer-term tenants in Victoria.

**Recommendation 15:**

The Act should be amended to include a mechanism to ensure that the bond is automatically returned to the tenant if no claim is made by the landlord within ten business days of the end of the tenancy.



## 6. Adapting to new issues in tenancy law

### 6.1 Tenancy and family violence

Increasing attention given to family violence in recent years, including the Royal Commission into Family Violence that commenced in February 2015, has demonstrated that it is a widespread issue that affects large numbers of Victorians. For instance, the Australian Bureau of Statistics estimated that in 2012 17 percent of all adult women in Australia had experienced intimate partner violence at some point since they were 15.<sup>34</sup> As such, the operation of the Act in the context of responding to family violence should be a key area of concern for the review of the Act.

The current Act does contain some provisions designed to assist parties who are experiencing family violence, including:

- Under section 233A, a protected person under an intervention order may apply to VCAT to terminate the existing tenancy agreement in the names of a couple and require the landlord to enter into a new tenancy agreement with the protected person only; and
- Under section 243, a tenant may apply to reduce a fixed-term tenancy if they are an excluded or protected person under an intervention order.

While WCLC acknowledges that these represent an important step forward in the way that the Act deals with family violence, we have identified the following deficiencies with the Act in the way that it deals with victims of family violence:

- Despite running specialist programs in relation to both tenancy and family violence, we have had very few clients requesting assistance with either terminating or creating a tenancy under the Act. In light of this, it is our view that it may not be appropriate to require a victim of family violence to first apply to the Magistrates' Court of Victoria in relation to the intervention order and then make a second application in a separate jurisdiction to deal with their tenancy issues. It may be more appropriate for the Magistrates' Court of Victoria to be given the power to make a decision about the tenancy at the time that the intervention order is granted;
- In order to make an application to reduce a fixed term tenancy, a tenant must be in possession of the property. This means that where a victim of family violence abandons their property to escape a violent situation, they are often unable to make an application for reduction. Such clients will then be liable for unpaid rent until either a new tenant is found or the end of the lease.<sup>35</sup> The law should accept that safety should be the paramount consideration for victims of family violence, and that vacating the property should not prevent a victim of family violence from making an application to VCAT for the fixed term tenancy to be reduced;

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<sup>34</sup> Australian Bureau of Statistics, Personal Safety, Australia, 2012 (2013).

<sup>35</sup> *Residential Tenancies Act 1997 (Vic) s 210, Annotated Residential Tenancies Act*, June 2014, paragraph [210.05].

- The Act is unclear about whether compensation will be awarded to the landlord where a fixed term tenancy is reduced under section 234. The Act states that ‘the Tribunal may determine the compensation (if any) to be paid by the applicant’.<sup>36</sup> While the Act seems to consider that there may be no order of compensation, it does not set out the circumstances in which an order of compensation will be made. This creates uncertainty for applicants, and may create a barrier to family violence victims applying for a reduction;
- The creation of a new tenancy under section 233A requires there to be a final intervention order that excludes a tenant from the rented premises. This means that a protected person may be in a position whereby they have sole occupancy of the property as a result of an interim exclusion clause, but not technically be a tenant of the property; and
- There is no provision for having residential tenancies database listings removed on the basis that damage or rent arrears were the result of family violence. While it may be possible to argue apportionment of liability under the *Wrongs Act 1958 (Vic)*, this relies on the protected person attending the bond or compensation hearing and making this technical argument. For a person fleeing a violent relationship, however, attending a compensation hearing is unlikely to be a high priority. In addition, if that person flees the home, they are unlikely to receive the notice of hearing. As such, we have seen a number of women who did not attend the VCAT compensation hearing and who are ‘blacklisted’ due to damage to a property caused by a violent ex-partner.

**Mandy: ‘blacklisted’ for damage caused by her violent ex-partner**

Mandy was living with her partner, Rohan, and child in a private rental. Mandy and Rohan were both listed as tenants on the lease. Mandy was subsequently the victim of serious family violence, in the course of which Rohan caused significant damage to the property. Fearing for her safety, Mandy applied for an intervention order and left the property.

After Mandy vacated the property, there was a bond and compensation hearing. Mandy had a lot going on – she was dealing with the trauma that resulted from her experience of violence, and she was also scared that Rohan would attend the hearing. As such, she didn’t go to the bond and compensation hearing. VCAT made a substantial award of compensation against the tenants in Mandy’s absence.

A year later, Mandy attended WCLC because she was looking for a new property and had found out that she had been ‘blacklisted’ on a tenancy database due to the damage caused by Rohan. WCLC had to advise Mandy that there was no legal basis for having the listing removed. If Mandy had attended the bond and compensation hearing, she could have argued that the damages should have been apportioned. However, as Mandy had not attended, she was stuck with the listing until it ran out in three years.

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<sup>36</sup> *Residential Tenancies Act 1997 (Vic)* s 234(3).

**Recommendation 16:**

**The operation of the Act in the context of family violence should be fully reviewed. In particular, WCLC recommends that:**

- **Victims of family violence should be allowed to make an application for a reduction of a fixed-term tenancy after they have vacated the property;**
- **The Act should provide clarity about the circumstances in which compensation will be awarded where a fixed-term tenancy is reduced due to family violence;**
- **There should be provision for creating a new tenancy where a person is excluded from a property by way of an interim intervention order;**
- **There should be a mechanism to remove residential tenancy database listings if property damage or rent arrears were caused by family violence; and**
- **VCAT Members should be given specialist training in relation to family violence.**

## **6.2 The impact of landlord insurance policies**

Our experience demonstrates that landlords are increasingly taking out landlord insurance policies. These policies provide cover to landlords if the tenant vacates with rent arrears owing or if a tenant damages the property. A number of real estate agents have advised us that they will not manage a property that isn't covered by a landlord insurance policy, and Terri Scheer Insurance, one of the leading landlord insurance providers, have advised us that they have seen a 20% growth in their landlord insurance policies over the past year.

Through specialist insurance casework within our tenancy program, WCLC has identified a number of issues that arise within the context of landlord insurance policies. The most relevant in relation to the review is that we have seen numerous instances of landlords 'double-dipping' by making a claim for 100 cents in the dollar from the insurer and also making a claim against the tenant (by way of the bond or an order of compensation). Tenants may also be pursued twice as, under the right of subrogation, the insurer will then often pursue the tenant for amounts paid out under the policy, unaware that the landlord has already claimed these items against the tenant.

**Michelle: pursued by her landlord and an insurance company**

Michelle\* is a single mother of a young child who was living in a private rental in Melbourne's West. At the end of her tenancy, Michelle's landlord made a claim on the bond for unpaid rent. There was a VCAT hearing, and Michelle did not contest the landlord's claim. The unpaid rent was settled by way of an order that the whole bond be paid to the landlord.

A year after the VCAT hearing, Michelle received a letter from debt collectors demanding that she pay \$3,300 for 'unpaid rent'. Upon investigating the issue, WCLC found out that the landlord had both received the tenant's entire bond and made a claim against their insurance policy for unpaid rent.

It is our view that a landlord who has made a claim on their insurance policy cannot also succeed in claiming against the tenant. Instead, where the Tribunal is put on notice that there has been a successful insurance claim, it is our view that the landlord cannot establish that they have suffered loss, and therefore could not be awarded further compensation.<sup>37</sup> However, we have seen numerous cases in which VCAT did not enquire about whether an insurance payout had been made, and therefore awarded compensation to a landlord who had already recovered their loss.

The primary ways that the review could prevent landlords from double-dipping would be to:

- Amend the VCAT application form so that landlords must state whether they have made a claim under their insurance policy; and
- To require VCAT Members to consider whether a landlord has made a claim on an insurance policy when determining whether that landlord has suffered a loss or damage.

**Recommendation 17:**

**In light of the increasing prevalence of landlord insurance policies, the RTA review should consider the way landlord insurance policies impact on tenants, particularly in the context of compensation claim.**

**Recommendation 18:**

**That the VCAT application form be amended so that landlords are required to state whether they have made a claim under an insurance policy.**

**Recommendation 19:**

**The Act should require that VCAT Members consider whether a landlord has made a claim on an insurance policy when determining whether a landlord has suffered loss or damage.**

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<sup>37</sup> *Residential Tenancies Act 1997 (Vic)* s 210.