WEstjustice
Western Community Legal Centre

Residential Tenancies Act Review – *Fairer, Safer Housing*

WEstjustice submission in response to the 'Rights and Responsibilities of Landlords and Tenants' issues paper

May 2016

James Leckie
Lawyer

For any questions in relation to this submission, please contact:

James Leckie
WEstjustice (Western Community Legal Centre)
james@westjustice.org.au
(03) 9749 7720

Level 1
8 Watton Street
WERRIBEE VIC 3030

With many thanks to Joe Nunweek, Michelle Chumbley and Denis Nelthorpe.

Table of Contents

1. Introduction

1.1 About WEstjustice (Western Community Legal Centre)

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

WEstjustice has a particular focus on working with newly arrived communities. More than 40% of our clients over the last four years spoke a language other than English as their first language. Further, approximately 57% of our clients during that period were newly arrived, having arrived in Australia in the last five years.

1.2 About the WEstjustice Tenancy Program

WEstjustice employs two tenancy lawyers who provide specialist advice, casework and representation to vulnerable and underprivileged tenants who live in Melbourne's West. In the past five years, WEstjustice's tenancy program has assisted over 1,100 clients with almost 1,800 matters. Our catchment area includes suburbs in Melbourne's inner-west (including Footscray, Sunshine, and Braybrook), and Melbourne's outer-west (including the fast growing areas of Werribee, Wyndham Vale, Hoppers Crossing and Melton).

As part of our tenancy program, 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. Whilst we primarily assist tenants in private tenancies, we also advise tenants who live in rooming houses, 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.

WEstjustice 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.

WEstjustice'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. Executive Summary

Rights and responsibilities of landlords and tenants underline the relationship that exists between the parties. They can be complex and numerous, and derive from a number of sources, both legislative and contractual. Fundamentally, tenants and landlords must operate on a level basis – where one party assumes effective dominance over the other, the results can be highly detrimental.

WEstjustice has broken down a tenancy into a number of different stages to assess the weaknesses of the current framework. Before a tenancy (**Part 5**), discrimination can be problematic for tenants, and the means of redress can be complex. We are also particularly concerned about the use of Residential Tenancy Databases, and the manner in which they are used to unfairly screen and list tenants.

When a tenancy begins (**Part 6**), a lease is usually signed by the parties, drawing together many of the legislative and contractual duties and obligations owed to each other. Our submission is that agreements require standardisation, full disclosure of information pertaining to the premises, and ultimately an opportunity for a tenant to withdraw from an agreement where they deem it unsuitable.

During a tenancy (**Part 7**) is where the unevenness in the current framework between tenants and landlords is most pronounced. We cast an assessment over a number of prominent issues that disadvantage tenants, including statutory duties, breaches, assignments and pets. We further analyse the drawbacks for tenants, and their rights and responsibilities, when a tenancy ends (**Part 8)**.

As a service with a strong commitment to assisting victims of family violence, we cover this particular issue in some detail at **Part 9**.

The tenancy framework has certainly changed and adapted over time. WEstjustice advocates for this process to continue into the future. We submit this paper to the current reform discussion, and hope to see positive changes made. Whilst we believe that the current situation presents many inequities for tenants in their relationship with landlords, we are optimistic that our recommendations below will see a true balancing of rights and responsibilities of all parties.

3. Summary of recommendations

Recommendation 1: the Act should be amended to align with the provisions and jurisdiction of the *Equal Opportunity Act 2010* (Vic) to prevent discriminatory behaviour by landlords.

Recommendation 2: the 'red book' must be expanded to include information as to how tenants can enforce their rights in situations where discrimination occurs.

Recommendation 3: rental application forms should be standardised to ensure that every tenant provides the same information, and must only make disclosure sufficient enough for a landlord to determine whether a tenant is suitable for the premises.

Recommendation 4: the Act should be amended to prohibit key deposits.

Recommendation 5: Section 439E(1)(c) must be amended to remove a breach of Section 253 as a ground for listing on a Residential Tenancy Database ('RTD').

Recommendation 6: a tenant must not be listed on a RTD where the grounds for listing have been the result of family violence. Existing tenants who have been listed on a RTD on grounds resulting from family violence must be immediately removed. An intervention order should be sufficient proof to have the listing removed.

Recommendation 7: the Act must be amended extending the time period for a tenant to make submissions objecting to or challenging a proposed listing from 14 to 21 days.

Recommendation 8: the Act should be amended prohibiting a RTD listing from taking place, in circumstances where a tenant objects, until VCAT has made a decision on the matter.

Recommendation 9: where a tenant challenges the substance or accuracy of a listing at VCAT, this should not attract a commencement fee.

Recommendation 10: residential tenancy laws and rules should be amended requiring a RTD to provide a tenant with one free report of their profile in any 12-month period.

Recommendation 11: the Act must be amended to state that where a tenant's rental application is rejected on the basis of a RTD listing, this information must be provided to them.

Recommendation 12: the Act should be amended to include a penalty provisions for the misuse of a tenant's private information, in alignment with federal privacy principles, to prevent, among other things, credit checks being carried out.

Recommendation 13: 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 14: the standard form rental agreement should be expanded in line with the agreement in New South Wales, to comprehensively outline the parties' rights and obligations.

Recommendation 15: the Act should be amended to require that all special conditions proposed to be included in a lease agreement must be approved by Consumer Affairs Victoria.

Recommendation 16: the Act should be amended to render special conditions and terms that have not been fully explained to tenants, and been subject to their consent, unenforceable.

Recommendation 17: the Act should be amended to state that leases making reference to compliance with policies and procedures beyond the agreement will be invalid unless the relevant information has been provided, sufficient enough that the tenant can reasonably follow these policies and procedures.

Recommendation 18: the Act should be amended to state that leases, insofar as they are verbal, only incorporate the terms of the standard prescribed agreement.

Recommendation 19: the Act must be amended to state that where a landlord fails to provide their full name and address for service, the lease agreement remains unenforceable until such time as this information is provided.

Recommendation 20: the Act should be amended to provide that where a landlord terminates the services of an agent, they must provide an updated address for service within 7 days. Otherwise, a tenant can make an application to VCAT, listing the agent as the respondent, for compliance with this provision.

Recommendation 21: VCAT must reject applications where insufficient information has been provided to identify the landlord.

Recommendation 22: the Act should be amended requiring landlords provide instructions for all appliances in the property.

Recommendation 23: prescribed standard form lease agreements must provide meter identifying numbers to tenants for all water, gas and electricity connections.

Recommendation 24: Section 53(1)(a) must include the installation costs and charges in respect of the initial connection of rented premises to the internet.

Recommendation 25: the Act must be amended to require that landlords make a comprehensive statement about utilities, and who is liable for their ongoing charges.

Recommendation 26: the Act must require that the landlord or their agent forward all utility bills to the tenant's forwarding address for three months following the end of a lease.

Recommendation 27: the Act should be amended to broaden Section 206I to residential tenancies, and include a 14 day consideration period.

Recommendation 28: the Act should be amended to include a cooling off period of 3 business days.

Recommendation 29: a standard form document should be used to gain written consent for electronic service, separate from the lease agreement. The document should enable tenants to clearly specify the email address(es) they wish to receive electronic communication at, and should

set out the consequences of permitting documents to be served in such a manner. This consent should be revokable either in writing or verbally.

Recommendation 30: the 'red book' should be updated to include information regarding electronic service of Notices and documents.

Recommendation 31: the wording of section 60 must be changed to remove 'in any manner' and replace it with 'in an unreasonable manner prohibited by law.'

Recommendation 32: Section 61(1) should be amended to read 'a tenant must ensure that reasonable care is taken to avoid causing damage to the rented premises.'

Recommendation 33: the Act must be amended to include a definition of 'reasonably clean'. This should take into account the ordinary course of living, deterioration of the property over time and reasonable wear and tear, and restrict the use of Breach Notices to circumstances where health is threatened, fire may be caused, damage may occur, or laws or regulations may be breached.

Recommendation 34: the Act should be amended to state that a landlord must not unreasonably withhold consent to the installation of additional fixtures.

Recommendation 35: the tenant is not required, and the landlord may not seek compensation, for modifications where they add value or utility to the property.

Recommendation 36: the Act should be amended to provide the following notice periods:

- 24 hours for urgent repairs;
- 3 days for all other purposes aside from urgent repairs;
- 7 days for a routine inspection.

Recommendation 37: notice of entry procedures must be amended requiring a landlord to provide detailed reasons for their proposed entry, and the specific time they intend to enter the premises.

Recommendation 38: see below for details relating Breach of Duty Notices.

Recommendation 39 the Act should be amended to state that landlords must not hold open houses or auctions at a rented premises without the prior consent of the tenants.

Recommendation 40: the Act should be amended to state that landlords must not take photographs of the property containing a tenant's belongings without the prior consent of the tenant.

Recommendation 41: the Act should be amended to require landlords to compensate tenants a minimum of one day's rent, calculated at the ordinary daily rate, for each separate day that an open house that is conducted.

Recommendation 42: the Act should be amended to state that if the landlord requires the property to be in a condition other than 'reasonably clean', the landlord must incur all such expenses, and the works should be carried out at the tenant's convenience.

Recommendation 43: Repeal section 253 of the Residential Tenancies Act 1997, which empowers landlords to issue 14-day notices to vacate to tenants for un-notified assignment or subletting.

Recommendation 44: The standard-form tenancy agreement proposed above should include a plain-English statement that, subject to the Act, tenants accept that they will be liable for any damage or arrears caused by an un-notified sublessor or subtenant.

Recommendation 45: the Act should be amended to allow tenants to keep pets without prior consent. Landlords may object to the pets if they can demonstrate to the Tribunal that they will cause significant risk to the premises or safety of neighbours and neighbouring properties, or are highly unsuitable for the rented premises.

Recommendation 46: the Act should be amended to allow a landlord to request additional bond for unenclosed pets. The amount for a 'pet bonds' must not exceed $350, and can only be requested within 6 months of lease commencement.

Recommendation 47: the Act should be amended to allow a tenant to give 28 days before the end of a fixed term, or 14 days after the expiration of a fixed term, notice of intention to vacate where special or personal care is required, temporary crisis accommodation is needed, or the tenant is offered public housing.

Recommendation 48: Section 234 of the Act should be amended to explicitly apply even in circumstances where a tenant has taken actions to end a lease. Further, the word 'severe' should be removed from this section.

Recommendation 49: the Act should be amended to increase the length of time that personal documents must be retained from 90 days to 12 months. Further, personal documents should never be destroyed, and must be returned to their respective issuer at the expiration of 12 months.

Recommendation 50: the Act should be amended to increase the time required for goods of a monetary value to be stored from 28 days to 6 months.

Recommendation 51 the Act should be amended to allow a landlord to make an application to VCAT, not before 60 days of the goods first being stored, to have the goods sold at public auction before the expiration of the 6 month period where they can show the goods are highly unlikely to be collected by the owner of the goods.

Recommendation 52: standard practice by landlords should be to request an inspection by Consumer Affairs Victoria in circumstances where goods of a monetary value are left behind. This eradicates any ambiguity over value, whether goods should be stored, and provides more certainty to the parties about their rights and obligations. This can be encouraged by agents in the course of practice of managing properties, and in information provided to landlords.

Recommendation 53: avenues for notifying the owner of goods left behind should be expanded beyond newspapers. Consumer Affairs Victoria should run and maintain a website that allows landlords to list unclaimed items which are to be sold which the relevant tenants may freely check and access.

Recommendation 54 WEstjustice submits that the following amendments be made, in addition to those recommendations made above:

- The Magistrates' Court of Victoria should be given jurisdiction to decide tenancy matters where an application is made for a family violence intervention order. Alternatively, it must be incumbent on Magistrates to enquire as early as possible whether there is a tenancy involving the applicant and respondent to an application for an order, and advise them of their rights to apply for a new tenancy.
- An interim family violence intervention order should suffice for Section 233A to apply, and the creation of a new tenancy possible.
- It must be possible for VCAT to apportion rent arrears in circumstances of family violence.
- Tenants, who are a protected person under a family violence intervention order, must be permitted to make reasonably modifications to the premises that enhance the safety of themselves, their children, their property and the premises itself.
- Section 120 of the *Victorian Civil and Administrative Tribunal Act 1997* (Vic) must be amended to allow victims of family violence more time to lodge a review. We submit that 28 days is suitable.

4. The rental market – a snapshot

In our previous submissions to the Residential Tenancies Act Review, WEstjustice has flagged a number of important statistics and indicators in respect of the rental market. Rents are rising across the state,[1] and the proportion of Victorian households renting has increased by nearly 17% since 1994.[2] Around 26% of a median income goes toward a median rent.[3] Private tenants are more likely to be on lower incomes, be under the age of 45, and be relatively recent migrants to Australia.[4] Further, approximately 9.1% of households face rental costs greater than 30% of their gross household income,[5] an impact concentrated in particular geographical areas.

Australian Bureau of Statistics data analysed by the Council to Homeless Persons in 2014 established that one in three renters in outer suburban and regional electorates of Victoria (including electorates that WEstjustice serves) are in rental stress.[6] These renters will typically be earning incomes of $640 a week or less, and even rents considerably lower than the state median will require over a third of that income.

Ultimately, these figures show that where a greater number of Victorian households are now renting, it is becoming more expensive to do so, and tenants are coming under increasing financial pressure to meet their obligations. In the context of rights and responsibilities of tenants and landlords, we believe than an already difficult rental market is made more challenging for tenants by the structural, cultural and legal disadvantages currently faced.

---

[1] Victoria State Government Department of Health and Human Services ("DHHS"), *"Rental report – September quarter 2010"*, September 2010. Accessed at http://www.dhs.vic.gov.au/__data/assets/pdf_file/0004/589261/Rental-Report-September-2010.pdf, 1 May 2016.

[2] Australian Bureau of Statistics 2013, Housing Occupancy and Costs 2011-12, State and Territory data, 1994-1995 to 2011-2012, cat no. 4130.0, Table 18: Vic Households, Selected household characteristics.

[3] Wendy Stone, Terry Burke, Kath Hulse and Liss Ralston, *Long-term private rental in a changing Australian private rental sector*, Table 8: Median rents as a percentage of median income, states and territories 1981 and 2011, p. 20; Australian Housing and Urban Research Centre ("AHURI"), Swinburne-Monash Research Centre, July 2013. Accessed at http://www.ahuri.edu.au/downloads/publications/EvRevReports/AHURI_Final_Report_No209_Long-term_private_rental_in_a_changing_Australian_private_rental_sector.pdf, 1 May 2016. By way of measure, households paying more than 30% of their income in rent are considered to be in rental stress.

[4] Ibid p. 29.

[5] National Housing Supply Council ("NHSC"), "*Housing Supply Affordability Report 2012-13"*, Table 1.2: Households with rents of more than 30 per cent of gross household income, p. 11, 2013. Accessed at http://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2013/NHSC/Downloads/PDF/housing_supply_affordability_report_2012-13.ashx, 1 May 2016.

[6] Council to Homeless Persons ("CHP"), *"Low income families crushed by rent in outer suburbs"*, 8 October 2014. Accessed at: http://chp.org.au/wp-content/uploads/2014/10/141008-making-social-housing-work-housing-stress.pdf, 1 May 2016.

5. Before a tenancy

Prior to a tenancy commencing, the Act must carefully balance the rights and responsibilities of tenants and landlords to ensure that the market in which they operate is fair and equitable. This means that whilst landlords should be given the ability to conduct due diligence, and ensure that tenants are suitable for the property they apply for, that equally, tenants are not discriminated against, or systematically disadvantaged by the legal framework. WEstjustice assesses a number of the key areas that require reform to ensure that the 'playing field' is truly level for all parties.

5.1. Applying for a tenancy

When tenants find a property they believe is suitable to their needs, they will lodge an application either to the landlord directly, or the landlord's agent.[7] The Act is largely silent on the rights and responsibilities of at this stage. There is no prescribed application form, and there are few limits on the types of information that can be requested. WEstjustice submits that the application process for tenancies is too unregulated, and where the law does respond, means of redress must be made more amenable and accessible. We highlight the key issues of discrimination, disadvantage caused through broad use of residential tenancy databases, and key deposits.

5.1.1. Discrimination in the application process

WEstjustice has not specifically dealt with cases of discrimination in the application stage. Through our casework, however, we are aware that certain groups face a much more difficult proposition when searching for housing than others.

Income and employment status

Many of WEstjustice's clients are dependent on Centrelink as their sole source of income. We have become aware of circumstances where landlords refuse to let the property to applicants on this basis. Whilst not explicitly stated so as to attract anti-discrimination legislation, a justification landlord's often used is simply being 'picky' about who they let the property to. Not only does this over-simply a person or their family's circumstances, and overlook the distinct advantages of Centrepay as a payment method,[8] it serves to further stigmatise these groups because of their income source.

[7] Note that in Australia, 54.3% of occupied rental premises are managed by a real estate agent: Hawthorne, Evgeniya "Self Management vs Agents", *REIA News,* Issue 17, October 2012, p.16

[8] Centrepay is a free, voluntary bill paying service run by Centrelink. Deductions come from payments for payments including childcare, utilities and rent.

Case study – Renee – landlord was waiting for 'someone with a job'

Renee and her partner were forced to break a lease on a property. The landlord and their agent took a full three months to re-let the property, and then sought compensation from Renee for lost rent. We asked why it had taken so long to rent the property out. It was revealed by the agent that an applicant with no rental history issues had come forward soon after Renee vacated but that the landlord had rejected them as 'he wanted someone with a job'.

Tenants from culturally and linguistically diverse backgrounds

WEstjustice services an area with high numbers of newly arrived, refugee and asylum seeker populations. In particular, Footscray, Sunshine and St Albans are some of the most richly diverse areas of Melbourne.[9] Our organisation does not provide housing services, and we do not see first hand the level of difficulty our clients face. However, when dealing with possession matters particularly, we hear that tenants of culturally and linguistic diverse ('CALD') backgrounds will face extreme difficulty in finding housing. Many will keep a list of dozens of properties they have applied for to no avail.[10]

There is no doubt that Victoria has a competitive rental market, and this certainly goes some way to explaining why many tenants are squeezed out. We do believe, however, that a person's background and income status substantially disadvantages them in this market. As an organisation committed to social justice, we submit that any changes that can be made to residential tenancy and anti-discrimination law must take place to curb the disadvantages people of a CALD background face.

5.1.2. Changes to the anti-discrimination regime are needed

Anti-discrimination measures that protect tenants are found primarily in the *Residential Tenancies Act 1997* (Vic) and the *Equal Opportunity Act 2010* (Vic) ('Equal Opportunity Act'). The former goes some way to protecting tenants rights – for example, it is explicitly prohibited to discriminate against

[9] Australian Bureau of Statistics, http://stat.abs.gov.au/itt/r.jsp?RegionSummary&region=213031348&dataset=ABS_REGIONAL_ASGS&geoconcept=REGION&measure=MEASURE&datasetASGS=ABS_REGIONAL_ASGS&datasetLGA=ABS_REGIONAL_LGA&regionLGA=REGION&regionASGS=REGION, 22 May 2016; http://stat.abs.gov.au/itt/r.jsp?RegionSummary&region=213031347&geoconcept=REGION&dataset=ABS_REGIONAL_ASGS&datasetLGA=ABS_REGIONAL_LGA&datasetASGS=ABS_REGIONAL_ASGS&regionLGA=REGION&regionASGS=REGION; 22 May 2016; http://stat.abs.gov.au/itt/r.jsp?RegionSummary&region=213011335&geoconcept=REGION&dataset=ABS_REGIONAL_ASGS&datasetLGA=ABS_REGIONAL_LGA&datasetASGS=ABS_REGIONAL_ASGS&regionLGA=REGION&regionASGS=REGION, 22 May 2016.

[10] See Heather MacDonald, Jacqueline Nelson, George Galster, Yin Paradies, Kelvin Dunn and Rae Dufty-Jones (2016) 'Rental Discrimination in the Multi-ethnic Metropolis: Evidence from Sydney', Urban Policy and Research, DOI: 10.1080/08111146.2015.1118376.

prospective tenants by refusing to let a property on the basis they have children.[11] For a more comprehensive regime to prevent discrimination, we must turn to the Equal Opportunity Act and the complaints process of the Victorian Equal Opportunities and Human Rights Commission ('VEOHRC').

Where a tenant believes they have been discriminated against, they can make a complaint to the VEOHRC seeking a resolution. This may be monetary, through compensation, or non-monetary, which may take the form of an apology, commitment to undergo training, or conciliation.[12] Alternatively, or where a resolution cannot not reached through this process, an application may be made to VCAT.

There is nothing inherently wrong with the process of enforcing your rights within the anti-discrimination regime. However, it is relatively time consuming when compared with measures for redress under tenancy legislation. Further, we feel this process is too separated from the tenancy framework, and information is less readily available.[13] For this reason, WEstjustice advocates that there be clearer links between the prohibitions under the Equal Opportunity Act to the tenancy context, and that the jurisdictions be aligned so that tenants can enforce their rights in a speedier manner, in accordance with channels currently afforded under the *Residential Tenancies Act 1997*.

Recommendation 1: the Act should be amended to align with the provisions and jurisdiction of the *Equal Opportunity Act 2010* (Vic) to prevent discriminatory behaviour by landlords.

5.1.3. Provision of anti-discrimination information to tenants

Upon signing a lease, information regarding tenants' rights, responsibilities and obligations must be provided. This 'red book' assists renters in understanding how to comply with a lease, their statutory obligations, and how to enforce their rights under the Act. We see little impediment to anti-discrimination information, especially in accordance with any amendments made in response to our above recommendation, being provided as part of this book. This must be part of a concerted effort to harmonise the equal opportunity and tenancy legislation.

Recommendation 2: the 'red book' must be expanded to include information as to how tenants can enforce their rights in situations where discrimination occurs.

[11] *Residential Tenancies Act 1997* (Vic) s 30(1). See s 30(2) for exceptions to this rule.
[12] Victorian Equal Opportunities and Human Rights Commission, 'Making a Complaint', http://www.humanrightscommission.vic.gov.au/index.php/making-a-complaint, 22 May 2016.
[13] There are many avenues for tenants to gain information about tenancy, from community legal centres across the state, the Tenants Union of Victoria and Consumer Affairs Victoria, for example. Availability for information, advice and advocacy is not as broadly available for discrimination matters.

5.1.4. Screening and application processes

WEstjustice has concerns with varying standard of application processes, the forms used by landlords and agents, the types of information gathered, and how the collected data is subsequently used. A number of stakeholders to the review have raised concerns that sensitive information is collected and used inappropriately. This behaviour must not be tolerated, as it increases the likelihood of tenants suffering discriminatory behaviour, but also having their privacy significantly compromised.

To that end, we advocate for a standardised rental application form. This will ensure that only necessary information is collected, and reduces the likelihood that it will be misused. We submit that only enough disclosure for the landlord to determine that the tenant can sustain the tenancy is necessary – basic income details and identification. A prescriptive form goes some way to controlling what is collected, and protecting the privacy of tenants.

Recommendation 3: rental application forms should be standardised to ensure that every tenant provides the same information, and must only make disclosure sufficient enough for a landlord to determine whether a tenant is suitable for the premises.

5.1.5. Key deposits

When a prospective tenant approaches an agent for the purposes of inspecting a property, often they will be required to provide photo identification and a 'key deposit'. This is anywhere from $50-100, and is usually requested in cash. WEstjustice has encountered several tenants who have stated that one of the reasons they struggle with searching for a property is the cash deposit they must leave for keys is prohibitive. Many tenants on low incomes will not routinely have this cash to provide, let alone when conducting several inspections in a short amount of time. This simply serves as an impediment to tenants looking for properties – or worse, means accepting properties without inspecting them.

There must be a less onerous method of allowing prospective tenants to take keys. Further, WEstjustice is not convinced of the purpose of such a deposit, and is not satisfied that such a practice operates as anything other than an impediment to inspecting the property from the outset.

Recommendation 4: the Act should be amended to prohibit key deposits.

5.2. Residential tenancy databases

Residential Tenancy Databases ('RTD') are known commonly by our clients as 'blacklists', and contain information about a tenant's renting history. The most common databases are TICA and the National Tenancy Database (NTD) run by Veda. These are fully electronic, and real estate agents pay a subscription fee to access listings and lodge entries of their own. Information contained on the databases is broad, and ranges from past agreements, positive recommendations, and adverse listings including for breaches of duty, eviction and non-payment of rent.[14] The stated intention of such a service is to allow an agent to conduct a risk assessment of the prospective tenant as part of a broader due diligence process.[15]

The use of databases has been controversial and largely unregulated until recently. In 2004, RTDs came under scrutiny for a number of privacy related concerns, and lead to legislative changes constraining the use of such services, and the manner in which they can collect and retain information.[16] The Victorian Law Reform Commission noted that many, if not all, agents contain consent provisions in their application forms that are framed as non-negotiable.[17] Tenants are very concerned with being 'blacklisted', though there is widespread misunderstanding of the process. WEstjustice submits that the use of RTDs must be within very limited parameters. The Act must be reformed to limit circumstances tenants can be listed, private data must not be disclosed, and dispute resolution must be more structured and accessible.

5.2.1. Circumstances where database listings must not occur

The Act provides that a tenant who breaches a lease agreement, owes money in excess of the bond, or was evicted on a certain ground, may be listed on a RTD.[18] WEstjustice submits that many of these grounds must be removed to create a fairer and more equitable system.

Subletting and assignment

A tenant can be listed on a RTD if they are evicted for illegally subletting or assigning the premises, either in whole or in part.[19] WEstjustice is concerned about this for for two reasons: (1) we are not convinced that the loss to the landlord incurred in an illegal subletting or assignment situation is proportionate to the consequences tenants will face in the housing market as a result of listing; and (2) we are concerned that extended families and share houses (particularly students) will be affected the most by maintaining this status quo.

---

[14] Australian Law Reform Commission Report 108: Australian Privacy Law and Practice, at 17.64. Accessed at http://www.alrc.gov.au/publications/17.%20Interaction%20with%20State%20and%20Territory%20Laws/residential-tenancy-databases 1 May 2016.

[15] Victorian Law Reform Commission, 2006, 'Residential Tenancy Databases', 2.

[16] Australian Law Reform Commission Report 108: Australian Privacy Law and Practice, at 17.65. Accessed at http://www.alrc.gov.au/publications/17.%20Interaction%20with%20State%20and%20Territory%20Laws/residential-tenancy-databases 1 May 2016.

[17] Victorian Law Reform Commission, 2006, 'Residential Tenancy Databases', 3.

[18] See *Residential Tenancies Act 1997* (Vic) s 439E.

[19] *Residential Tenancies Act 1997* (Vic) s 439E(1)(c).

Recommendation 5: Section 439E(1)(c) must be amended to remove a breach of Section 253 as a ground for listing on a RTD.

Family violence

Family violence is discussed in detail below. However, it is the most pressing circumstance where RTD use requires further regulatory oversight. Family violence will often involve a specific set of events that can ultimately lead to orders for compensation against victims of family violence, and often eviction, giving rise to a listing on a RTD. A common pattern in our casework is that after a victim leaves the rented premises, the perpetrator will often cause significant damage, and leave rent in arrears. Paradoxically, it is the victim who will engage with the landlord in the VCAT process, and who will negotiate bond and compensation claims, but will suffer if they are listed on a database for a contravention of the Act. This will undoubtedly create a serious impediment to the victim finding housing in perhaps their greatest time of need.

Case study – Jane – potentially listed on a RTD in circumstances of family violence

Jane had been the victim of long-term family violence. As is common with many victims, it took Jane several attempts to finally leave her abusive partner and co-tenant. Jane tried everything to have her name taken off the lease – neither her partner nor the landlord or agent was responsive to these requests.

When her partner finally left the property (more accurately, was evicted), significant rent arrears had accrued, the house had not been cleaned, and there was damage. As we see in many family violence matters, Jane, as the victim, was the only one to engage in the VCAT process, and the partner could not be found. Despite our efforts, we were unable to argue that Jane should be protected from a compensation order, which was the ultimate outcome.

The landlord now has the ability to list Jane on a RTD, despite her not being responsible for any of the circumstances that led to eviction and the compensation order.

WEstjustice make the following recommendation in accordance with the findings of the Royal Commission into Family Violence:[20]

Recommendation 6: a tenant must not be listed on a RTD where the grounds for listing have been the result of family violence. Existing tenants who have been listed on a RTD on

[20] State of Victoria, Royal Commission into Family Violence: Summary and Recommendations, Parl paper no. 133 (2014-2016), recommendation 116.

grounds resulting from family violence must be immediately removed. An intervention order should be sufficient proof to have the listing removed.

5.2.2. Dispute resolution

One further consideration with respect to RTDs is dispute resolution. Currently, the Act stipulates that a tenant who is to be listed must be given at least 14 days to object or challenge the listing's accuracy.[21] These submissions must be 'considered' by an agent, however the Act makes no further indication as to what this consideration must entail.[22] Given the significant disadvantage a listing will give a tenant in the rental market, we suggest that 14 days is insufficient for a tenant to seek advice and prepare submissions. A time period of 21 days is more appropriate.

WEstjustice submits that where a disagreement arises between the tenant and landlord in regards to a listing, this matter should be resolved by VCAT prior to a listing taking place. Furthermore, an application pursuant to Section 439L of the Act for removal or amendment of a listing should be free of VCAT commencement fees. We believe this will allow tenants more time to formally object to RTD listings, and prevent any such action taking place pending an application to the Tribunal – fee-free for tenants.

Recommendation 7: the Act must be amended extending the time period for a tenant to make submissions objecting to or challenging a proposed listing from 14 to 21 days.

Recommendation 8: the Act should be amended prohibiting a RTD listing from taking place, in circumstances where a tenant objects, until VCAT has made a decision on the matter.

Recommendation 9: where a tenant challenges the substance or accuracy of a listing at VCAT, this should not attract a commencement fee.

5.2.3. Access to databases for tenants

For tenants facing setbacks in the rental market, information to determine the reasoning behind this can be crucial. We note that RTDs usually charge for access to listings by tenants. Where there is a free service available, the usefulness of this is offset by a slow turnaround time. We submit that this situation makes little sense when individuals can already access free credit reports from companies including Veda, operator of the NTD database. WEstjustice recommends that tenants be given access to at least one report in a 12-month period. This measure aims to provide transparency,

[21] *Residential Tenancies Act 1997* (Vic) s 439F(2).
[22] *Residential Tenancies Act 1997* (Vic) s 439F(3).

assist tenants when searching for properties, and ultimately allow a tenant to begin the dispute resolution process where they object to the accuracy of a RTD listing.

Recommendation 10: residential tenancy laws and rules should be amended requiring a RTD to provide a tenant with one free report of their profile in any 12-month period.

Recommendation 11: the Act must be amended to state that where a tenant's rental application is rejected on the basis of a RTD listing, this information must be provided to them.

5.2.4. Misuse of a tenant's information

Stakeholders have expressed concerns that information gathered by landlords and agents for the purpose of screening tenants is misused. This includes for the purposes of conducting credit checks. Under federal privacy laws, information that is gathered must be necessary, and used only for the purpose for which it was gathered.[23] We believe that penalty provisions must apply where information gathered is used for, amongst other things, credit checks on prospective tenants. Whilst in reality this can be difficult to monitor, there must be a deterrent included in the Act to this effect.

Recommendation 12: the Act should be amended to include a penalty provision for the misuse of a tenant's private information, in alignment with federal privacy principles, to prevent, among other things, credit checks being carried out.

5.2.5. Databases for landlords

WEstjustice has previously advocated the creation of a landlord database in similar vein to RTDs used to list tenants.[24] We reiterate our recommendation in this respect:

Recommendation 13: 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.

[23] *Privacy Act* 1988 (Cth), Sch III, National Privacy Principles, 2.1(a)-(b).
[24] WEstjustice, *Laying the Groundwork*.

6. Beginning a tenancy

Once the preliminary stages of investigating whether a particular property and tenancy is suitable for their needs – from both tenants' and landlords' perspectives – a lease agreement is usually entered into. The key issues that arise at the beginning of a tenancy are discussed below, and includes the form of agreement entered into, adequacy of disclosure, cooling off and consideration periods, and the form of service. Our recommendations intend to ensure that tenants have full transparency and disclosure about their agreements, and sufficient time to consider the relationship they intend to enter. It is only once a tenant is provided with a full set of information about a property and agreement that they can make an informed decision about entering into legal relations.

6.1. Form of agreement

The prescribed standard form rental agreement is brief, and only lists some of the statutory duties and obligations that tenants and landlords owe each other. In a general sense, the prescribed form merely highlights an overall obligation to comply with the Act. Parties are free to negotiate terms of their agreement insofar as they do not exclude, restrict or modify provisions of the tenancy legislative framework. In our casework, we often come across leases with lengthy sets of special conditions for tenants to comply with. Often, however, tenants have very little idea what they have signed as terms have not been properly explained, insufficient information is provided, or landlords have not sought to bridge any linguistic barriers that present

WEstjustice submits that a thorough prescribed tenancy agreement should be introduced in Victoria in line with the standard agreement adopted in New South Wales. This should outline all of the statutory obligations and responsibilities of the parties. A prescriptive standard form agreement adds certainty to the tenancy relationship, and removes vague, unfair, misleading or unenforceable terms. Further, in the rare event that special conditions are necessary, Consumer Affairs Victoria should approve these prior to being put to the tenant for consideration, and must be the subject of the tenant's consent.

Recommendation 14: the standard form rental agreement should be expanded in line with the agreement in New South Wales, to comprehensively outline the parties' rights and obligations.

Recommendation 15: the Act should be amended to require that all special conditions proposed to be included in a lease agreement must be approved by Consumer Affairs Victoria.

Recommendation 16: the Act should be amended to render special conditions and terms that have not been fully explained to tenants, and been subject to their consent, unenforceable.

Despite the requirement that agreements conform to the law, WEstjustice has seen many instances whereby this is disregarded. We see little reason why penalty provisions should not apply to terms that deliberately attempt to mislead tenants of their rights and obligations.

Case study – Harry – told he must steam clean his carpets every 6 months

Harry was an elderly tenant who had lived in his rented premises for 5 years. Originally he sought our advice with respect to maintenance issues and getting a number of repairs attended to. Harry had casually mentioned that it was time for his '6 monthly steam clean'. Upon further inspection, it was written into his lease that he must have the carpets professionally cleaned every 6 months, and provide proof of this to the landlord. Ultimately, Harry's obligation is to keep the premises reasonably clean, which can be done without necessarily needing to professionally clean the carpets twice per year. This did not remedy the fact that Harry had been incurring significant expense for over 5 years at the misrepresentation of his obligations by the landlord.

Lease agreements often include terms that refer to compliance with additional policies and procedures. Examples of this include owners corporation rules, or a broad requirement that tenants not do anything that may invalidate a landlord's insurance. Where such terms arise, compliance is only possible where the necessary information has been provided with the agreement itself. Failing proper incorporation into the agreement, such terms should be invalid.

Recommendation 17: the Act should be amended to state that leases making reference to compliance with policies and procedures beyond the agreement will be invalid unless the relevant information has been provided, sufficient enough that the tenant can reasonably follow these policies and procedures.

Finally, we support the recommendation of the Tenants Union of Victoria ('TUV') that verbal lease agreements only apply the prescribed terms and conditions.[25] This adds certainty to verbal agreements, and discourages the removal of protections from tenants who enter into unwritten leases.

[25] See Tenants Union of Victoria, *Laying the Groundwork*, 23.

Recommendation 18: the Act should be amended to state that leases, insofar as they are verbal, only incorporate the terms of the standard prescribed agreement.

6.2. Provision of information

A landlord, or their agent, must provide certain information to tenants at the beginning of a tenancy. Such information includes:

- A copy of any written tenancy agreement;[26]
- A condition report, where a bond is paid;[27]
- Notice of residency rights for rooming houses;[28]
- The landlord's full name and address for service;[29]
- An emergency telephone contact in case of need for urgent repairs;[30]
- Information regarding authorisation to carry out urgent repairs;[31]
- Landlords must update a tenant on any changes to their address for service or any emergency telephone contacts;[32]
- A copy of the 'red book' – *Renting a Home – A guide for tenants* provided by Consumer Affairs Victoria.

There are similar corresponding provisions for rooming houses, caravan parks and site agreements.

With reference to the list above, WEstjustice has a particular problem with obtaining the landlord's full name. In circumstances where the landlord self-manages the property, it can even be difficult to obtain an address for service. This makes it troublesome for tenants to enforce their rights at VCAT, especially when trying to have urgent repairs carried out. When faced with landlord-initiated VCAT action, we often see few details included about their identity. At its worst, the application will simply say "the landlord". In such circumstances, VCAT should be rejecting applications until this information is provided, on the basis that the relevant parties cannot be adequately identified.

Recommendation 19: the Act must be amended to state that where a landlord fails to provide their full name and address for service, the lease agreement remains unenforceable until such time as this information is provided.

[26] *Residential Tenancies Act 1997* (Vic) s 29.
[27] *Residential Tenancies Act 1997* (Vic) s 35.
[28] *Residential Tenancies Act 1997* (Vic) s 92C.
[29] *Residential Tenancies Act 1997* (Vic) s 66.
[30] *Residential Tenancies Act 1997* (Vic) s 66.
[31] *Residential Tenancies Act 1997* (Vic) s 66.
[32] *Residential Tenancies Act 1997* (Vic) s 66.

Recommendation 20: the Act should be amended to provide that where a landlord terminates the services of an agent, they must provide an updated address for service within 7 days. Otherwise, a tenant can make an application to VCAT, listing the agent as the respondent, for compliance with this provision.

Recommendation 21: VCAT must reject applications where insufficient information has been provided to identify the landlord.

6.2.1. Further information that must be provided by the landlord

WEstjustice advocates for the following sets of information to be provided to a tenant prior to the commencement of a lease.

Operating instructions

Many landlords will provide operating instructions for appliances and facilities, including those in the common areas. This aims to avoid misuse by tenants, but also assists when arranging repairs, and even troubleshooting of basic problems by tenants themselves. The simple provision of such documents, which are almost universally available online if lost, would potentially lead to less repairs being needed, or less onerous callouts where required.

Case study – Mohammad – told to clean the air conditioner, but does not know how

Mohammad raised a repairs issue with the landlord's agent. The air conditioner was leaking water. The agent rejected the request, simply telling the tenant to clean the dust from the unit. Mohammad had no idea how to take apart the unit to clean it. No instructions had ever been provided, and there is no model number readily available to download the instructions from the internet.

To eliminate dust as the cause of the water leak, Mohammad needed to be provided with instructions from the outset, otherwise risk damaging the unit or causing injury.

Recommendation 22: the Act should be amended requiring landlords provide instructions for all appliances in the property.

Meter information

Gas, electricity and water meters have unique identifying numbers. The number is required by utility companies to make the necessary connections prior to tenants taking possession of the property. Usually, providers can find the identifying numbers in their databases with little problem. In new properties, and especially strata blocks, this can be more complicated, and tenants run the risk of not having utilities connected upon taking possession if the meter number cannot be found.

WEstjustice submits that it should be a standard requirement in lease agreements that meter numbers be provided. They are readily available on inspection for landlords, not an onerous obligation, and the information can be invaluable for tenants.

Case study – Esteban – tried to get meter details prior to moving in

Esteban was moving into a new apartment. There was patchy information about the electricity meter from his preferred utility provider, so he requested the meter number from the agent. The agent refused several times to give Esteban the meter number, saying that it was not necessary, and that he could simply use a connection service (for which the agent obtains a commission). Esteban ultimately took a risk that the information held by the utility company was right, and it worked out in the end. It was extremely frustrating, though, that the agent refused many times to provide this simple information.

Recommendation 23: prescribed standard form lease agreements must provide meter identifying numbers to tenants for all water, gas and electricity connections.

Types of utility connections

Most properties will have a reasonably straightforward combination of gas, water, electricity and telecommunications connected. Confusion can sometimes arise, however, especially around internet connections and relatively rare services. WEstjustice has dealt with a number of cases that suggests full disclosure in lease agreements is required to ensure tenants know exactly the sorts of liabilities they will be taking on, and exactly what, and what is not, connected to the property. This mirrors the obligations of vendors under the *Sale of Land Act 1962* (Vic).[33]

Occasionally, tenants will move into a property that does not have internet connected. The cost of a callout from an internet service provider ('ISP') can be quite substantial. Tenants are often reluctant to pay this charge as it is expensive, and provides an ongoing benefit to the landlord and future tenants, long after they have vacated. In these circumstances, we submit that the Act has not kept pace in recognising the importance and prevalence of the internet in modern society.

Case study – Winnie – reluctantly paid for internet connection

Winnie moved into her rental premises, but did not realise that there was no internet connected. Telstra sent her an invoice for $250 for the connection, which she was very reluctant to pay. Winnie suggested that the landlord should pay for the connection because ultimately, it is a benefit that will endure well beyond her tenancy. Technically, the Act may not support her proposition, however. Winnie has been left out of pocket.

[33] *Sale of Land Act 1962* (Vic) s 32.

Recommendation 24: Section 53(1)(a) must include the installation costs and charges in respect of the initial connection of rented premises to the internet.

Commonly found in new apartment buildings, bulk hot water is an example of a relatively rare utility that can catch tenants unaware. The premise of bulk hot water is that a utility company will charge for the provision of gas-heated water, separate from other water and gas charges that might be incurred.[34]

Case study – Xian – was not made aware of bulk hot water

Xian moved into a new build apartment. She explicitly asked which company would be the best to provide gas and electricity. The agent stated there was no gas, and did not mention the existence of a bulk hot water utility. As a result, Xian ignored letters 'to the householder' from Origin seeking payment for this hot water. Eventually the hot water was cut off. When Xian sought assistance, it transpired that a very large bill had gone unpaid because of the poor communication by the agent.

This case study shows that disclosure is fundamentally important. WEstjustice advocates for the Act to mirror the requirements of Vendors' Statements in the sale of a property whereby agreements must make a comprehensive statement about utilities. This includes those connected, and those which have not been connected, and who is liable in accordance with the Act.

Recommendation 25: the Act must be amended to require that landlords make a comprehensive statement about utilities, and who is liable for their ongoing charges.

Recommendation 26: the Act must require that the landlord or their agent forward all utility bills to the tenant's forwarding address for three months following the end of a lease.

6.2.2. Consideration periods and cooling off provisions

The common practice for landlords and agents is to sign lease agreements immediately upon presentation, often with very little opportunity to seek independent advice. Many tenants report that the first time they see a lease is immediately prior to signing it. This is problematic given the

[34] See Origin Energy: https://www.originenergy.com.au/for-home/hot-water/hot-water-for-apartments.html, 22 May 2016.

term of the agreement, the obligations pursuant to it, and the consequences of non-compliance. WEsjustice therefore advocates for a consideration period, and cooling off provisions to be incorporated into the Act.

Consideration periods currently exist for site agreements, whereby an owner cannot require a site agreement be signed unless it has been provided to the tenant at least 20 days prior.[35] We submit that providing the proposed lease agreement to a tenant in advance of signing is important. It gives certainty as to what they are entering into, and allows them time to obtain legal advice, or make a full assessment as to whether the property is in fact suitable for them.

Recommendation 27 the Act should be amended to broaden Section 206I to residential tenancies, and include a 14 day consideration period.

Cooling off periods apply to many contracts for goods and services, including those for motor vehicles,[36] insurance,[37] telecommunications,[38] and the sale of land.[39] There is provision under the Act for a tenant to terminate a lease prior to taking possession where a property is uninhabitable.[40] However, WEstjustice submits that the ability to terminate a lease should be expanded into a narrow cooling off period. This allows a small window during which a tenant can fully determine whether a property is suitable, considering that most tenants will have inspected the premises for a very short time prior to signing the lease.

A number of cases illustrate where a cooling off period would have assisted the tenant to terminate an agreement as the property was vastly inadequate.

Case study – Frank – house was not suitable for his needs

Frank inspected a property, and requested that a number of repairs be conducted before he moved in. When Frank had signed the lease and took the keys, it transpired that the repairs had not been conducted, rendering the property unsuitable for him, and there were many things about the premises he had not noticed on his brief inspection. Had there been a cooling off period available, it would have been simple enough for him to terminate the agreement pursuant to such a provision. Instead, Frank was forced to make an application to VCAT, and make reasonably complex legal submissions as to why his lease should be terminated.

[35] *Residential Tenancies Act 1997* (Vic) s 206I.
[36] *Motor Car Traders Act 1986* (Vic) s 43.
[37] Insurance Council of Australia, http://understandinsurance.com.au/cancelling-your-policy, 22 May 2016.
[38] Telecommunications Industry Ombudsman, https://www.tio.com.au/publications/news/cancelling-a-contract-during-a-cooling-off-period, 22 May 2016.
[39] *Sale of Land Act 1962* (Vic) s 31.
[40] *Residential Tenancies Act 1997* (Vic) s 226.

Case study – Yosef – house was in very poor condition

Yosef was living in New South Wales, and his friend conducted an inspection of a property that he ultimately accepted, pending a satisfactory personal inspection. After reaching the property, it was severely run down, dangerous and entirely unsuitable for his family. Rather than having a simple mechanism of a cooling off period during which he could have terminate the lease, it was left to Yosef to apply to VCAT to terminate the lease for the property being uninhabitable.

Recommendation 28: the Act should be amended to include a cooling off period of 3 business days.

6.3. Method of service

The standard practice is for notices other than Notices to Vacate to be sent by ordinary mail (and electronically where possible), and for Notices to Vacate to be served via registered post. However, the Victorian Government announced its intention to amend service requirements for documents to be in line with the *Electronic Transactions (Victoria) Act 2000* (Vic) ('ETA'). This means that where a tenant has consented to a notice or lease being given electronically, they may be served via email. Consent may be express or implied.

WEstjustice is concerned that as a result of such changes, many tenants will be encouraged, perhaps pressured, into accepting electronic service of documents under the Act. In particular, we believe this will disadvantage the most vulnerable tenants, notably those in rooming houses and caravan parks, who may not have the most readily available access to internet services, or those for whom internet is too expensive.

We submit that the following safeguards must be implemented to ensure that electronic service of documents is fair and equitable to all tenants:

Recommendation 29: a standard form document should be used to gain written consent for electronic service, separate from the lease agreement. The document should enable tenants to clearly specify the email address(es) they wish to receive electronic communication at, and should set out the consequences of permitting documents to be served in such a manner. Consent should be revokable either in writing or verbally.

Recommendation 30: the 'red book' should be updated to include information regarding electronic service of Notices and documents.

7. During a tenancy

Throughout the duration of a tenancy, both tenant and landlord owe each other a set of mutual obligations. These are set out either in the Act, or are agreed upon and set out in the lease agreement. Should either party breach their responsibilities, the Act provides mechanism by which action can be taken to seek compliance. Fundamentally, the relationship tenants and landlords have must be equal and fair. WEstjustice makes a number of submissions below that seek to rectify the increasing inequity between the parties and improve renting in Victoria.

7.1. Reforms to duties under the Act

The Act specifies a number of statutory duties that tenants and landlord owe to each other. It is important that the parties meet these obligations, otherwise they face the prospect of action being taken against them. WEstjustice submits that a number of duties are in need of reform to better balance the position of tenants and landlords.

Nuisance

The Act stipulates that tenants or their guests must not use the rented premises or common areas to cause interference with the reasonable peace, comfort or privacy of neighbours. WEstjustice has handled several cases involving breaches of this duty; one of the key issues we have is that where the alleged nuisance is otherwise permitted at law, it may be captured by the broad concept of nuisance caused 'in any manner' under the Act.[41]

In effect, tenants are held to a higher standard than owner-occupiers with regards to how they behave in their homes.[42] This only exacerbates the situation where tenants are already subject to a reduced right to quiet enjoyment compared with owner-occupiers.

Case study – Gurpreet – accused of causing a nuisance

Gurpreet was served with several Breach of Duty Notices for causing nuisance. It had been a very difficult period for her, having endured family violence and mental illness. Gurpreet had admitted she would often play loud music during the day, and occasionally at night. It was one of the few escapes Gurpreet felt she had. Despite explaining her situation to the landlord, the breach notices continued to come, which would otherwise not have been possible if she was an owner-occupier. The prospect of losing her accommodation is a further stress that Gurpreet hardly needs when recovering from her many setbacks.

[41] *Residential Tenancies Act 1997* (Vic) s 60.
[42] Tenants Union of Victoria, *Laying the Groundwork*, 60.

Recommendation 31: the wording of section 60 must be changed to remove 'in any manner' and replace it with 'in an unreasonable manner prohibited by law.'

Damage

Tenants are required to avoid causing damage to the rented premises, and take reasonable care to avoid damaging the common areas. WEstjustice submits that the inconsistency in standard between damage to the premises and common areas should be removed.

Recommendation 32: Section 61(1) should be amended to read 'a tenant must ensure that reasonable care is taken to avoid causing damage to the rented premises.'

Reasonably clean conditions

Perhaps the most common duty that landlords allege tenants breach is that to keep the property reasonably clean.[43] We submit that a lack of clear definition, or even guidance, in the Act significantly contributes to this. There can often be confusion about the level of cleanliness that is required by both landlords and tenants – this is particularly the case with respect to carpets, where what is reasonably clean can vary immensely.

We agree with the recommendation made by the Tenants Union of Victoria on this issue, in that the Act must provide more guidance on what is a highly contentious issue.[44]

Recommendation 33: the Act must be amended to include a definition of 'reasonably clean'. This should take into account the ordinary course of living, deterioration of the property over time and reasonable wear and tear, and restrict the use of Breach Notices to circumstances where health is threatened, fire may be caused, damage may occur, or laws or regulations may be breached.

Tenants must not install fixtures, make alterations, renovations or additions to the rented premises

We discussed the issue of modifications in our Security of Tenure response. We suggest that the prohibition on modifications and fixtures prevents tenants from treating the rented premises as their home. Further, the duty is so broad that it means potentially anything added to the property could be a technical breach – this may be something as small as putting in new plants or a television antenna. We suggest that this is short-sighted, and does not take into account fixtures or modifications that may increase the value or utility of the property.

[43] *Residential Tenancies Act 1997* (Vic) s 63.
[44] Tenants Union of Victoria, *Laying the Groundwork*, 61.

Recommendation 34: the Act should be amended to state that a landlord must not unreasonably withhold consent to the installation of additional fixtures.

Recommendation 35: the tenant is not required, and the landlord may not seek compensation, for modifications where they add value or utility to the property.

Rights of entry

Entry into rented premises by the landlord and/or their agent is regulated by the Act. Particular grounds for entry at short notice are included at Section 86.[45] They include inspections for prospective buyers and tenants, for valuation purposes, where a landlord believes that a beach of duty has occurred, or to enable the landlord to carry out their duties under legislation.[46] The notice period can be as short as 24 hours in many circumstances.[47]

We believe 24 hours is an unnecessarily short notice period, especially where the reason for entry is a routine inspection under Section 86(f) of the Act,[48] which could otherwise have been planned well in advance; also where the rented premises is listed for sale. In such instances, landlords demand that the property is available at very short notice, and demand the property be clean and tidy. We have seen instances of tenants being significantly inconvenienced in such situations, needing to take time off work, make alterative arrangements for children, and even see family members suffer deterioration in their mental health and wellbeing.

Case study – Samara – constant open houses caused hardship

Samara is a single mother of three children. The landlord decided to sell the premises, and open houses were part of the advertising campaign. The first selling agents never gave Samara written notice of their entry, but would call the night before, or sometimes on the day, and require that the property be opened for groups of people to conduct an inspection. When the sale transferred to another selling agent, the notice was at even shorter, and Samara felt bullied into having people come through.

Samara was successful in applying for a restraining order, requiring that the agent follow correct entry procedure. However, significant stress and hardship had already been caused by this time.

[45] *Residential Tenancies Act 1997* (Vic) s 86.
[46] *Residential Tenancies Act 1997* (Vic) s 86.
[47] *Residential Tenancies Act 1997* (Vic) s 85.
[48] *Residential Tenancies Act 1997* (Vic) s 86(f).

Recommendation 36: the Act should be amended to provide the following notice periods:

- 24 hours for urgent repairs;
- 3 days for all other purposes aside from urgent repairs;
- 7 days for a routine inspection.

Notices of entry

Further to the discussion above regarding entry into premises, the Act requires that a Notice of Entry be provided to the tenant in order for this to occur.[49] WEstjustice advocates that amendments be made to the Act to require such notices be specific in nature, and propose a specific timeframe during which it will occur. We do not believe it is acceptable for landlords or their agents to provide broad and vague reasons for entry, and a timeframe that is essentially meaningless as it covers an entire day. We do not consider it onerous on the landlord to provide sufficient details and reasons for the entry, or a proposed entry time.

Recommendation 37: notice of entry procedures must be amended requiring a landlord to provide detailed reasons for their proposed entry, and the specific time they intend to enter the premises.

7.2. Breach of duty provisions

Breach of Duty Notices are a formal warning to parties, whether tenant or landlord, that they are not meeting their obligations. The Notice must set out what the breach is, should provide details around the loss that has been suffered, and state that the breaching party must remedy the situation within the required timeframe.[50] Usually, this timeframe is 14 days, and the breach party provides remedy by either attending to the circumstances that have led to it, or by paying compensation.[51]

Where a Breach of Duty Notice is not complied with, the party who served the notice can apply to VCAT for a compensation or compliance order. Alternatively, further Breach Notices may be served. Where a compliance order is not followed, the party who is owed this may terminate the tenancy. In circumstances where a tenant has accrued two Breaches already, the third may be in the form of a Notice to Vacate.[52]

[49] *Residential Tenancies Act 1997* (Vic) s 85.
[50] *Residential Tenancies Act 1997* (Vic) s 208(2).
[51] *Residential Tenancies Act 1997* (Vic) s 208(2).
[52] *Residential Tenancies Act 1997* (Vic) s 249. This is commonly known as the 'three strikes policy.'

Case study – Gladys – served with three breaches and a Notice to Vacate

Gladys lived with her family in a new growth suburb of Melbourne's west. Gladys accepted that whilst she did not keep the property spotless, it was far from damaged and dirty. This was a fundamental disagreement between Gladys and the landlord's agent, who continued to serve breach notices on her, demanding that she spend considerable amounts of money having the property professionally cleaned. Gladys was eventually evicted on the basis of persistent breaches, which we believe was unfair and an unjust outcome. This is especially the case when the landlord might otherwise, and more appropriately, have simply pursued their rights at the end of the tenancy.

Case study – Emmanuelle – served with persistent breach notices

Emmanuelle has been a tenant in her property for three years. There had been no previous problems in respect of her tenancy until a routine inspection in 2015. The agent made a long list of alleged breaches, and served a Breach of Duty Notice on her. It was not until the third such Notice that Emmanuelle sought assistance from WEstjustice. The fourth Notice demanded that she attend to considerable maintenance, repairs and cleaning works, or pay $3,000 in compensation. Upon challenging the Notice with the agent, it transpired that many of the items were in fact the landlord's responsibility.

This highlights that Breach of Duty Notices are used in an arbitrary manner. Without our assistance, the prospect of Emmanuelle being evicted was much higher, or she may simply have paid compensation or attended to matters beyond her responsibility.

Our primary concerns with Breach of Duty Notices can be summarised as follows:

- They are often used to assert liability without any formal determination of the Tribunal, or any evidence having been tested. Effectively, a Notice serves as an indication of a tenant's guilt unless they decide to initiate a challenge. Notices may assert that, among other things, tenants have caused damage, caused nuisance, or not kept the property reasonably clean;
- The timeframe for compliance is too short, and should be extended;
- Notices do not expire, which is particularly concerning given the consequences that can follow, including compliance orders and eventually a Notice to Vacate;
- Compensation can be demanded of a tenant when this may not reflect what the landlord is ultimately entitled to. In determining compensation matters, the Tribunal must take into account matters such as depreciation and fair wear and tear. A demand for compensation in a Notice, however, will usually not take this into account. We suggest is unjust and unfair. Ultimately, it should be for VCAT to determine the quantum of compensation, if any, and not the landlord;
- There is no penalty for misusing a Breach Notice;
- There is no suspension of time for Breach of Duty Notices pending a VCAT application. This means that even where a tenant lodges an application to the Tribunal, they may receive another Notice in this time, advancing the process and putting their tenancy at risk;

- Tenants are required to pay a fee to challenge the reasonableness or validity of a Breach of Duty Notice at VCAT.

Recommendation 38: WEstjustice submits that the Act must be amended to address the above concerns.

7.3. Open houses

Open houses are often held as part of an advertising campaign when the landlord sells the property. The Act does not specifically prohibit open houses. Whilst case law at VCAT has determined in some cases that the Act's requirement to grant access to a prospective buyer is not an open-ended right to hold open viewings to the public,[53] they continue to be set up using the established rights of entry provisions under the Act.

WEstjustice is particularly concerned with the level of inconvenience tenants are put through, the level of cleanliness the landlord demands, and the level of imposition and loss of privacy inflicted on tenants. Furthermore, we are concerned about the use of photographs in advertising material. Some tenants have raised to WEstjustice their belief that this represents a gross invasion of privacy. The Act does not address this issue, in contrast to Queensland, where it is prohibited to use photographs of a tenant's belongings in an advertising campaign without prior consent.[54]

Many tenants and landlords choose to negotiate a schedule of open houses and inspections, in return for compensation for the loss of quiet enjoyment during this period. This often takes the form of reduced rent. Our organisation has assisted a number of clients, however, where this negotiation has not happened, or has resulted in a fundamentally unfair outcome for the tenant. Our primary concern in these instances is that inspections are often pushed on tenants with little notice, with potentially large numbers of people coming through the house, with an unfair rate of compensation paid for the loss of quiet enjoyment, if any at all.[55]

Case study – Yasmine – children became distressed, little compensation paid

Yasmine was informed that the landlord would be selling the property. In a good faith effort to assist the landlord, Yasmine agreed to a schedule for the inspections to take place, but no specific amount of compensation was discussed. After several months, and countless inspections, the landlord offered a fixed rate of $20 per inspection going forward. WEstjustice submitted that this was woefully inadequate given the number of inspections and people coming through, also the level of stress and inconvenience suffered. Further, Yasmine's children's health started to deteriorate, and could no longer stay at the property during the times inspections were impending or taking place.

[53] See *Hargans v Ronchetti* [2015] VCAT 1779, *Hossein v Rizzo* [2015] VCAT 2052.
[54] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 203.
[55] See also our case study for Samara above.

WEstjustice believes that the Act must be amended to be more in accordance with Queensland provisions, whereby along with the taking of photographs, the conducting of open houses and auctions should be prohibited without the consent of tenants. Further, tenants should be compensated at the ordinary daily rate of rent for a whole day, irrespective of how long the open house was. This is because the imposition on tenants extends well beyond the immediate inspections, and goes some way to compensating the need to make alternative arrangements and attend to cleaning.

Recommendation 39: the Act should be amended to state that landlords must not hold open houses or auctions at a rented premises without the prior consent of the tenants.

Recommendation 40: the Act should be amended to state that landlords must not take photographs of the property containing a tenant's belongings without the prior consent of the tenant.

Recommendation 41: the Act should be amended to require landlords to compensate tenants a minimum of one day's rent, calculated at the ordinary daily rate, for each separate day that an open house that is conducted.

Recommendation 42: the Act should be amended to state that if the landlord requires the property to be in a condition other than 'reasonably clean', the landlord must incur all such expenses, and the works should be carried out at the tenant's convenience.

7.4. Assignment, subletting and AirBnB

WEstjustice is of the opinion that the current rules guiding the assignment and subletting of a tenancy – particularly Section 253, which allows a landlord to issue a 14-day notice to vacate where a tenant has "assigned or sub-let or purported to assign or sub-let the whole or any part of the premises without the landlord's consent" – are draconian and do not reflect the realities of the modern rental market.

Subletting

Whether or not it is legally confirmed as 'subletting', there is no doubt that the proportion of tenants who list part of a premises (a floor, a room, a sleepout) as ongoing accommodation is increasing. A head tenant subletting a room or rooms to housemates on a premediated and successive basis is how most share houses work:

Example

Jack and Kim, a young de facto couple, were accepted as tenants for a three-bedroom apartment in Brunswick in May 2014, and have lived there since. Although they informally ran their initial two proposed housemates past the landlord's agent when they moved in, they have replaced both housemates since without notifying the agent. The agent is aware that Jack and Kim have never intended to cover the full rent themselves or use the remaining bedrooms, and would not be able to cover the rent by themselves.

Even where tenants don't intend to take on housemates or lodgers, the reality of family and community expectations is that they may unexpectedly find themselves subletting part of the home to a relative or friend.

Example

Maya and Faisal live in Sunshine and have a downstairs level they use for storage and as a play space for their two young children. Maya's cousin Amal is fleeing a family violence situation with her baby daughter and has not been able to find appropriate housing since vacating her last home. She moves in and insists on paying an amount to Maya and Faisal that covers shared meals, utility use and use of the downstairs part of the house.

Given the time-dependent nature of the share house and family scenarios (head tenants will risk going into arrears without housemates; family and friends in serious hardship should have a roof over their heads) it is peculiar that the Act still requires tenants to seek and obtain consent. It is even more peculiar that the Act could potentially provide a *prima facie* case for the landlord to issue 14-day notices to vacate in each of these cases.

Divining the protective purpose of restrictions and penalties on non-notified subletting is difficult, given that a head tenant ultimately assumes risk for any damage, breach of duty, or failure to pay rent or board arising from an individual they sublet to. Most tenants will vet their would-be sublessors for this very reason, knowing full well that the landlord will be able to recover against them.

Swan v Uecker, Air B'nB and Houseproud Tenants

It was only a matter of time before VCAT had to rule on the legality of Airbnb, a website that allows people to list, find and rent lodging while travelling, in the tenancy context. In *Swan v Uecker*,[56] the Tribunal held use by the tenants of the rented premises amounts to a licence and not a subletting.

[56] [2016] VCAT 483.

The Tribunal indicated that its finding was based on the following reasons:

- Airbnb's standard agreement states that use of rented premises by guests is a license;
- Guests making use of the premises through Airbnb consented to short-term stays with fixed arrival and departure times;
- The tenants used the rented premises as their principal residence before, during and after each Airbnb guest;
- The tenants retained right of entry and the right to remove overstaying guests during the tenancy.

At the time of writing, we understand that the landlord is appealing the Tribunal's decision to the Supreme Court of Victoria.

At any rate, as with other forms of subletting, it is difficult to see the additional risk to the landlord, or why a tenant should be punished by eviction as a result. Whether a guest is a sublessor or a licensee, liability for damage or nuisance they cause will revert to the tenant who hosted them. Additionally, Airbnb hosts are likely to be 'houseproud'. The website runs on a reciprocal feedback and rating system that means it is in tenants' interests to keep the house in a clean condition to ensure ongoing custom if they list on Airbnb.

We note that Airbnb is currently largely unregulated under Australian law, and that a detailed evaluation of what oversight is required is well beyond the ambit of this paper. From the perspective of tenants' protections, we must also note that Airbnb has been criticised by some overseas housing advocacy groups and analysts for aggravating a housing shortage for long-term renters[57]. Higher-level inquiries into the system should assess this risk closely.

However, as long as homeowners are able to operate Airbnb accommodation unimpeded, we see no reason why tenants should be denied the ability to do the same.

Assignment

Assignment of an interest in a tenancy agreement, unlike subletting, tends to be somewhat of a 'one way door'. The interest in the tenancy agreement is unlikely to revert to the original, exiting tenant. With this in mind, it is hard to see how the threat of a 14-day notice to vacate would do much to dissuade a tenant who chooses to assign without consent.

Section 253 is also clear that a landlord's right to issue a notice to vacate will extend only to an assignor, not an assignee. Further, Sections 231-233 of the Act establish a process for a person ordinarily living in a property to become the new tenant in the event that the original tenant abandons or vacates the rented premises, and does not appear exclude an assignee, who through no fault of their own, was not registered as the tenant.

We believe the assignment provisions in Part 2, Division 7 of the Act are still valuable. For example, they may cover a situation in which an original tenant is trying to find a replacement tenant to avoid breaking a fixed-term lease and faces a situation where a tenant is unreasonably holding consent. Most incoming tenants would be prudent to ensure a landlord-approved (or VCAT-approved)

[57] For reference, see http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=55575 and http://prospect.org/article/evictions-and-conversions-dark-side-airbnb.

transition and this Division of the Act ensures this will happen. However, a Section 253 action against an unapproved assignor is unlikely to be an effective sanction.

Recommendation 43: Repeal section 253 of the Residential Tenancies Act 1997, which empowers landlords to issue 14-day notices to vacate to tenants for un-notified assignment or subletting.

Recommendation 44: The standard-form tenancy agreement proposed above should include a plain-English statement that, subject to the Act, tenants accept that they will be liable for any damage or arrears caused by an un-notified sublessor or subtenant.

7.5. Pets

Many Victorians place great value in having pets for companionship and wellbeing. Their status within a tenancy, however, is relatively uncertain, as the Act does not directly address this issue. Duty provisions will certainly attach where pets have led to nuisance, damage, or a need for cleaning. This does not deal explicitly with the matter of keeping pets from the outset, which will commonly have been prohibited by tenancy agreements.

WEstjustice submits that the Act must be amended to add greater certainty around pet ownership, and the rights and responsibilities parties owe to each other. We believe that the starting point must be allowing tenants to keep pets. To prevent discrimination, tenants should not be asked to disclose whether they have pets in the application form. However, the may be asked to provide details once the lease has been signed. From there, landlords may challenge pets being at the property, if they can show that the pets highly unsuitable for the premises, or pose a significant risk to the premises or safety of neighbours.

Recommendation 45: the Act should be amended to allow tenants to keep pets without prior consent. Landlords may object to the pets if they can demonstrate to the Tribunal that they will cause significant risk to the premises or safety of neighbours and neighbouring properties, or are highly unsuitable for the rented premises.

WEstjustice accepts that unenclosed pets potentially pose a higher risk to the reasonably cleanliness of the premises, or increase the chances of damage being caused. In line with Western Australia,[58] we submit that a pet bond is suitable. However this should not exceed $350. As we have advocated that tenants need not disclose pets prior to signing the lease agreement, a landlord may request a pet bond within the first 6 months of the commencement of the term.

[58] *Residential Tenancies Act 1987* (WA) s 29(1)(b)(ii).

Recommendation 46: the Act should be amended to allow a landlord to request additional bond for unenclosed pets. The amount for a 'pet bonds' must not exceed $350, and can only be requested within 6 months of lease commencement.

8. At the end of a tenancy

The end of a lease triggers a number of processes and procedures that must be followed by all parties. The lease must first be terminated in accordance with both the agreement and the Act. Either party can terminate the lease. In some instances, a tenant will leave possession behind at the premises, for which the Act provides guidance as to how they must be handled. WEstjustice submits that terminations and goods left behind are in need of reform to ensure that tenants are better protected both in leaving the property, and when they have left goods behind.

8.1. Termination by tenants

We note that termination by landlords has been extensively covered in our Security of Tenure *response paper, where we advocated for a purely grounds-based termination framework. We do not propose to cover this any further, and reiterate our recommendations from that paper.*

8.1.1. Reducing the notice period tenants must give in situations of an immediate nature

The Act outlines the reasons for which a tenant can serve a Notice of Intention to Vacate on the landlord. The notice period required varies, and can be summarised as follows:

During a fixed term tenancy:

- Where the property is destroyed, unsafe or unfit for human habitation, the tenant may give immediate notice;[59]
- Where a landlord breaches a compliance or compensation order, the tenant may give 14 days notice;[60]
- Persistent breaches by the landlord means a tenant can serve a Notice of Intention to Vacate with 14 days notice.[61]

Where the fixed term has ended, 14 days notice may be given in the following circumstances:

- If a tenant requires temporary crisis accommodation;[62]
- The tenant requires special or personal care;[63]
- The tenant is offered public housing.[64]

Finally, a tenant may give 28 days notice for no reason where there is no fixed term, or the term has ended. There are also provisions under the Act allowing for a reduced notice period where the tenant is served with a Notice to Vacate.[65]

With regards to a tenant requiring crisis accommodation, public housing or special care, WEstjustice submits that 28 days notice is fair, irrespective of a fixed term. These grounds have immediacy in

[59] *Residential Tenancies Act 1997* (Vic) s 226.
[60] *Residential Tenancies Act 1997* (Vic) s 239.
[61] *Residential Tenancies Act 1997* (Vic) s 240.
[62] *Residential Tenancies Act 1997* (Vic) s 237(1)(d).
[63] *Residential Tenancies Act 1997* (Vic) s 237(1)(b).
[64] *Residential Tenancies Act 1997* (Vic) s 237(1)(c).
[65] *Residential Tenancies Act 1997* (Vic) s 237.

common. A tenant will often be waiting for public housing due to their financial, personal or physical circumstances, for example. This should not be hindered in any way, especially given the public housing stock's role in ensuring enough housing is available for tenants who can afford to rent on the private market. We believe that 28 days notice within a fixed term, and 14 days outside of this, is an appropriate balancing of rights.

Recommendation 47: the Act should be amended to allow a tenant to give 28 days before the end of a fixed term, or 14 days after the expiration of a fixed term, notice of intention to vacate where special or personal care is required, temporary crisis accommodation is needed, or the tenant is offered public housing.

8.1.2. Reforms to provisions reducing a fixed term tenancy

Tenants may make an application to VCAT where unforeseen circumstances mean that maintaining the tenancy would cause severe financial hardship. We submit that there are two problems with this section – firstly, the inclusion of 'severe' in the wording sets an unreasonably high benchmark. It should not be the case where hardship might otherwise be found, because this is not 'severe' enough in the eyes of the Tribunal, the tenant is rejected in their request to reduce the fixed term tenancy. We believe that this extra value judgement beyond a finding of hardship is unnecessary.

Secondly, VCAT has interpreted this section as only applying where a tenancy is currently on foot. Should a tenant terminate a tenancy, perhaps by handing back the keys, this section no longer applies and the landlord can then pursue a tenant for break lease costs. We believe that there would be good reason why a tenant would take such action – mitigation of arrears or fleeing an abusive household for example.[66] This section must continue to operate even where a tenancy has been deemed at an end, so as to allow the Tribunal to reduce the fixed term to the date they purported to end the lease.

Recommendation 48: Section 234 of the Act should be amended to explicitly apply even in circumstances where a tenant has taken actions to end a lease. Further, the word 'severe' should be removed from this section.

[66] See further discussion below in the context of family violence.

Case study – Guhan – handed the keys back to stem the arrears

Guhan, an asylum seeker, was living in a private rental with his family. The Department of Immigration and Citizenship abruptly revoked his visa status and he suddenly lost his right to work or receive Centrelink until the matter was resolved with the help of a refugee law centre. Because he was drawing in no income, he desperately wanted to vacate before his arrears exceeded the bond. Faced with a delay of two to three weeks to see a tenancy lawyer, have them prepare a VCAT application for him, then wait for the VCAT hearing itself, Guhan decided it was better to simply hand back the keys and avoid arrears increasing further. However, this created the risk that the landlord may later pursue him for break lease costs.

8.1.3. Breaking the lease

We note that this issue has been extensively dealt with in our Security of Tenure response paper.

8.2. Goods left behind by a tenant

Tenants occasionally leave goods behind at the property. Whilst there are undoubtedly circumstances where the tenant has truly abandoned these goods, our casework demonstrates that more often than not, there are financial, logistical or safety barriers preventing a tenant from recovering goods they would have otherwise sought to remove. The case studies below show various instances in which tenants have left goods behind after possession has been granted, or the execution of a warrant.

Case study – Abdul – warrant was executed without knowing

Abdul was the subject of a possession order, and the warrant was executed in accordance with the standard procedures. It was too late for him to lodge a review with VCAT challenging the possession order, and he accepted the need to move. Victoria Police gave him until the end of the day to remove a whole house worth of possessions and furniture, which was not possible. Whilst he did his best, Abdul was forced to leave many possessions behind, and was then required to arrange access to the keys and property with the landlord. Technically his possessions became goods left behind.

Case study – Amardeep – family violence saw her leave possessions behind

Amardeep left her partner who had been abusing her for many years. There was no time to collect all of her possessions and furniture, and left early one morning with whatever she could carry. When her partner was eventually evicted from the property, the landlord removed all of her goods, and much was destroyed or disposed of before she had a chance to even contemplate claiming the goods back.

The Act outlines the procedures for handling goods left behind. These items fall into two categories – personal documents, and goods of monetary value.

Personal documents

- Must be retained for 90 days;
- The documents may be removed from the property, but not destroyed otherwise in accordance with the Act;
- Reasonable steps must be taken to notify the former tenant;
- Personal documents may then be disposed of after 90 days have elapsed.[67]

Replacement of documents such as birth and marriage certificates and passports is costly. Further, the destruction of some documents can be an offence. It is puzzling that these essential documents are given a relatively short time limit, given that they are relatively easy to store.

WEstjustice submits that the length of time must be increased for personal documents to be retained. Further, documents of this sort must never be destroyed, and should be returned to their respective issuer.

Recommendation 49: the Act should be amended to increase the length of time that personal documents must be retained from 90 days to 12 months. Further, personal documents should never be destroyed, and must be returned to their respective issuer at the expiration of 12 months.

Goods of monetary value

Where a tenant leaves goods with a monetary value behind, the owner of the premises must remove and store the goods where the value of these goods is greater than the estimated cost of removal, storage and sale of the goods.[68] The minimum period that goods must be held for in accordance with these provisions is 28 days.[69] There is an obligation to inform the owner within 7 days of the goods being stored either by sending the prescribed form to a forwarding address provided, or by placing an advertisement in a widely distributed newspaper.[70] The goods owners may reclaim their possessions in exchange for the reasonable costs incurred for storage, preparation

[67] *Residential Tenancies Act 1997* (Vic) s 381.
[68] *Residential Tenancies Act 1997* (Vic) s 384(2).
[69] *Residential Tenancies Act 1997* (Vic) s 386(1).
[70] *Residential Tenancies Act 1997* (Vic) s 386(2).

for sale or in notifying the tenant.[71] Where goods are not collected, the landlord must sell the goods at a public auction.[72]

WEstjustice submits that the present timeframe for storage is far too short. As the case studies above show, in many cases where goods are left behind, this will have been the result of a significant life event, including family violence. Whilst goods may be important to the tenants, they may take a lower priority to matters such finding housing, fleeing violent relationships, seeking assistance with addiction or other health-related issues. We submit that the time period for storage must be increased significantly to account for the fact that many tenants are not simply just abandoning their goods, but may also be suffering from setbacks and overcoming a very unfortunate set of circumstances.

Recommendation 50: the Act should be amended to increase the time required for goods of a monetary value to be stored from 28 days to 6 months.

Recommendation 51: the Act should be amended to allow a landlord to make an application to VCAT, not before 60 days of the goods first being stored, to have the goods sold at public auction before the expiration of the 6 month period where they can show the goods are highly unlikely to be collected by the owner of the goods.

Recommendation 52: standard practice by landlords should be to request an inspection by Consumer Affairs Victoria in circumstances where goods of a monetary value are left behind. This eradicates any ambiguity over value, whether goods should be stored, and provides more certainty to the parties about their rights and obligations. This can be encouraged by agents in the course of practice of managing properties, and in information provided to landlords.

Notification of sale

Where a landlord has no forwarding address for the owner of the goods, they must place an advertisement in a newspaper distributed generally across Victoria. There is some degree of practicality in this – it is a public medium that all Victorians have access to. However, its usefulness and relevance in 2016 is questionable, with declining newspaper sales and the increase of technology and web based delivery of services such as news.

One possible solution is for Consumer Affairs Victoria to run a database on which landlords can list unclaimed items that are to be sold and which tenants can access for free. As a privacy matter, such a database should not retain listings for longer than necessary.

[71] *Residential Tenancies Act 1997* (Vic) s 389(1).
[72] *Residential Tenancies Act 1997* (Vic) s 391.

Recommendation 53: avenues for notifying the owner of goods left behind should be expanded beyond newspapers. Consumer Affairs Victoria should run and maintain a website that allows landlords to list unclaimed items which are to be sold which the relevant tenants may freely check and access.

9. Family violence

Increasing public attention is being given to the once very private scourge of family violence. Among the most important developments in fully appreciating its damaging effects was the Victorian Royal Commission into Family Violence ('RCFV'), which reported in March 2016. The Report made 227 recommendations that are directed at improving the way in which family violence is treated not just in the courts, but in policing, reporting, support services, protection and prevention.[73] Relevant to this submission, the Commission made a number of important recommendations with respect to housing and tenancies.

We note that much work has been done with respect to family violence in a tenancy:

- 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;
- 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; and
- Under Section 70A, a protected person under an intervention order may change the locks and prevent the excluded tenant from being given a copy while the order remains in force.

However, there are still many gaps in the way tenancy legislation handles family violence. These can be summarised as follows:

- 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. WEstjustice submits that it is not 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 to VCAT to resolve their tenancy issues. It is 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. Further, in line with recommendation 118 of the Commission's report,[74] we believe it is incumbent on Magistrates to inquire as early as possible whether a tenancy is on foot, and to inform applicants of their right to apply for a new tenancy, and be provided with the requisite information to do so.
- We have discussed the shortcomings of the provision to allowing a reduction in fixed term tenancy. In order for this section to attach, the tenancy 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.[75] 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

[73] State of Victoria, Royal Commission into Family Violence: Summary and Recommendations, Parl paper no. 133 (2014-2016), 15.
[74] State of Victoria, Royal Commission into Family Violence: Summary and Recommendations, Parl paper no. 133 (2014-2016), recommendation 118.
[75] *Residential Tenancies Act 1997* (Vic) s 210, Annotated Residential Tenancies Act, June 2014, [210.05]

violence from making an application to VCAT for the fixed term tenancy to be reduced. Compensation should not be awarded where a fixed term is reduced due to, or in circumstances of, family violence.

- 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. A final intervention order should not be necessary for Section 233A to be applicable.
- 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. WEstjustice has advocated above for a prohibition on listing family violence victims on a RTD. Further, in accordance with recommendation 116 of the RCFV's report, the Act and *Wrongs Act 1958* (Vic) must be amended to allow for apportionment of rent arrears.[76]
- Whilst there are provisions for a protected person to change the locks at the premises, and prevent an excluded person from being given a copy, WEstjustice submits that this ability to modify the property should go further. We believe that tenants must be permitted to make reasonable modifications to the premises that enhance the safety of the tenant and protected person.[77]

Recommendation 54: WEstjustice submits that the following amendments be made, in addition to those recommendations made above:

- The Magistrates' Court of Victoria should be given jurisdiction to decide tenancy matters where an application is made for a family violence intervention order. Alternatively, it must be incumbent on Magistrates to enquire as early as possible whether there is a tenancy involving the applicant and respondent to an application for an order, and advise them of their rights to apply for a new tenancy.
- An interim family violence intervention order should suffice for Section 233A to apply, and the creation of a new tenancy possible.
- It must be possible for VCAT to apportion rent arrears in circumstances of family violence.
- Tenants, who are a protected person under a family violence intervention order, must be permitted to make reasonably modifications to the premises that enhance the safety of themselves, their children, their property and the premises itself.

[76] State of Victoria, Royal Commission into Family Violence: Summary and Recommendations, Parl paper no. 133 (2014-2016), recommendation 116.
[77] State of Victoria, Royal Commission into Family Violence: Summary and Recommendations, Parl paper no. 133 (2014-2016), recommendation 116.

- Section 120 of the *Victorian Civil and Administrative Tribunal Act 1997* (Vic) must be amended to allow victims of family violence more time to lodge a review. We submit that 28 days is suitable.