Submission to Consumer Affairs Victoria

Heading for Home -

Residential Tenancies Act Review

10 February 2017

Peninsula Community Legal Centre Inc

Introduction

Peninsula Community Legal Centre is pleased to be given the opportunity to comment on the third stage of the Victorian Government's Review of the Residential Tenancies Act 1997 (*the Act*), namely the Heading for Home Residential Tenancies Act Review (*the paper*).

About Peninsula Community Legal Centre

We are an independent, not-for-profit organisation that has been providing free legal services to Melbourne's south-eastern communities since 1977. We are one of the largest community legal centres in Australia, spanning a catchment of over 2,600 square kilometres, six local government areas and almost one million people.

In addition to our general services and programs, we have operated a Specialist Tenancy and Consumer Program since 1998. We currently receive funding from Consumer Affairs Victoria to deliver the Tenant Advice and Advocacy Program across ten local government areas, which enables the Centre's advocates to provide advice, casework, negotiation, and representation at the Victorian Civil and Administrative Tribunal, including duty advocate services at the Dandenong and Frankston Magistrates Courts. We also operate a rooming house outreach program.

Our clients overwhelmingly experience disadvantage, with around three-quarters reporting no or low income (less than $26,000 per annum). Tenancy issues were in the top 10 problem types addressed by our Centre in the last year. We commonly help with a wide range of matters including possession, rent arrears, repairs, compensation, bond claims, lease breaks, tenancy agreements and rent increases.

Summary of our Previous Submissions to the Review

We noted in our first submission that security of tenure and affordability issues are of great concern to our Centre. [1] We pointed out that the Act does not adequately encourage a rental market that provides sustainable, secure and safe housing, particularly for those most vulnerable. Our client base of seniors, people with low income, people with disabilities, those living in rooming houses and residential parks, will often have trouble finding secure accommodation. Insecurity of tenure is brought about, in part, by the structural imbalance in favour of the landlord that exists under the current system. Although this imbalance is not always evident or clearly expressed in the Act, it is ingrained within the current structure of the landlord-tenant relationship. We previously highlighted the following areas of concern: (1) long term leases, (2) rent increases, (3) minimum housing standards, and (4) notice periods.

In our second submission we focused on broader industry practices and culture within the rental market.[2] Although the amendment of the Act is a step in the right direction, we feel there needs to be a cultural shift in the way tenancy is dealt with in Victoria. We addressed the need to create an environment that encourages long-term leases and responds to the diversity of needs of both the

[1] Submission to Consumer Affairs Victoria, Residential Tenancies Act Review – Fairer Safer Housing (5 August 2015).
[2] Submission to Consumer Affairs Victoria, Security of Tenue Issues Paper – Residential Tenancies Act Review (December 2015)

tenant and landlord. In the previous submission we provided case studies to highlight the deficiencies in industry practice. We continued to support a new way of thinking and a fresh approach to long established industry practice.

Scope of this Submission

We are pleased to see the review has responded to the issues raised by the various stakeholders that made previous submissions to the review. It is important to note that the review has highlighted areas of concern to security of tenure, such as providing an option for long-term leases. We again welcome the opportunity to provide feedback and comment on the proposed changes.

This submission does not address all consultation questions, however, we will share our views on the key issues we believe require consideration. The proposals and comments we offer are intended to empower the relevant stakeholders to achieve outcomes beneficial to security of tenure and the long-term health of the Victorian rental market.

Response to Consultation Questions

6. What are the potential benefits of amending the RTA to cover longer fixed term agreements as per option 3.1?

We support the removal of the five-year limit on the scope of the Act. The removal of section 6 will broaden the scope of the Act to include tenancy agreements in residential parks, community housing, Part 4A dwellings, and other forms of tenancy associated with long-term leases. In addition, option 3.1 will lend further support to the implementation of option provisions into leases. Lease duration will cease to be a barrier to the protection of the rights under the Act. As mentioned in our previous submissions, we would like to see the culture of the rental industry move towards flexible and longer term lease agreements. Amending the Act to cover longer fixed term agreements will help to foster changes in industry practice.

There is no need for this jurisdictional limit to be entrenched in law and we would like to see the Act amended to incorporate the appropriate provisions to cover all disputes relating to rental agreements no matter the length of the tenancy. Long-term tenancies are subject to the same issues of conflict between the tenant and landlord, which the Act is designed to address. Housing is not a matter that should be left unregulated. In our clients' experience, long-term leases, such as those in residential parks, often contain unjust terms and conditions. Often tenants in these long-term leases do not have a means of recourse readily available to them in the event of tenancy disputes. Option 3.1 will provide a means of empowering the parties to resolve their disputes through the use of the Act.

11. What are potential benefits and risks of providing the option for tenants to extend fixed term lease agreements as under option 3.3?

We support the use of long-term lease agreements and option provisions in residential leases. The standard in commercial leases is to provide an option clause which allows the lessee upon certain conditions to renew for an agreed period of time. As highlighted in our previous submissions, landlords have no obligation to outline their intent to the tenant at the start of the tenancy. This is in contrast to commercial leases, which often provide longer terms with the option to renew.

We reiterate that we have previously made submissions in support of both option 3.2 and 3.3, and again suggest the following provisions:

a) That lease terms are introduced which contain renewal options similar to commercial leases.

b) That the method of exercise of the renewal options should be as clear and unequivocal as possible to protect both landlord and tenant. Should the tenant fail to fulfill the terms of the option, they lose their right to exercise it.

c) That the option clause clearly specifies the terms and conditions which will apply to the new lease, including the new lease term and rent, as well, as rent review mechanisms.

d) That the landlord or agent be required to obtain acknowledgement from the tenant that they understand the terms.

Our proposal balances the needs and responsibilities of the parties. Tenants receive security of tenure through the use of an option, assuming they have not breached the terms of the lease. Turnover rates are reduced, and the landlord's position is protected should the tenant breach the terms of the lease. Both parties are empowered to pursue their own objectives while having a built-in resolution in the event of a breach.

The incorporation of option 3.2, extending the provisions of the Act to long-term leases, further strengthens the relevance of option 3.3. Option 3.3 provides the opportunity for tenants to extend fixed term leases for a subsequent period, which we support. Option 3.2 will encourage the extension of lease options beyond five-years as the parties will have the protections of the Act.

12. What other relevant considerations are there for facilitating long-term leases for tenants and landlords who may be interested in this type of arrangement?

We find industry practice is to provide standard leases of 12 months. This practice creates a 'hidden' conflict of interest between the agent and the landlord. Often landlords appear unaware of alternative lease options. The agent may appear to place their interests above that of the landlord. Agents benefit by reducing the length of the tenancy as turnover creates the need for additional services, and thus, income for the agent. In order to facilitate the introduction of long-term leases,

both landlords and tenants need to be aware of alternative options. Regulatory framework should require the disclosure of alternative forms of lease terms to both the tenant and landlord.

This is not to say we fully support the proposal to introduce an optional prescribed fixed-term agreement for general tenancies of five years or longer in duration. We feel landlords and tenants wishing to enter a longer term agreement should work together to meet their specific needs on a case-by-case basis. Not every tenancy is the same, yet we find industry practice is to treat each lease agreement as if it is. Broadening the scope of potential variations in lease agreements will help to facilitate the implementation of long-term leases.

18. Should each of the items of information listed in option 4.6 warrant disclosure before entering into a tenancy agreement, and should any other material facts be considered?

Tenants and landlords do not communicate as equals. Landlords have no obligation to outline their intent at the start of the tenancy. Lack of disclosure creates conflict. As an example, tenants are often required to move from the rental premises within a short time frame as the property is sold. The pending sale may have been known by the landlord at the commencement of the tenancy. This creates an informational advantage over tenants which serves as a detriment to the security of tenure for the tenant.

As discussed in consultation question 11, commercial leases often require disclosure statements. Disclosure statements contain material facts relevant to the commercial tenancy. The same logic should apply to residential tenancies. Material facts of the landlord's intentions should be made known to the tenant. This will allow the tenant to assess the suitability of the property and eliminate the landlord's information advantage.

We support the disclosure of the information as presented in option 4.6, which requires the disclosure of (1) any proposal of sale, (2) mortgagee is taking action for possession, (3) landlord has the legal right to let the premises, and (4) details of an embedded electricity network. Other material facts worth considering included, (1) whether the property is separately metered for utilities, and (2) disclosure of landlord's identity or the identity of their acting agent.[3]

19. Which factors are important or most likely to influence the tenant's decision to enter into a tenancy agreement, and which are more appropriately dealt with in the condition report?

We find factor (1), proposal of sale, and factor (2), mortgagee taking possession, the most relevant to a tenant's decision regarding the tenancy. Both these factors affect the tenant's security of tenure. As mentioned, we have seen a number of cases where a tenant has taken possession of a rental premises and within a very short timeframe is forced to move due to a pending sale or mortgagee repossession. To add further distress, the tenant is often required to support the 'open for inspection' process during the final days of their tenancy. Once the tenancy has terminated the tenants then incur costs in relocating.

Without disclosure of the landlord's intent there will remain an informational advantage over the tenant. Informational advantage by either party may lead to disputes and unforeseen costs. Requiring disclosure of relevant information will lead to further empowerment of tenants to make sound decisions on their housing choices. .

[3] We have assisted clients where the person named on the lease as the landlord is in fact only an agent acting on behalf of an the landlord.

20. Would a prohibition on false, misleading or deceptive representations under option 4.7 have unanticipated consequences, or be unduly burdensome for landlords and agents to satisfy?

Other professions and relationships between contracting parties require the prohibition on false, misleading, or deceptive representations. Businesses are not allowed to make statements that are incorrect or likely to create a false impression. This prohibition relates to representations made about the product the business produces or sells and on the services the business offers.

Landlords are in the business of renting properties. There is no valid reason to exempt landlords from the requirements that other businesses operating in the marketplace are subject to. Fair practice is essential to creating an environment in which the consumer (tenant) knows all the facts relevant to the property they are renting. To allow otherwise is to actively cultivate conflict within the rental market between the tenant and landlord.

53. Should the optional fixed lease break fee in option 6.2 be a set amount, or should the RTA prescribe a method for calculating the fee in proportion to the remaining term of the lease?

Neither option is suitable. Tenants are forced to break leases for an array of legitimate and reasonable reasons, including situations not envisioned by options 6.2 and 6.3. Imposing a fixed break fee of five or four weeks is inherently unfair when properties are capable of being re-let in a shorter time frame. Similarly, calculating the fee in proportion to the remaining term may add additional costs to the tenant which they may not have incurred in the current system.

In reality option 6.2 operates as a penalty provision, imposing costs on a tenant which he or she would not otherwise incur if the property was relet in a timely fashion. Option 6.2 further eliminates a landlord's duty to mitigate damages, which is a well-established principle of law. Under this proposal, the landlord has the potential to relet the property prior to five or four weeks, thus, collecting rent from the new tenant and lease break fees from the old tenant. Such a scenario creates a windfall for the landlord. Damages for loss of rent, like damages for breach of contract, are meant to make the party whole. In other words, damages should be actual and not punitive. The potential impact of option 6.2 is to penalise the tenant and impose punitive damages.

68. What are the benefits and risk of restricting rent increase to once per year?

We have previously proposed that the Act be amended to limit the frequency and quantum of rent increases given that the Act provides no restrictions on this. In the current market, the high demand for properties, low vacancy rates, and the mainstream use of six to twelve month tenancy agreements provide landlords with opportunities to increase rent far beyond indicators such as the Consumer Price Index.

In response to the query for 'appropriate alternatives' to considered, we note as follows:

a) In our previous submission we proposed that a regulation of rent hikes to stay in line with CPI may curb the trend in the rental market of outpricing a long term tenant.

b) We also referred to international jurisdictions where rent control measures have been put in place and increases are limited by government regulation or are subject to a 'rent index' which cannot be exceeded. We note that this has been discussed in the paper and we support this international approach.

c) We refer to our earlier proposals which included a recommendation that for leases with 12 months recurring duration, the rental payments should be adjusted in line with CPI once in a calendar year. A shorter period between rental increases, which is often a term of the lease, should not be allowed.

Although not directly asked, we feel the implementation of rent control or regulation is required to bring about meaningful change. The current system, even with the introduction of yearly increases, is balanced heavily towards the landlord. Landlords have greater market power as tenants are likely to accept rental increases due to the high costs associated with moving. A form of rent control will help to balance the power of the parties.

The residential tenancy market in Victoria operates with a built in imperfection. A tenant will always incur costs if they relocate. As a result, the landlord is free to impose a higher rent then that of the market rent.[4] Often tenants having tired of rental increases move properties to later discover the previous property is now advertised for a lower rent. We often hear this complaint from our clients. Landlords are aware of this advantage and exploit it on a regular basis. Rent control mechanisms can reduce the landlord's advantage to charge above market rents.

The benefits of rent control are not one-sided. It will also reduce tenant turnover, allowing consistent returns for the benefit of the landlord.[5] Rent control should be seen as balancing the tenant's security of tenure with that of the landlord's investment. The current system favours the landlord's return on investment to the detriment of the tenant. This is neither fair nor sustainable in the long term.

Limiting rent increases to once per year rather than 6-monthly would provide a slight improvement for tenants, but ultimately does very little to address the advantage landlords have in controlling rents.

88. In light of available evidence on current property conditions, how difficult would it be in practice for a property to achieve compliance with basic minimum standards prior to lease?

As noted in our previous submissions, we support the inclusion of minimum housing standards in the Act. We support option 8.13D, the introduction of minimum health, safety, and amenity standards for vacant premises. Option 8.13D, like other 'feature based' standard models, ensures a basic level of compliance not currently present.

We believe the proposed minimum standards of 8.13D can be achieved without a great deal of difficulty. The standards as listed do not contain items that require major structural overhauls of properties. Instead, the requirements require the installation of appropriate appliances, fixtures, and implementation of safety measures. From past experience with urgent repair orders, which often cover the replacement of similar items to those listed, we have found landlords are able to address these items in a timely fashion. We believe minimum housing standards are a human right, and although the difficulty in implementation is a consideration to weigh, it should not be an overriding factor in determining the viability of imposing such standards.

[4] See, Marietta Haffner, Marja Elsinga, Joris Hoekstra, *Balance between landlord and tenant? A comparison of the rent regulation in the private rental sector in five countries,* ENHR 2007 International Conference on 'Sustainable Urban Areas,' June 2007.

[5] Id. (Providing further commentary on the matter).

90. Do any of the features listed go beyond basic standards and, if so, could they be addressed through other means (for example, by permitting particular modifications or via the tenant adopting their own solution – such as a portable air conditioner)?

We support the majority of the standards proposed in Option 8.13D. We believe the main consideration should be the health and safety of the tenant. Thus, we would refer to recommendations provided by health and safety organisations and practitioners. We acknowledge items such as an air conditioner may go beyond what is required to create a safe and healthy environment, however, such a determination should only be made after consulting with health and safety experts.

We do not support the option of having the tenant adopt their own solution. We believe meeting the requirements of minimum standards is solely the responsibility of the landlord, who is providing the property. Forcing the tenant to adopt various solutions on a case-by-case basis maintains the status quo and fails to eliminate the current problems.

91. What is an optimal transition period for ensuring that landlords have adequate time to bring properties up to any legislative standards?

We support option 8.14B, the implementation of a flat transition date. A flat transition brings clarity and simplifies the process by eliminating confusion on when specific items must be brought to standard. We believe a staggered approach creates uncertainty as tenants and landlords may become confused on when compliance is required. A staggered approach may also create further disruption to existing tenancies. Each pending compliance date will bring a new disruption, requiring the tenant to again open the property to renovation or repair.

Within the framework of a flat transition date we support a limited timeframe. As discussed in consultation question 88, we believe the proposed minimal standards can be satisfied without significant hardship to the landlord. The added benefit of a limited transition period is the potential elimination of future repair requests and other maintenance issues.

92. Should a landlord be able to lease out a property that is fit for habitation, clean and has working features, regardless of whether it meets any other standards?

The above proposal creates a subjective standard, similar to what is currently in place. The problem with subjective standards is the creation of conflicting view points. Whether the property is fit for habitation will differ from tenant to landlord and from the potential viewpoint of VCAT. For example, commentary [226.01] of the Act states, "'Unfit for human habitation' has been held by courts to include not only unfitness due to some structural or other defect but unfitness for any reason, regardless of the cause for unfitness." This definition is vague and hard to comprehend, and leaves the outcome open to interpretation.

We have assisted clients living in properties of questionable condition. If is difficult to discern whether it is fit for habitation. This has real life ramifications. As an example, if it is unfit the tenant may terminate the lease immediately pursuant to section 238 of the Act. Should the tenant's assessment, however, be incorrect, they face the possibility of lease break costs. Proscribed minimal standards eliminate the risk of misinterpretation of the relevant law.

The implementation of a minimal standards approach creates an objective standard. The parties are less likely to disagree as the standards are specific and listed. It further supports the review process as it presents an opportunity to clarify and simplify the regulatory requirements. The potential problems, as exampled above, are reduced.

110. Would the proposed changes in option 8.32 improve the existing process for handling repairs? What other changes would promote the timely resolution of repairs disputes, and give VCAT or another dispute resolution service access to all relevant information?

Matters of repair and maintenance are a leading cause of grievance among our clients. The current process is time consuming and often results in a significant delay before the repair is rectified. We believe the proposals presented in option 8.2 will improve the existing process. We often find the tenant is confused by the repair process. When the landlord is not responding to their repair request the tenant is unsure who to contact for assistance - CAV, VCAT, or an outside agency. Frustration builds as a result and often the tenant gives up on the repair.

Streamlining the process to allow for a tenant to seek alternative lines of resolution will assist the tenant in their pursuit of the repair. The proposal of 8.32 applies regulatory flexibility, while also simplifying the process. Direct application to VCAT allows for the tenant to seek a quick remedy and creates an alternative avenue to CAV. Should the tenant request an inspection from CAV, the broadening of CAV's inspection power, integrated within an administrative dispute resolution service, will further assist the tenant in resolving repair disputes.

149. Which of proposed additional powers would most assist in addressing non-compliance?

The expansion of civil remedies allowing CAV the power under the Act to seek civil penalties against the landlord will assist with non-compliance. CAV is better positioned to seek civil penalties than the tenant. Tenants lack the expertise, time, and resources to pursue civil penalties. Furthermore, the focus of the tenant should be on the resolution of the problem. Civil penalties are in essence a form of enforcement, which is best left to governmental agencies.

As cited in previous submissions, there is often a lack of compliance by landlords. We find landlords often ignore VCAT orders. Without a real threat, particularly one aimed at their finances, landlords may feel there is no reason to comply. Landlords know it is unlikely the tenant will persist with the matter long term. Our clients often struggle to have orders enforced, particularly those awarding compensation. Allowing CAV to seek compliance orders with the possibility of penalties will likely increase compliance.

172. What is the period of time following the due date for rent payment that would be appropriate before action can be taken to negotiate a repayment plan or to terminate a tenancy for non-payment of rent?

Fourteen days or longer is a more appropriate timeframe then the proposed seven days. A longer timeframe takes into account the fact most tenants receive income on a fortnightly basis. There are a number of reasons, many legitimate, why a tenant may miss rental payments resulting in seven days outstanding. Timeframes for arrears should be tied closely with the timeframe of when tenants receive income. Fourteen days or longer facilitates the repayment of arrears, while reducing the stress a tenant would incur if they have to locate funds prior to receiving their fortnightly income.

Further, businesses are expected to have capital requirements. That is they should hold enough capital on hand to cover operating cost when there is a shortfall in revenue. Often landlords do not possess sufficient capital requirements to meet the cost of their mortgage payment should the tenant be delayed in making rent payments. It is not unreasonable to expect landlords to temporarily cover the costs until the arears are repaid.

Another concern centres on the negotiation of a payment plan outside of VCAT. In theory this would be welcomed, however, we find landlords are inclined to offer a 'take it or leave' payment plan. The payment plan proposed by the landlord is often too onerous on the tenant and likely to lead to default. Landlords should not be able to apply for a termination order or application for possession for failure to follow a payment plan when the payment plan was unrealistic to begin with. VCAT should be able to consider the terms of the payment plan in question.

175. What are the potential benefits and risks of including repeated late payment as grounds for termination on application to VCAT?

The basis of terminating a tenancy for arrears is, in part, to protect the landlord from suffering economic hardship. Late payments, absent creating a situation of arrears of more then 14 days, should not cause 'severe' economic hardship to the landlord. It may create an annoyance, however, an annoyance should not be a valid reason to terminate a tenancy. In our experience, there is a lack of flexibility within the industry to adjust the terms of rental payments. Landlords often refuse to make adjustments or consent to a change in rental payment dates or methods. Tenants' requests to pay fortnightly as opposed to monthly, or to have the due date moved to coincide with the tenant's pay day, are often refused.

Not all late payments are equal. A single day late is not the same as ten days late. We require further clarification as to the number of late payments required and the length of the tardiness before we are able to provide additional comment.

176. What alternative options are there to facilitate and incentivise the use of repayment for tenants to pay rent arrears?

The Act could formulate the maximum percentage of the normal rent a landlord could offer and the tenant be expected to pay in a payment plan. Such a provision would lend itself to the negotiation of payment plans outside of VCAT, while protecting the parties from unjust or unreasonable terms.

189. What are the potential benefits and risks of removing the option for a landlord to terminate a tenancy at the end of a fixed term agreement, as under option 11.25A?

We noted in previous submissions that low vacancy rates, the shortage of affordable housing, and the financial cost to relocate compounds the difficulty for tenants who are served with a notice to vacate. Security of tenure is improved by the elimination of the notice to vacate for the end of the fixed term. As a flow over effect of option 11.25A, tenants are more likely to exercise their rights, including requesting repairs. Tenants would not fear the retaliation of the landlord, as their tenure would be secure.

Naturally this option would need to consider the landlord's right to have possession of the property. The landlord, however, has alternative means of gaining possession should they desire to sell or renovate the property. If the landlord is planning to continue to let the property, there is no reason the current tenant should not be afforded the opportunity to remain in possession in the absence of a significant breach of duty.

190. How effective would provisions enabling tenants to challenge notices to vacate for the end of the fixed term as under option 11.25B be in protecting tenants against unfair terminations?

We find tenants are often reluctant to challenge a notice to vacate for the end of a fixed term agreement, even in cases where the notice appears to be retaliatory or discriminatory in nature. Tenants are also unaware of their right to challenge a notice, and if they are aware, they are often not capable of mounting a challenge on their own. Option 11.25B would not change this fact. Instead, we believe landlords would still issue notices to vacate for retaliatory reasons knowing the tenant is unlikely to mount a challenge. Removing the ability of a landlord to terminate a tenancy at the end of a fixed term agreement, as proposed in option 11.25A, offers a better solution and eliminates the knowledge gap suffered by many tenants.

193. What would be the potential risks and benefits of increasing the notice period to 182 days for this notice to vacate as described in option 11.27A?

As discussed in our previous submissions, we often find landlords use 120 day no reasons notices as a 'get out of jail free card' if they simply want the tenant to vacate. Although a tenant can challenge the notice as retaliatory, to do so, places the onus on the tenant to lodge an application with VCAT. Even when successful in their challenge the tenant is likely to receive another 120 day no reason notice to vacate in the near future.

It is still our recommendation that landlords be obligated to provide termination notices with reasonable grounds only or for the termination of 120 day notices altogether as proposed in 11.27D. Option 11.27A, however, does move in the right direction. Increasing the notice period from 120 days to 182 days will provide additional time for tenants to find alternative accommodation. Tenants with low incomes or those suffering from other hardships – our client base – have a difficult time finding accommodation. Often our clients comment that 120 days is simply not enough time to obtain accommodation as their housing options are restricted due to limited income and hardships. To further complicate matters, tenants facing 120 day notices to vacate are often provided poor references from the current property manager. Poor references further complicate the tenant's ability to secure new accommodation.

Increasing the notice period to 182 days will afford more time. We are still concerned, however, that the new proposal does not address the underlying issues of a why a no reason notice is given in the first place.

196. Which of the options in this section would be most effective in protecting tenants against unfair termination while providing adequate scope for landlords to exit an agreement other than by at fault evictions or prescribed changes of use?

Apart from the elimination of the notice to vacate for no specified reason, option 11.27C is the most effective in protecting tenants against unfair terminations. Option 11.27C, unlike the current provision of the Act, requires the landlord to obtain an independent evaluation by VCAT before the termination of the tenancy. Again, this does not resolve the underlying issues of harassment and security of tenure. Some tenants will simply move prior to a VCAT hearing, often as a result of bullying and misinformation by an estate agent. We have found many clients are told they must leave prior to a possession hearing. We assume this behaviour would continue under option 11.27C. Nevertheless, we feel 11.27C does offer an additional layer of protection which does not exist under the current provisions.

198. What are any alternative reforms that would provide appropriate additional protections to tenants who have been in a tenancy for five years or more?

We support option 11.27D, the removal of the notice to vacate for no specified reason. We further, support option 3.1 which extends provisions of the Act to lease agreements beyond five years. As discussed earlier, the use of option provisions in residential leases would provide additional protections to tenants. Option provisions allow tenants the ability to opt into an increased length of stay. If done correctly, the option to renew is presented well in advance. Should the tenant fail to excise the option they will have adequate time to relocate. Options provisions, coupled with disclosure requirements, create an informed tenant capable of planning out the length of their tenancy.

199. How workable and effective would requirements to accompany a notice to vacate for change of use be in ensuring notices to vacate are valid as under option 11.28?

We believe the Act already requires a notice to vacate for change of use be accompanied with relevant documentation as evidence of the intended change. Section 319(d) of the RTA requires a notice to vacate "specify the reason or reasons for giving the notice." In *Smith v Director of Housing* [2005] VSC 46, the Court stated, "the requirement laid down in s319(d) is deigned to require advice to be given to the tenant as to the reason the landlord demands possession with sufficient degree of detail to enable her to understand the facts being alleged as a basis for terminating the tenancy, and to contest those facts." The Court further elaborated, "a reason which merely repeated the words of the Act which were invoked could not satisfy the requirements of s 319." Subsequent case law has found it necessary for the landlord to accompany the notice to vacate with evidence, pursuant to *Smith v Director of Housing* and section 319(d). A failure to do so results in the notice being found invalid. We have successfully made this argument on several occasions.

The problem stems from the fact most tenants are reluctant to challenge notices. When tenants do challenge a notice to vacate for 'change of use' they are often unaware of the requirement of section 319(d). Although restating this requirement in another section may increase the awareness among landlords and tenants, it is unlikely to resolve the underlying issue of invalid notices. Landlords may simply ignore the rule or inadvertently provide misleading information.

202. What is an appropriate notice period for terminations for changes of use?

We propose the implementation of 182 days as proposed in option 11.27A for no reason notices. The tenant faces the same challenge of finding new accommodation for terminations for changes of use as for a no reason notice. An extended time period is crucial for tenants who try their best to locate alternative accommodation but find it difficult to achieve in the current 60 day timeframe. The tenant has not done anything wrong, nevertheless, they face homelessness. Creating the same notice period for all forms of termination has the added benefit of bringing clarity to the Act.

Again, requiring disclosure of the landlord's intent at the start of the tenancy will also eliminate the effects of change of use notices, as in some cases, the tenant will be aware of the potential change in use prior to entering the tenancy.

205. What issues could arise from the requirement to disclose any mortgagee repossession proceedings at the point of lease as under option 11.32?

As stated in previous submissions and in options 4.6 and 4.7, the Act should require landlords to disclosure certain relevant facts prior to entering a lease agreement. A tenant is unable to determine whether a mortgagee has commenced repossession proceedings prior to receiving

notification. This information is paramount to providing the prospective tenant a true assessment of the suitability of the property. The tenant may have plans to reside at the property for several years only to receive a 28 day notice to vacate from the mortgagee. This is unfair and detrimental to the policy goals of the Act.

Option 11.32 will also allow the tenant to assess the suitability of the landlord. Portions of the discussion paper have commented on the suitability of a prospective tenant. Disclosing information such as pending mortgagee repossession provides the tenant with the ability to assess the suitability of the landlord. Tenants are reluctant to rent from landlords in financial distress – typically the case in mortgagee repossession. Landlords are able to assess the tenant's ability to pay rent prior to entering a lease, however, no provision allows for a tenant to assess the financial status of the landlord or their ability to maintain the property. Parties entering into an agreement have the right to know relevant information which will affect their rights and responsibilities under the lease.

207. What are any alternative workable approaches to providing an adequate period of notice and compensation for the termination of a tenancy due to a mortgagee repossession?

As mentioned in our previous submission, all jurisdictions except for the Northern Territory allow evictions by mortgagees, even during a fixed term tenancy.[6] The Australian Capital Territory, the Northern Territory, and Queensland require the longest notice periods before a mortgagee can obtain possession. Below is a summary of Australian jurisdictions:

1. Australian Capital Territory: 8 weeks notice
2. New South Wales: 30 days
3. Northern Territory: Prohibits mortgagees taking possession if tenancy less then 12 Months – allowed to become a landlord.
4. Queensland: 2 months
5. South Australia: Direct Application to Tribunal
6. Tasmania: 28 Days
7. Western Australia: No notice required

Tenants often receive notification of the eviction from the holding bank or an acting law firm.[7] This further complicates matters as a tenant will not fully understand the legal relation or interaction of land title, property, and tenancy laws. Compensation is not an option as the landlord will likely face substantial debts. Risk of homelessness is high as the forced move is unanticipated and the notice period short.[8]

[6] The National Shelter Inc., *"A Better Lease on Life – Improving Australian Tenancy Law"* (April 2010) 28.
[7] Id.
[8] Id. at 29.

Alternative approaches to the current problem include: (1) requiring the mortgagee to assume the responsibilities of the landlord once they have obtained a possession order in regard to the mortgage contract. The mortgagee could only evict the tenant upon the expiration of the lease term or upon just cause as specified in in the Act. (2) Increasing the notice period to 182 days as suggested in option 11.27A for no reason notices to vacate.

The United States and Britain provide comparative models. In the midst of the housing collapse and foreclosure crises, the United States enacted the Protecting Tenants at Foreclosure Act of 2009 (PTFA). The PTFA granted tenants living in a foreclosed property the right to remain in the home until the end of their lease term, or in the case of a periodic tenancy, the right to receive 90 days notice before vacating. In 2010 Britain passed the Mortgage Repossession Protection of Tenants Act (MRP), which allows a tenant to apply for a postponement of a possession order not exceeding two months.

Even with the current perceived low rate of foreclosures, there are still tenants experiencing the effects of a section 268 notice. For these reasons, Victoria should amend section 268 of the Act to include a longer notice period.

208. What are any alternative options for providing an adequate level of protection for tenants where a mortgagee repossession is in process?

We propose a provision to the Act that requires the mortgagee to step into the place of the landlord until the expiration of the lease, should the expiration be more then 182 days out. Rent is paid to the mortgagee, thus protecting its financial interests. The tenant can stay in the property and maintain security of their tenure.

Similar provisions as to the one proposed have worked in foreign jurisdictions. The United States enacted the PTFA which granted tenants living in a foreclosed property the right to remain in the home until the end of their lease term. The PTFA can serve as a comparative model.

209. Which of the models most effectively provides an appropriate balance of protections to the tenant against unfair termination of their tenancy, while also providing the landlord with adequate confidence that they may manage the risks associate with letting the property?

We support model 1 as the most appropriate option. It is still our recommendation that landlords be obligated to provide termination notices with reasonable grounds only or for the termination of 120 day notices altogether as proposed in option 11.27D. Model 1 encompasses these recommendations, and therefore, provides the greatest protections to tenants.

It is our experience that landlords use the no reason notice as they are the hardest to challenge. When a tenant challenges a 60 or 90 day notice at a possession order hearing, the landlord is required to establish that the notice is valid. Often landlords are unable to do this. For a no reason notice to vacate, the only time they are required to provide any evidence as to the reason for the notice is if a tenant challenges the notice. Tenants are often reluctant or incapable of challenging the notice on their own. Even when tenants mount a successful challenge there is no restriction on the landlord serving another notice within a short time period. Often tenants feel unnecessarily forced into submission.

Model 1 still provides landlords with adequate protection. At fault terminations and change of use notices are still in place. There is nothing preventing the landlord from evicting a tenant for a legitimate purpose unrelated to retaliation or discrimination.

Model 2 and model 3 retain the status quo and maintain the imbalances in the relationship between the tenant and landlord. Although provisions expanding grounds to challenge a notice appear beneficial to the tenant, it does not address the underlying issue - the built-in imbalance of the relationship. The onus is still on the tenant to lodge an application with VCAT and to carry the burden of proof of their claim. Even if the tenant is successful, model 2 and 3 do not prevent the landlord from simply serving another notice.

210. What alternative models could provide a more appropriate balance?

There is sufficient international evidence to suggest strong protections are beneficial to all parties. European countries such as Germany, France, and Ireland, among others, provide for longer minimum lease terms, cost controls, defined reasons to end the tenancy, and longer notice periods. As discussed in our previous submission, the Grattan Institute in Melbourne provided a report, which concluded these European countries were able to provide better protections to the tenant without disruption for landlords or the housing market.[9]

Again, we encourage the active review of foreign jurisdictions to find successful alternative models.

[9] Janes-Frances Kelly, *Renovating Housing Policy,* Grattan Institute Report No. 2013-12, October 2013.

214. What are any other circumstances in which tenants would be appropriately entitled to give a reduced period of notice of intention to vacate?

Other circumstances may include (1) death of a co-tenant, (2) unforeseen loss of income, (3) change in ownership of the property, and (4) significant illness or loss of capacity.

216. Which alternative option for improving access to family violence protections in the RTA do you support and why?

We support option 12.1C, which will allow VCAT to consider anything it believes relevant to the matter. Often we assist clients who are experiencing family violence but who have not pursued the legal avenues to obtain an intervention order. As the Royal Commission noted, the process of seeking family violence redress is not linear. Our clients are seeking immediate relief. Delay in obtaining a resolution in VCAT regarding their tenancy is detrimental to their wellbeing and safety.

Potential risks to "due process" as a result of broadening access to family violence provisions are overstated. As mentioned, VCAT staff will receive training on identifying and responding to risk factors associated with family violence. The goal should be the reduction in the occurrence of family violence. This is best achieved by allowing the parties to quickly vary their tenancy agreement so as to prevent future conflict. The concern over who is the perpetrator is secondary to the need to separate the two parties to minimize the risk that further violence will occur. There is no valid reason to deny an applicant relief should they approach VCAT as the first entry point in the system for family violence redress.

217. What would be a reasonable time within which VCAT should hear a family violence related matter.

VCAT is directed to hear matters of urgent repairs within 48 hours. We believe this is a reasonable time frame to incorporate with family violence matters. The proposal of 48 hours provides VCAT with adequate time to process the application, while also responding quickly to the needs of the victim. Often our clients are in need of immediate assistance. A delay of more then 48 hours will often lead to potential risks to the victim, including the reoccurrence of violence and damage to the property. Often are clients have fled the property only to later discover the offender has damaged the property. Our clients then bear the liability and cost for repair to the property. Agents and landlords do not always recognize the gravity of the situation, and are therefore, unlikely to assist in the matter. Applications to VCAT offer the only reasonable solution to the victim in the event the landlord is unwilling to accept proposed changes to the tenancy.

218. Which option best addresses the needs of victims of family violence while providing for any potential impacts on landlords and other co-tenants? Why?

Both options offer an improvement over the current legislation as it relates to protecting victims of family violence. On the whole, we support option 12.4B as it empowers the tenant to seek their own resolution, simplifies the current procedures, and offers a fast resolution.

Conclusion

We would welcome the opportunity to address any queries or provide further information about this submission. Thank you for allowing us to participate in the review.