Response to

Security of Tenure Issues Paper of the Residential Tenancies Act Review

December 2015
Response to

Security of Tenure Issues Paper of the Residential Tenancies Act Review

December 2015

Prepared by
Tenants Union of Victoria
About Us

The Tenants Union of Victoria (TUV) was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 16,000 private and public renters in Victoria each year. Our purpose is to improve the status, rights and conditions of all tenants in Victoria.

The TUV’s activities can be divided into three broad categories:

1. **Advice & Advocacy**

   The aim of the general Advice Service is to provide accessible and effective assistance to residential tenants across Victoria, with a particular focus on metropolitan Melbourne. Advice is provided by telephone and a drop-in service. During 2014/15, the TUV handled more than 19,200 enquiries. TUV provided advocacy on behalf of tenants in almost 880 matters, represented tenants in over 225 hearings at VCAT or other Courts, attended 350 outreach visits to 250 rooming house, caravan parks and services.

2. **Community Education**

   The TUV produces a wide range of publications and resources for tenants, rooming house and caravan park residents, as well as tenancy workers.

3. **Social Change**

   The TUV undertakes a broad range of social change activities to represent the interests of tenants and to highlight the impact of living in the rental sector. This work includes research, policy formulation, lobbying and media liaison.
Contents

1. Summary of Recommendations ......................................................... 1
2. Introduction ....................................................................................... 4
   A short clarification about leases ......................................................... 6
3. Lease terms ....................................................................................... 7
4. Tenancy Terminations ....................................................................... 10
   4.1 Evicting for no reason .................................................................... 12
   4.2 Notices to vacate for no fault ......................................................... 14
   4.3 Fairer eviction process for tenants at fault ..................................... 17
   4.4 Increased safeguards to prevent unnecessary evictions ................. 19
   4.5 Service of Notices ......................................................................... 20
5. Rent Increases .................................................................................. 22
   5.1 Rent increases and security of tenure ............................................. 22
6. Repairs, Maintenance & Modifications ............................................. 24
   6.1 Repairs and security of tenure ....................................................... 24
   6.2 Modifications and security of tenure ............................................. 25
7. Privacy ............................................................................................... 26
   7.1 General privacy ............................................................................... 26
   7.2 Notice of entry ................................................................................. 26
   7.3 Open house inspections ............................................................... 27
   7.4 Photographing tenants’ possessions ............................................. 28
8. Family Violence .................................................................................. 29
9. Compliance & Enforcement ............................................................. 31
   9.1 Compliance and security of tenure ............................................... 31
   9.2 Enforcement and security of tenure .............................................. 32
10. Access Issues .................................................................................... 33
   10.1 Tenancy databases ....................................................................... 33
   10.2 Pets ............................................................................................... 33
   10.3 Discrimination ............................................................................... 33
11. Alternative forms of tenure .............................................................. 35
    11.1 Social Housing ............................................................................. 35
    11.1.1 Access to social housing .......................................................... 35
    11.1.2 Policy transparency ................................................................. 36
    11.1.3 Repairs ..................................................................................... 36
    11.1.4 Rental rebate scheme ............................................................... 37
    11.2 Rooming Houses ........................................................................ 38
    11.2.1 Rooming houses and security of tenure .................................. 38
    11.2.2 Rooming house agreements .................................................. 38
    11.2.3 Resident’s rights and duties ...................................................... 40
    11.2.4 Operator conduct .................................................................... 40
1. Summary of Recommendations

Terminations
R1. Abolish no reason and end of fixed term notices to vacate.
R2. Amend notice to vacate for sale of property.
R3. Increase evidence required when issuing notices to vacate for a specified reason.
R4. Restrict notices from being served in retaliation.
R5. Prohibit re-letting after serving notices to vacate for all ‘change of use’ notices.
R6. VCAT should have discretion to determine whether a possession order be made given certain considerations.
R7. Repeal notices to vacate for successive breaches.
R8. Improve compliance orders by:
   8.1 Repealing S332(1)(b)(iii);
   8.2 Amending S332(1)(b)(i) to include the word ‘or’; and
   8.3 Limiting compliance orders to 6 months.
R9. Introduce a pre-eviction checklist and reasonableness test for all potential evictions.
R10. Require explicit informed consent to serve notices electronically.
   10.1 Notices to vacate must be exempt from electronic communication and must not be served electronically.
   10.2 A landlord must not serve a notice via email or other electronic means, unless the tenant has expressly consented to the service of those notices in writing.
   10.3 Consent must not be sought before or at the time of entering into a tenancy agreement.
   10.4 A tenant who has consented to receive a notice electronically may revoke their consent at any time, providing that it is not less than 3 clear business days prior to receiving a notice.

Rent increases
R11. Rent increases should be capped at CPI.
R12. The CAV Director’s rent report about whether a rent increase is excessive should be binding.
R13. Rent increases should not occur if there are outstanding repair orders or an outstanding CAV report for repairs.
R14. All factors under s 47(3) must be considered when determining whether a rent increase is excessive.
R15. Rent increases not permitted during a fixed term tenancy of 14 months or less.

Repairs, maintenance and modifications
R16. Urgent repairs should include air conditioners, significant mould, fault causing significant damage to tenants’ possessions, fault to existing phone and internet connection.
R17. A tenant should be entitled to rely on the report of the CAV Director for the completion of any repairs and to create an offence for a landlord not to comply with the report.
R18. A tenant should be able to pay rent into the rent special account at the time a CAV repairs report is issued.
R19. Minor, reasonable modifications should be allowed without the need to gain the landlord’s consent and need not be remedied at the end of a tenancy.

R20. A landlord cannot unreasonably withhold consent for disability modifications.

Privacy

R21. A tenant’s right to privacy should be strengthened under the RTA.

21.1 S67 (Quiet enjoyment) should be amended to provide that a tenant is entitled to privacy, peace and quiet and normal use of the rented premises.

21.2 Notice periods for entry should be extended.

21.3 S88 of the Act should be amended to require the landlord to provide the specific time and detailed reasons for the entry.

21.4 A landlord should compensate the tenant for any loss or damage including theft which occurs while the landlord is exercising a right of entry under the Act.

21.5 Open house inspections should be expressly prohibited without the written consent of the tenant.

21.6 A landlord must gain consent before taking photographs of a tenant’s possessions.

Family Violence

R22. A possession order must not be made under s243 (Damage) if a notice to vacate is given due to family violence.

R23. Adopt the recommendations made to the Family Violence Royal Commission.

Compliance and enforcement

R24. Penalties for offences under the residential tenancies and caravan parks parts of the Act should be at least doubled immediately and all penalties should be better aligned with penalties for comparative detriment in other consumer protection legislation over time.

R25. Empower VCAT to Award civil penalties for prescribed breaches of the Act.

Tenancy Database

R26. Allow for a mechanism for tenants to apply to be removed from a database on hardship grounds.

R27. CAV should have the power to audit residential tenancy database records every 12 months and fine the operators if they discover entries that should not be recorded.

R28. There should be one free method available for a tenant to obtain their record from a database operator.

Pets

R29. A tenant should be permitted to give notice of a pet.

Discrimination

R30. Landlords or agents must not refuse to rent, assign or sublet to individuals, or issue them with a notice to vacate on the basis of a protected attribute within the meaning of the Equal Opportunity Act 2010.

Social Housing

R31. The Victorian Government should establish a new Social Housing Supply program with funding of $200 million per year (indexed) over 20 years to enable growth of a minimum 800 homes annually.
R32. The Housing Act 1983 should state that any housing provider that relies on internal policies must make them publically available.
R33. State and federal governments need to increase funding for stock renewal and proper maintenance of aging stock.
R34. The rental rebate system should be reviewed.

Rooming Houses
R35. Repeal tenancy agreements and prohibit fixed-term agreements.
R36. Mandatory use of a prescribed standard rooming house agreement.
R37. Repeal the duty to pay rent.
R38. Repeal no reason, end of fixed term and successive breaches notices to vacate.
R39. Address compliance issues in the rooming house sector.

Caravan Parks
R40. Repeal the 60 day probationary period.
R41. Repeal s304 Notice to Vacate for Disruption.
R42. Clarify owners’ responsibility for site maintenance.
R43. Allow for reduction of fixed term due to hardship.
R44. Allow termination by consent.
R45. Allow for postponement of warrant of possession.

Residential Parks
R46. Mandatory disclosure required including the real costs of the dwelling not on the site.
R47. Mandatory fixed-term agreements of at least 5 years or more for all new site agreements.
R48. Use of prescribed agreements for all agreements.
R49. Clarify that the site owner is responsible for maintenance of the site including any structures that have become attached to the site.
R50. The Act should be amended to include urgent and non-urgent repair processes that mirror the provisions in the Act in relation to tenancies.
2. Introduction

The Tenants Union of Victoria welcomes the opportunity to contribute to the Security of Tenure Issues Paper as part of the Residential Tenancies Act Review.

Security of Tenure is the most fundamental issue for renting households as it influences all aspects of a tenancy.

Security of Tenure is about having choice, control and certainty over your housing circumstances. It is about the ability to create a home and a sense of belonging in the community. Tenure security is not only about the length of the lease, it is also about:

- having a rent that is affordable with predictable increases;
- having a properly maintained home with an accessible and simple process for accessing repairs;
- having privacy and quiet enjoyment of your home;
- having confidence that you will be able to stay in your home for as long as you want whilst maintaining your responsibilities as a tenant;
- having the ability to make your house a home; and
- in the first instance being able to access accommodation that is appropriate and affordable.

This submission draws upon the legal work undertaken by the TUV. A number of case studies have been used throughout. Names have been changed for confidentiality reasons. This has been indicated throughout with the use of an asterisk.

Why is security of tenure important for Victorian tenants?

The private rental sector plays a critical and increasingly important role in the Australian housing system. There has been sustained, long-term growth in the Australian private rental sector in recent decades.

Tenure security is important as longer-term stable residency enables people to construct a home, make connections to their community and facilitate social and economic participation. Tenure security is also important as it allows tenants to have control over their own destinies. With secure tenure a tenant is able to choose when they move house and why.

The Australian rental market is changing, the number of people renting is increasing and the number of people renting for the long term is also growing. There are proportionally more families and older people renting. With renting now a long term housing solution for many we need to ensure that households have adequate protection to create and maintain a home. This will be a particular issue with the aging population and the need for stable and appropriate housing for older residents who do not own their own home.
Security of tenure is particularly important to more vulnerable renters such as families with young children, the elderly, people with disabilities, Aboriginal and Torres Strait Islander people, and those with low incomes.

Security of tenure is important to vulnerable renters as it is incredibly difficult to find new homes that are appropriate and affordable due to a range of factors including discrimination and a lack of affordable housing options. A TUV Report¹ found that on the 23rd June 2015 there were virtually zero affordable and appropriate properties available for low income households in the private rental market.

Reasons why tenancies end

The average tenancy is relatively short and private tenants remain more mobile than households in other tenure forms such as home ownership. The average length of a tenancy in Victoria is 18 months. Whilst rates of movement within one year have declined, the overall mobility of tenant households is significantly greater than the same types of households in owner occupation.

According to TUV research² the top three reasons that tenants moved from their previous address were:

> Needed to move for work/education (20%)
> Landlord moved in/sold property (18%)
> Wanted a bigger/smaller dwelling (18%)

This is consistent with data from the Australian Bureau of Statistics³ that found a similar top three reasons that tenants move.

The number of applications for possession to VCAT remains relatively high at 18,459 applications made in 2014-15⁴.

A report from AHURI⁵ found that 32 per cent of renter households, who had moved home in the previous five years, characterised the move as forced or constrained, compared to 11.1 per cent of owners and public housing tenants.

Although not reflected in the above data, rent arrears notices are understood to be one of the most common notices to vacate received by tenants. This would be due to widespread affordability issues and the relatively low threshold of 14 days arrears of rent for service of a notice to vacate.

A short clarification about leases

Unfortunately the terminology employed when discussing the length and security of tenancies can be very confusing and different people, including tenants themselves, use the key words in different ways. In the interest of clarifying, we use the key words in the following way:

**Tenancy agreement** means an agreement whether or not in writing and whether express or implied under which a person lets premises as a residence. The crucial term being “lets”.

**Lease** (the noun of “lets”) means an agreement with a grant of exclusive possession to the tenant where the tenant is entitled to use the premises and to exclude all others including the landlord until the agreement is terminated.

Essentially **lease** is interchangeable with tenancy agreement in most instances and is contrasted to a “**licence**” to occupy premises which may be revoked by the landlord at will.

Fixed-term tenancy agreement means a tenancy agreement for a defined period of time.

Periodic tenancy agreement means a tenancy agreement for an indefinite “period” usually associated with the period of the rent payments.

Conjoined with the above terms, the words “written”, “express” and “implied” have their ordinary meaning.

Consistent with these key words the length of a tenancy agreement means the period of continuous occupation from the commencement of the agreement until the agreement is terminated (which may include both a fixed term and a periodic term).
3. Lease terms

Obstacles to longer term tenancies

The main obstacles to longer term tenancies are:
> The difficulty of securing a longer fixed-term tenancy agreement from estate agents and landlords
> The current exemption from the application of the Act to fixed-term tenancy agreements of more than 5 years
> The reluctance of tenants and landlords to enter into longer fixed-term tenancy agreements for different (and often competing) reasons
> The relative simplicity with which a tenant under a periodic tenancy agreement can be evicted for no fault including for no specified reason
> The limited amount of discretion to prevent evictions where the tenant is at fault but the fault could be rectified.

Overall the presumption underlying the Act is that the landlord should be granted possession (or the tenant evicted) in most instances where the landlord requests it. This basic presumption is inimical to longer term tenancies. Current practice in Victoria generally provides an initial offer of a 12 months fixed-term tenancy agreement which rolls over to a periodic lease after the 12 month period ends. TUV research\(^6\) found that 65% of tenants signed a 12 month fixed term contract when entering a new rental property.

Even though fixed-term tenancy agreements of up to five years are catered for under the Act, fixed-term agreements are rarely longer than 12 months suggesting that legislative change would not necessarily be effective in and of itself to change current practice. If longer term tenancies are a priority an effort would need to be made to influence a widespread cultural change.

Tenants and landlords alike are often hesitant to enter into fixed-term tenancy agreements. From the perspective of the tenant, one issue is being locked into a contract and liable for costs if their circumstances change and they need to move. A tenant may face a change in circumstances causing the need to move, this will generally result in being liable for high lease breaking fees.

Lease breaking (leaving before the end of a fixed term period) is already a major problem for tenants and was one of the top five enquiry topics received by the ‘Tenants Union in 2014-15’.\(^7\) Lease breaking costs can be a large financial burden to a tenant, who will often have to pay a re-letting fee (usually one or two weeks’ rent), advertising costs, and rent until new tenants move in or until the end of the fixed term. This can quickly add up to thousands of dollars.

Unknown rent increases are another factor that a tenant must consider in relation to longer fixed-term agreements. Currently landlords can increase rents every six months and it is very rare that a rent increase will be found to be excessive. Although the RTA outlines a number of considerations to determine whether a rent increase has been fair, generally only the rent comparable with similar properties in a similar location s47(3)(a) is considered, not taking into account important details such as the condition of the property and actual expenses incurred by the landlord.

Tenants are often hesitant to enter into fixed-term agreements at the beginning of the tenancy because they do not yet know what the conduct of the landlord and estate agent will be like. It is common for tenants to be treated unfairly, to have repair requests ignored and privacy breached such that tenant’s often do not want to be tied into a fixed term when they do not yet know if the tenancy will meet their needs.

In our research, many tenants preferred shorter fixed terms because they wanted flexibility in case they needed or wanted to move. Others expected a change in their circumstances. Others said they were only short term renters because they were either planning to buy a house or to move into social housing. Many were concerned about the exit costs if they broke the fixed term period. Others who wanted shorter fixed terms said this was because “they might not like the property or the area, or that the landlord may be unsatisfactory (particularly in regards to repairs).”

**Longer term tenancies and security of tenure**

The ability for long-term leases to improve security of tenure is a complex issue and one that needs to be properly thought through.

There are a number of questions that tenants would need to see addressed:

- Tenants are a diverse group with varying needs. How will tenants who need flexibility be catered for?
- If a tenant needed to move, how will a “lease break” be managed in terms of cost and compensation?
- How will the legislation be amended to increase compliance to give tenants assurance that their landlord will undertake repairs and respect their right to privacy?
- Will tenants have financial stability through rent regulation or some other measure?
- How will more vulnerable tenants such as the elderly, single parents and those on low incomes be protected against discrimination from landlords who may see these groups as an increased liability in a longer fixed-term agreement?
- Will longer fixed-term agreements be compulsory or if not how will they be incentivised in a way that is consistent, successful and fair?

In order for longer fixed-term agreements to be attractive and beneficial to tenants and landlords these issues need to be properly considered. There is a potential to do more harm than good to tenants’ security of tenure if all aspects are not properly thought through and addressed.

**Do tenants want longer fixed-term agreements anyway?**

Tenants are a diverse population with a wide divergence in needs, from the elderly and young families looking to put down roots and create a home, and younger tenants looking for flexibility.

---

This diversity has been demonstrated through TUV research\textsuperscript{9} which found the following preferences for length of lease:

\begin{itemize}
  \item 21\% 12 months fixed term
  \item 19\% 24 months fixed term
  \item 17\% 6 months fixed term
  \item 16\% no fixed terms
  \item 9\% Indefinite
  \item 8\% 3 year fixed term
  \item 7\% 5 year fixed term
  \item 1\% 10 year fixed term
\end{itemize}

An important distinction must be made between a long-term tenancy and a long fixed-term agreement as they would have very different outcomes for tenants and landlords. It is the fixed term element that causes complications through locking tenants in, although it is this “lock” that can also provide increased protection.

A move towards long-term tenancies without fixed terms could be a great opportunity for tenants and landlords alike. This would need to occur by strengthening tenants’ occupancy rights and compliance around the landlords’ duties. It would also involve a necessary cultural shift towards an emphasis on tenants’ right to a secure home.

An obvious barrier to longer fixed-term agreements is the current exclusion in the RTA for fixed-term tenancies of more than five years. There is no apparent reason why this exemption should remain, and thus the current exemption under section 6 of the RTA should be repealed.

\textsuperscript{9} Ibid
4. Tenancy Terminations

Given that longer fixed-term tenancy agreements, under the current arrangements, are not a universal solution, in this section we highlight ten recommendations that would improve tenants’ security of tenure by reducing unnecessary evictions in periodic agreements and strengthen regulations for serving illegal notices.

Our recommendations include:

- Abolish no reason and end of fixed term notices to vacate.
- Amend notice to vacate for sale of property.
- Increase evidence required when issuing notices to vacate.
- Restrict notices from being served in retaliation.
- Prohibit re-letting after serving notices to vacate for all ‘change of use’ notices.
- VCAT should have discretion to determine whether a possession order be made given certain considerations.
- Repeal notices to vacate for successive breaches.
- Improve compliance orders by:
  - Repealing S332(1)(b)(iii);
  - Amending S332(1)(b)(i) to include the word ‘or’; and
  - Limiting compliance orders to 6 months.
- Introduce a pre-eviction checklist and reasonableness test for all potential evictions.
- Consent must be gained to serve notices electronically.

Notices to Vacate can essentially be categorised in three ways:

- Notices to vacate that are served on the tenant for a breach of the Act or the tenancy agreement. The notice periods vary depending on the seriousness of the alleged breach with immediate notice for serious breaches and 14 days’ notice for less serious breaches.
- Notices to vacate that are served on the tenant for a reason specified in the Act. The notice period for these notices is generally 60 days with the notable exception of the mortgagee’s repossession notice that is 28 days.
- Notices to vacate for no specified reason. We include the Notices to vacate for the end of fixed-term agreement in this category as the presumption elsewhere in the Act is that the tenancy agreement would simply become periodic at the end of the fixed-term. These notice periods are generally 120 days or 60 days for a shorter fixed-term agreement.
Case Study

Sandra* received a Notice to Vacate under s258 (the landlord to occupy). Sandra believed it was retaliatory as she had had long-standing dispute with the landlord and estate agent about repairs and other issues including:

- An issue with her pet dog where Sandra claimed that the landlord gave her permission to have a dog;
- The landlord wanted to attend the property to undertake a repair. Sandra requested for this not to be undertaken on a weekend because her partner was a shift worker and needed to sleep;
- The landlord requested Sandra not to use the garden shed, and
- A water leak.

Sandra issued a breach of duty notice to the landlord and the landlord undertook most repairs and some maintenance.

It was after the repairs that Sandra received the notice to vacate.

In general terms to enhance security of tenure:

> Notices to vacate for the less serious breaches should be subject to reasonable opportunities for remedy of any alleged breach.

> Notices to vacate for a specified reason should have tighter conditions and better substantiation at the point of service of the notice and VCAT should be given much wider discretion to reject applications for possession.

> Notices to vacate for no reason should be repealed or the notice periods significantly extended to discourage their use.

Case Study

Sam* had been living in a property for 16 years. Reportedly during this time both Sam and the landlord never had any problems.

Sam had a routine inspection with a new Property Manager and received a letter requesting all newspaper and cardboard to be removed from the property. Sam removed most items however when the Property Manager reinspected the property there were still a few items remaining. Photographic evidence showed that the property looked reasonably clean and did not breach his s63 obligation to keep the property clean.

The Property Manager reportedly was angry with Sam for not adequately cleaning the property. Sam enquired what needed to be done but the Property Manager left the inspection without answering.

Sam received a No Reason notice to vacate under s263 (no specified reason).

Terminations are not only about security of tenure

A fear of eviction is one of the major impediments to tenants asserting their rights under the RTA. Tenants are reluctant to ask for repairs, or make complaints about breaches to privacy because they don’t want to risk being perceived as a nuisance in case they are given a notice to vacate.
The range of reasons and the periods of notice are short by comparison to many other countries, particularly many European countries.

Legislation and current cultural norms both lean heavily in favour of the landlords’ ability to regain control of their investment rather than the rights of a tenant to have a secure home. This is evident through the plethora of notices available to evict a tenant for no fault of their own, for no specified reason, and for end of fixed-term tenancy.

**Case Study**

Sasha* was on a periodic lease. In October he was contacted by the Estate Agent who informed him that he must either renew a fixed-term tenancy agreement or would be given a notice to vacate.

Sasha wanted to stay on the periodic lease and so was issued a no reason notice to vacate.

### 4.1 Evicting for no reason

**R1. Abolish no reason and end of fixed term notices to vacate.**

Under the RTA a landlord can evict a tenant for no reason under s263 (Notice to vacate for no specified reason) and s261 (End of fixed-term tenancy). A caravan park resident can be evicted for no reason under s314 (Notice for no specified reason).

The ability for a landlord to evict their tenant for no reason is a great inhibitor to security of tenure. The threat of being evicted for no wrong-doing hangs over the head of the tenant and inhibits them from exercising their rights under the Act. The Act provides 20 alternative notices to vacate for landlords who wish to gain possession of their property. This covers an extensive list of reasons, however unfortunately landlords are using the no reason notices to sidestep the safeguards that the specified reasons provide.

The misuse of no reason notices has been demonstrated through the current consultation process undertaken for the review of the RTA. The following comments were made on the Consumer Affairs Victoria Facebook page by landlords in response to the question of why landlords use no reason notices.

> “1. Premises were always very dirty and tenants were arrogant.

> 2. Tenants constantly complaining about very little or irrelevant things, like something eating their garden plant”

> “annoying tenants who constantly complain”

> “Damaging homes, keeping it in a discussting [sic] mess, winging [sic]”

Despite the fact that there are provisions in the RTA to deal with tenants who are not adequately completing their duties, landlords have stated that they use no reason notices to side-step this legislated process. It is also disturbing to note that ‘complaining’ was often raised as a reason to serve a notice.

---

Case Study

Amber* is a single mother who had lived in a property for three years. Amber had been experiencing some financial difficulty. Due to this she has struggled to cover the rent. She has been managing this by paying more than the rent each week to catch up and never falls in more than 12 days arrears.

Amber fell sick last year which put her behind in the rent, but she maintained contact with the estate agent during her illness and made arrangements to pay the rent which she adhered to.

Amber received a no reason notice to vacate. She was shocked to receive this as there had been no indication that it was coming. She asked her estate agent for a reason but was refused.

Amber had a daughter who was to be in year 12 the following year and moving would have a big impact because of this. She had built a life in the street she lived in, had friends who are her neighbours, and helped her elderly neighbours. Amber felt that her and her daughter’s lives were adversely affected by her eviction.

No reason notices in community housing

The ability of social housing landlords to use the no reason notices is particularly problematic due to the lack of alternative options for affordable and appropriate housing available to social housing tenants. A social housing tenant who is evicted is at severe risk of extended homelessness.

In social housing no reason notices are used to evict “problem” tenants. This is a serious issue as community housing residents often have complex needs including mental health issues, and evicting a person into homelessness will do nothing other than to shift the “problem” elsewhere.

Case Study

Sonya* and Albert* were on a six month fixed term lease.

The house was in disrepair and so Sonya and Albert obtained a CAV report for repairs. Sonya and Albert obtained a VCAT order that the repairs be completed.

The Landlord completed the repairs ordered, and then issued a no reason Notice to Vacate. Sonya and Albert applied to VCAT to challenge the notice for being given in retaliation.

A couple of days after being served the application, the Estate Agent wrote to Sonya and Albert withdrawing the notice, but giving notice of a rent increase, and stating that the landlord will not renew the lease.

Other jurisdictions do not allow tenants to be evicted without reason. Many internationally and in Australia itself, for example in Tasmania landlords are not permitted to evict tenants without reason.

It is clear that no reason notices to vacate are being abused by some landlords. No reason and end of fixed term notices hold no place in the RTA for either social or private landlords.
4.2 Notices to vacate for no fault

R2. Amend notice to vacate for sale of property.

Section 259 (Premises to be sold) enables a landlord to give 60 days’ notice to vacate if the landlord intends to sell the rental property or offer it for sale immediately after the termination date; or if the rental property has been sold, within 14 days of the contract of sale being entered into; or, if a conditional contract of sale has been entered into, within 14 days of the conditions being satisfied.

Current practice in many instances is to serve a notice prior to sale to enable the property to be sold with vacant possession. It is common for the property to be sold to another investor who will simply re-let the property after purchase. In these instances the tenants will have been uprooted unnecessarily. Similarly, at times a property will not be successfully sold and will be returned to the rental market to be re-let. Again in these cases the tenant’s eviction would be needless.

To avoid unnecessary evictions section 259 should be amended such that the notice can only be served if the premises has been sold and if the premises is to be occupied by the new owner as their principal place of residence and if contract of sale has a condition that the landlord must provide vacant possession. Subsequently, if the new owner wishes to live in the property they are also able to issue a notice to vacate under s258 (Premises to be occupied by landlord or landlord’s family).

R3. Increase evidence required when issuing a notice to vacate for a specified reason.

The current practice in Australia is highly favourable towards a landlord’s ability to access their investment with as few barriers as possible, even though to the tenant the property is their home.

In other jurisdictions the priority is given to the tenant’s need for security and a home.

For example in France and Germany if a landlord wants to evict a tenant so that their family member can move in they must provide proof of why their need is greater than the tenant’s need.

In Australia minimal evidence is required when issuing a notice to vacate. This means that there is very limited transparency between the tenant and the landlord and it is very difficult for the tenant to determine whether the notice being served is valid.

We know that landlords can serve notices to vacate under false pretences with high numbers of tenants contacting us each year with stories of notices not served in good faith.

It is recommended that evidence must be provided when issuing a notice to vacate. This will provide two purposes:

> It will allow a tenant/VCAT to assess the validity of the notice
> It will encourage a cultural shift away from swift and thoughtless evictions, as landlords would be required to spend more time preparing notices.
We recommend the following amendments:

> **S255 Repairs:** Landlord must detail the nature, extent and estimated time period required for the repairs. The landlord must attach any permits and tradespersons quote for the planned works.

> **S256 Demolition:** Landlord must include permits required for demolition.

> **S257 Premises used for business:** Landlord must specify the nature of the business and provide any documentation.

> **S258 Premises to be occupied by landlord or landlords’ family:** Landlord must specify the name of the person to move in and their relationship to the landlord. A statutory declaration from the landlord or relative must be provided.

> **S260 Public purpose:** Landlord must specify and attach evidence of the public purpose that the property is required for, the basis for the public statutory authority to use the property for that purpose, and the time that the works will be commenced.

> **S268 Notice by mortgagee:** The Act should be amended to require the tenant to be given 60 days’ notice to vacate to standardise this with the other notice periods.

Section 259 (sale) has not been included in this recommendation as we have previously stated that it should be amended.

**R4. Restrict notices from being served in retaliation.**

It is currently very difficult for tenants to prove if a notice has been given in retaliation and this is an area in which stronger protections are needed. Additional safeguards would ensure that VCAT decisions about this issue adequately reflect the experience of many tenants who receive notices in response to exercising their rights.

**Case Study**

Chris* had lived for 6 years in a property.

Chris had a routine inspection, where some issues were identified such as some stickers on a wall and mess due to his young children, although no breach of duty notice was issued.

Chris received a second routine inspection notice during the 6 month period. Chris called the estate agent to raise this issue, and the estate agent said they would reschedule. However on the proposed inspection date the estate agent attended the property to undertake the inspection. Chris requested the estate agent leave and warned that if he did not leave he would call the police.

Chris contacted consumer affairs to complain about the estate agent. Consumer affairs contacted the estate agent and allegedly informed them that they were not allowed to inspect for the given reason.

The estate agent issued Chris with a no reason notice to vacate. An application to VCAT to set aside the notice to vacate as being retaliatory was dismissed.

Chris firmly beleived that notice was retaliatory and was issued as a result of his complaint about the property manager wrongfully accessing the property.
Currently only a no reason or end of fixed-term lease can be challenged for retaliation when in reality tenants often raise concerns that other notices have been served to them because they have exercised their rights under the Act.

4a. Section 266(2) of the Act should be amended to state:
A notice under Section 257 (premises used for business), 258 (premises to be occupied by landlord or family), 261 (end of fixed term), or 263 (no reason) is of no effect if it was given in response to the exercise, or proposed exercise by the tenant of a right under this Act. This should be an offence provision.

It is recognised that section 255 (repairs) and section 256 (demolition) should be excluded from this recommendation because of their direct link between a tenant excising their right (seeking repairs) and the potential need to gain possession of the property in order to comply with the request.

Section 259 (sale) has not been included in this recommendation as we have previously stated that it should be repealed.

4b. The Act should also be amended to provide that if a notice to vacate is declared to have been given in retaliation then no further notices to vacate may be served by the landlord under sections 257 (premises used for business), 258 (premises to be occupied by landlord or family), 261 (end of fixed term) or 263 (no reason) within 6 months of the VCAT order. If a notice to vacate is given within this period the Act should state that the notice is invalid. This should be an offence provision.

R5. Prohibit re-letting after serving notices to vacate for all ‘change of use’ notices.

Section 264 (Prohibition on letting premises after notice) should be amended to include s255 (repairs) so that it is an offence to re-let a rental property within 4 months of giving a notice to vacate under s255 (repairs).

Section 264(2)(b) allows the Tribunal to determine that a premises may be re-let before the prohibition period has finished. This section of the Act should be repealed.

R6. VCAT should have discretion to determine whether a possession order be made given certain considerations.

Eviction should be a last resort. Tenants should not be evicted unless there is no other practical course of action available.

Currently under section 330 (Order of Tribunal) of the Act, the Tribunal must order possession if a notice has been given for a reason permitted under the Act and if the correct amount of notice has been provided.

Where a tenant is not at fault, we are proposing that in addition to the ‘reasonableness test’ discussed below, VCAT should have the ability to either grant or not grant a possession order after considering certain factors.

VCAT should operate with the express aim to reduce unnecessary evictions by considering the following:
> Whether the notice was served in good faith.
> Whether the evidence provided by the landlord is correct and sufficient.
> Whether or not it would be possible for the tenant to remain in the property (for example in the case of a notice to vacate for repairs).
VCAT should be able to make broad ancillary orders to enable issues to be rectified by means other than eviction.

For example a landlord may wish to undertake repairs to their property and so issue their tenant a notice to vacate for repairs (s255). The landlord may be repairing certain sections of the house or be undertaking works that will only take a short time period. In these cases the tenant may wish to stay but ordinarily would not have this option. Using our recommendation VCAT may determine that the tenant may temporarily relocate during the repairs process and move back in once the works have been completed. VCAT could also make orders about what, if any, rent was payable during this period.

4.3 Fairer eviction process for tenants at fault

R7. Repeal s249 Successive breaches by tenant and s240 Successive breaches by the landlord.

The successive breaches pathway to eviction is inherently flawed as there is no pathway for a tenant to challenge a breach of duty notice. The perceived breach of duty can often be subjective and can be a matter of dispute between the parties. For example a breach of duty may be given due to the property being perceived as not reasonably clean, however if the tenant believes that the property is in fact clean they have no way of disputing the notice. If the matter progresses to a notice to vacate for successive breaches under s249 the tenant is still unable to dispute the breach and VCAT does not have discretion to determine whether the breaches were valid and must award the possession order.

This process puts the tenants at great risk of eviction and allows estate agents and landlords to serve unreasonable notices with no mechanism for oversight or repercussion.

S249 notice to vacate for successive breaches is unnecessary as s248 notice to vacate due to failure to comply with a Tribunal order serves essentially the same purpose but provides a far more rigorous process.

The current processes under which a tenant would receive a notice to vacate for successive breaches or failure to comply with a Tribunal order are detailed in the table below.
<table>
<thead>
<tr>
<th>Successive breaches</th>
<th>Failure to comply with Tribunal order</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Landlord issues first breach of duty notice (s208) – tenant has 14 days to comply</td>
<td>Landlord issues breach of duty notice (s208) – tenant has 14 days to comply</td>
</tr>
<tr>
<td>2 Landlord issues second breach of duty notice (s208) – tenant has 14 days to comply</td>
<td>Landlord applies to VCAT for a compliance order (s209)</td>
</tr>
<tr>
<td>3 Landlord serves Notice to vacate for successive breaches (s249)</td>
<td>VCAT issues compliance order detailing how tenant must remedy the breach</td>
</tr>
<tr>
<td>4 Landlord seeks possession order through VCAT</td>
<td>Landlord issues notice to vacate due to failure to comply with a Tribunal order (s248)</td>
</tr>
<tr>
<td>5 VCAT awards a possession order if:</td>
<td>Landlord seeks possession order through VCAT</td>
</tr>
<tr>
<td>- on two previous occasions the tenant has been in breach of the same provision and</td>
<td></td>
</tr>
<tr>
<td>- tenant has received 2 breach of duty notices</td>
<td></td>
</tr>
<tr>
<td>6 Tenant has 14 days to vacate premises</td>
<td>VCAT awards a possession order if it is satisfied that:</td>
</tr>
<tr>
<td></td>
<td>- the failure to comply with the order was trivial or remedied as far as possible;</td>
</tr>
<tr>
<td></td>
<td>- there will not be any further breach of the duty; and</td>
</tr>
<tr>
<td></td>
<td>- the breach is not a recurrence</td>
</tr>
<tr>
<td>7</td>
<td>Tenant has 14 days to vacate premises</td>
</tr>
</tbody>
</table>

R8. Improve compliance orders.

Under s332 (Order not to be made in certain circumstances) of the RTA the Tribunal must consider:

> S332(1)(b)(i) whether the order was trivial or has been remedied as far as possible,
> S332(1)(b)(ii) whether there will be any further breach of the duty, and
> S332(1)(b)(iii) whether the breach of duty is not a recurrence of a previous breach of duty.

This section has the potential to provide safeguards to tenants from unnecessary eviction however because of the inclusion of S332(1)(b)(iii) it is virtually meaningless. If the breach of duty is not a recurrence of a previous breach there would not be grounds to make a possession order. This is because to obtain a compliance order under section 212 the landlord must establish that there has been a breach of a duty provision.
This section should be amended to enable it to achieve its purpose, which is to enable a tenant to retain their tenancy if the breach of the order is trivial and the issue is not likely to reoccur in future.

This would bring the legislation in line with Australian Capital Territory legislation where:

“The ACAT may, if satisfied that it is appropriate and just to do so in relation to an application mentioned in subsection (1)(a) refuse to make a termination and possession order if—
(i) the tenant has remedied the relevant breach; or
(ii) the tenant undertakes to remedy the breach within a reasonable specified period and is reasonably likely to do so”

Recommendations:
8.1 Repeal S332(1)(b)(iii) the breach of duty is not a recurrence of a previous breach of duty.

8.2 Amend S332(1)(b)(i) to include the word ‘or’, as shown below:
S332(1)(b)(i) whether the order was trivial or has been remedied as far as possible; and/or S332(1)(b)(ii) there will not be any further breach of the duty.

8.3 Compliance orders should have a 6 month time limit.

4.4 Increased safeguards to prevent unnecessary evictions

R9. Introduce a pre-eviction checklist and reasonableness test for all potential evictions.

The relative ease with which tenants can be evicted into homelessness is a major issue of security of tenure and a social issue more broadly.

There are minimal legislated safeguards for tenants experiencing financial difficulties, with 14 days of arrears potentially triggering the eviction process. With ever increasing affordability issues in the private rental market more people are struggling to keep up with their rent payments.

There is an opportunity to greatly improve security of tenure by including additional safeguards into the eviction process.

Scotland provides inspiration with a distinct consideration of security of tenure. Under the Housing (Scotland) Act there are legislated ‘pre-action requirements’ that the landlord must undertake and substantiate before serving a notice to vacate. These are detailed below:

Pre-Action Requirements:\11:
1. The landlord has provided the tenant with clear information about the terms of tenancy agreement, the outstanding rent and any other outstanding financial obligation of the tenancy, including a description of any charges likely to be incurred if the money due is not paid.
2. The landlord has made reasonable efforts to provide the tenant with advice and assistance on whether the tenant may be able to get housing benefit or other financial help (such as benefits or grants).
3. The landlord has provided the tenant with information on where to go for debt advice and assistance.

\11 Schedule 2 of the Scottish Secure Tenancies (Proceedings for possession) (form of notice) regulations 2012 http://www.gov.scot/Publications/2012/06/2337/8
4. The landlord has made reasonable efforts to agree with the tenant a reasonable plan for paying the money due and paying the rent in the future.

5. The landlord has asked the tenant if they have made an application for housing benefit and, if they have done, the landlord has considered the likely effect of that application on the money due.

6. The landlord has considered whether the tenant is taking any other steps to pay the money due.

7. The landlord has considered whether the tenant is keeping to an agreed plan for paying the money due and continuing to pay the rent.

8. To be completed where the landlord is a Registered Social Landlord: The landlord has advised the tenant to contact their local authority about their housing situation.

Scotland also legislates an additional protection whereby all potential evictions must be considered against a ‘reasonableness test’ by the Tribunal before a possession order can be made.

The tribunal must consider:
> The nature, frequency and duration of the tenant’s conduct leading to the notice to vacate;
> The proportion of which the tenant is personally responsible, or whether it was the consequence of acts or omissions of others;
> The effect of the tenant’s conduct on others; and
> Whether the landlord has considered other courses of action before beginning the eviction process.

These considerations are particularly relevant where there is an allegation of a breach of duty or of the tenancy agreement. It is recommended that similar measures are implemented in Victoria to ensure tenants are evicted only as a last resort. This is in addition to Recommendation 6 which grants VCAT discretion as to whether a possession order should be granted.

4.5 Service of Notices

R10. Require explicit informed consent to serve notices electronically.

10.1 Notices to vacate must be exempt from electronic communication and must not be served electronically.

10.2 A landlord must not serve a notice via email or other electronic means, unless the tenant has expressly consented to the service of those notices in writing.

10.3 Consent must not be sought before or at the time of entering into a tenancy agreement.

10.4 A tenant who has consented to receive a notice electronically may revoke their consent at any time, providing that it is not less than 3 clear business days prior to receiving a notice.

The electronic service of notices holds many significant problems, as email is not a reliable form of communication for formal correspondence. Emails can easily be sent to a spam folder, a tenant may have their internet disconnected or otherwise be unable to access their emails, a tenant may not regularly check

---

12 Housing (Scotland) Act 2001, s16(3)
emails, may live in a rural area with intermittent internet access, or simply may miss an email containing a notice.

There are a multitude of possibilities where a tenant may not receive a notice served electronically. This is particularly concerning for Notices to Vacate due to the serious consequence if it is not received. A person may lose their home simply because they did not check their emails. Additionally notices of entry, if not seen by a tenant, could result in distress and conflict between tenants and landlords or estate agents.

Under the Electronic Transactions (Victoria) Act 2000 consent does not need to be gained explicitly, it can be ‘reasonably inferred from the conduct of the person concerned’. This means that a tenant who has emailed their estate agent may be found to have ‘consented’ to receive notices by email and without realising it may receive a Notice to Vacate via email.

Landlord - tenant relationships are different to most other contractual relationships because tenants are an individual and are not operating a business. Tenants should not be obliged to have regular access to internet with a consistent email address, whereas a business would do so through the operation of their business.
5. Rent Increases

In this section we discuss five recommendations that would improve tenants’ security of tenure by providing a fairer and more predictable system for rent increases.

> Rent increases should be capped at CPI.
> The CAV Director’s rent report about whether a rent increase is excessive should be binding.
> Rent increases should not occur if there are outstanding repair orders or an outstanding CAV report for repairs.
> All factors under s 47(3) must be considered when determining whether a rent increase is excessive.
> Rent increases not permitted during a fixed term tenancy of 14 months or less.

5.1 Rent increases and security of tenure

R11. Rent increases should be capped at CPI.

Affordability is a major issue for renters in Victoria with rents increasing rapidly over the last few decades. The lack of affordable housing forces low income households to live in substandard conditions or struggle by paying more than they can afford in rent. Rapid and unpredictable rent increases is not only an issue for tenants looking for a property, but also for households in ongoing tenancies.

Rent is the most significant single financial outlay for a tenant household. Rent increases have the potential to create a financial ‘shock’ that makes the tenancy insecure or compromises the ability of the tenant to pay for other necessities. Rent increases have to be seen in the context of a high level of affordability problems in the rental sector. Rent increases are both cause and consequence of these affordability problems (or at least the underlying conditions creating affordability problems).

One of the larger inhibiting factors for tenants to seek resolution of their issues is the threat of having their rent increased in response. This is often a risk when asking for repairs to be done to the property. There are cases where landlords increase rent in retaliation to these types of requests and the current legislation does not prohibit this from occurring. Typically, the landlord sees this as simply recovering their cost whilst the tenant sees this as punitive.

Capping the amount rent is able to be increased during a tenancy agreement at a reasonable and steady amount, such as CPI, allows for the tenant to budget and plan for the future and to also have security knowing that the rent won’t be unexpectedly raised.

This would not affect the right of landlords to set rents between tenancy agreements.

R12. The CAV Director’s rent report about whether a rent increase is excessive should be binding.

Allowing the Consumer Affairs Victoria (CAV) report to deliver a binding result would greatly improve tenants’ access to justice as tenants would be more likely
to initiate the CAV process than take the matter further to VCAT. It is also a much simpler and less onerous process.

R13. Rent increases should not occur if there are outstanding repair orders or an outstanding CAV report for repairs.

A prohibition on rent increases in properties with outstanding repair orders would incentivise landlords to undertake repairs and improve the standard of properties more broadly.

R14. All factors under s47(3) must be considered when determining whether a rent increase is excessive.

Section 47 of the Act outlines a number of factors to be considered in assessing whether or not a rent increase is excessive. Our experience in the limited number of these applications considered by VCAT, is that VCAT overwhelmingly relies on the test in section 47(3)(a), which is effectively the rent payable for a similar property in a similar location, and subordinates any other factors to that basic test. With regards to Recommendation 12 we believe that the CAV report should be binding. We now include that CAV must consider all factors under s47(3).

R15. Rent increases not permitted during a fixed term tenancy of 14 months or less.

Up until about a decade ago, the long standing practice, reflected in the standard additional terms and conditions in many tenancy agreements, was that the rent could not be increased during the fixed term. This practice was in effect a better protection than the Act itself afforded. About a decade ago, the standard REIV lease in particular was changed to incorporate a term that the rent could be increased during the fixed-term. This change in practice immediately started to undermine what had been a significant additional benefit to fixed-term agreements. It is a cautionary tale about relying on existing practice when the actual legislated protections are insufficient.
6. Repairs, Maintenance & Modifications

6.1 Repairs and security of tenure

In this section we discuss three recommendations that would improve tenants’ security of tenure by ensuring repairs are completed within a reasonable timeframe.

- Urgent repairs should include air conditioners, significant mould, fault causing significant damage to tenants’ possessions, fault to existing phone and internet connection.
- A tenant should be entitled to rely on the report of the CAV Director for the completion of any repairs and to create an offence for a landlord not to comply with the report.
- A tenant should be able to pay rent into the rent special account at the time a CAV repairs report is issued.

The most common frustration and cause for complaint from tenants is the landlord’s failure to do repairs in a timely and proper manner. Or experience over a long period of time is that tenants will make many requests of the landlord or estate agent prior to seeking any further advice or taking any further action.

R16. Urgent repairs should include air conditioners, significant mould, fault causing significant damage to tenants’ possessions, fault to existing phone and internet connection.

In current residential tenancy legislation a failure of an air conditioner is not classified as an urgent repair. This is unlike a breakdown of heater, which is deemed to require immediate attention. This seems to be an oversight as extreme weather, either hot or cold, is a health risk particularly for young or elderly tenants.

Mould is a common and recurring problem faced by residential tenants. In many cases mould outbreaks are so severe that urgent repair is necessary to ensure the safety of the property is maintained. This is currently not addressed in the RTA under the definition of an urgent repair or elsewhere. Often when issues of mould are raised, the responsibility of the outbreak is put back on the tenant, who is also required to provide reports from mould specialists to prove whether the mould is hazardous. This can be a very expensive and lengthy process. During this time the tenant is exposed to the mould and their possessions may be damaged as a result and need to be thrown away.

There are times when a fault in the property is not classified as an urgent repair, but may be causing damage to the tenants’ possessions. An example of this is a minor roof leak in the rental property. A tenant may be unable to move certain items such as furniture and the fault may cause significant damage to the tenants’ possessions. As this would not be classed as an urgent repair it may not be rectified for six weeks or longer, in the meantime the tenants’ possessions may be significantly damaged or ruined.

Telecommunications are now an essential part of the home environment and are often needed for safety, health and everyday necessities. In some cases the landline phone may be the only phone available; in this instance it is a safety risk
to have no access to phone in the event of an emergency. This is particularly a concern for the elderly or those in rural locations. Despite this risk, a fault with the telephone line is not classed as an urgent repair.

R17. **A tenant should be entitled to rely on the report of the CAV Director for the completion of any repairs and to create an offence for a landlord not to comply with the report.**

The most common frustration and cause for complaint from tenants is the landlord’s failure to do repairs in a timely and proper manner. Our experience over a long period of time is that tenants will make many requests of the landlord or estate agent prior to seeking any further advice or taking any further action.

Tenants are often reluctant to serve a formal notice of repair on the landlord and are even more reluctant to apply to VCAT for a repair order. Tenants express frustration at the numerous steps in the repair process and the length of time it will take to resolve the problem usually after a considerable period that they have already spent trying to get the repairs done. As we have noted, many tenants would prefer to terminate the agreement (lease break or otherwise) than follow the further steps required.

R18. **A tenant should be able to pay rent into the rent special account at the time a CAV repairs report is issued.**

Compliance around repairs is a major issue affecting security of tenure in rental properties. There are many cases where a landlord simply will not comply with a CAV report or VCAT order and currently there is very little compelling them to do so.

The Rent Special Account in its current form has proven to be ineffective. VCAT rarely uses its discretion to have rent paid into the Rent Special Account and it would appear to be the rationale of VCAT that to require a landlord to undertake works at the same time as financially depriving them of rental income is unreasonable.

However, this approach has the practical effect of subverting the intention of the provision which is to provide an incentive to the landlord to comply by withdrawal of rent until compliance is affected. The landlord is not deprived of the income, the income is simply deferred.

It is recommended that a mechanism is put in place that would allow the tenant, upon receiving a CAV report, to pay their next rent payment into the rent special account. The money should not be released until the repairs have been completed and any compensation has been paid to the tenant.

### 6.2 Modifications and security of tenure

R19. **Minor, reasonable modifications should be allowed without the need to gain the landlord’s consent and need not be remedied at the end of a tenancy.**

R20. **A landlord cannot unreasonably withhold consent for disability modifications. The Act should make specific reference to section 53 of the Equal Opportunities Act 2010.**

Lack of ability to install fixtures and modifications means tenants aren’t able to make the house their home. This impacts on the satisfaction and length of time a tenant wishes to stay in a property, or in many instances the amount of time they can stay in a property.
7. Privacy

7.1 General privacy

R21. A tenant’s right to privacy should be strengthened under the RTA.

In its recent report the Victorian Law Reform Commission observed (inter alia) the following:

Victorian tenants do not currently enjoy an express right to privacy, although they have an obligation not to interfere with the reasonable peace, comfort and privacy of their neighbours. Rooming house residents, caravan park residents and site tenants have a right to privacy, peace and quiet ...

With the exception of Victoria, the residential tenancy legislation of every state and territory in Australia incorporates an express right to reasonable peace, comfort and privacy within the statutory right to quiet enjoyment...\(^\text{13}\)

The current quiet enjoyment protections for tenants are woefully inadequate and antiquated. As the VLRC observed a breach of quiet enjoyment would ordinarily be understood to require a substantial interference with the tenant’s right to possess the property or to enjoy it for all usual purposes.\(^\text{14}\) This narrow interpretation means that many unreasonable actions may still be allowed including breaches of privacy.

21.1 S67 (Quiet enjoyment) should be amended to provide that a tenant is entitled to privacy, peace and quiet and normal use of the rented premises. Similar amendments should be made across all tenure types covered in the RTA.

7.2 Notices of entry

21.2 Notice periods should be extended by amending S85(b) of the Act to require:

\[\begin{align*}
> & 7 \text{ days’ notice of entry for a routine inspection;} \\
> & 48 \text{ hours’ notice for all other entries except urgent repairs;} \\
> & 24 \text{ hours’ notice of entry for an urgent repair}
\end{align*}\]

21.3 S88 of the Act should be amended to require the landlord to provide the specific time and detailed reasons for the entry to ensure that the notice requirements are being properly complied with.

21.4 S90 of the Act should be amended to require the landlord to compensate the tenant for any loss or damage including theft which occurs while the landlord is exercising a right of entry under the Act.

\(^{13}\) Victorian Law Reform Commission (2015), Photographing and Filming Tenants’ Possessions for Advertising Purposes: Report

\(^{14}\) Ibid, p50
7.3 Open house inspections

Open house inspections should be expressly prohibited without the written consent of the tenant.

Open house inspections cause disruption and stress to tenants. Generally the landlord requires the property to be kept in immaculate condition, and they may conduct multiple open house inspections for months at a time.

**Case Study**

Simon* and his partner moved into a property on a 6 month fixed-term tenancy agreement. Soon after moving in they were told that the landlord would soon be selling the property. When the sales campaign began James and his partner had multiple private and open house inspections per week. Over the two month period they had a total of eight open house inspections, 20 private inspections, and one auction at the property.

James raised concerns at the level of disruption and requested compensation but was ignored by the estate agent who simply kept notifying him of new inspection dates.

The Act does not specifically prohibit open house inspections being conducted without consent, although tenants have successfully obtained restraining orders prohibiting open house inspections on the basis that this is not a ground for entry under the Act.

Auctions are also an unnecessary disturbance to the tenant, and there is no reason for them to take place on the premises.

It should be noted that this conduct can also occur during a fixed-term agreement creating significant disturbance for the tenant who cannot avoid it without the cost of terminating the fixed-term agreement.

By contrast, the Residential Tenancies Act in Queensland has strong protections against this conduct.

204 Lessor or lessor’s agent must not conduct open house or on-site auction without tenant’s consent

(1) The lessor or lessor’s agent for premises must not do either of the following without the tenant’s written consent—

(a) conduct an auction, or allow an auction to be conducted, on the premises;
(b) conduct an open house, or allow an open house to be conducted, on the premises.

Maximum penalty—20 penalty units.

(2) In this section—open house means an advertised period during which premises that are for sale or rent may be entered and inspected by prospective buyers or tenants generally.

**Case Study**

James* was in a fixed-term tenancy agreement although the landlord was planning on selling the property. James received notification that the landlord would be conducting an open house inspection the next day. James’ daughter was very unwell with vomiting and diarrhoea. James requested that the open house...
inspection not go ahead, but the landlord insisted that it would go ahead saying that they would not go into the daughter’s room. This was unsatisfactory as the daughter needed privacy and access to the bathroom.

7.4 Photographing tenants’ possessions

21.6 A landlord must gain consent before taking photographs of a tenant’s possessions.

Currently, tenants are frequently forced into having their possessions photographed and displayed on the internet and billboards if the property is being sold or re-let. This is an appalling breach of privacy and can be a risk to personal security and theft. The Act does not contain any specific provisions relating to photographing tenants’ possessions. Rather than see this situation as the problem, the VLRC outrageously concluded that whilst such conduct may be a breach of the tenant’s privacy, in Victoria this would not constitute a breach of the narrower duty to take reasonable steps to provide quiet enjoyment of the premises.

Case Study

Anna* moved into a new property after finalising a family violence intervention order against her former partner. Anna was pregnant and for safety reasons did not want her former partner to know her new address. The landlord was selling the property and the Estate Agent had entered the property to take photographs to advertise the property.

Anna was concerned that her partner would recognise her furniture as it had distinctive markings. She raised this concern with the Estate Agent who responded rudely and with little concern saying that the furniture was not distinctive and that he would go ahead and use the photographs.

By contrast, the Residential Tenancies Act in Queensland also has strong protections against this conduct.

203 Lessor or lessor’s agent must not use photo or image showing tenant’s possessions in advertisement

Unless the lessor or lessor’s agent has the tenant’s written consent, the lessor or agent must not use a photo or other image of the premises in an advertisement if the photo or image shows something belonging to the tenant.

Maximum penalty—20 penalty units.

Property sales have continued in Queensland unhampered by this provision.
8. Family Violence

R22. A possession order must not be made under s243 (Damage) if a notice to vacate is given due to family violence.

S332 (Order not to be made in certain circumstances) should be amended to include a notice that has been given to a tenant who has experienced family violence and the malicious damage referred to in the notice was caused by the perpetrator of the family violence.

R23. Adopt the recommendations made to the Family Violence Royal Commission.

Recommendations from the TUV submission to the Family Violence Royal Commission:

1. We recommend a new part of the RTA be introduced, to address termination of both fixed term and periodic tenancies where there is family violence. This part would incorporate the existing “creation of a tenancy agreement” provisions with some additional provisions to clarify the effect of a “reduction of a fixed term” and to enable the termination of either fixed term or periodic agreements where there is family violence.

2. We recommend that the provisions for a reduction of fixed term (section 234(2A)) be replaced with a section that provides for termination of a fixed term lease or periodic lease where a tenant has:
   - either an interim or final intervention order under the FVPA; or
   - has been affected by family violence.

3. We recommend that a definition of family violence be inserted in to the RTA which reflects the definition of family violence under the FVPA. This would enable a tenant who has been affected by family violence, but has not obtained an intervention order, to make this application.

4. We recommend that the RTA specifically state that the Tribunal is able to make an order under Section 234 (Reduction) even if the applicant has returned the keys to the rental property.

5. We recommend that the Tribunal have discretion to order compensation to be paid to the landlord for the early termination of the tenancy.

6. In addition to the above, we also recommend that a tenant who is an affected family member under a final family violence intervention order be able to give an immediate notice of intention to vacate the rental property. This should apply whether the lease is fixed term or periodic. The Notice to Landlord form could be modified to be used for this purpose. The notice should be served on the landlord and all other tenants, and have a certified copy of the intervention order attached. The legislation should state that the person who gives this notice is not liable for any compensation to the landlord for early termination of the lease.
7. We recommend that the amendment specifically states that the person who gives this notice ceases to be a tenant if they vacate in accordance with this notice.

8. We recommend that VCAT be required to list an application for termination of the lease within 2 business days. This will enable the matter to be resolved as soon as possible, and limit liability under the lease for the family violence victim.

9. We recommend that the Tribunal be given a specific power to apportion liability between tenants when:
   - a notice of intention to vacate has been given by a tenant with a final intervention order; or
   - the Tribunal has made an order to terminate the lease because the tenant has an intervention order under the FVPA or has been affected by family violence.

10. We recommend that the power to apportion liability be the same as that provided to the Tribunal by section 233C, in the case of a creation of tenancy. This would mean that the Tribunal could apportion any existing liabilities under the tenancy and the RTA, including the bond and outstanding utility bills. This would enable the Tribunal to apportion liability for damage to the rental property, rent and any compensation payable to the landlord for the lease ending early.

11. We also recommend that the Tribunal be given a general power to apportion liability between tenants when there has been family violence to deal with situations where family violence is a factor but the provisions of the Act do not specifically allow for that to be taken into account.

12. We recommend that the RTA be amended to enable a tenant to make an application to VCAT for an order that they be removed from the tenancy database because the incident that was listed occurred due to family violence.

13. We recommend that section 64 of the RTA be amended to state that the landlord must not unreasonably withhold consent to a request to modify the rental property, when modifications are requested to improve the security of the rental property, and the tenant is affected by family violence.

14. We recommend that DHS housing staff be provided with training on their policies regarding tenant damage and family violence.

15. We recommend that DHS do not issue any further compensation claims against tenants which are not reduced for depreciation or that claim for fair wear and tear.

16. We recommend that DHS policies be reviewed to ensure that outstanding charges do not prevent people affected by family violence from accessing public housing in the future.
9. Compliance & Enforcement

9.1 Compliance and security of tenure

A lack of compliance greatly impacts security of tenure because of the inherent power imbalance between tenants and landlords. Tenants need to rely on a robust legislation that protects their rights through strict compliance and enforcement measures. If this is not present then the stronger party is able to take advantage of the situation and not uphold their duties. This is the current situation in Victoria.

Whilst the primary means of ensuring compliance with the Act is through compliance action by the parties, offences are nevertheless important to provide an active disincentive for unlawful conduct.

In order for these offences to work effectively there must be:

> A penalty of significant quantum to act as genuine deterrent, and,
> A real prospect of being investigated and prosecuted for the offence.

Despite changes to the quantum of offences under the Act in 2008, the quantum of many penalties lags behind the level of penalties in other consumer protection legislation. This sends a strong message to the primary parties to residential tenancies agreements and to prosecutors and judges that the law itself does not take these breaches very seriously.

For example:

**MOTOR CAR TRADERS ACT 1986**

38. Odometer tampering

(a) tamper with any instrument or device in a motor car for the recording of distance travelled by a motor car; or
(b) install in substitution for an instrument or device in a motor car for recording the distance travelled by the motor car another instrument or device for recording the distance travelled by the motor car.

Penalty: In the case of a natural person—240 penalty units or imprisonment for 2 years or both.

In the case of a body corporate—1000 penalty units.

**RESIDENTIAL TENANCIES ACT 1997**

229. Offence to obtain possession etc. of premises

(1) A landlord or a person acting on behalf of a landlord must not, except in accordance with this Act, require or compel or attempt to compel the tenant under the tenancy agreement to vacate the rented premises.

Penalty: 60 penalty units in the case of a natural person

300 penalty units in the case of a body corporate.
(2) A landlord or a person acting on behalf of a landlord must not, except in accordance with this Act, obtain or attempt to obtain possession of the rented premises by entering them, whether the entry is peaceable or not, unless there are reasonable grounds to believe that the tenant has abandoned the premises.

Penalty: 60 penalty units in the case of a natural person
300 penalty units in the case of a body corporate.

On this assessment, odometer tampering is three or four times more significant than an illegal eviction from rented premises. This seems grossly out of step with ordinary community sentiment about the relative significance of these offences. This is not an argument to reduce the penalty for odometer tampering but to increase the penalties for residential tenancies offences in order to create a stronger incentive for compliance and to change behaviour.

R24. Penalties for offences under the residential tenancies and caravan parks parts of the Act should be at least doubled immediately and all penalties should be better aligned with penalties for comparative detriment in other consumer protection legislation over time.

This does not require that every offence must involve a prosecution and penalty. The CAV Director has wide powers to secure undertakings that may also be effective in restraining or preventing unlawful conduct. Unfortunately, the Director's manifold powers are used too infrequently in residential tenancies as other areas of consumer protection or compliance are given greater priority. We also strongly support the use of infringement notices for some offences under the Act and believe that their use should be extended and focussed on areas foundational to a tenancy and where there is unlikely to be a reasonable incentive for an individual to pursue the compliance process (if available).

9.2 Enforcement and security of tenure

The processes for offences should also be simplified with greater use of infringement notices for offences.

We also believe that the civil penalty power of VCAT under the Owners Corporation Act 2006 (OCA) should be extended to residential tenancies. The OCA provides:
166. Penalty for breach of rules
If VCAT determines that a person has failed to comply with a rule of the owners corporation that imposes an obligation that is binding on the person, VCAT may make an order imposing a civil penalty not exceeding $250.

This would enable, or in some instances, require, VCAT to award a civil penalty against a landlord where there is a finding of fact that an offence has been committed. For example, where a landlord has without reasonable excuse not either refunded the tenant’s bond or made a claim against the bond within 10 business days then VCAT could award a civil penalty payable by the landlord. We think this would be a much more efficient and effective means of encouraging and enforcing compliance with the requirements of the Act.

R25. Empower VCAT to Award civil penalties for prescribed breaches of the Act.

More serious breaches would still be prosecuted through the Magistrates Court and these would continue to be focussed on systemic problems with widespread reach or impact. It is right that serious offences should be subject to criminal test and sanction.
10. Access Issues

The ability of a person to access a property and the barriers that they face greatly impacts on their security of tenure.

10.1 Tenancy Databases

Tenants who find themselves on a tenancy database are essentially locked out of the private rental market until the time that they are removed from the list. Although the reasons a tenant can be put on a database are limited, they currently do not recognise the reasons why a tenant may find themselves on the list. This includes a sudden job loss or financial strain, family violence, episodic mental health issue.

R26. Allow for a mechanism for tenants to apply to be removed from a database on hardship grounds.

R27. CAV should have the power to audit residential tenancy database records every 12 months and fine the operators if they discover entries that should not be recorded.

R28. There should be one free method available for a tenant to obtain their file from a database operator.

10.2 Pets

Tenants with pets have considerable difficulty accessing rental properties due to the large number of landlords who do not permit pets in their properties. This issue also constrains tenants who are in existing properties from getting a pet even though they wish to.

Local laws regulate safety, registration and noise complaints, and nuisance and cleanliness provisions should already capture some of these concerns. Additionally the tenant’s bond is kept as a safeguard to cover any potential damage to the property; this should be more than sufficient protection for a pet.

R29. A tenant should be permitted to give notice of a pet.

In the absence of any order by the Tribunal preventing the tenant from keeping a pet (for reason of nuisance or damage) a tenant may retain a pet on the rented premises.

10.3 Discrimination

We continue to have fairly persistent reports of discrimination against tenants with protected attributes identified in the Equal Opportunity Act. These reports include problems with accessing rented housing, with responses from landlords and real estate agents during the tenancy and with termination of tenancy.

Currently a tenant is not able to effectively address discrimination by their landlord or agent. For example, if a tenant believes a notice to vacate has been issued due to discrimination, they are not able to take action to stop the eviction as the Equal Opportunity Act 2010 cannot be considered by the VCAT at
challenge or at possession order stage. The process under the Equal Opportunity Act 2010 will generally not run its course until after eviction has been effected.

R30. **Landlords or agents must not refuse to rent, assign or sublet to individuals, or issue them with a notice to vacate on the basis of a protected attribute within the meaning of the Equal Opportunity Act 2010.**

In the alternative, VCAT could be specifically empowered to consider the lawfulness of actions generally, including claims of discrimination, when hearing disputes under the Act.
11 Alternative forms of tenure

11.1 Social Housing

In this section we discuss four recommendations that would improve tenants’ security of tenure by improving the provision and management of social housing.

> The Victorian Government should establish a new Social Housing Supply program with funding of $200 million per year (indexed) over 20 years to enable growth of a minimum 800 homes annually.

> The Housing Act 1983 should state that any housing provider that relies on internal policies must have them publicly available.

> State and federal governments need to increase funding for stock renewal and proper maintenance of aging stock.

> The rental rebate system should be reviewed.

Social housing provides secure and affordable housing to 76,000 households in Victoria where tenant mobility is far lower than in the private rental market. Social housing is made up of public housing (65,000 households) managed by the state where rents are set at 25 per cent of income, and community housing (18,000 households) managed by non-government bodies with a variety of housing types, rent setting and management arrangements.

Social housing is essential as even with a number of legislative changes proposed in our submission, vulnerable households will still struggle to find and sustain decent affordable housing in the private rental market.

Whilst social housing provides great security to tenants through indefinite leases and affordable rents, there are still a number of issues that affect security of tenure for tenants living in both community and public housing. These are discussed below.

11.1.1 Access to social housing

R31. The Victorian Government should establish a new Social Housing Supply program with funding of $200 million per year (indexed) over 20 years to enable growth of a minimum 800 homes annually.

Victoria has the lowest proportion of social housing of all the states in Australia at 3.4 per cent of all housing stock. This is one of the lowest rates of social housing in the western world.

---

17 Burke, et al, 2013, Forecasting Social Housing Demand.
The waiting list for social housing in Victoria is over 59,000 households\textsuperscript{19}. Although research\textsuperscript{20} suggests that this number is an underestimate as many people who are eligible for social housing may not apply due to the long waiting times or the stigma associated with social housing.

The private rental market in Victoria provides little option for low income households and even many on higher incomes, with 38% of private renters in housing stress and 76% of low income private renters in housing stress. It is difficult to see how renters are able sustain secure housing when it is so difficult to find a home with affordable rent in a suitable location.

Affordability is a significant consideration when discussing security of tenure. There is a need for more affordable and social housing to help increase security of tenure for all renters in Victoria.

The 2014 Making Social Housing Work report\textsuperscript{21} has called for public housing in Victoria to reach a target of 5% of the State’s housing stock as proposed by the 2010 Victorian Parliamentary Family and Community Development Committee public housing inquiry.

\textbf{11.1.2 Policy transparency}

\textbf{R32.} The \textit{Housing Act 1983} should state that any housing provider that relies on internal policies must make them publically available.

The delivery and management of public housing is guided not only by the RTA and the \textit{Housing Act 1983}, but also by public housing policies and operational guidelines. These documents provide integral information to staff managing public housing tenancies and also to tenants and tenant advocates as they explain how properties are managed and tenant requirements.

Community housing providers also have policies guiding their operation which can vary greatly between providers.

Community housing providers are regulated through the Housing Registrar.

These documents are important public information. It is vital that they are accessible to the public to ensure transparency and accountability within the department.

\textbf{11.1.3 Repairs}

\textbf{R33.} State and federal governments need to increase funding for stock renewal and proper maintenance of aging stock.

The repairs process in public housing can often be very lengthy, and even if a repair order from VCAT is obtained it is often not adhered to.

There are chronic issues around maintenance and repairs in public housing. This is due to a lack of prioritisation, funding and long term planning.


In Victoria, forty-two percent of the public housing stock is more than 30 years old\(^{22}\). The 2012 Auditor-General’s report\(^{23}\) into public housing found that 14 per cent (10,000) of public housing properties would be in unliveable condition over the four years to 2016 if substantial maintenance was not undertaken. This report found that $600 million would be needed redress this issue over three years.

The extreme disrepair in many public housing properties impacts on tenants’ security of tenure as it affects the appropriateness of a home, often impacting on the health of the tenant.

A report from West Heidelberg Community Legal Service\(^{24}\) found that new public housing tenants often have little choice but to move into substandard properties in fear of being removed from the public housing waiting list if they refused an offer of a property by the Office of Housing.

**Case Study**

Freda* has been living in her property for 15 years. The property is in a state of extreme disrepair. VCAT have refused to make orders for repair work to be done, despite CAV reports recommending repair work.

Freda’s main concern is about utility bills in winter as there is no carpet or any other insulation in the property.

### 11.1.4 Rental rebate scheme

**R34. The rental rebate system should be reviewed.**

Rents in public housing are set under the rental rebate system. This is a highly complex system that calculates the market rent of a property, the assessable household income, and the rebate applicable at approximately 25 per cent of the income for a fixed rent period.

Complications arise when certain factors are taken into account such as visitors staying in the property for a prolonged period or Centrelink reporting issues. The rebate can be retrospectively reviewed, which can incur huge debts often of thousands of dollars in rent arrears for the tenant, who may have unawares been paying too little rent. This can greatly affect the financial situation for a tenant, putting them in an insecure position.

The complex nature of the system means that a tenant will often not understand how their rent has been calculated, reducing their ability to question whether it correct.

In community housing the rebate system is used inconsistently, and the system by which rent is set varies greatly across the sector and housing type. This creates problems again where tenants may not understand how their rents are calculated and may be overcharged. Community housing providers can be inconsistent in how they use rent assistance in the calculation of rents.

The rental rebate system needs to be reviewed to ensure the system is robust and transparent and to protect tenants from unfair debts and affordability issues.

---


\(^{23}\) Ibid p11

11.2 Rooming Houses

In this section we discuss five recommendations that would improve security of tenure in rooming houses by standardising and prescribing practices.

> Repeal tenancy agreements and prohibit fixed-term agreements.
> Mandatory use of a prescribed standard rooming house agreement.
> Repeal the duty to pay rent.
> Repeal no reason, end of fixed term and successive breaches notices to vacate.
> Address compliance issues through increased CAV enforcement.

11.2.1 Rooming houses and security of tenure

The rooming house sector has seen change over the past few decades from a predominance of large purpose built establishments to an increase in the conversion of smaller suburban dwellings. As a response to Melbourne’s tight rental market this smaller form of rooming house has grown to dominance. This has seen a change in operation practices and an increase in issues previously not seen.

The Rooming House Standards Taskforce in 2009 identified that the business model in these smaller rooming houses is of concern as it is built from an opportunistic targeting of vulnerable individuals with a deliberate strategy of increasing profits by operating on the fringe of legality.25

Despite an increase in regulation of the sector more recently rooming houses still do not meet community expectations, and there are a high number of vulnerable people who are living in substandard conditions.

Rooming house residents are a transient population at a high risk of homelessness and therefore tenure security issues are of acute concern.

It is recognised that the licensing scheme that is soon to be established in Victoria will eliminate some of the issues impacting on rooming house residents’ access to security of tenure.

11.2.2 Rooming house agreements

R35. Repeal tenancy agreements and prohibit fixed-term agreements.

As discussed in our initial submission there is considerable confusion around residential tenancy agreements in rooming houses. Although counterintuitive the presence of tenancy agreements does not improve security of tenure in rooming houses. This is largely because of the conduct of the rooming house operators.

Tenancy agreements, particularly with fixed terms, can also trap tenants in unfavourable living arrangements that the tenant has little control over. Unlike other forms of tenure a resident in a rooming house has less autonomy over their living space. Residents do not have control over how many other people they live with or who they are. Rooming house residents often have complex needs and, they may have conflict with other residents. If the resident is under a tenancy

---

agreement it can be more difficult to leave an undesirable situation because notice periods are longer and there may be lease-breaking costs.

In a rooming house a fixed-term tenancy agreement offers very limited security as rooming house occupants are generally at a high risk of falling into rent arrears. The very reason they are in a rooming house is that they are unable to access more suitable accommodation.

Rooming house operators often create agreements that take parts from a tenancy agreement and parts from residency agreements to create the best possible outcome for themselves whilst leaving the tenant with little protection.

**Case Study**

Ryan* rented a room in a registered rooming house. The agreement was called a ‘house rules and license agreement’ and referred to the residents variously as occupants, licensees and residents.

The agreement contained many clauses that were inconsistent with both the tenancy and rooming house residency provisions of the _Residential Tenancies Act 1997_ (RTA). For example, the agreement required the residents to give 14 days’ notice if they intended to vacate. A rooming house resident must give 2 days’ notice of their intention to vacate under the RTA. A tenant must give 28 days’ notice of their intention to vacate.

The agreement also provided that the resident could be required to vacate on 24 hours written notice for any breach of the agreement. The agreement was for a fixed term and contained an early termination clause that provided that the resident must pay 2 weeks rent (for advertising and re-letting fees) and 28 days rent if they moved out before the end of the lease. However, lease-breaking costs would only be payable if the agreement was a tenancy agreement instead of a rooming house residency agreement.

Uncertainty about whether an agreement is a tenancy agreement or a residency agreement means that the resident rights and obligations are unclear without a determination from VCAT as to what the agreement is.

The rooming house operator also required Ryan to enter an agreement with a company to provide furniture to the room. The furniture leasing agreement and the rooming house rental agreement required the resident to pay a ‘furniture deposit’ in addition to the bond that was not lodged with the Residential Tenancies Bond Authority. The terms of both agreements provide that the furniture deposit was to be used to secure breach of either the furniture leasing agreement or the rooming house rental agreement.

---

**R36. Mandatory use of a prescribed standard rooming house agreement.**

As mentioned above a large issue in rooming houses is the difficulty to regulate the management of rooming houses. Often operators design rooming house agreements that include additional bonds, and invalid terms and charges. One way in which this could be addressed is through prescribing a standard rooming house agreement. This would prevent residents unknowingly signing unlawful agreements.

---

*Case Study*
Sai* was newly arrived in Australia and entered into an agreement to lease a room with his partner for a fixed term. The property had 9 available rooms for rent. Our client was asked to pay a bond (which was lodged at the RTBA) as well as a separate furniture deposit. The agreement purported to be a license agreement, but also incorporated elements of the RTA. It also contained a variety of invalid and arbitrary charges which would be imposed on the resident. As well as a term that the rooming house operator could move the residents out of their room at any time if they needed use of the room for another reason.

The property was in a state of poor repair and Sai was met with hostility when he approached the rooming house operator about these issues. He was told to leave if he didn’t like it.

11.2.3 Resident’s rights and duties

R37.  Repeal the duty to pay rent (s112).

Unlike in the residential tenancies section of the RTA, rooming house residents have a duty to pay rent.

Rent payment should not be a duty as it exposes residents to an unnecessary risk to their tenure. If rent is not paid then a notice to vacate can be served through s246 Non-payment of rent. This duty creates a more onerous responsibility for residents who generally have less amenity and capability to manage regular rent payments.

R38.  Repeal no reason, end of fixed term and successive breaches notices to vacate.

Recommendations for notices to vacate under residential tenancies should also be incorporated in the rooming house provisions. These include:

> No reason notices to vacate should be repealed
> Notice to vacate for successive breaches should be repealed.

11.4.4 Operator conduct

R39.  Address compliance issues through increased CAV enforcement.

There are widespread problems with the conduct of operators around the management of rooming houses. Despite this operators are rarely prosecuted by CAV. Under s131A of the Act the Director may investigate a rooming house without an application by the resident. Despite this provision and the widespread practice of non-compliance CAV rarely will do so.

A 2013 Auditor-General’s report highlighted significant deficiencies in CAV’s compliance activities. It was found that of the 24 rooming house inspections audited not one compliance officer had gained entry to the property and seven were recorded as taking only one minute to complete.

This lack of enforcement is coupled with the issue that rooming houses are regulated across multiple jurisdictions. Rooming house registration and provisions under the Building Act 1993 and the Public Health and Wellbeing Act 2008 are enforceable by local councils. This creates multiple issues as the

---

councils themselves are inconsistent with how they regulate and monitor rooming houses.

Increased consistency and enforcement is needed across the board to ensure rooming houses are regulated in a holistic manner.

11.2.5 Affordability in rooming houses

Despite the needs of the rooming house population, private rooming houses are not affordable accommodation. The rent for a room in a rooming house currently sits at about $240 per week. This is 74 per cent of a single person on Newstart’s weekly income, putting them into severe rental stress. This is for a room with a group of strangers, in a house that often is poorly maintained and in disrepair.
11.3 Caravan Parks

In this section we discuss six recommendations that would improve security of tenure by providing greater rights to those living in caravan parks.

> Repeal the 60 day probationary period.
> Repeal s304 Notice to Vacate for Disruption.
> Clarify owners’ responsibility for site maintenance.
> Allow for reduction of fixed term due to hardship.
> Allow termination by consent.
> Allow for postponement of warrant of possession.

11.3.1 60 day period

R40. Repeal the 60 day probationary period.

We remain concerned about the current definition of resident in relation to caravan parks.

The definition of resident in relation to caravan parks states the following:

"Resident" means—

(b) in relation to a caravan park, a person (other than a site tenant) who occupies a site in the caravan park as his or her only or main residence and—

(i) who has obtained the prior written agreement of the caravan park owner to do so (whether that agreement was given in respect of that site or another site in the caravan park); or

(ii) who has so occupied any site in the caravan park for at least 60 consecutive days;

Given the requirement in the first part of this provision that a resident must be occupying the site as their only or main residence we believe that subsection (ii) is an unnecessary restriction on the protections that should be afforded to a resident from their first day of occupation.

11.3.2 Security of tenure and quiet enjoyment

R41. Repeal s304 Notice to Vacate for Disruption in caravan parks, rooming houses and residential parks.

S304 (Disruption) is an overly harsh provision, as it can essentially send someone into homelessness with no warning and no second chances. Whilst the quiet enjoyment of other residents is important, there are already other provisions that can be used to manage a situation, such as serving a breach of duty notice.

11.3.3 Maintenance in caravan parks

R42. Clarify owners’ responsibility for site maintenance.

It is currently unclear which party is responsible for the maintenance of a site in caravan parks. This can include external fixtures, infrastructure and drainage as well as any garden maintenance. This should be clarified to ensure that disputes are minimised.
11.3.4 Standardising the Act

R43. Allow for reduction of fixed term due to hardship.

R44. Allow termination by consent.

R45. Allow for postponement of warrant of possession.

There are a number of provisions under the RTA that are available to tenants that are not also available to caravan park residents. These include the ability to reduce a fixed-term agreement due to unforeseen hardship (s234), allowing the termination of an agreement by consent (s218), and allowing for the postponement of a warrant of possession due to hardship (s352). These provisions all provide safeguards to tenants and residents particularly in times of hardship and should be extended to caravan park residents.
11.4 Residential Parks

In this section we discuss five recommendations that would improve security of tenure in residential parks by increasing transparency and certainty for residents.

- Mandatory disclosure required including the real costs of the dwelling not on the site.
- Mandatory fixed-term agreements of at least 5 years or more for all new site agreements.
- Use of proscribed and regulated agreements for all agreements.
- Clarify that the site owner is responsible for maintenance of the site including any structures that have become attached to the site.
- Include urgent and non-urgent repair processes that mirror the provisions in the Act in relation to tenancies.

11.4.1 True valuation of a dwelling

R46. Mandatory disclosure required including the real costs of the dwelling not on the site.

The value of a Part 4A dwelling is inextricably linked to its site occupation including the terms and conditions of the site agreement. In law, the value of the dwelling is entirely separate and independent of the interest in the site. It is only upon severance of the dwelling from a site tenancy that the economic reality of the transaction becomes clear. For example, when a dwelling is purchased for $150,000 on site, it may be resold with a site tenancy agreement at $150,000 or more, the dwelling appears to maintain value. However, if for any reason, the dwelling must be removed from the site, and sold at auction as a chattel independent of the site, it will only sell for a fraction of its value on the site.

This is an issue of security of tenure due to the potential implications for the site tenants, many of whom have their financial security tied to their dwelling with plans to use funds from sale to enter into a retirement or nursing home. To ensure potential purchasers are able to make informed decisions, the resident should be provided a genuine and true valuation of the dwelling at the point of contracting and prior to entering into any agreement. As part of the contract disclosure, it should be required that the dwelling which is being purchased has an independent valuation certificate as if it were sold as a mere chattel (i.e. with no onsite value). This valuation should include comparison to how much such a structure would fetch at market if it were sold from a yard and an estimate of the cost of relocation and re-assembly if required.

Unless the law requires this valuation, the dwelling’s worth will continue to be deceptively inflated with the site and park in which it is located. If it is not then there is significant potential for economic harm to the individuals concerned.

11.4.2 Site agreements

R47. Mandatory fixed-term agreements of at least 5 years or more for all new site agreements.

Site-tenants are different to other tenants covered under the RTA for a number of reasons. Firstly they hold significant investment through the ownership of their dwelling, the purchase of which was based on the assumption of long term tenure. Site-tenants are a much more homogenous group, largely elderly, and largely seeking a long-term stable home. Mandatory longer fixed-term agreements are a suitable option that would provide the security for this
population of tenants. This differs to mainstream tenants who are far more divergent in their needs, many of whom value flexibility over security.

R48. Use of proscribed and regulated agreements for all agreements.

As with all sections of the RTA we believe that the use of a proscribed agreement would provide necessary protections to residents. The issue in residential parks is the risk of rent increases, and the inconsistent charging of fees.

11.4.3 Site Maintenance

R49. Clarify that the site owner is responsible for maintenance of the site including any structures that have become attached to the site.

The Act is unclear about the specific responsibility for site maintenance of the concrete slab (or other footings) and any other fixtures that are attached to the site. This can cause great conflict in cases where repair or maintenance is required. This needs to be clarified under the Act.

Case Study

Sally* had purchased the dwelling in 2011. The dwelling had been constructed and purchased on site on top of a concrete slab laid by a third party. Several years later, the slab had shown some minor cracking and there appeared to be movement in either the slab or the dwelling, causing cracks in walls to appear, doors to jar and the floors to become un-level. The site tenant believed that it was the movement in the ground beneath the slab. The site owner alleged that it was an issue with the Part 4A dwelling. It was unclear as to whether the cause was in relation to the dwelling, the concrete slab or the earth that made up the site.

Sally discovered there was no repair mechanisms or obligations specific to the site, save for the section 61 of the Australian Consumer Law, in relation to the site being fit for purpose. It was further unclear as to the nature and responsibility of the concrete slab. That is to say, was the concrete slab a fixture of the land, and whose responsibility it would be to repair the slab if there was a defect, or if the dwelling had to be relocated who would be responsible for laying a new slab or removing the old slab if a new dwelling was required to be placed onto the site. The dwelling also contained additional fixtures such as a veranda and carport.

R50. The Act should be amended to include urgent and non-urgent repair processes that mirror the provisions in the Act in relation to tenancies.

Currently under Part 4A of the Act here is no mechanism to request repairs. Whilst the resident owns the dwelling there are other structures such as the concrete slab and energy connections that may require repairs. There needs to be a pathway for residents to ensure repairs can be completed. This may include situations, like site subsidence, where an urgent repair is required to make the site occupancy safe.
References


Burke, et al, 2013, Forecasting Social Housing Demand.


Housing (Scotland) Act 2001, s16(3).


