Residential Tenancies Act Review: Consultation Paper

Submission from the Victorian Aboriginal Legal Service

August 2015

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Overview: moving towards sustainable, safe and secure housing for Koories

The Victorian Aboriginal Legal Service welcomes the opportunity to provide a submission to the 2015 Residential Tenancies Act Review. Housing and tenancy is an area of concern for the Victorian Aboriginal community. The 2014 Indigenous Legal Needs Project for Victoria[1] identified that tenancy dispute matters were the most prevalent areas of legal need, being material for over forty percent of the respondents to their survey.

Secure tenancy is often identified as an essential precursor in preventing the slide into crisis for community members. As a consequence, the VALS civil law practice prioritises tenancy matters as a key measure in reducing the factors that contribute to the overrepresentation of Aboriginal people in the criminal justice system. Accordingly, the VALS is well placed to identify the impact of the current legislative regime on the Victorian Aboriginal Community.

In this paper, we have outlined some of the special characteristics of the Victorian Aboriginal community. We have then answered the consultation questions issued by Consumer Affairs Victoria. Finally, we have provided some further observations and recommendations for CAV's consideration.

We have been reviewing our cases and have identified the following specific areas of concern about the Act as it is currently applied:

- There is little distinction between tenants in public, social and transitional housing and tenants in private rental.
- Public housing and social housing providers are not required to make or publish policies and procedures and VCAT is not empowered to consider the policy documents of public housing authorities.
- VCAT does not have an explicit requirement to consider rights protected by the *Victorian Charter of Human Rights and Responsibilities 2006* ("**the Charter**") when considering residential tenancies.
- 120 day notices:
    - The application of 120 day notices to public, social and transitional housing tenants creates special vulnerabilities for those clients that may not apply to those in private rental.
    - 120-day notices have very limited rights to appeal and can only be challenged if they are retaliatory in nature, which is very difficult to prove.
    - Hardship to the tenant is not a valid consideration in the decision to issue 120 day notices.
    - 120-day notices are cancerous on the whole system. They have a significant impact on tenants' willingness to assert their rights. The knowledge that they can be evicted for no reason means that tenants are very unlikely to engage in activities such as seeking repairs or protecting their privacy.

[1] M Schwartz, F Allison, C Cunneen, *The Civil and Family Law Needs of Indigenous People in Victoria: A Report of the Australian Indigenous Legal Needs Project*, Cairns Institute, James Cook University, Cairns. Downloaded from http://www.jcu.edu.au/ilnp/ on 9 August 2015.

- VCAT has very limited powers to respond to family violence, including the ability protect victims of family violence from debts and breaches caused by perpetrators.
- VCAT is a very limited and inadequate mechanism for settling disputes between landlords and tenants, and this is particularly so for Aboriginal clients who may experience fear and distrust of courts and court-like forums.
- There is no provision for settling tenant-tenant disputes.
- Provisions relating to sub-letting intended to reduce the risk of transient tenancies and "overcrowding" can be used to the detriment of Aboriginal clients.
- VCAT is not sufficiently empowered to beneficially review and alter tenancy agreements to reflect the best interests of the tenants balanced against the needs and circumstances of a landlord. This is particularly relevant for public and socially housed tenants where tenants are highly vulnerable and the landlord generally has the capacity to manage a flexible tenancy.
- Evictions should never be based on matters that are irrelevant to the tenancy. This means that transitional housing providers cannot evict people for failure to engage with programs or for personality conflicts with social workers.

1 Background to the Victorian Aboriginal Legal Service (VALS)

The Victorian Aboriginal Legal Service is an Aboriginal community controlled organisation. It was established in 1972 by committee, and incorporated in 1975. The VALS is committed to caring for the safety and psychological well-being of clients, their families and communities and to respecting the cultural diversity, values and beliefs of clients. The VALS vision is to ensure Aboriginal and Torres Strait Islander Victorians are treated with true justice before the law, our human rights are respected and we have the choice to live a life of the quality we wish.

We operate in a number of strategic forums which help inform and drive initiatives to support Aboriginal and Torres Strait Islander people in their engagement with the justice, and broader legal system, in Victoria. We have strong working relationships with the other five peak Aboriginal Community Controlled Organisations in Victoria and we regularly support our clients to engage in services delivered by our sister organisations. Our legal practice spans across Victoria and operates in the areas of criminal, civil and family law (including child protection and family violence).

Our 24 hour support service is backed up by the strong community based role our Client Service Officers play in being the first point of contact when an Aboriginal or Torres Strait Islander person is taken into custody, through to the finalisation of legal proceedings. Our community legal education program supports the building of knowledge and capacity within the community so our people can identify and seek help on personal issues before they become legal challenges.

We seek to represent women, men and children who come to us for assistance in their legal matters, and are only hindered in doing this where there is an ethical problem such as a legal conflict of interest or where we do not have the capacity to assist. If this is the case, we provide warm referrals to other suitable legal representatives, which include Victoria Legal Aid, the Aboriginal Family Violence Prevention Legal Service, community legal centres and private practitioners as appropriate.

2 Special characteristics of the Aboriginal community

2.1 Mistrust and avoidance

Aboriginal Victorians have a long history of adverse interventions, dispossession, abuse and maltreatment by government and non-Aboriginal institutions. This has resulted in deep levels of mistrust and fear of organisations such as housing providers, but also courts and other administrative arms of government. This intergenerational trauma cannot be ignored in setting a policy agenda to respond to the needs of the Aboriginal community.

As a result, Aboriginal clients are, often to their detriment, highly avoidant in their behaviour towards non-Aboriginal people and institutions. This needs to be addressed if clients are to enjoy safe and secure housing within the Victorian residential tenancies scheme.

In our experience the value of an Aboriginal legal service is that it bridges the gap between Aboriginal clients and non-Aboriginal systems and laws. We believe we have an important role to play in supporting Aboriginal clients through the residential tenancy system.

2.2 Cultural expectations

A further characteristic of the Aboriginal community is that there is a strong cultural expectation that members of the community will support each other. This means that for every Aboriginal person who is securely housed, several others who are not housed may be receiving support from that person. This means that the eviction of a member of the Aboriginal community can have far-reaching effects across families and communities, including vulnerable children. It also means that they are open to criticism of "overcrowding".

2.3 Transience

Finally, members of the Aboriginal community can be highly transient. This is for many reasons. Some are cultural. Connection to "country" of origin is extremely important in many cases. If there are difficulties in life some people will need to return to country. This can include events like deaths in the family or community of origin. It can also be in response to an existing crisis such as drug and alcohol dependency, homelessness or violence. Family violence in particular is a cause of transience in the community.

2.4 Family Violence

Family violence affects every community in Victoria, including the Aboriginal community. However it is more severe and widespread in Aboriginal communities. The 2008 NATSISS report identified that 25% of women in Aboriginal communities had experienced violence or threats of violence in the past 12 months, 60% of which were from a family member or current or previous intimate partner, and 85% of which were from someone known to them. This doesn't include boyfriends/girlfriends/dates/ex-boyfriends. Many receive physical harm and injuries.

Reporting rates to police are low, with only around 60% of victims reporting to police, particularly from young women (aged 15-24). Those who are unemployed, under financial stress, have a disability or are under a range of "life stressors" are also statistically more likely to experience violence.

Family violence therefore compounds pre-existing disadvantage.

Eviction and debt in circumstances of family violence is a clear risk factor for the ability of a person to recover from that violence and keep themselves and their children safe.[2]

2.5 Common characteristics of tenancy

Our clients are predominantly in public, social and transitional housing. It is well accepted that Aboriginal clients are more at risk of low education, unemployment, criminality and discrimination than the non-Aboriginal population. This leaves many of them unable to obtain private rental. Discrimination, in particular, is a significant problem. Many Aboriginal families with no other apparent difficulties report that if their name appears Aboriginal or if they meet landlords or agents face-to-face, there is suddenly an excuse for rejecting their rental application.

Many Aboriginal people are housed by Aboriginal housing agencies, many of which are run by Aboriginal co-operative organisations (such as Rumbalara) or through Aboriginal Housing Victoria.

3 Consultation questions

3.1 The changing housing context

1. Does the current Act enable and encourage a rental market that provides sustainable, secure and safe housing to Victorians? Why or why not?

The model of the tenancy market in the Act currently envisages a much more even power balance between tenants and landlords than our clients tend to experience. Our clients are often in housing provided by large housing providers such as government or large non-profit organisations, and they are usually highly vulnerable to financial insecurity and homelessness. The consequences of eviction for these vulnerable tenants is inadequately contemplated by the Act, which is based on the idea that tenants will have access to alternative housing in the event of eviction.

The current Act therefore has numerous flaws by attempting to be a "one-size-fits-all" approach to tenancy, when in reality the power imbalances between tenants and landlords can be more significant that the current Act allows for.

2. (a) What issues would you like examined in the Review of the current Act?

We would be encouraged by consideration of the following issues:

- Whether the Act appropriately regulates housing with respect to the most marginally housed, namely those who are in public, social and transitional housing (and are therefore suffering hardship)
- Whether the current system appropriately caters for the unique circumstances of the Aboriginal community, particularly around the problem of avoidance and disengagement with non-Aboriginal and adversarial systems and processes.
- How the use of the Act affects tenants experiencing family violence
- How the Act manages transient tenants.
- The silence of the Act on tenant-tenant disputes.

[2] Australian Bureau of Statistics, *4714.0 – National Aboriginal and Torres Strait Islander Social Survey 2008.* "Feature Article: Experiences of Physical Violence 2008".

- Whether the role of VCAT as the first point of dispute resolution in residential tenancies is appropriate.
- Whether VCAT is appropriately and rigourously applying the provisions of the Act.

(b) What are your preferred outcomes, and what evidence base is there to support them?

We would like to see a system where clients who are highly vulnerable, such as those who are young, on low incomes, or experiencing family violence, are treated in a way that supports them to rehabilitate their lives.

We would like to see a system which adequately identifies and supports Aboriginal clients through the dispute resolution system.

We would like to see a system that is capable of responding to the power imbalances between tenants and landlords, especially with respect to public housing.

We would like to see a system that is less adversarial at first instance.

3.2 Regulatory and policy framework

3. Are the principles and objectives underpinning the current Act relevant today? Why or why not?

The purposes outlined in the act can be summarised as giving clarity to landlords and tenants about rights and duties, providing for quick and inexpensive resolutions, providing for a centralised system of bonds and establishment of the RTBA, and to regulate for caravan parks and similar.

While the Act does achieve many of these objectives, the principles and objectives do not cover the fair resolution of disputes, the right to live in safe housing or the right to live in secure housing, or consistency with the Charter of Human Rights and Responsibilities. The Act as applied is providing for quick and inexpensive resolution in the interests of landlords without considering the power imbalances and the interests of vulnerable tenants.

The current environment of high rent and low public housing stock is creating an extremely vulnerable class of poor and "working poor" who live in very low security housing. The Act is silent on any sort of objectives around ensuring that tenants are sufficiently protected in this environment.

4. What is working well about the current Act and what needs to be improved?

The centralised bonds system seems to work very effectively.

However, the evictions system is broken. The rate of non-attendance at VCAT speaks volumes about the ineffectiveness of VCAT as an independent and impartial arbitrator of disputes. The current system does nothing to ensure that the rights of tenants are being protected and in no way supports tenants with low literacy education, with low engagement, experiencing violence or other stressors to be fairly heard.

The system also does not allow for the fact that tenants in public, social and transitional housing are far more at risk and marginal than those in private rental, who are not in the public/social/transitional system and therefore have something of a safety net.

5. What can Victoria learn from the approach to the regulation of residential tenancies in other Australian jurisdictions and internationally?

We have conducted limited research comparing Victoria to other jurisdictions. In particular, Europe offers successful models of security of tenure such as:

- In Germany, lifetime leases give security to those clients most at risk from homelessness. Our understanding is that, in Germany, if an unlimited lease is provided, notices to vacate cannot be given without "legitimate grounds".
- In France, public housing is understood to be for life unless the tenant breaches the terms of the lease or decides to leave. A landlord can terminate the lease for particular reasons, not unlike those listed in the RTA for notices to vacate based on prescribed reasons.[3]

We think that the European model is based on what is currently becoming the norm in Victoria, and particularly in Victorian cities, which is that property ownership is becoming more concentrated and renting is becoming the norm for the middle-class, who are competing with the disadvantaged and working poor for properties. In this environment, security of tenure for renters is extremely important.

6. What are the challenges and barriers to reform of the rental sector?

The major challenge to change is probably the interests of powerful attitudes and elements in Victoria, namely landholders. We have a very punitive attitude to disadvantage in Australia. Clients who are not "textbook" tenants are seen as being deserving of expulsion and social exclusion. This would be a significant barrier.

We also understand that a barrier to reform is the inadequacy of services to persons experiencing family violence, mental illness, alcohol and drug rehabilitation. All of these factors can aggravate the risk of tenants failing to meet their duties and obligations, and increases the perception that tenants deserve to be evicted.

7. What considerations need to be given to the regulation of rooming houses, caravan parks and residential parks?

We have to date had little to do with these kinds of housing.

3.3 Tenants

8. (a) What are the key issues for regulating the private rental sector that arise from the:

- **growing number of families and proportion of older tenants**
- **Tenants renting for longer periods, and**
- **decreasing proportion of tenants renting in multi-unit properties (flats, units or apartments), especially given the increasing proportion of households living in multi-unit properties more generally?**

[3] Wharton, N and Cradduck, L, "A comparison of security of tenure in Queensland and in Western Europe" (2011) *Monash University Law Review* 37(2)

We have not undertaken any research into these areas in preparing this submission. However, we do see the following issues for these tenants in our client population:

- houses of families in public and private rental are becoming increasingly crowded because of low public housing availability, increasing their risk of eviction and increasing the risk of family violence
- elderly tenants are experiencing difficulty obtaining necessary repairs to accommodate their disabilities as they age. Their vulnerability combined with the risk of being issued with a 120-day notice threat means they are particularly vulnerable to substandard housing.

(b) How should residential tenancies regulation take into account these trends in the private rental sector?

Residential tenancies regulation needs to recognise the special vulnerabilities of certain groups, including families – especially single families - and older people in the RTA regime. Both groups experience significant risk of discrimination and disadvantage in seeking alternative housing.

We would like to see VCAT mandated to beneficially re-make tenancies to suit the best interests of tenants and families balanced against powerful landlords such as NGOs and government.

Allowing VCAT to specifically engage with rights under the Charter of Human Rights and Responsibilities may allow some of these issues to be resolved in a manner that is beneficial to vulnerable tenants such as tenants with children.

9. How do changes in tenant mobility impact on the current balance of rights and responsibilities between landlords and tenants?

We're not sure what changes in tenant mobility you are referring to. However, it would be helpful if there were a clear mechanism which could allow tenancies to continue even though the tenants have changed. At present the law is very unclear in these situations.

10. What situations trigger issues of affordability in the rental housing sector, and how do these affect tenants and the choices they make?

Our clients, experience racial discrimination at virtually every level of their lives, and, even if not appearing conventionally Aboriginal, experience circumstances leading to significant disadvantage based on the intergenerational trauma and history of deprivation. Our clients also have disproportionately high incarceration rates, which significantly affects their ability to find work and housing.

As a result, housing affordability is a significant problem for the large majority of our clients. Many of them rely on public housing because there are simply no other options.

Even those clients in private rental experience significant amounts of pressure and discrimination. The difficulties that our clients experience are closely linked to affordability because they reduce the market power that they otherwise might have.

Case Study 1: Eddie and Pam

Pam is a single mother of two from an established and respected Gunditjmara family, living in Portland. Her son, Eddie, is 13 years old.

Eddie plays drums for his school and has received many awards for his drumming prowess. His family recently moved from the "tough side" of town to a "nice" township because Pam wanted her two children away from some bad influences. However, since moving to this new area, Pam and Eddie's real estate agent has received repeated anonymous threats from the neighbours. Much of it is centred around Eddie's drumming, which has been muted and Pam has installed soundproofing.

The Council has tested the noise levels and found them to be normal for suburbia. However, the neighbours have said things like "you are unwilling to kick them out because they're Aboriginal" and "we're afraid we'll have rocks thrown through our windows because we know what sort of family they are".

This has proven to be highly distressing to Eddie, who wants to give up his passion, drumming, and who is suffering poor mental health. The landlord is starting to suggest that the family move on. The family are afraid they will receive a 120-day notice and as an Aboriginal family, they are concerned that they will struggle to find other housing.

11. From a tenant's perspective, what role does residential tenancies regulation play in enabling access to rental housing?

We're unsure whether "access" means being able to enter into the rental market, or being able to hold onto your housing.

The ability to enter the market is significantly affected by multiple vulnerabilities experienced by our clients. Many are single parents, many have criminal histories, many are escaping family violence. They are supposed to be covered by the Equal Opportunity Act 2010 and other anti-discrimination legislation, but most of these issues aren't grounds that are covered by that legislation, and it can't be considered within the Residential Tenancies Act.

The ability to remain in the market is more closely affected by regulation. Clearly, 120-day notices do not facilitate security of rental housing. They also have the knock-on effect of preventing clients from asserting their rights. However, the broader inability of VCAT to consider extenuating circumstances such as family violence (with one narrow exception), significant financial hardship, family circumstances and cultural needs in coming up with a solution is a significant problem.

3.4 Landlords

12. How do investor trends affect the current and future management of tenancies and the availability of rental housing?

We have not considered the issue of investor trends.

13. From landlord's perspective, how does residential tenancies regulation influence the ongoing supply of rental housing?

We do not act for landlords and therefore feel unqualified to comment on this point.

14. How do estate agents influence the relationship between landlords and tenant, and what implications does the increasing use of agents as property managers have for residential tenancies regulation?

We should qualify our comments with the observation that most of our clients are in public or social housing.

Estate agents can be forces for good. In the above case study of Eddie and Pam, the estate agent has been very strong in supporting the landlord to defend Pam and Eddie's interests. They also often have a clearer understanding of their legal obligations than landlords. However, we have experienced landlords taking a very "black-and-white" approach to the needs of tenants, particularly with respect to repairs and bonds, and are quick to go to VCAT rather than engage in alternative dispute resolution. Estate agents are strong advocates of the needs of landlords.

3.5 Residential tenancies disputes

15. What more could be done, or what could be done differently, to enable landlords and tenants to effectively manage their tenancy relationship?

An early, compulsory, alternative dispute resolution service would be very helpful. In many of disputes matters could be easily resolved out of court with a bit of effort and goodwill.

In particular, a dispute resolution service that is "culturally safe" for Aboriginal tenants would be invaluable to prevent the avoidance behaviour that is so significantly to the detriment of our clients. This is particularly the case for public housing, and the Office of Housing should be doing a lot more towards ensuring a supportive and safe relationship for Aboriginal tenants.

In the case of public housing, the transparent publication of internal guidelines and policies is essential. Otherwise tenants have no idea of the terms on which they are leasing the property. This leads to significant confusion and avoidance, and hampers our ability to advocate on behalf of the tenant because housing workers hide behind policies that we have no access to.

16. Are the current arrangements for resolving disputes and providing access to redress for both landlords and tenants sufficient, or are other mechanisms needed?

No they are not sufficient. There needs to be a dispute resolution service available much earlier, before things get to VCAT for determination.

17. What factors contribute to tenants exercising, or not exercising, there rights?

120-day notices are a serious barrier to tenants exercising their rights. Tenants know that they can be evicted for no reason and they are therefore much more reticent to exercise their rights.

It means that landlords can effectively add requirements to the tenancy that are unrelated to the business of tenancy.

4 Further observations and recommendations

4.1 Family violence and the RTA

Family violence, as noted above, is an endemic problem in the Aboriginal community, leading to marginal housing and homelessness for large numbers of Aboriginal people, disproportionately affecting women and children.

The Residential Tenancies Act is virtually silent on this matter, except for a very narrow provision in s.234 which allows for a fixed-term lease to be re-made in the event that an intervention order was taken out.

S.234 is wholly inadequate to respond to family violence. It relies on the ability of a client to obtain assistance with a family violence intervention order.

The Victims of Crime Assistance Tribunal (VOCAT) is a model for how family violence can be established by a tribunal. In that tribunal, the matter is determined on the balance of probabilities and there is no requirement that an intervention order or police report is made. Instead, a client can rely on an affidavit or statement prepared with a solicitor and personal testimony. VOCAT also has a specialist service staffed by members of the Aboriginal community to support these applicants through the process and ensure that they are connected with services that can get them out of violence and into financial independence.

Case Study 1: Maree

Maree is 17 years old. She privately leased a property with her then boyfriend, Max, who was 39 years old. Maree became pregnant at 16 and Max became violent. She repeatedly tried to leave him but he would find her and force her to return. Late in pregnancy he severely assaulted her and this induced labour. He was arrested and she fled with the baby to New South Wales, to live with her uncle. She does not otherwise have a strong family support network. She lost the keys to the property.

As a result of the escape and the arrest, the property was abandoned. After a month the real estate agent investigated and found that the property was abandoned. They then applied for a warrant of possession. The application failed for an error made by the landlord. It was then made again. The matter was not listed to be heard until three months after Maree had left. Over this time the arrears continued to accrue.

By the time the matter was heard, the claim was for around $2500 plus the bond of $1400.

We attempted to argue that the lease should be re-made beneficially for the client but we could not rely on s.234 because the lease was not fixed-term but periodical.

VCAT made an order that the client surrender her bond and that she was liable for $2500.

The VCAT member noted to the landlord that they "had insurance" so they would not be pursuing the client.

However, this means that the client is now liable to being pursued by an insurer for the full amount, which she cannot pay. This debt could hang over her for many years, depending on the insurer's discretion.

Case Study 2: Casey

Casey, a 25 year old with three children, leased a property from an Aboriginal housing service. Her mother experiences problems with alcohol and drug use and becomes violent when she uses methamphetamine. Casey's mother became homeless in the first few months of Casey's tenancy and Casey felt pressure to have her mother move in. She soon became increasingly violent and threatening towards Casey and the children. Casey verbally told the Aboriginal housing worker that she needed to leave urgently because of the violence and she fled to a friend's house, leaving her mother behind.

Casey reported the violence to the local police, but they said they "didn't want to know about it" because she was living in Aboriginal housing where there is a lot of violence. So they did not take out an intervention order. This led to Casey's decision to leave.

Two months later, Casey retrieved her mail and found that she was served with an application for a possession order, including $2000 for arrears.

In this situation, Casey could not rely on s.234 to re-make her tenancy because she did not have an existing intervention order against her mother.

VCAT made an order that Casey surrender her bond and pay the arrears.

Recommendation 1: that VCAT be given the power to assess family violence in a way that is commensurate with the provisions used by VOCAT.

Recommendation 2: that VCAT be mandated to beneficially re-make a tenancy agreement in the event that a tenant has left a property based on family violence, where the tenant has advised the landlord that family violence is the reason for the abandonment of the tenancy.

We recognise that this puts landlords in the difficult position of wanting to refuse tenancies to anyone who appears to be at risk of violence. Perhaps there are options open to rebalance these provisions, such as allowing landlords, once notified of violence, to urgently apply to VCAT to end the lease with a 30 day notice if the remaining tenant is the person who is alleged to have committed acts of violence.

Recommendation 3: that in the event that family violence is established, VCAT provide a service that can support victims to find safe housing.

4.2 Regulating Public, Social and Transitional Housing

In our experience, Aboriginal people have poor access to private housing. Accordingly, the majority tenancy issues dealt with by VALS involve public, social and transitional housing tenants.

The nature of the power imbalance between landlord and tenant is differs for tenants in public, social and transitional housing from their private counterparts. Generally tenants will have a greater exposure to vulnerabilities when compared with tenants in the private market and will often be there as a last resort. Invariably the consequence of a termination of the tenancy will often be homelessness. Similarly, the characteristics of the institutional landlord differ greatly to that of a private landlord. Institutional landlords will have a greater ability to rationalise costs and do not face many of the emotional and financial considerations of the private landlord. Institutional landlords also have a greater ability to absorb costs and risk and have the advantage of legal departments and specialists in residential tenancies that puts tenants at a disadvantage.

Recommendation 4: Institutional housing providers should be required to undertake alternative dispute resolution processes with tenants. This is because of the special vulnerability of the tenants and the special power of the institutional tenants.

It is arguable that institutional landlords who are providing public, social and transitional housing should have special provisions of the RTA.

4.2.1 Public Housing Authorities

Public housing authorities provided by government agencies are subject to administrative law, but this is an area that is very difficult to access for vulnerable tenants.

Technically, if a poor decision is made at an administrative level, tenants can undertake Freedom of Information applications to determine the policy framework that should have been applied, they can apply for reasons for the decision, lodge applications for administrative review and engage in interlocutory measures. They can also argue that the Charter is engaged and litigate on this basis. Alternatively, tenants can seek redress through the internal Housing Appeals Tribunal (HAT).

Of course, this is completely unrealistic. By the time any of this litigation is becoming meaningful, the client is evicted.

Public housing authorities should be required to make and publish guidelines or policy framework documents. It may be appropriate that these be made as subordinate legislative documents. However, transparency in advance of tenancy disputes is essential.

VCAT should then be empowered to consider these policy instruments in determining if a client should be evicted or penalised for arrears or repairs. While VCAT is the most appropriate forum to promote compliance with housing policies, this task currently rests with the HAT. Given that the power to determine the continued existence or termination of tenancies is given to VCAT and not the HAT, the option to have the decision to seek an order of possession reviewed by the HAT is an illusory remedy for tenants facing eviction.

VCAT should also be specifically empowered to consider the application of the Charter rights in tenancy disputes where the tenant is housed by a government agency, without requiring separate action in the Supreme Court to ensure compliance.

This is again particularly important for tenants experiencing violence towards them in their home.

Publication and application of such documents would ensure that we can hold housing workers to account for their decisions in a simple and meaningful way.

Recommendation 5: That there be a separate administrative review power for VCAT to review the decisions of public housing providers based on their policies and procedures.

4.2.2 Social Housing Providers

Increasingly the Victorian Government is relying on civil organisations to deliver social housing to disadvantaged Victorians. Social housing schemes are funded through a variety of funding models both Federal and State. Unlike public housing, social housing providers are not subject to the added compliance mechanism of the HAT. It is also questionable as to whether the provisions of the Charter apply to them.

Social housing providers are in a unique position. They provide housing to the most vulnerable who have very little market power and are therefore much more vulnerable should eviction occur. Many social housing providers are also larger NGOs with the capacity to put in place procedures to accommodate the needs of these clients.

These organisations also generally have policies and procedures which they apply with respect to their tenants.

A clear mechanism which allows for the application of the Charter would be helpful in these cases. It may also be helpful if tenants had a right to the policies and procedures of these organisations.

Recommendation 6: that social housing providers be subject to the Charter.

Recommendation 7: that social housing providers be required to publish their policies and procedures, and that VCAT be empowered to review their decisions based on those policies.

4.2.3 Transitional Housing Providers

Transitional housing providers are intended to be providing short-term emergency housing. By its nature, transitional housing is provided to those who have no other housing options.

Providers also often require tenants to undergo programs that may assist them to find alternative housing and to treat other problems such as mental illness or drug and alcohol dependency.

Transitional housing is a difficult space and may require specific regulation. One of the problems we have discovered for transitional housing is that clients who do not attend programs that are unrelated to their housing status are given 120-day notices to leave. This has proven to be a serious problem. When relations break down for unforeseen reasons, clients are given a 120-day notice without anywhere else to go.

Recommendation 8: that transitional housing providers – and landlords generally – be prohibited from issuing eviction notices on the basis of matters that are not relevant to the maintenance of the tenancy.

Case Study 3: Brenda

Brenda was in transitional housing through ABC Ltd, a small housing NGO, after a long period of homelessness. She had been there for around 12 months when she heard the police knocking at her door and found out she was being asked to vacate by the end of the week. She came to us for assistance.

It turned out that the problem was that Brenda had not "engaged" with her allocated social worker. This was for several reasons.

Brenda cared for her brother who is an alcoholic. She often went to "pick him up" after a binge and would bring him back to her place to eat and shower and rest. He was not violent or disruptive at all but Brenda didn't want her social worker finding out about this because she thought it wouldn't be permitted.

Around 4 months into her tenancy, Brenda had her nephew die of a drug overdose in her presence. Brenda was distraught and returned to her country to be with her family. She disengaged from everyone and was rarely at home.

A couple of months later her daughter fled a violent partner with a child. The mother was living out of a car so her child – Brenda's granddaughter – came to live with Brenda. Brenda was also worried about her social worker finding out about this, but she also spent time transporting the child to and from school, which was sometimes the allocated meeting time with the worker.

The whole time Brenda was in transitional housing she paid her rent. She also had an active application for public housing and was on a waiting list.

VALS immediately asked for a re-hearing to review the Possession Order. We made arguments to ABC Ltd that they had obligations under the Charter to protect Brenda's granddaughter from homelessness. ABC Ltd withdrew the 120-day notice and agreed to start again with her, and would consult with us or with a case worker from another agency before commencing any action against her.

5 Dispute resolution mechanisms

5.1 VCAT

VCAT as it is currently functioning is completely inadequate for the task.

The lack of attendance by tenants at VCAT is shameful. VCAT schedules 10 minutes per hearing. This clearly assumes that there will be no contest between tenants and landlords.

It has been reported to us that VCAT is immensely intimidating for our clients. Our clients suffer feelings of shame and avoidance in the face of not being able to cope with their housing. Even when

we are in attendance we find that VCAT's decision-making is often rushed and often does not allow us to put meaningful submissions in our client's favour.

We would like to see a service at VCAT which is culturally safe for our clients. This would be similar to some of the Koorie court processes in other areas of the Victorian justice system. VOCAT, again, can be a model for this.

Ideally we would have a separate list for those clients who identify as Aboriginal and hearings would happen on a particular day of the week or month. VALS, a trusted Aboriginal controlled community organisation, could provide a duty lawyer service and other Aboriginal services could be in attendance to assist, such as Aboriginal Housing Victoria, or other local services.

Recommendation 9: that VCAT is required to provide a Koorie or Aboriginal list day. This could be based on the model at VOCAT or other models for Koorie justice in the Victorian justice system and could be staffed by a duty lawyer service and attended by other services.

5.2 Alternative Dispute Resolution

At present there is no requirement for parties to resolve their disputes before they come to VCAT. This is inefficient for VCAT but also increases the risk of non-attendance by tenants.

A process which is more conciliatory such as those facilitated by the Dispute Settlement Centre of Victoria would encourage more engagement with the process and allow tenant voices to be heard.

Recommendation 10: That VCAT provide a facilitated dispute resolution service between tenants and landlords.

5.3 Tenant-tenant disputes

A further problem is where tenants change or leave and lessors are left with the burden of arrears and debts which are not their fault. Tenants can also end up in disputes with other tenants over bills and other costs.

Presently this is a policy vacuum. Tenants must go to the Magistrates' Court to initiate proceedings against other tenants, which is unrealistic and unwieldy, leaving many tenants who were trying to do the right thing liable for the actions of others.

A compulsory dispute resolution service for tenant-tenant disputes would be a highly valuable service.

Tenant-tenant obligations and disputes in general are a serious problem for tenants and are ignored by the Act. We think that tenant-tenant default duties and responsibilities can be better incorporated into the Act and VCAT should be empowered to arbitrate these disputes, in particular disputes around the responsibility for rent and bond payments.

Recommendation 11: Basic tenant-tenant duties and responsibilities be explored for regulation, including, for example, providing template tenant agreements and requirements that tenants who move out be severally responsible for their rental payments unless another tenant takes their place.

Recommendation 12: a compulsory dispute resolution service for tenant-tenant disputes be offered.

Recommendation 13: that VCAT be empowered to arbitrate tenant-tenant disputes based on regulations in that area or agreements made between tenants.

6 Concluding remarks – eviction and its consequences

Eviction in general is something that is treated far too lightly in the Act. For Aboriginal clients, this is extremely serious. For every Aboriginal person with secure housing there is often a network of people who depend on that person. Evicting an Aboriginal tenant therefore has a wider ripple effect across a range of other vulnerable people.

Eviction is something that should be treated as seriously as incarceration. It has enormous ramifications for a person's life and leaves them vulnerable in every other material area of their lives, including risking their employment, risking Centrelink benefits for lack of an address, risking child removal, incurring debts and incurring infringements, and finally ensuring criminal behaviour. Eviction is a disaster for vulnerable people. Whilst it can be necessary, it needs to be treated as an absolutely last resort.

Hopefully the measures that we have recommended can provide greater protection against eviction for tenants.