



SUBMISSION BY EASTERN COMMUNITY LEGAL CENTRE

Dispute Resolution Issues Paper

Residential Tenancies Act Review

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Background

Eastern Community Legal Centre (ECLC) is located in the Eastern region of Melbourne and serves the Cities of Whitehorse, Boroondara, Manningham, Maroondah, Knox and the Shire of Yarra Ranges. The ECLC Tenancy program serves an additional municipality namely, the City of Monash. ECLC offers free legal advice from its offices in Box Hill, Boronia and Healesville during the day, at night and also through various outreach locations across the East, with a priority being given to those who are disadvantaged.

The Eastern Region has a number of areas of significant disadvantage. Healesville, in the Shire of Yarra Ranges, is home to the second most populous indigenous population in Victoria. The cities of Whitehorse, Maroondah and Knox host large communities of new arrivals to Australia.

In addition to direct legal services, ECLC also focuses on community development and education activities that empower clients, workers and the general community. It raises awareness of its service, new legal developments and human rights through various projects.

The ECLC Tenancy Advice and Advocacy Program (“TAAP”) has been operating since 2012, and is funded by Consumer Affairs Victoria (CAV) to protect vulnerable and disadvantaged tenants. In providing funding, CAV ‘recognises that some of the most v[ulnerable] and d[isadvantaged] Victorians often experience tenancy problems. These can lead to adverse outcomes, including homelessness, if they remain unaddressed.’¹

The ECLC TAAP has assisted in more than 1312 separate tenancy matters since it opened in late 2012, and its advocates assist clients via advice, advocacy, negotiation and representation at the Victorian Civil and Administrative Tribunal (‘VCAT’). The tenant advocates at ECLC have over twenty years tenancy experience between them. All of the ECLC TAAP clients have limited financial resources and receive Centrelink allowances.

Additionally, ECLC has been funded by the Deakin University Student Association since April 2012 to provide on-site legal information, casework and support to all currently enrolled Deakin University students at the Burwood campus. Tenancy matters make up about 10% of this work, and the service has provided assistance on 132 tenancy matters to date. The majority of students are either receiving a Centrelink benefit and/or are being fully or partially supported by their families and/or working only nominal casual hours. Many clients are also international students for whom English is not their first language, are unfamiliar with Australian culture and the legal system, and are first-time renters.

¹ Department of Justice, Consumer Affairs Victoria., *Guidance on TAAP- Operational guidelines on the Tenancy Advice and Advocacy Program*, p 6

This submission is informed by the experiences of our clients from TAAP and the Deakin University program.

We have directly addressed questions raised in the Dispute Resolution Issues Paper in areas where we believe the Centre's and clients' experience will add value in considering reforms to the *Residential Tenancies Act 1997* (Vic) (the 'Act'). We note that this submission is a non-exhaustive list of recommendations, but that other areas for reform have been comprehensively covered by other organisations' submissions.

Dispute Settlement Centre of Victoria (DSCV)

5 How effective are the information and advice services provided by DSCV as tools for parties to independently resolve disputes?

6 How could existing services be improved?

8 How effective are the third party assistance mechanisms provided by DSCV in dealing with residential tenancies issues?

10 What aspects of the third party assistance mechanisms work well?

While DSCV provides a valuable service to the community, this mediation service has extremely limited application in tenancy situations.

Because mediation is voluntary, often time-consuming (ie. taking several hours to complete), and agreements are non-binding, there is little to no incentive for agents to engage with the process. However, even if mediation were legislated as a mandatory step and agreements were binding, we have reservations about parties attending mediation in tenancy disputes because of the power disparity. We understand that DSCV do not provide any form of legal advice to the parties, and will often refer clients back to CLCs for that advice first. With access to little or no legal guidance during the mediation, tenants may feel pressured into agreeing to an unfair outcome on the mistaken belief, for example, that landlords and agents are able to evict at will.

Our referrals to DSCV have been limited to co-tenancy and shared housing situations where disputes are not covered by the RTA, and where there is less disparity of power between the parties. We do not have information about how many of these matters proceed to mediation, or whether they are successful at reaching agreement.

Consumer Affairs Victoria (CAV)

5 How effective are the information and advice services provided by CAV as tools for parties to independently resolve disputes?

6 How could existing services be improved?

8 How effective are the third party assistance mechanisms provided by CAV in dealing with residential tenancies issues?

10 What aspects of the third party assistance mechanisms work well?

21 How effective are the compliance and enforcement functions provided by CAV?

22 How could CAV's compliance and enforcement functions be improved?

Tenants have reported positive experiences with Consumer Affairs Victoria assisting in simple disputes, for example, when it comes to educating and seeking compliance with private landlords for bond lodgement or providing a service address. As the independent government regulator, landlords are more willing to accept CAV's advice about their obligations under the RTA than when a TAAP advocate gives the same information and because CAV operates with the threat of enforcement of penalty provisions under the RTA. ECLC also frequently refers landlords to CAV as the generalist service does not provide advice to landlords.

CAV also has a relatively well-staffed phone service with short wait times. Some tenants prefer to call CAV because they can use the phone service immediately rather than wait for a call back or appointment with the advocate.

However, tenants have reported little or no assistance with respect to more complicated disputes that would fall under a number of other penalty provisions under the Act. As mentioned in the Issues Paper at 2.1.6, there are a number of penalty provisions relating to false representations, false information, and attempts to prevent a person from exercising their legal rights under the RTA. There are also penalty provisions that prevent a landlord and their agent attending the property except in accordance with the RTA² and that prevent landlords from attempting illegal evictions³. Attempts at requesting CAV assistance with these matters often results with a referral back to TAAP or VCAT, which, while appropriate in some cases, means that consequences for breaches of the RTA penalty provisions are dependent on tenant enforcement. This sends the message to landlords and agents that

² Residential Tenancies Act 1997 (Vic) at s 91A.

³ Residential Tenancies Act 1997 (Vic) at s 229.

regulatory oversight is limited, and as long as they undertake basic administrative requirements (such as submitting the bond to the RTBA).

We understand that conciliation, prosecuting and enforcing penalty provisions are a resource-intensive process, as illustrated by table 2.6 of the Issues Paper. However, if the regulator is struggling to enforce all but the simplest sections of the RTA designed to protect tenants from landlords, it is clear that the current system of conciliation and enforcements must be changed.

We would therefore support CAV to move towards an infringements-based system for these types of penalty provision contraventions, and for CAV Inspectors and VCAT Members to also be given the power to issue those infringements. An infringement system would allow illegal landlord behaviour to be addressed on a larger scale, and provide concrete financial disincentives for landlords to reoffend. We would further propose an infringement offence be created where landlords do not comply with compensation orders at VCAT.

Recommendations:

- **CAV to implement an infringement system to enforce penalty provisions under the RTA.**
- **CAV to enforce all penalty provisions equally under the RTA.**
- **Infringement offences to be created to ensure compensation orders at VCAT are complied with by landlords.**

Consumer Affairs Victoria Inspectors

12 How effective are CAV's inspections activities in facilitating both independent resolution of disputes and resolution of disputes at VCAT?

13 How could CAV's inspections activities be improved?

14 How could CAV's inspections activities be of greater benefit to vulnerable and disadvantaged tenants?

15 What (if any) alternative or additional areas of dispute would be appropriate for the Director of CAV (or another agency) to have powers to intervene?

Most tenants have found their experience with CAV Inspectors to be positive, and found that being able to show and explain repair issues in person was very useful. The inspectors provide a valuable service as many repair problems are not immediately apparent through photographs, so many tenants find reports for repairs beneficial in either negotiating for a resolution or at VCAT proceedings.

We therefore reiterate our past submissions⁴, that would allow CAV Inspectors to make determinations about repairs, for rent to be paid into the Rent Special Account and for money to be paid out from that account to pay for those repairs to be made. We believe that giving inspectors wider powers would increase the numbers of tenants using the service. At the moment, because tenants are still required to make a VCAT application in order to compel the agent or landlord to make repairs, many tenants bypass contacting CAV in favour of taking their own photographs or in some cases, getting their own expert reports. We note that figures in the issues report show that the number of good left behind reports initiated by landlords exceeds the combined number of repairs and rent increase reports initiated by tenants.

Recommendations:

- **CAV inspectors to be given powers to make binding decisions for landlords and agents make repairs to the property.**
- **CAV inspectors to be given powers to allow rent to be paid into the Rent Special Account, and for money from that account to go towards paying for repairs.**

⁴ ECLC submission to the Issues Paper on Security of Tenure, pp 26-27.

Tenancy Advice and Advocacy Program (TAAP)

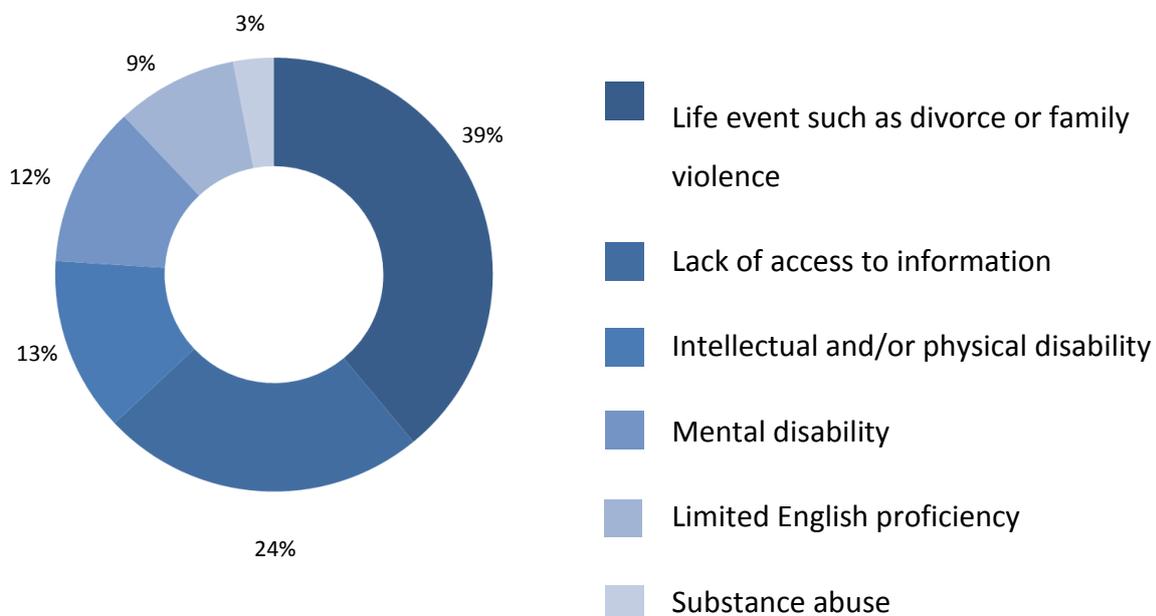
5 How effective are the information and advice services provided by TAAP as tools for parties to independently resolve disputes?

6 How could existing services be improved?

8 How effective are the third party assistance mechanisms provided by TAAP in dealing with residential tenancies issues?

10 What aspects of the third party assistance mechanisms work well?

One of the main benefits of TAAP is to provide local, tailored advice to tenants. The advocate's advice is tailored towards a tenant's particular legal situation and also to the client's particular personal circumstances and vulnerabilities. For example, a large proportion of clients have reported an intellectual or physical disability (13%), mental health issues (12%) or lack of a proficiency in English (9%) that may mean there are high barriers in engaging with other services. Other tenants seek advice from TAAP after calling CAV because their matter is complex, or because they found the advice from CAV too general to get a clear direction about next steps to take. We note that CAV's enquiries policy specifically states that CAV does not give legal advice⁵.



⁵ Enquiries policy at 1.2.1, available at: <https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/our-role-scope-and-policies/enquiries-policy>

Figure 1. Vulnerability factors

Advocates are able to take full instructions from the client and provide both legal advice and pragmatic solutions, such as how to communicate with the landlord/agent, what amounts to a reasonable settlement figure, how to collect evidence, and arguments to be made at VCAT. Advocates are also able to advise about the likelihood of success at VCAT and give preventative advice, which may incentivise tenants to resolve matters through negotiation early on, and prevent disputes from escalating.

Tenants are also given options for face-to-face appointments in locations that are central, local and convenient for them. Face-to-face appointments give advocates an opportunity to look through evidence and documentation, and assist with filling out forms. This is especially important for client groups for whom English is a second language, clients that may struggle with technology or where the matter involves a large amount of evidence such as reports or pictures.

Advocates who help tenants prepare for VCAT or attend VCAT on their behalf help to narrow issues before and at the hearing, thereby saving time at VCAT and often assisting the VCAT member to better understand the issues in dispute. Advocates and representatives also have the opportunity to make legal submissions at hearings to create precedents that would impact tenants across Victoria. While VCAT precedents are non-binding, we note that they can be very persuasive for VCAT Members⁶.

While the Tenants' Union of Victoria provides valuable and similar services to TAAP, access to TUV can be challenging for many vulnerable clients. Clients are often required to wait hours on their advice phone line, and many are not able to travel hours to attend Fitzroy for a drop-in clinic. TUV also do not provide advice in situations where the dispute involves another tenant, with the exception of family violence matters. Tenants with problems accessing tailored advice is reflected in our statistics where 24% of our total clients report a lack of access to information being a vulnerability factor.

Currently ECLC is only funded for one full time tenant advocate under TAAP across seven municipalities; this region comprises 2,877 square kilometres with a total population of 1,028,573 people. It is unsurprising that the demand for services far exceeds the capacity of the tenant advocate. As stated in CAV's review of the Specialist Services Program:

Demand exceeds supply

A core contextual reality of the program is that it is not resourced at a level to allow comprehensive service delivery to all clients in the target group across Victoria who would benefit from the service.⁷

⁶ For example, the TUV represented a tenant in an 'open for inspection' case in *Higgerson v Ricco* [2014] VCAT 1214 which was later confirmed in *Hargans v Ronchetti* [2015] VCAT 1779.

⁷ Specialist Services Program – Research findings: for consultation, p 25.

Advocates must therefore prioritise the most vulnerable people in the community to undertake casework and VCAT representation. Many priority clients are referred to TAAP from local homelessness and housing services; a result of strong relationship and partnership that advocates undertake on a local level. For these priority clients, there are often multiple legal issues within the same tenancy, making these cases both complex and lengthy. Additionally, clients are often distressed and using the service in a time of crisis because they may be experiencing homelessness, family violence, loss of employment and mental health issues. Consequently, due to the intensive nature of cases and lack of resourcing, many clients only receive limited ongoing assistance, and must be encouraged to self-represent and negotiate where possible.

Limited TAAP resources also go towards the significant administration burden of the operation agreement. While the transparency of the service funding is important, the division of work between advice, negotiation, VCAT preparation and representation is arbitrary. This division will largely depend the merits of the case, the client's instructions, the capacity of the client to self-help and whether matters can be resolved without attending VCAT. In those cases, having strict requirements about the percentage of time to spent on each activity is detrimental to the advocate's work in being able to tailor approaches to the clients. This approach puts pressure on advocates to find the "right" types of cases, rather than helping the most vulnerable clients.

Recommendations:

- **That the State Government expand TAAP in the Eastern Metropolitan Region to a minimum of 3 effective full-time positions in response to client demand.**

Victorian Civil and Administrative Tribunal (VCAT)

16 How effective are the ADR, hearings and other services provided by VCAT?

17 How could VCAT's services be improved?

18 What are the obstacles (if any) to tenants or landlords in taking appropriate matters to VCAT?

19 What barriers or obstacles are there to enforcing VCAT orders, and how can these be improved to achieve compliance with orders?

20 What particular or additional barriers or obstacles are there for vulnerable and disadvantaged tenants in accessing or utilising VCAT's services, or defending cases that been brought to VCAT against them, and how can these be addressed?

CAV has already received feedback from a number of TAAP agencies about the issues advocates have encountered at VCAT. We refer to Table 5 of the document “Specialist Services Program – Research findings: for consultation”⁸, and echo the experiences outlined by other advocates about VCAT.

Tenants’ lack of engagement with VCAT is two-fold: firstly, tenants do not have access to the relevant information or knowledge about the law and its process, but secondly, even when they are able to access information or advice, they are reluctant to take action due to the power disparity. Tenants feel intimidated by the process and are worried about retaliation from the landlord. While some reforms can be made to VCAT to improve access to justice for tenants, for example, an internal VCAT appeals process for where an error of law has been made, the low level of engagement by tenants are due in part to the nature of how any Tribunal operates.

While the Residential Tenancies List at VCAT is much less formal than the Magistrates’ Court, for many tenants this will be their first experience with a legal claim and a court-like setting. Many tenants are apprehensive about attending and applying to VCAT due to ignorance of the law, not knowing how to present their evidence and being required to speak in front of a judge-like figure. Many tenants believe they will inevitably lose cases against real estate agents because agents are familiar with the law, the Tribunal and its processes. Some agents will also threaten tenants with “costs” for their appearance at VCAT, despite the fact each party bears their own costs in almost all cases⁹.

Many of the tenants expressing these beliefs are well-educated, and native English speakers who feel intimidated by the process; it is therefore unsurprisingly that more marginalised

⁸ Specialist Services Program – Research findings: for consultation, p 30

⁹ Victorian Civil and Administrative Tribunal Act 1998 (Vic) at s 109

tenants from CALD backgrounds, with disabilities or mental health issues may find the thought of attending VCAT to be much more of a struggle.

For these reasons we support moving towards an Ombudsman scheme for tenants to operate alongside the current VCAT process.

Recommendations:

- **VCAT to implement an internal appeal process where there has been a mistake of law.**

Dispute Resolution Models

23 What are the problems, issues and gaps (if any) that impact the effectiveness (comprehensiveness, coherence and efficiency) of the overall system for dispute resolution in residential tenancies?

At the moment, issues with landlords and real estate agents are only considered discretely and dependent on tenants seeking advice and assistance. For example, a real estate agent who has illegally charged a tenant for utilities that are not separately metered is likely to have done so for more than one tenant in their portfolio of properties. A private landlord who has failed to lodge a bond with the RTBA is also likely to have breached many other sections of the Act.

While these issues can be dealt with on a case-by-case basis, often the same agents and landlords will continue previous practices knowing that only a small percentage of tenants will take any action, so VCAT orders and hearings do not act as an effective deterrent. And given the rarity of CAV prosecutions and oversight, there is a very little chance of the illegal activity even being discovered.

A systematic approach to these problems must be taken. It is an inefficient use of resources at VCAT, CAV and TAAP to spend time enforcing individual cases often against the same agents and landlords, when these incidences could be prevented with effective deterrence and monitoring measures.

26 What alternative or additional mechanisms used by other jurisdictions or sectors (or aspects thereof) would be suitable for residential tenancies dispute resolution in Victoria?

While VCAT is a valuable method for resolving some disputes, an Ombudsman scheme for tenants would have a number of benefits to improve access to justice and timeliness for resolutions.

Complaints to the Ombudsman are less formal, and there is no expectation they will need to use legal jargon. An Ombudsman would be able to provide practical information and advice for tenants, but also fulfil a more investigative role, and take action with legislative authority that would balance some of the disparity of power between landlords, real estate agents and tenants.

Recommendations:

- **Implement an Ombudsman scheme for tenants in Victoria.**

List of Recommendations

1. CAV to implement an infringement system to enforce penalty provisions under the RTA.
2. CAV to enforce all penalty provisions equally under the RTA.
3. Infringement offences to be created to ensure compensation orders at VCAT are complied with by landlords.
4. CAV inspectors to be given powers to make binding decisions for landlords and agents make repairs to the property.
5. CAV inspectors to be given powers to allow rent to be paid into the Rent Special Account, and for money from that account to go towards paying for repairs.
6. That the State Government expand TAAP in the Eastern Metropolitan Region to a minimum of 3 effective full-time positions in response to client demand.
7. VCAT to implement an internal appeal process where there has been a mistake of law.
8. Implement an Ombudsman scheme for tenants in Victoria.