

19 July 2021

Review Panel  
Social Housing Regulatory Review  
PO Box 55  
East Melbourne 3002

**By email only:** [info@shrr.vic.gov.au](mailto:info@shrr.vic.gov.au)

Dear Review Panel

**Joint community legal centre submission in response to Consultation Paper 1 of the Review of Social Housing Regulation.**

We are a group of community legal centres that provide assistance to people with tenancy related legal needs. We predominantly work with tenants experiencing disadvantage. We practice across the housing landscape including private rental, public and community housing.

We welcome the opportunity to participate in this Review which comes at a critical juncture for social housing in Victoria.

We attach a response (including appendices) to the Panel's Consultation Paper 1 – Background and scoping paper.

We look forward to engaging further throughout the course of the Review.

Please direct any queries to Agata Wierzbowski, Director of Legal Services at Tenants Victoria on 0431 975 770 or at [agata.wierzbowski@tenantsvic.org.au](mailto:agata.wierzbowski@tenantsvic.org.au).

Yours faithfully

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**A fair regulatory system will deliver positive renter outcomes for all people living in social housing, with key measures of success being the provision of safe, secure, appropriate, and affordable homes.**

We commend the Panel's foregrounding of access to safe, suitable, and adequate housing as essential to "the inherent dignity and well-being of the person". In our view, the design and operation of a fair social housing regulatory system will be underpinned by this principle. To realise this principle, we suggest that a fair regulatory system must identify, concretely, what are the characteristics of adequate housing.

As the Panel notes, adequate housing is more than merely the provision of shelter. It is housing that is *safe* – of good physical quality, subject to responsive and scheduled maintenance, provides adequate space and privacy for occupants, *suitable* – well located and accessible, *secure* – ongoing tenure and absent forced moves, and it is *affordable* – rent is pegged to income, including any fluctuations, is less than 30% of general household income and rent calculation policies are consistent and transparent.

Whether community and public housing is subject to a joint or parallel regulatory model, a fair system is premised on an expectation that social housing arrangements will deliver these key renter outcomes.

Positioning positive renting outcomes as central to the regulatory system will ensure that government investment in community and public housing delivers strong social outcomes that support individuals and communities to thrive. The social and economic costs of homelessness and housing insecurity are well known. How we measure outcomes for renters must deliver on the aim of providing safe, secure, appropriate, and affordable homes.

**Quality data is essential to a transparent and accountable housing system. The Review should be informed by robust data analysis and future regulation should be underpinned by open and accessible data that demonstrates positive renter outcomes are being achieved and where there are areas of concern.**

There is a paucity of publicly available data about the activities of social housing landlords, particularly as they relate to renter outcomes. The data that is available, does not readily allow for the type of comparative analysis needed to provide the basis for evidence-based recommendations about best practice regulation.

For instance, DFFH publishes a relatively rich dataset (current to 2018-19) about public and community housing stock numbers, waitlists, and some useful public housing tenant demographics (age, income source, rental rebate status). Yet, it publishes no data about tenant exits (eviction or other reason), repairs, appeals or complaints. On the other hand, the Housing Registrar publishes no data about tenant demographics (age, income, rental rebate status). It does, however, publish individual CHO self-reported data about rent arrears, complaints, and repair completion timeframes. It also publishes self-reported aggregated sector data about tenancy maintenance rates and evictions (as a proportion of exits). Aggregation of this data does not allow for the comparison of exit or eviction data between CHOs or indeed with DFFH data if this were obtained. We suggest that this is the very type of analysis that will provide the Panel with critical insights into the operation of the current regulatory landscape.

The challenges associated with using current data sets to make policy-based findings is highlighted at p.15 of the Consultation Paper 1. Here, VCAT application data is cited as evidence that the Director of Housing sought to evict around 6 percent of households in 2019. DFFH eviction data and VCAT warrant data would show that most of these applications did not result in eviction, and instead were resolved without termination of the tenancy. Similarly, relying on Housing Registrar data, a figure of 7 percent is cited as the proportion of community housing tenants evicted in 2019. In fact, though it is not very clearly expressed in the Housing Registrar's reports, this figure is likely to show that 7 percent of tenancy exits from community housing are the result of eviction. So, while on their face these two data measures look broadly comparable, they are not. Crucially, neither provide an interested inquirer with an answer to the question: how many, or what proportion, of tenants in community and public housing were evicted in 2019?

Given the significance of this Review, we believe it is important that the Panel gathers sufficient data to establish a clear understanding of how the current regulatory landscape operates in practice across and within different types of social housing. While each of our organisations can provide the Panel with insights based on practice experience, the Panel is uniquely placed to seek data from the Housing Registrar, VCAT and DFFH that can provide a whole of state picture of social housing regulation and practice.

We have **appended** a list of data that we suggest will provide key information about best practice frameworks to measure renter outcomes (Appendix 1). We acknowledge that the Panel may not be able to obtain all the data set out and indeed, that not all the suggested data is necessarily collected or easily retrievable by the relevant agencies. If this is found to be the case, this Review presents an opportunity to ensure that any future regulatory model/s are underpinned by open, accessible, and meaningful data. Renters, the public, Government and others should be able to see, in measurable terms, the outcomes being delivered across social housing and identify where there may be areas of concern.

**There should be a clear and consistent standard of rights for everyone who lives in social housing.**

With one Victorian Housing Register wait list, people can be housed in either public or community housing. A key principle should be to ensure that a person is not worse off, or left with fewer rights, based on the type of housing they are allocated. Currently there is no clear or consistent standard of rights.

As outlined in the **appended** paper, DFFH publishes a detailed operational manual, setting out the key protections available to public housing renters, which promotes transparency, accountability and enables renters and advocates to effectively engage with DFFH around expected standards within rental properties (Appendix 2). We believe this sets a benchmark for the standard of rights that all renters in social housing should expect.

By contrast, CHOs discharge a very similar housing function as DFFH, tend to have a mismatch of policies, some publicly available, others not, with no consistency for renters across the sector. Additionally, the policies tend not to be as prescriptive and detailed as the DFFH manual. In practice, this makes it challenging for CHO workers to make informed and consistent decisions as to their obligations and renter rights, and may improperly apply policies which do not offer enough guidance. An ill-informed decision by a housing worker can have significant life consequences for renters in social housing.

This “two-tier system” means there is often a lacuna in standards, accountability, and transparency in the administration of community housing tenancies. Case studies illustrative of this problem are included in the appended paper.

Creating sufficiently prescriptive, consistent and publicly available and enforceable policies for all residents in social housing will go a long way to guaranteeing standards and improving decision-making amongst providers and inform better renter outcomes.

**The human rights of social housing renters must be enforceable through the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.**

The *Charter of Human Rights and Responsibility Act* (the Charter) provides an effective tool to ensure the human rights of renters in social housing are promoted and protected.

As a “public authority”, DFFH is bound by the Charter in its decision-making and cannot act in a way that is incompatible with human rights. This has ensured that human rights are embedded in publicly available policies and procedures of the DFFH.

Conversely, it remains unclear<sup>1</sup> as to whether the Charter applies to CHOs, notwithstanding that they are performing the same public function in the provision of social housing as DFFH. Some CHOs view themselves as bound by the Charter, but others do not. In practice, this has meant that though CHOs will often reference the importance of the Charter to their functions, many fail to consider Charter rights in their decision-making, particularly when it comes to consideration of protected characteristics. Even for CHOs that consider themselves bound by the Charter, there are often difficulties in the consistent application of Charter rights, and an inability to articulate how Charter considerations informed decision-making (as required). For renters, enforcement of those rights is a problem: Charter rights are a nullity without the ability to easily enforce them. As it stands, the enforcement of Charter rights must be brought through the Supreme Court, tethered to a judicial review ground.

To ensure equality in standards and rights for renters across the social housing sector, it is important that it is clear that the Charter applies to all providers. The review should consider what are the necessary changes the Victorian Government should make including, regulations that may prescribe CHOs as public authorities or amendments to the Charter, to ensure all social housing renters have its protection. The proposals should consider the implementation of the rights, such as ensuring all social housing providers produce public facing documents outlining how they make Charter-compliant decisions, how Charter rights are promoted, and most significantly, how to create better access to Charter rights enforcement.

**The Review is an opportunity to improve protections for social housing renters.**

The Review’s Terms of Reference ask that the Panel consider the “degree resident’s rights should be harmonised”. We believe that harmonisation should be a core objective of social housing regulation. Tied to this though, is our view that alignment must not be created through a diminution of existing rights. Particularly crucial is that the comprehensive set of rights and policies applicable to people living in public housing are not undermined for the goal of harmonisation. We want to put in place protections that enhance renter experiences and outcomes, informed by the principle of delivering safe, secure, appropriate, and affordable homes.

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<sup>1</sup> See *Durney v Unison Housing* [2019] VSC 6.

Through this, we can ensure that Government investment delivers a return for all Victorians through an inclusive housing system, that allows us to care for our families, participate in our communities, and supports those of us experiencing health and social inequities, to thrive. These are core objectives by which the housing system, indeed our society, can be measured.

## Appendix 1 – Data relevant to Social Housing Regulation Review

- Data that the Housing Registrar collects in relation to community housing reporting against performance standards
- Comparable eviction and exit data across the social housing landscape (public housing, community housing – disaggregated by provider (for CHOs) and by tenure type (transitional, rooming housing etc), including, where possible:
  - o Notices to Vacate served
    - Rent arrears
    - Other reasons
  - o Applications to VCAT for an Order of Possession (or Termination Order during COVID-19 temporary laws\*)
  - o Applications to VCAT for, and executions of a Warrant of Possession
  - o Number of and reason for tenant exit
  - o Number of Breach of Duty Notices issued to tenants
  - o Number of applications for Compliance or Compensation order made to VCAT
- Tenancy and eviction data should also be disaggregated by tenant demographics, including, where possible:
  - o By allocation basis (Register of Interest or Priority Access)
  - o Income source
  - o Family type
  - o Aboriginal and Torres Strait Islander identity
- Number of disability-related housing modification requests made (including the number of successful applications, the average spend and median spend)
- Number of temporary absences granted
- Number of repair request applications made at VCAT
- Rent arrears –
  - o average number of days in arrears
  - o average days of rent arrears before application to VCAT
- Rent calculation –
  - o proportion of tenants paying 25% of income
  - o proportion paying 30% of income
  - o proportion paying market rent
  - o proportion paying a 'service charge' in addition to rent.

\*It is likely that the impact of temporary legal and practice changes implemented during 2020 will affect the data collected during this period. Accordingly, it will be important that the Panel obtain and review data collected across a number of years.

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## Introduction

Community housing providers (**CHPs**) are playing a rapidly increasing role in housing the most vulnerable tenants in Victoria, including those on the Victorian public housing register. However, community housing tenants do not have the same enforceable rights and are not offered the same tenancy support as public housing tenants. Community housing tenants are more likely to be evicted, subject to inconsistent decision-making processes and have fewer genuine avenues for review.

A number of community legal centres decided to develop this paper as a result of shared concerns about this disparity between the protections available to public housing tenants vis-à-vis community housing tenants, and concern about the accountability and enforcement mechanisms available to community housing tenants. As more and more public housing stock is transferred to CHPs, the impact of these disparities becomes more acute.

We set out our key concerns in this paper, together with a set of recommendations for reform, a summary of which is set out below.

### Summary of recommendations

#### Part 1 – Ensure consistent and transparent community housing policies and standards

1. A relevant body develop Model Rules for the community housing sector that are of a standard equivalent to the tenancy management policies of Department of Families, Fairness and Housing including, but not limited to the key areas of temporary absence, internal appeals, rent setting, arrears and evictions.
2. These Model Rules should be the deemed policies of all registered housing associations and providers and should be required to be made publicly and readily available in a variety of formats.
3. The Housing Registrar should undertake an audit of all CHP policies to ensure that they cover the key areas outlined in the Housing Registrar's 2019 Guidance Note and issue their findings in a publicly available report.
4. Where CHPs do not have compliant policies, or fail to publish their policies, the Housing Registrar should use its powers to suspend or refuse registration of non-compliant CHPs.

#### Part 2– Protect community housing tenants' human rights

5. That the Victorian Government make legislative amendments to clarify that CHPs are functional public authorities under the Charter, either by amending the *Charter* or introducing regulations prescribing a list of CHPs as public authorities.
6. That the Victorian Government amend Schedule 7 of the Housing Act and the Registration Criteria for agencies, to require all agencies registered under the Housing Act to have a constitution and rules which include an acknowledgement of being bound by the Charter and have a stated object and purpose to act compatibly with and promote human rights in their management of housing stock.

7. That the Victorian Government amend s 81 of the Housing Act to an application for registration under that provision should include a report on how the applying agency's policies provide for Charter-compatible decision making.
8. That the Victorian Government amend section 93(1) of the Housing Act to include new performance standards that require all registered agencies to have public facing statements about their obligations under the Charter on their websites and tenancy agreements and have policies equivalent to DFFH that specifically embed Charter-compatible decision-making in all areas of tenancy management. These performance standards should be phrased as "mandatory requirements" rather than "indicators".
9. That the Housing Registrar prepare and publish guidance to agencies on how the Charter should be considered and applied in decision-making.
10. Amend s 39 of the Charter to provide VCAT with judicial review and or collateral review jurisdiction on Charter grounds.
11. Amend ss 4(1) and 96(1) of the Housing Act to enable a tenant to make complaints to the Housing Registrar about breaches of the Charter.
12. Amend s 101 of the Housing Act to enable a complainant to refer a direction or a refusal to make a direction of the Housing Registrar under s 100 to the Review and Regulation List of VCAT for merits review.
13. Amend s 141(1) of the Housing Act to give the Housing Registrar power to revoke or suspend an agency's registration under that Act for repeated breaches of the Charter.

### Part 3 – The need for a robust accountability mechanism for community housing

14. That the Victorian Government amend legislation in order to:
  - a. Create a central Housing Appeals Office to oversee complaints of both public and community housing tenants.
  - b. Require that the central Housing Appeals Office must provide a remedy to the tenant if a complaint is upheld.
  - c. Enable both landlords and tenants to apply to the Review and Regulation List of VCAT for merits review of decisions of a central Housing Appeals Office.
15. That the Victoria Government amend the Housing Act to enable complaints to the Housing Appeals Office to be made earlier than 30 days after the dispute is raised with a landlord and make it unlawful for an agency to take steps to do things that would frustrate the complaint or the remedy sought before the complaint can be determined.
16. That the Victoria Government amend the definition of 'agency' under s 2(1) of the *Ombudsman Act 1973* (Vic) to include any agency registered under s 84 of the Housing Act.

17. That the Victorian Government amend the RTA to prevent VCAT from listing and hearing an application for a possession order where a relevant complaint has been made to the Housing Registrar by a tenant that is yet to be determined. Amend the Housing Act to require the Housing Registrar to notify the Principal Registrar of these unresolved complaints.
18. That the Victorian Government amend the definition of 'agency' in section 5(1) of the *Freedom of Information Act 1982* (Vic) to include any agency registered under s 84 of the Housing Act.

Part 4 – Eviction as a genuine outcome of last resort

19. That the Housing Registrar conducts an audit and publicly reports on CHPs' use of end of fixed-term notices to vacate.
20. That the Victorian Government introduces legislative amendments to prevent, or at least limit, CHPs from using end of fixed-term notices to vacate.
21. That the Housing Registrar determine new performance standards that frame registration under the Housing Act as requiring eviction to be treated as a mechanism of last resort, rather than an 'indicator' of compliance within the performance standards.
22. That the Housing Registrar develop model policies and training on the use of notices to leave for CHPs that operate rooming houses and monitor the use of these notices.

# 1. Ensure consistent and transparent community housing policies and performance standards

Community housing providers (**CHPs**) own or manage around 20,000 housing units in Victoria and control \$3.3 billion in housing assets.<sup>1</sup> Nearly one in four Victorian social housing tenants lives in community housing. Public and community housing waitlists have been collapsed into one, the Victorian Housing Register.<sup>2</sup> It is largely a matter of chance whether a person on the Register is offered a community or public housing tenancy. However, despite CHPs and Department of Families, Fairness and Housing (DFFH) exercising a near-identical function as providers of housing to Victoria's most vulnerable, legal protections for community housing tenants lag well behind public housing tenants.

## Protecting tenant rights through consistent CHP policies

DFFH publishes a detailed Tenancy Management Manual (**Manual**) online.<sup>3</sup> The Manual contains important operational guidelines which establish, in practice, the key protections available to public housing tenants including, for example in areas such as disability modifications, temporary absence, tenant breaches, arrears, eviction and decision review. The manual facilitates consistent decision-making by DFFH workers across the state and its public availability provides a level of transparency, promotes accountability and appropriately equips tenants, and their advocates, to engage with DFFH about tenancy issues as they arise.

CHPs, on the other hand, have individual policy frameworks, which provide varying degrees of protection and security for tenants. While there is significant variation within the community housing sector, CHP policies generally contain fewer and weaker protections for tenants than comparable DFFH policies, particularly in the important areas listed above. This is shown through the Simon and Jonathon's stories, below.

CHPs are performing a similar, if not identical, function to DFFH. It is our view that without steps to align the policies applicable to community and public housing tenants, we risk the entrenchment of a two-tiered model of social housing provision. Ultimately, as the second tier grows in number, the result will be a material erosion of housing security for Victoria's most vulnerable tenants.

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<sup>1</sup> Housing Registrar, *Sector Performance Report 2017–18* (Report, July 2019) 13 <<http://www.housingregistrar.vic.gov.au/Publications/Sector-data-and-dashboards>>.

<sup>2</sup> The state-wide total number of social housing applicants at June 2020 was 45,698. At that time, there were also 7,422 current social housing tenants/residents who were waiting for transfers. See Department of Health and Human Services Victoria, *Victorian Housing Register* (Website, 2020) <<https://www.housing.vic.gov.au/victorian-housing-register>>.

<sup>3</sup> Department of Health and Human Services Victoria, *Tenancy Management Manual* (Website, 2021) <<https://providers.dhhs.vic.gov.au/tenancy-management-manual>>.

## Case study – temporary leave of absence policy

### **SIMON'S STORY**

*Simon grew up in regional Victoria. As a child, he was a victim of institutional child sexual abuse which caused post-traumatic stress disorder (PTSD) as an adult. Simon self-medicated with drugs and alcohol which soon turned into a serious addiction. He spent a number of years homeless and in unstable housing. Eventually, Simon and his partner, Ashley, were provided a community housing rental property and he began to receive treatment for his PTSD and addiction. Unfortunately, Simon relapsed and was sentenced to a custodial sentence of 6 months for non-violent offending.*

*While in custody, Simon applied on several occasions for a “temporary absence” to be applied to his rebated rent so that the rent would be reduced to reflect the fact that only Ashley, who received a Centrelink income, was living at the property while he was imprisoned. The CHP refused to consider Simon’s request, stating that it did not have a temporary absence policy, despite the fact that other prisoners had temporary absences in place with the same CHP.*

*As a consequence, significant rental arrears started to accumulate, and the landlord obtained a possession order at VCAT. On the brink of a warrant being executed, a community legal centre (CLC) lawyer applied for an urgent re-hearing. The CHP argued that as they were not a public housing provider they did not have to apply a temporary absence policy and were not obliged to provide their policies on assessing rebated rents.*

*After the lawyer raised the possibility of a complaint to the Housing Registrar, the CHP agreed to apply a temporary absence and reassess the rebated rent. This intervention meant that Ashley was able to pay off the arrears under a payment plan and Simon had a stable home to return to at the end of his sentence.*

If Simon were a public housing tenant, he would have been automatically entitled to a temporary absence for six months under the Department’s guidelines.<sup>4</sup>

## Case study – disability modification policy

### **JONATHON'S STORY**

*Jonathon, who uses a wheelchair, had applied to the Victorian Housing Register for housing. He accepted an offer in a community housing apartment specifically aimed at accommodating people living with disability.*

*After residing in the apartment for some time, Jonathon’s occupational therapist (OT) recommended that a door magnet be installed to allow him to more easily enter and exit*

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<sup>4</sup> See Department of Health and Human Services Victoria, *Tenancy management manual: temporary absence operational guidelines* (September 2018) <<https://providers.dhhs.vic.gov.au/tenancy-management-manual-temporary-absence-operational-guidelines-word>>.

*through the heavy fire safe front door. Some low storage cupboards and a handle on the wall near his kitchen sink were also recommended by the OT.*

*Jonathon requested these disability modifications with the help of his housing support worker, and later a lawyer from a community legal centre (CLC). The CHP refused the request; it insisted that modifications must be paid for by NDIS funding. Jonathon does not receive NDIS funding as there is some hope that he may eventually recover from the need to use his wheelchair and the disability is therefore not 'permanent' (an NDIS eligibility requirement).*

*The CLC requested an internal review of the decision, which was not responded to by the CHP, and made a complaint about this matter to the Housing Registrar. The Housing Registrar found that they had acted consistently with their policy and met the relevant Performance Standard of "...facilitating access to support for social housing applicants and tenants with complex needs." Jonathon is no longer on the priority wait list so would struggle to find alternate housing. He therefore must live with the housing in its un-modified condition, which makes everyday tasks more difficult.*

Had Jonathon been housed from the Victorian Housing Register waitlist in a publicly managed home, he would have had these 'reasonable adjustments' undertaken upon request pursuant to the Department's guidelines. Instead, he remains without the modifications, and at a significant disadvantage for having been housed in a property managed by a CHP.<sup>5</sup>

### **The need for model rules for CHPs**

To ensure consistency and transparency of decision-making across the social housing sector, we recommend the adoption of Model Rules for CHPs. These should be drafted in consultation with tenants and the tenancy advocate and legal assistance sectors.

The Model Rules should contain detailed tenancy management policies and operational guidelines across all key tenancy management areas. They should include the adoption, at a minimum, of the following critical policies that currently apply to public housing tenancies:

- ▼ **Temporary absence policy** – CHPs should recognise that tenants or residents may be absent from their property for periods of time and accept periods of temporary absence of up to 6 months if special circumstances are approved. This may require a funding arrangement with DFFH to subsidise rent during the temporary absence.
- ▼ **Disability modifications policy** – CHPs should undertake minor 'reasonable adjustment' modifications where there is a report recommending these be made from a treating health professional.
- ▼ **Internal appeals policy** – Community housing residents should have access to an avenue for genuine internal review of decisions. Such a process must recognise the procedural

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<sup>5</sup> See Department of Health and Human Services Victoria, *Maintenance manual: home modifications in public housing during the transition to NDIS operational guidelines* (October 2018) <<https://providers.dhhs.vic.gov.au/home-modifications-public-housing-during-transition-ndis>>.

fairness obligations of a CHP and require that a CHP not take action that would extinguish a tenant's complaint remedies before the review is determined.

- ▼ **Rent setting policy** – Rent should be limited to 25% of household income (plus 100% Commonwealth Rent Assistance). CHPs policies must also establish clear processes for a tenant to have their rent reduced where household income is reduced.
- ▼ **Arrears policy** – Repayment plans for rental arrears should be limited to a percentage of the weekly household income and CHPs should only proceed to eviction as a mechanism of last resort.
- ▼ **Evictions policy** – Eviction should be used only as a mechanism of last resort. In circumstances of forced transfer, right of return should be allowed where it is available, and permanent and appropriate relocation offers should be made.

These Model Rules should be the deemed policies of all registered housing associations and providers and should be made publicly available, ensuring that tenants and those who assist them (including the legal assistance sector) have certainty about the management of CHP tenancies.

Within such an approach, there could be scope to permit individual CHPs to apply to the Housing Registrar or other relevant regulating agency or department for a varied application of the Model Rules where a provider-specific requirement for this can be established. Where such a variation is granted, the amended policy or policies, and the basis for the variation request, should also be required to be made publicly available.

### **The need for publicly-available CHP policies and guidelines**

Many CHP policies are difficult to find and lack consistent language or structure. In some cases, CHP policies provide little practical guidance to tenants or CHP staff members and operate in large part to provide a CHP with discretion to determine key tenancy management issues on a “case-by-case basis”. In other cases, CHP policies are not publicly available at all.<sup>6</sup>

Having consistent, clear and publicly available policies which provide meaningful guidance about how tenancies are managed by CHPs is essential to ensuring fair treatment of community housing tenants. It is also critical in creating consistent standards across the community housing sector. The *Performance Standards for Registered Housing Agencies (Performance Standards)* require that CHPs make their policies readily available in a range of formats, and it is a breach of the *Housing Act 1983 (Vic) (Housing Act)* for CHPs to fail to comply with these *Standards*.<sup>7</sup>

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<sup>6</sup> On a review of CHP policies at 9 November 2020, a number of CHPs did not have particular policies online, and a number did not have the complete suite of policies required by the 2019 Guidance Note. See **Annexure 1** for more detailed analysis.

<sup>7</sup> Housing Registrar, *Performance Standards for Registered Housing Agencies* (Report, Department of Treasury and Finance, 1 July 2014) 3 <<http://www.housingregistrar.vic.gov.au/Publications/Performance-standards-and-evidence-guidelines>>.

On 11 February 2019, the Housing Registrar issued a Guidance Note to all registered agencies requiring them to make available and publish policies in key areas of tenancy management and rent calculation, including evictions, rent setting, repairs and arrears management (**2019 Guidance Note**).<sup>8</sup> Since this time, there has been some progress in this area. However, some CHPs have still not made available all their key tenancy management policies.<sup>9</sup>

Until such time as Model Rules are implemented, or in the event that they are not, we recommend that the Housing Registrar take a proactive role in auditing and reviewing CHP policies to ensure that they are compliant with the requirements of the 2019 Guidance Note, including that of policies being made publicly available. Where CHPs fail to maintain compliant policies, or do not publish their policies, the Housing Registrar should use its powers to suspend or refuse registration of those CHPs.

### **RECOMMENDATIONS**

1. A relevant body develop Model Rules for the community housing sector that are of a standard equivalent to the tenancy management policies of DHHS including, but not limited to the key areas of temporary absence, internal appeals, rent setting, arrears and evictions.
2. These Model Rules should be the deemed policies of all registered housing associations and providers and should be required to be made publicly and readily available in a variety of formats.
3. The Housing Registrar should undertake an audit of all CHP policies to ensure that they cover the key areas outlined in the Housing Registrar's 2019 Guidance Note and issue their findings in a publicly available report.
4. Where CHPs do not have compliant policies, or fail to publish their policies, the Housing Registrar should use its powers to suspend or refuse registration of non-compliant CHPs.

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<sup>8</sup> Housing Registrar, *Guidance: Agency Publication of Key/Online Policies* (Guidance Note, 11 February 2019) <<http://www.housingregistrar.vic.gov.au/How-we-regulate/Guidelines-for-agencies>>.

<sup>9</sup> A number of CHPs do not have policies covering all the key areas outlined in the 2019 Guidance Note, as set out in Annexure 1.

## 2. Protect community housing tenants' human rights

For Office of Housing tenants, the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**)<sup>10</sup> plays a critical role in protecting human rights, particularly around eviction. DFFH takes seriously its obligation to consider the Charter and requires all staff to use tools and policies to enable consistent, fair and accountable decision-making to ensure it is acting lawfully under the Charter. For tenants of CHPs, the landscape is fundamentally different, with lack of clarity about whether the Charter applies and an inconsistent approach to applying the Charter in decision-making. Given CHPs are performing a function arguably identical to DFFH, it is crucial that CHPs have in place procedures and processes to ensure they are acting lawfully under the Charter and that human rights are protected.

### How the Victorian *Charter* provides protections to those in social housing

The Charter protects twenty fundamental human rights. It makes it unlawful for public authorities to fail to give proper consideration to those human rights when making decisions, or act in a way that is incompatible with relevant human rights.<sup>11</sup> There are a number of rights that need to be properly considered by public authorities when decisions are made in relation to a person's housing, including the right not to have one's home or family arbitrarily interfered with, the best interests of any children affected by the decision, the importance of a fair hearing, the protection of the family group, and the right not to be discriminated against.

Public authorities under the Charter include public servants and statutory bodies, such as the Director of Housing (**Director**). Each time an eviction related decision is made, the Director's policies require them to specifically consider the Charter rights of those affected by the decision. The Supreme Court made clear in the case of *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 (**Burgess**) that the decision to give a notice to vacate and the decision to purchase a warrant of possession, engaged the tenant's human rights under the *Charter*.<sup>12</sup> The Court held in *Burgess* that decisions of the Director that involved a failure to give proper consideration to these human rights were unlawful, and issued writs quashing the decision of the Director to purchase a warrant.<sup>13</sup> The court also outlined the circumstances where a decision to issue a notice to vacate could be quashed and the timing for exercising this public law remedy.<sup>14</sup>

In addition to the eviction context, there are other decisions and actions of public authorities that arise in the housing context that could theoretically be judicially reviewed, including decisions to give breach of duty notices, decisions to apply or cancel rental rebates and decisions to make applications to VCAT for certain orders that engage or limit relevant human rights.

As a result of the decision in *Burgess* DFFH have become even more responsive to engagement around ensuring Charter rights are protected, and those facing eviction can

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<sup>10</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>11</sup> *Ibid* s 38.

expect to have an opportunity to be heard in relation to their Charter rights. It is common for there to be genuine opportunities to explore alternatives to eviction, including provision of additional supports, or addressing some of the difficulties the tenant is having in complying with their obligations as a tenant.

Successful advocacy to sustain tenancies and ensure rights are protected for those residing in CHPs has been far more limited due to uncertainty about whether the Charter applies to them. Sandra's story, below, illustrates these difficulties, and also how the Charter provides a useful framework for making rights-based decisions around housing.

## **SANDRA'S STORY**

*Sandra contacted a CLC and instructed that her landlord, a CHP, had recently obtained a possession order from VCAT, and would soon be purchasing a warrant for her removal from the premises. The stated reason in the notice to vacate was that she had breached a compliance order by having a cluttered room, not looking after her health and hygiene and that her strange odour was causing nuisance to other residents.*

*Sandra had previously told her landlord that her inability to clean and maintain personal hygiene was symptomatic of her mental illness and that she was continuing to see medical professionals to assist with this. However, a new housing manager took issue with Sandra's hygiene issues and complained about her body odour on several occasions before issuing a notice to vacate for breaching an earlier compliance order. Sandra was fearful of losing her housing as the instability of homelessness would significantly exacerbate her mental health issues.*

*Sandra's lawyer negotiated with the CHP not to purchase a warrant to remove her from the property. Sandra's lawyer's negotiation encouraged the CHP to explore other options that might help to address their concerns. Sandra's lawyer asserted that the CHP was a functional public authority under the Charter and was required to give proper consideration to Sandra's Charter rights, particularly the right to privacy and her right not to be discriminated against because of her disability.*

*Sandra's lawyer asserted that the CHP had failed to adequately take Sandra's mental illness and inevitable homelessness into account prior to deciding to evict her. Throughout the negotiations, the CHP refused to accept that they were a functional public authority under the Charter.*

*Despite the lack of clarity regarding the CHP's obligations under the Charter, an agreement was reached to allow Sandra to remain in the premises on the condition that she continue to engage with support services, and to make efforts to address her landlord's concerns in relation to the premises.*

*Sandra kept her housing and this stability has allowed her to continue engaging with relevant support workers to improve her health and address the clutter that had accumulated at her property.*

*Following the negotiations, the CHP stated that they benefited from the framework for negotiation provided by the Charter.*

*While negotiations were successful in Sandra's matter, it was an ad hoc, one-off outcome and throughout the negotiations the CHP maintained that they were not a public authority and were not bound by the Charter.*

### **Ensuring the Charter applies to Community Housing Providers**

The term 'public authority' in the Charter includes entities that carry out 'functions of a public nature'.<sup>15</sup> The Second Reading Speech on the Charter highlighted that this definition should be applied 'broadly'.<sup>16</sup> While there has been some recognition that CHPs are functional public authorities bound by the Charter<sup>17</sup> due to their public function of providing affordable social or community housing for low income tenants, some uncertainty remains.<sup>18</sup> This results in considerable divergence in the application of the Charter to community housing providers' decisions. Human rights would be better protected if it was clear that CHPs were bound by the Charter.

This could easily be rectified by amending the Charter to clarify that CHPs are public authorities for the purposes of the Charter. As suggested by the 2015 independent review of the Charter, this could be achieved by amending the Charter to specifically include CHPs as public authorities.<sup>19</sup> Alternatively, regulations could be made prescribing a list of CHPs as public authorities under the Charter.

Other jurisdictions in Australia have taken steps to expressly recognise CHPs as public authorities for the purposes of their human rights charters. For example, the Queensland *Human Rights Act 2019* (Qld) specifically states that a housing service by a state-funded provider or the state under the *Housing Act 2003* (Qld) is 'performing functions of a public nature'.<sup>20</sup> Similarly the *Human Rights Act 2004* (ACT) provides that the provision of public housing is a function of a public nature when performed by entities on behalf the Australian Capital Territory.<sup>21</sup>

### **RECOMMENDATION**

5. That the Victorian Government make legislative amendments to clarify that CHPs are functional public authorities under the Charter, either by amending the Charter or introducing regulations prescribing a list of CHPs as public authorities.

### **Inconsistent application of the Charter by CHPs**

Although some CHPs recognise that they are bound by the Charter, other issues arise in relation to their application of the Charter, which include: applying the Charter inconsistently; often refusing to provide explanations of the human rights assessments undertaken in their

<sup>15</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4.

<sup>16</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls).

<sup>17</sup> See, *Goode v Common Equity Housing Limited (Human Rights)* [2016] VCAT 93; *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025.

<sup>18</sup> See *Durney v Unison Housing* [2019] VSC 6.

<sup>19</sup> See recommendations 12 and 13 in Young, Michael Brett, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) vi.

<sup>20</sup> *Human Rights Act 2019* (Qld) ss 9(1)(f), 10(3)(b)(vi).

<sup>21</sup> *Human Rights Act 2004* (Act) ss 40(1)(g), 40A(3)(b)(vi).

decision-making processes; not providing tenants with information about their rights; and providing inadequate training to housing workers on their obligations under the Charter.

Community housing workers often have limited or no understanding of their obligations under the Charter. Where housing workers consider the impact of a decision on a tenant's human rights, this consideration generally fails to fulfil the requirements under s 7 of the Charter (which requires a detailed examination as to whether any restrictions on rights can be demonstrably justified).

As Trevor's story below shows, CHP workers seem confused about the difference between considering human rights in order to ensure their own decision-making is lawful under the Charter, and the separate role of the Victorian Civil & Administrative Tribunal (**VCAT**) in determining whether the CHP are legally entitled to certain orders under the RTA. Just because VCAT has granted a CHP a possession order, does not mean they have complied with the Charter. The Victorian Supreme Court of Appeal has made clear that VCAT has no role in determining the separate question of lawfulness of public authorities' decision-making under the Charter.<sup>22</sup>

Even where a CHP's policies or website references the Charter, it is often in an unclear manner that fails to recognise their obligations or provide a framework for Charter-compatible decision making.<sup>23</sup> A list of CHP policies that reference the Charter in this way are set out in **Annexure 1** of this paper. Trevor's story, below, shows the consequences of decision-making by CHPs without proper consideration of the rights of tenants. Although negotiations were successful in Trevor's case, it was an ad hoc, one-off outcome, and it was necessary to issue judicial review proceedings before the CHP properly considered Trevor's human rights under the Charter. Had the CHP had in place proper processes to comply with its obligations under the Charter the matters in VCAT and the need for the Supreme Court application might have been avoided.

### **TREVOR'S STORY**

*Trevor has a long history of mental health issues, with diagnoses of major depressive disorder, bipolar and dependent personality disorder. A homelessness service had assisted him to find housing in a rooming house run by a CHP.*

*The CHP knew about Trevor's history of mental ill-health and, during his time at the rooming house, his mental health fluctuated, including hospitalisations. In 2018 Trevor became concerned for a close friend of his, who also resided in the rooming house. Trevor broke down the door to his friend's room and found that he had committed suicide by hanging. In despair, Trevor damaged another door within the rooming house. He later fixed that damage and apologised to the resident whose door he had damaged. Trevor was remorseful for his actions but explained that he was frustrated with the CHP as, only a few days before, he had complained to them about the lack of support provided by the CHP to the residents.*

<sup>22</sup> *Director of Housing v Sudi* [2011] VSCA 266.

<sup>23</sup> For example, Aboriginal Housing Victoria refers to the Charter under the heading 'Relevant legislation and regulation' in various chapters of its *Housing Services Manual*, but it doesn't then refer to human rights through the body of the manual text (see, i.e. [https://ahvic.org.au/cms\\_uploads/docs/ahv-tenant-housing-services--chapter-7-property-management-tenant-relocation.pdf](https://ahvic.org.au/cms_uploads/docs/ahv-tenant-housing-services--chapter-7-property-management-tenant-relocation.pdf)). Locations of *Charter* references in Victorian CHP policies are set out in **Annexure 1**.

*The CHP issued multiple breach of duty notices to Trevor alleging that he had engaged in anti-social behaviour towards staff and other residents at the rooming house. No support or referral was offered to Trevor by the CHP. The CHP applied to VCAT for possession orders on multiple occasions without giving any consideration to Trevor's rights under the Charter, or even having a discussion with him about what was happening and his response to the allegations against him.*

*A legal assistance service assisted Trevor at some of the hearings at VCAT, and two of the three notices to vacate were found by VCAT to be without basis. At a third possession order hearing, Trevor was unrepresented and the representative from the CHP told VCAT that they did not want to evict Trevor and just needed the possession order for security and assured the VCAT Member that Trevor would be assisted to seek alternative accommodation. Despite these assurances, the CHP immediately purchased a warrant of possession and took steps to try to evict Trevor.*

*The legal assistance service assisted Trevor to commence judicial review proceedings in the Supreme Court. The matter was ultimately settled without the need for the Supreme Court to determine the issues in dispute.*

We recommend that requirements and standards be introduced for CHPs to incorporate the Charter into their policies and decision-making processes to ensure human rights are protected and CHP decisions that engage human rights are lawful. The Housing Registrar could play a key role in providing this guidance and in taking action against CHPs which repeatedly breach the Charter in their decision-making. Allowing tenants to make complaints about breaches of the Charter to the Housing Registrar will also assist in increasing accountability and consistency of decision-making.

## **RECOMMENDATIONS**

6. That the Victorian Government amend Schedule 7 of the *Housing Act* and the Registration Criteria for agencies, to require all agencies registered under the Housing Act to have a constitution and rules which include an acknowledgement of being bound by the Charter and have a stated object and purpose to act compatibly with and promote human rights in their management of housing stock.
7. That the Victorian Government amend s 81 of the *Housing Act* to an application for registration under that provision should include a report on how the applying agency's policies provide for Charter-compatible decision making.
8. That the Victorian Government amend section 93(1) of the *Housing Act* to include new performance standards that require all registered agencies to have public facing statements about their obligations under the Charter on their websites and tenancy agreements and have policies equivalent to DFFH that specifically embed Charter-compatible decision-making in all areas of tenancy management. These performance standards should be phrased as "mandatory requirements" rather than "indicators".
9. That the Housing Registrar prepare and publish guidance to agencies on how the Charter should be considered and applied in decision-making.

## Protecting human rights and ensuring decisions are lawful – the absence of accessible remedies and protections

There are currently no accessible remedies for tenants when a public authority (including CHPs) engages in conduct or makes a decision that is unlawful under the Charter. This is because the Charter does not provide for a separate cause of action, nor any other regulatory tools for ensuring conduct is Charter compliant.

When applications are made for review in the Supreme Court, a Charter ground is brought alongside a judicial review application. As VCAT does not possess judicial review jurisdiction, it is unable to determine whether a decision is lawful under the Charter when considering whether to make a possession order.<sup>24</sup> A tenant must go to the Supreme Court to have the Charter-compatibility and lawfulness of a decision reviewed. As Jacqueline's story below shows, this presents significant barriers to tenants being able to fully exercise their rights under the Charter.

### JACQUELINE'S STORY

*Jacqueline is an Aboriginal woman who has a cognitive impairment and had been living in community housing and receiving a disability support pension for a number of years. She had previously obtained an intervention order against one of her children due to persistent family violence but, in a recent incident, Jacqueline's child had attended her property and caused significant damage. Jacqueline had hidden in the bathroom and called police during the incident.*

*When Jacqueline's CHP learned about the damage, they issued her with an immediate notice to vacate for malicious damage and sought for her to immediately repay over \$4000 in damage that had been caused. Jacqueline attended a VCAT hearing, unrepresented, where a possession order was made against her. Several days before police were due to remove her from the property, Jacqueline contacted a CLC for assistance.*

*Jacqueline's lawyers entered into urgent negotiations with the CHP in an attempt to prevent the eviction, which included providing detailed information about her history of family violence and cognitive impairment that the CHP had not previously been aware of. When the CHP refused to call off the eviction, Jacqueline's lawyers lodged an urgent injunction application in the Supreme Court, arguing that the landlord had failed to give proper consideration to Jacqueline's human rights in reaching its decision to evict her.*

*Shortly after these proceedings were commenced, Jacqueline's landlord agreed to cancel the eviction, and instead offered Jacqueline alternative housing in a new location, with no liability for the damage caused by her child. She has relocated to a different community housing property which has better security that improves her safety.*

If a CHP does not accept that it is a public authority under the Charter and does not agree to negotiate with a tenant's representative as to their Charter obligations, tenants are forced to choose between accepting an unjust outcome and commencing litigation in Victoria's highest court. Judicial review proceedings in the Supreme Court are costly, lengthy, inaccessible and

<sup>24</sup> *Director of Housing v Sudi* [2011] VSCA 266

risky for tenants. Most tenants and their legal representatives will be deterred by these negatives, regardless of the merit of an application.

There is a further layer of complication, as whilst CHPs are likely to meet the definition of “public authority” for the purposes of the Charter, this does not automatically mean they are a public authority whose decisions are amenable to administrative law remedies such as judicial review in the Supreme Court. The test for judicial review like remedies has traditionally been much narrower than the definition of public authority in the Charter. In the UK, there has been a shift towards considering whether a public function is being exercised in determining whether a public authority’s decision can be judicially reviewed.<sup>25</sup> Courts in Australia have not yet fully embraced this approach. It leaves open the possibility that CHPs are required to comply with the Charter, but that there is no mechanism for review of their decisions under the Charter.

This has reduced the potentially preventative role of the Charter, slowed the practical guidance provided by Charter-based decisions, and diminished protection and accountability in the event of non-compliance.

Tenants should not be forced to commence expensive and risky litigation in the Supreme Court of Victoria to uphold their human rights. We recommend that s 39 of the Charter be amended to confer judicial review and/or collateral review jurisdiction on the Review and Regulation List of VCAT, presided over by a Judicial Member within the meaning of s 3 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**) and that this review jurisdiction be extended to all decisions made by a “public authority” under the Charter.<sup>26</sup>

Similarly, while the Housing Appeals office considers complaints on Charter grounds regarding the Director of Housing, the Housing Registrar currently refuses to consider complaints on Charter grounds relating to CHPs. This refusal is on the basis that they are not ‘matters relating to rental housing’ pursuant to s 96(1) of the Housing Act, or complaints capable of being referred to VCAT under the RTA. This prevents tenants from having an accessible and low-cost means of resolving Charter disputes with CHPs. We recommend that amendments be made to allow tenants to bring Charter complaints to the Housing Registrar, to enable complainants to refer decisions of the Housing Registrar to VCAT and to provide the Housing Registrar with powers to revoke or suspend a CHP’s registration for repeated Charter breaches.

## **RECOMMENDATIONS**

10. Amend s 39 of the Charter to provide VCAT with judicial review and or collateral review jurisdiction on Charter grounds.
11. Amend ss 4(1) and 96(1) of the Housing Act to enable a tenant to make complaints to the Housing Registrar about breaches of the Charter.

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<sup>25</sup> See *R v Panel on Take-overs and Mergers; Ex parte Datafin* [1987] QB 815.

<sup>26</sup> A judicial member of VCAT is defined as either the President or Vice President which are required to be a judge of the Supreme Court, or a Judge of the County Court respectively, pursuant to *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*VCAT Act*) ss 10(1), 11(2).

12. Amend s 101 of the Housing Act to enable a complainant to refer a direction or a refusal to make a direction of the Housing Registrar under s 100 to the Review and Regulation List of VCAT for merits review.
13. Amend s 141(1) of the Housing Act to give the Housing Registrar power to revoke or suspend an agency's registration under that Act for repeated breaches of the Charter.

### 3. The need for a robust accountability mechanism for community housing

Effective enforcement and “accessible, consistent and clear reporting on enforcement strategies and activities” is an essential part of any well-functioning regulatory framework.<sup>27</sup> It is necessary to demonstrate the effectiveness of a regulator in administering the laws in its remit and enabling individuals, the advocates who represent them and parliament to hold the regulator to account.<sup>28</sup> This is particularly important when what is being regulated are the standards in place to ensure safe and secure housing of some of Victoria’s most vulnerable tenants.

Community housing is regulated by the Housing Registrar, which states that its purpose is to “contribute to the development, growth and continual improvement of the Victorian community housing sector through proactive, risk based, and outcomes focused regulation.”<sup>29</sup> Due to a relatively narrow reading of its own jurisdiction, and other limits on its function, including limited resources, many tenancy-related complaints are not considered by the Registrar. This significantly reduces the efficacy of the Registrar as a regulator of the community housing sector and impacts on its ability to achievement its purpose. This sits in sharp contrast to the rigorous accountability mechanisms supporting public housing.

#### Why are effective accountability mechanisms important?

Consumer Action Law Centre, in its 2020 report ‘Regulator Watch’, sets out these three key reasons for effective enforcement action by consumer law regulators, which apply equally in the community housing context:

- Individuals need their regulators to act on their behalf, as there are significant barriers (financial and other) to individuals enforcing their rights
- Poor housing outcomes impacting tenants occur when there is noncompliance with laws and the market is seen to ‘get away with it’ due to a lack of regulatory action
- There is a need to test the boundaries of the law so tenants, CHPs, governments and regulators are clear on their rights and responsibilities under that law.

The lack of sufficient accountability mechanisms and enforcement activity can undermine the integrity of a regulatory framework.

#### Accountability mechanisms for DFFH tenancies

Public housing tenancies are governed by a strong regulatory framework. Firstly, DFFH practice is governed according to highly detailed and prescriptive, publicly-available policies that mandate exactly how decisions are to be made regarding tenancies and their day to day management. These DFFH policies include those contained in the Allocations Manual, Bond

<sup>27</sup> Consumer Action Law Centre, ‘Regulator Watch’ (2020), 5 and 10 < [https://consumeraction.org.au/wp-content/uploads/2020/03/RegulatorWatch\\_Report\\_Compressed.pdf](https://consumeraction.org.au/wp-content/uploads/2020/03/RegulatorWatch_Report_Compressed.pdf)>

<sup>28</sup> Ibid.

<sup>29</sup> Housing Registrar, *Housing Registrar Regulatory Update Report 2019-20* (November 2020) “Our Purpose”, 2. < [https://www.vic.gov.au/sites/default/files/2021-03/Housing-Registrar-Regulatory-Update-Report-2019-20\\_Word-Accessible-Version.docx](https://www.vic.gov.au/sites/default/files/2021-03/Housing-Registrar-Regulatory-Update-Report-2019-20_Word-Accessible-Version.docx)>

Loan Scheme Manual, Business Practice Manual, Maintenance Manual, Relocation Manual, Rental Rebate Manual and the Tenancy Management Manual.

When a tenant is not satisfied with a decision or believes it has been made incorrectly according to DFFH policy or unlawfully under the Charter, complaints can be made internally within the Local Housing Office as a Tier 1 Complaint.<sup>30</sup> Within 24 hours of a Tier 1 Complaint being made it must be registered in DFFH's internal database and must be completed within 10 business days.<sup>31</sup> If a Tier 1 appeal is unsuccessful the person's complaint is automatically escalated to a Tier 2 Complaint to the Housing Appeals Office,<sup>32</sup> which is independent and external to the Local Housing Office.<sup>33</sup> This Office is responsible for providing independent merits review of decisions made at the Local Housing Office level and look at the complaint afresh and remake the decision.<sup>34</sup>

Unlike with CHPs, in most cases, DFFH will allow a tenant to explore all their internal review remedies before making a final decision. DFFH will await the determination of those options, and follow a process that grants the tenant procedural fairness, before proceeding to make any decision or taking further steps (such as giving a notice to vacate, making an application to VCAT for a possession order or purchasing a warrant of possession) that would extinguish the tenant's complaint remedies before they can be determined.

At every step in this decision-making process, the decision maker and the decision-making process is subject to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) and all information pertaining to the decision are available to the tenant under the FOI Act (except those specifically exempt under Part IV of that Act).

Subject to the outcome of the Tier 2 Complaint, a tenant can potentially apply to the Supreme Court for judicial review of the decision,<sup>35</sup> or may make a complaint to the Minister, Victorian Equal Opportunity and Human Rights Commission<sup>36</sup> or the Victorian Ombudsman.<sup>37</sup>

### **Community housing accountability mechanisms under the Housing Act**

CHPs have far weaker complaints procedures and accountability mechanisms. Section 97 of the Housing Act requires CHPs to establish an internal complaints procedure, for tenants and prospective tenants of the CHP who are "affected by decisions of a CHP on matters relating to rental housing".<sup>38</sup> Complaints therefore can be made by both tenants and prospective tenants of the CHP. Tenants and prospective tenants can complain about "matters relating to

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<sup>30</sup> Department of Families, Fairness and Housing, [Business Practice Manual – Housing Appeals](#) (May 2017), 10.

<sup>31</sup> Ibid, 12-13. Sometimes the Tier 1 decision maker will request additional documents from the complainant or others, which will result in an extension of time being requested by Tier 1 decision maker to the Manager of Housing Appeals (MHA) for consideration, and this may also result in an extension of time on the 10 business day response time.

<sup>32</sup> Ibid 10, 13.

<sup>33</sup> Ibid 12.

<sup>34</sup> Department of Health and Human Services. *Business Practice Manual – Housing Appeals* (Victorian Government, May 2017) [14]

<sup>35</sup> *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648.

<sup>36</sup> Department of Families, Fairness and Housing, [Business Practice Manual – Housing Appeals](#) (May 2017), 10.

<sup>37</sup> For an example of this see Complainant A in the Victorian Ombudsman's [Investigation into the management of maintenance claims against public housing tenants](#) (October 2017) 6, 11-12.

<sup>38</sup> *Housing Act 1983* (Vic), s 97(1).

rental housing” but cannot make complaints about matters that are capable of being referred to VCAT under the RTA.<sup>39</sup>

The CHP is required to take all reasonable steps to resolve a complaint within 30 days. Where a CHP fails to resolve a complaint within 30 days, tenants and prospective tenants are entitled to refer the complaint to the Housing Registrar for external dispute resolution.<sup>40</sup> The Housing Registrar may reject a complaint if it is not referred to it within a reasonable time frame after the 30-day period lapses, and is not obligated to provide a remedy even if the complaint is upheld.<sup>41</sup> If the complaint is upheld, the Housing Registrar may then direct the CHP to remedy the matter or take further action to reduce the likelihood of future non-compliance.<sup>42</sup> If the Housing Registrar makes a direction under s 100(1) of the Housing Act, the CHP is legally obliged to comply with the direction.<sup>43</sup>

### **The Housing Registrar’s narrow interpretation of its own jurisdiction**

One key issue with the existing accountability mechanisms for CHPs is that the Housing Registrar and individual CHPs have a narrow interpretation of the scope of s 96(2) of the Housing Act and the kinds of complaints that can be made. Section 96(2) states that complaints cannot be made to CHPs or the Housing Registrar about matters that are capable of being referred to VCAT under the RTA. This is theoretically any dispute arising under a tenancy agreement or residency agreement, given the broadness in the drafting of s 452 and 472 of the RTA.

It is clear from a common sense reading of s 96 that complaints can still be made about a CHP’s failure to follow its own policies, unprofessional conduct, breaches of the Housing Act or breaches of the Performance Standards, even if the ultimate decision or matter is one in which can theoretically be referred to VCAT under the RTA. That is, section 96 appears to leave open complaints about the process or procedure that leads up to a referral to VCAT under the RTA, rather than the decision/action/matter itself that is capable of being referred to VCAT.

As Samir’s case study below shows however, the Housing Registrar does not consider that it has jurisdiction to investigate any aspect of a decision that might ultimately be referred to VCAT under the RTA including the process followed by the CHP, whether it has complied with Performance Standards or the Charter. Given almost all disputes are capable of being referred to VCAT under the RTA (including repairs, disputes about rent increases, disputes about compensation, disputes about eviction, disputes about entry to the property) this seemingly gives the Housing Registrar no jurisdiction at all to investigate complaints.

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<sup>39</sup> *Housing Act 1983 (Vic)*, s 96(2).

<sup>40</sup> *Housing Act 1983 (Vic)*, s 98(1).

<sup>41</sup> See s 100(1) of the *Housing Act 1983 (Vic)* and the use of the word ‘may’ rather than ‘must’.

<sup>42</sup> *Housing Act 1983 (Vic)*, s 100(1).

<sup>43</sup> *Housing Act 1983 (Vic)*, s 100(3).

This is in contrast to the approach to Housing Appeal complaints taken by DFFH, where DFFH seek to distinguish the decision that is capable of being referred for a defective process, and a failure to follow Departmental policies in arriving at that decision.<sup>44</sup>

## **SAMIR'S STORY**

*Samir moved to Australia 13 years ago and lives with her two children, one of whom was born with autism and an intellectual disability and requires special care. Around 11 years ago, after leaving a violent relationship, Samir was offered a community housing property through a cooperative. Samir resided at this property for 11 years without any issues. The community housing provider was but managed by a board, elected by members of the co-operative who were also tenants at the apartment building where Samir lived.*

*Samir has since worked intermittently in restaurants. She cannot speak much English. She has little to no family, friends or supports in Australia and barely survives on a parenting payment.*

*During this time, Samir met a man called Abdul who worked with her at the restaurant. Abdul was kind to her and occasionally helped her out financially. One day Abdul asked if he could store some belongings in Samir's garage. She agreed as she felt indebted to Abdul for his friendship and financial support over the years and she trusted him.*

*One day, several men burst into Samir's home with weapons, yelling at her in English and demanding money. Samir called the police. When police arrived, they discovered that Abdul had been growing marijuana in Samir's garage without her knowledge. Samir maintains that she was not aware of Abdul's actions. Police accepted this and decided not to charge Samir.*

*The CHP served Samir with an immediate notice to vacate and told her that she had to leave the property immediately (contrary to the RTA). The CHP did not inform Samir that they needed to obtain a possession order from VCAT in order to evict her. They also did not offer to provide Samir with an interpreter or inform her that she could get legal advice. The CHP disconnected the electricity to the property and refused to reconnect it for a number of weeks. Samir spent 3 nights sleeping in her car with her children until a community legal centre lawyer advised her that she had not been properly evicted under the RTA and could return home until VCAT granted the CHP a possession order. At the hearing, VCAT dismissed the application for a possession order on the basis that the notice to vacate was invalid.*

*The CHP refused to engage with Samir's lawyers and personally served a second notice to vacate on Samir, refusing to leave until Samir signed a document saying she agreed to relinquish her tenancy. CHP did this without speaking to Samir's lawyers, without giving Samir an opportunity to speak with her lawyers or having the document translated for her. At the second VCAT hearing Samir instructed that she did not have the strength to keep fighting and only wanted to avoid being evicted until after Christmas. Despite the unlawfulness of the CHP's actions under the Charter, Samir instructed her lawyers to agree to consent orders ordering her to vacate by mid-January.*

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<sup>44</sup> Department of Families, Fairness and Housing, [Business Practice Manual – Housing Appeals](#) (May 2017), 8-9.

*Samir made a detailed complaint to the Housing Registrar about the CHP's conduct prior to the tenancy ending. Samir's lawyers focused the complaint on the processes followed by the CHP rather than framing the complaint around the notice to vacate or decision to go to VCAT, which are matters capable of being referred to VCAT under the RTA and outside of the Registrar's jurisdiction.*

*Several days before Samir's tenancy was due to end, the Housing Registrar wrote to Samir's lawyers advising that the matters complained of were outside the Registrar's jurisdiction, as they were matters capable of being referred to VCAT under the RTA, and would thus only respond to other matters raised in their complaint letter. Samir's lawyers wrote back correcting this mischaracterisation of the complaint and clarifying that the matters were within the Housing Registrar's jurisdiction.*

*In March, the Housing Registrar wrote to Samir's lawyers advising that it had found that the CHP's handling of Samir's matters did not amount to a breach of Performance Standards, the Housing Act or the Charter. The letter was one page in length and provided no written reasons for the decision and did not address any of the specific issues complained of.*

*At the time of writing this case study, Samir instructed that she was still homeless 6 months after eviction. She has reapplied for social housing; however, she and her children face years before she has any prospect of being rehoused.*

Samir's case study clearly demonstrates that the Housing Registrar is not performing its statutory complaints function under the Housing Act. When the Housing Registrar was forced into exercising its jurisdiction, its consideration of the complaint was superficial, incorrect and fundamentally inadequate. Unfortunately, under s 101 of the Housing Act, only CHPs have the right to bring merits review proceedings to VCAT meaning Samir was left homeless and with no rights.

### **Lack of transparency and access to information surrounding decisions**

Decisions of the DFFH are subject to Freedom of Information requests under the FOI Act. This oversight and access to information surrounding how a decision has been made is a key accountability mechanism for tenants and ensures that decisions are made in a fair and transparent way.

The oversight and transparency required of departments and agencies under the FOI Act also arguably raises the standard of decision making, as decision-makers know that their decisions and the processes they follow could come under scrutiny by external reviewers.

Unfortunately, Registered Housing Agencies (CHPs which are registered under the Housing Act) and the Housing Registrar are not bodies covered by the FOI Act and amenable to FOI requests. CHPs are quite clearly exempt, as they are independent from government and are not captured under s 13 of the FOI Act. Similarly, the Housing Registrar is not subject to FOI requests as it does not meet the definition of an 'agency' under s 5(1) of the FOI Act.

This means that tenants and their advocates are completely excluded from the decision-making processes of both CHPs and the body tasked with regulating them, the Housing

Registrar. As Thuy's case above demonstrates, this lack of transparency leads to highly unaccountable decision-making on behalf of both the CHP and the Housing Registrar.

### **Inaccessible complaint procedures on CHP's websites**

Many CHPs only provide the statutory complaint procedures required under s 97 of the Housing Act as "feedback", not making it clear for tenants how they can make a formal complaint that has legal consequences and gives rise to external dispute resolution rights through the Housing Registrar. Commonly, these will appear on CHPs webpages as a "Feedback text box" that makes no reference to the Housing Registrar.

Alternatively, the complaints procedures or the policies that apply will be separated in different pages on the CHP's website, and both will be hidden beneath a litany of hyperlinks away from the home page with misleading names such "FAQ", "tenant info" or "about us" "resources".

By misnaming and concealing statutory complaint procedures, CHPs do not provide an accessible forum for making complaints.

### **The lack of an injunction power whilst complaints are being made and investigated**

Issues can arise from the fact that a tenant or prospective tenant has to wait 30 days before referring a complaint to the Housing Registrar.<sup>45</sup> Unfortunately, it is the experience of the community legal centres that some CHPs take steps to evict or irreparably extinguish complaint-based remedies before the complaint can be referred to the Housing Registrar.

The Housing Registrar's current position is that it does not have discretion under s 98 to accept a complaint made before the expiration of the 30-day time limit under s 96, even in circumstances where the agency is acting to terminate the tenancy before it can be investigated. Similarly, the Housing Registrar does not consider that s 100 gives it the power to make interim directions of an injunctive nature until the investigation is properly completed.

This loophole effectively undermines the usefulness of the current complaints procedures of CHPs and the Housing Registrar, particular in regards to evictions. The uneven approach to how complaints are dealt with is key difference between the rights of people living in community and public housing. By being able to subvert the Housing Registrar's oversight, complaints of community housing tenants can effectively be ignored. The ability to effectively enforce and oversee existing rights and protections puts those in community housing at a disadvantage compared to those in public housing.

#### **Recommendations**

14. That the Victorian Government amend legislation in order to:

14.1 Create a central Housing Appeals Office to oversee complaints of both public and community housing tenants.

14.2 Require that the central Housing Appeals Office must provide a remedy to the tenant if a complaint is upheld.

<sup>45</sup> *Housing Act 1983 (Vic)*, s 98(1)

- 14.3 Enable both landlords and tenants to apply to the Review and Regulation List of VCAT for merits review of decisions of a central Housing Appeals Office.
15. That the Victoria Government amend the *Housing Act* to enable complaints to the Housing Appeals Office to be made earlier than 30 days after the dispute is raised with a landlord and make it unlawful for an agency to take steps to do things that would frustrate the complaint or the remedy sought before the complaint can be determined.
16. That the Victoria Government amend the definition of 'agency' under s 2(1) of the *Ombudsman Act 1973 (Vic)* to include any agency registered under s 84 of the Housing Act.
17. That the Victorian Government amend the RTA to prevent VCAT from listing and hearing an application for a possession order where a relevant complaint has been made to the Housing Registrar by a tenant that is yet to be determined. Amend the Housing Act to require the Housing Registrar to notify the Principal Registrar of these unresolved complaints.
18. That the Victorian Government amend the definition of 'agency' in section 5(1) of the *Freedom of Information Act 1982 (Vic)* to include any agency registered under s 84 of the Housing Act.

## 4. Eviction as a genuine outcome of last resort

One of the objects of the Housing Act, which regulates the registration of CHPs, is ‘to promote security... of tenure’.<sup>46</sup> To this end, the Performance Standards specifically require registered CHPs to have policies that treat eviction as an outcome of last resort.<sup>47</sup> This is consistent with CHPs’ obligations under ss 4(1)(c), 13(a) and 38(1) of the Charter to avoid acting in a way or making decisions that result in an arbitrary interference with tenants’ or residents’ homes and their right to housing. Supporting long-term, safe and affordable tenancies is not only good for tenants – it has also been clearly linked to better wellbeing and health outcomes,<sup>48</sup> reducing health costs for the state.<sup>49</sup>

The Performance Standards’ treatment of eviction as a last resort recognises that community housing is intended to provide long-term, stable and affordable accommodation for disadvantaged Victorians. This is particularly important because eviction carries more serious consequences for social housing tenants than other tenant cohorts – as social housing tenants often find it more difficult to find alternative accommodation, they are more likely to end up homeless as a result of an eviction.<sup>50</sup>

However, despite the relevant Performance Standard and *Charter* obligations, our experience is that some CHPs do not genuinely treat eviction as a measure of last resort.

Research commissioned by Unison Housing found that almost half of its tenancies ended within 18 months.<sup>51</sup> Most of these exits (59 per cent) were from what it describes as “negative push factors” such as rent arrears or conflict with neighbours.<sup>52</sup> There are clearly difficulties in maintaining tenancies for people with complex needs and living circumstances.

Given the complexity of the need and the significant consequences when tenancies end, there needs to be clear and transparent processes and supports to assist people maintain their tenancy. Appropriate policy and procedures outlined in Chapter 1 should not be circumvented.

One concerning factor that community legal centres sometimes see is the use of ‘end of fixed term’ notices to vacate by some CHPs to circumvent the normal process of providing grounds

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<sup>46</sup> Housing Act, section 6(1)(f).

<sup>47</sup> Housing Registrar, [Performance Standards and Evidence Guidelines | Housing Registrar](https://www.vic.gov.au/performance-standards-and-evidence-guidelines), 3, available at: <<https://www.vic.gov.au/performance-standards-and-evidence-guidelines>>

<sup>48</sup> Shelley Mallet, Rebecca Bentley, Emma Baker, Kate Mason, Deborah Keys, Violet Kolar, Laurent Krnjacki, *Precarious Housing and Health Inequalities: What are the links? Summary Report* (August 2011) available at: [https://www.vichealth.vic.gov.au/~/\\_media/resourcecentre/publicationsandresources/health%20inequalities/precari%20housing/precari%20housing\\_summary%20report\\_web.pdf?la=en](https://www.vichealth.vic.gov.au/~/_media/resourcecentre/publicationsandresources/health%20inequalities/precari%20housing/precari%20housing_summary%20report_web.pdf?la=en)

<sup>49</sup> Estimated annual cost to government services of an individual experiencing homelessness is \$29,450 higher than for the rest of the Australian population. See Zaretsky K. et al, Australian Housing and Urban Research Institute (AHURI), *The cost of homelessness and the net benefit of homelessness programs: a national study*: AHURI Final Report No 205 (2013) 14 available at [https://www.ahuri.edu.au/\\_\\_data/assets/pdf\\_file/0007/2032/AHURI\\_Final\\_Report\\_No218\\_The-cost-of-homelessness-and-the-netbenefit-of-homelessness-programs-a-national-study.pdf](https://www.ahuri.edu.au/__data/assets/pdf_file/0007/2032/AHURI_Final_Report_No218_The-cost-of-homelessness-and-the-netbenefit-of-homelessness-programs-a-national-study.pdf).

<sup>50</sup> See Justice Connect Homeless Law, *There’s No Place Like Home: Submission on the Security of Tenure Issues Paper* (December 2015) 21-27; Tenants Union of Victoria, *Response to Security of Tenure Issues Paper of the Residential Tenancies Act Review* (December 2015) 12-13; Victoria Legal Aid, *Residential Tenancies Act Review: Security of Tenure Submission* (31 December 2015) 8-10.

<sup>51</sup> Guy Johnson, Susan McCallum, Juliet Watson. *Who stays, who leaves and why: Occupancy patterns at Unison Housing between 2014-2016* (Research Report No. 2, February 2019) 3.

<sup>52</sup> *Ibid* 4

for possession underpinned by evidence, as set out below. This is inappropriate given the vulnerability and needs of the tenants in community housing. We believe a higher standard of protection is needed to avoid evictions into homelessness.

### **Use of ‘end of fixed term’ notices by CHPs**

Tenants of CHP properties are vulnerable to eviction by ‘end of fixed term’ notices as they begin their tenancies on a fixed term lease generally not longer than a year. Evicting a tenant/resident at the end of the fixed-term lease for any reason,<sup>53</sup> can provide a cover for evictions to occur for discriminatory and unjustified reasons. Such notices raise similar concerns as a ‘no reason’ notice to vacate, which will shortly be unavailable to all landlords as a result of legislative amendments due to come into effect on 29 March 2021.<sup>54</sup>

CHPs have at times used ‘end of fixed term’ notices to vacate to evict tenants for minor issues or to control tenant behaviour, where they know that they would otherwise have no legal basis of evicting them under any of the other grounds in Part 6, relating to termination of tenancies, of the RTA.

For community lawyers these cases are particularly difficult as there is little recourse or options to assist the tenant to stay in their home. The tactic is lawful and difficult to prove. The alternative to an end of lease, would require policy and procedures to address any issue. For people who are experiencing vulnerability, such as mental illness or disability, housing stability is essential. Most people spend many months or years waiting to be housed off the Housing Register, to have your lease end in a year and return to the waiting list, is particularly unfair. For most circumstances in community housing the use of fixed term leases is not appropriate.

Joan’s story below provides an example of how the ‘no reason’ notice to vacate can be misused. This applies equally to the ‘end of fixed term’ notice to vacate as it is essentially a ‘no reason’ notice, given that no grounds need to be proven when seeking possession in reliance upon such a notice.

#### **JOAN’S STORY**

*Joan and her adult son became tenants of a CHP after Joan was the victim of extreme family violence perpetrated by her former partner. After living in the CHP-managed property for 2 years, Joan and her son were given a ‘no specified reason’ notice to vacate. Joan was shocked and very concerned, as she had thought the rental was long-term. It had provided her with comfort and security after fleeing family violence. Joan feared that she and her son would become homeless.*

*The CHP applied for a possession order and, when Joan attended the hearing at VCAT, she was told that the notice had been given due to suspicions that her son was drug dealing out of the property. The CHP told Joan that a ‘no specified reason’ notice was given instead*

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<sup>53</sup> Other than those provable as being retaliatory, which is extremely difficult to prove: *Residential Tenancies Act 1997* (Vic), ss 266(2), 289(1).

<sup>54</sup> We note that ‘no reason’ notices to vacate will no longer be available to landlords as of 29 March 2021, due to amendments under the *Residential Tenancies Amendment Act 2018* (Vic): *Residential Tenancies Amendment Act 2018* (Vic) ss 91ZZD, 142ZA.

*of a notice to vacate for illegal use because the CHP would not have to prove anything at VCAT.*

*This was the first time Joan had heard of these allegations, and she had not been asked to respond before the notice was issued. No attempt was made to sustain her tenancy. A VLA duty lawyer tried to negotiate with the CHP to adjourn the hearing so the CHP could make enquires about the alleged conduct and consider its obligations under the Charter, but the representative from the CHP refused to engage in any negotiations. Because no reason was needed VCAT made a possession order.*

*Joan's lawyer entered into negotiations after the possession order was made to keep Joan and her son in the property. The CHP admitted that they had no evidence of actual drug dealing and were basing their actions on the fact that Joan's son was inviting people experiencing homelessness into the apartment. It turned out that Joan's son was providing food to people experiencing homelessness and there was no suggestion that he was taking drugs, selling them or allowing drug use to occur at the property.*

We acknowledge the need for and responsibility of CHPs to manage the conduct of their tenants/residents, and to provide for the safety and comfort of their tenants or residents. Nonetheless, we believe that concerns about conduct should be managed via the breach and compliance mechanisms or the cause-based eviction provisions (such as danger, illegal use, successive breaches or breach of compliance order)<sup>55</sup> set out in the RTA rather than through an end of fixed-term notice to vacate. When the *Residential Tenancies Amendment Act 2018* (Vic) commences, landlords and rooming house operators will also be given further grounds for giving notices to vacate and evicting their tenants and residents, including the grounds of making threats and intimidation towards the landlord, staff, agents and contractors.<sup>56</sup>

These mechanisms clearly identify the alleged breach and give the tenant or resident an opportunity to address it. If the matter does proceed to VCAT, there are procedural and evidentiary requirements that the landlord must satisfy, and the tenant has an opportunity to defend the application.

The RTA also provides grounds for giving notices to vacate in circumstances where the tenant is not at fault, including where the premises are unfit for habitation,<sup>57</sup> where the landlord intends to conduct repairs or renovations<sup>58</sup> or where the tenant is no longer eligible for social housing.<sup>59</sup>

### **Transitional Housing Providers**

Another key concern is the use of 'end of fixed term' notices to vacate by CHPs that are also Transitional Housing Providers (**THPs**). The purpose of transitional housing is to transition people out of homelessness into temporary accommodation and then into more permanent public or community housing or the private rental market. In practice, however, we frequently

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<sup>55</sup> *Residential Tenancies Act 1997* (Vic), ss 243, 246, 249, 250, 278, 281, 283, 284.

<sup>56</sup> See *Residential Tenancies Act 1997* (Vic) pt 8.

<sup>57</sup> *Ibid* ss 245, 272.

<sup>58</sup> *Ibid* ss 255, 286.

<sup>59</sup> *Ibid* s 262

see THPs transitioning people back into homelessness without the THP having secured alternative housing for their transitional tenants.

For this reason, THPs regularly issue 'no reason' and 'end of fixed term' notices to vacate at the very commencement of the fixed term tenancy agreement. When they fail to find alternative housing for their clients, they then rely on these notices to vacate to evict the tenant. Given that there are very few grounds under which these notices to vacate can be challenged, there is often little that can be done for these tenants by their advocates.

Most tenants in transitional housing are on Centrelink benefits and have low prospects of securing an income needed to afford market rent in the private rental market. Evicting transitional housing tenants for failing to secure private rental accommodation perpetuates the revolving door of homelessness.

THPs do not always act on these notices and may choose to 'roll over' to a new 120-day tenancy. Nevertheless, in our view it is not appropriate to be planning a tenant's eviction at the very moment that an agency enters into a tenancy agreement with them. For the vulnerable cohort who rely upon transitional housing as they seek to improve their lives, this is hardly comforting. From the outset, the threat of eviction looms over them.

#### **RECOMMENDATIONS**

19. That the Housing Registrar conducts an audit and publicly reports on CHPs' use of end of fixed-term notices to vacate.
20. That the Victorian Government introduces legislative amendments to prevent, or at least limit, CHPs from using end of fixed-term notices to vacate.
21. That the Housing Registrar determine new performance standards that frame registration under the Housing Act as requiring eviction to be treated as a mechanism of last resort, rather than an 'indicator' of compliance within the performance standards.

#### **Limiting The Use Of Notices To Leave**

Many CHPs administer rooming houses, which house some of the most vulnerable and complex-needs tenants. The RTA enables rooming house operators to issue a resident with a notice to leave for 'serious acts of violence'.<sup>60</sup> This notice requires the resident to leave the property for 48 hours and makes it an offence for them to return during this period. These notices suspend the residency (though the resident remains liable for rent during the suspension), and during the 48-hour period the manager can apply to VCAT for an urgent order terminating the residency. The result is that residents can be made homeless for 48 hours because of untested or unsubstantiated allegations.

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<sup>60</sup> *Residential Tenancies Act 1997* (Vic) s 368.

In our experience, these notices can be misused by CHPs and are sometimes issued to residents who raise legitimate issues about repairs or unfair house rules, or when a resident is being a nuisance but has not committed a serious act of violence.

The power to issue a notice to leave is given to rooming house managers who are not independent, formally trained or professionally supported to fairly determine whether a serious act of violence has occurred or whether the safety of any person is in danger. While the RTA makes it an offence for an operator to issue a notice to leave without reasonable grounds,<sup>61</sup> we are unaware of this penalty ever being applied. In practice, it would be very difficult for a resident to prove that the CHPs had no reasonable grounds upon which to issue such a notice.

In our view, the law provides sufficient protection to CHPs who have a reasonable belief that a resident has committed a serious act of violence or poses a danger to other residents. CHPs can make use of personal safety intervention orders, and may call the police, who have powers to remove or arrest the resident. If a CHPs believes that a resident has caused danger, they may issue a notice to vacate and obtain an urgent VCAT hearing.<sup>62</sup>

The risk of misuse of a notice to leave is highlighted in Bianca's story, below.

### **BIANCA'S STORY**

*Bianca began living at a CHP rooming house after 5 years of homelessness. She suffered from Post Traumatic Stress Disorder, social anxiety and depression. Soon after moving in, Bianca was involved in a verbal altercation with another resident, who called the police. Police attended and obtained an interim Personal Safety Intervention Order against Bianca, excluding her from the rooming house. Bianca disputed that she was the aggressor in the altercation and sought to challenge the exclusionary condition of the intervention order – to instead negotiate safe contact conditions.*

*On the same day of the altercation, the CHP served Bianca with a Notice to Leave and applied for possession of the rented premises. Bianca sought legal assistance from a CLC, who raised with the CHP that there were other options available to them to resolve the matter without resorting to rendering Bianca homeless. The lawyer encouraged the CHP to withdraw the Notice to Leave, or alternatively, that the CHP transfer the resident to a vacant room they had available in another rooming house. The CHP refused and proceeded with their efforts to evict Bianca at VCAT.*

*At the hearing, VCAT was satisfied that there was no ongoing danger at the rooming house caused by Bianca, ordered that the suspension of the residency right cease and dismissed the application for possession. Bianca's lawyer lodged a complaint with the Housing Registrar that the CHP had not taken reasonable steps to avoid seeking to evict Bianca into homeless. The Housing Registrar found that the CHP had not breached the Performance Standards or any other obligations under the Act.*

In our view, notices to leave provide an unnecessary means of immediate eviction that carries significant risk to the rights of residents. Notices to leave should only be used as an option of last resort, and only where justified. The person giving the notice should be aware

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<sup>61</sup> Ibid s 368A.

<sup>62</sup> Ibid s 279.

of what it means and the consequences for the resident, and the resident must be provided with a proper opportunity to respond.

We recommend that model policies and training on notices to leave be developed for CHPs to reduce and limit the use of notices to leave.

**RECOMMENDATION**

22. That the Housing Registrar develop model policies and training on the use of notices to leave for CHPs that operate rooming houses and monitor the use of these notices.

## Conclusion

The Tenant Working Group recognises the important role of CHPs in providing homes for vulnerable and disadvantaged tenants in Victoria, and the at times challenging role that they perform in doing so. As government policies increasingly rely on community housing growth to house those people who are experiencing greater complexity of needs; accountability, transparency and safe guards of community housing need to keep pace. This paper sets out a number of changes that are necessary for improving how CHPs delivers housing, and the policies and procedures that support tenants who may be particularly vulnerable, in order to provide for fair and equal treatment of all social housing tenants. With CHPs playing what is in essence a public function, housing those on the housing registers waiting list, increased accountability is essential to ensure that the most disadvantaged tenants have the best chance of retaining long-term, stable, and affordable housing.