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Ms Deborah Glass
Victorian Ombudsman
Level 2, 507 Bourke Street
Melbourne VIC 3000

3 October 2016

Dear Ms Glass,

**Submission for the Ombudsman's own motion investigation into maintenance charges against tenants (MCATs)**

We write this submission in response to the Ombudsman's 'own motion' investigation into the Office of Housing's (**OOH**) management of maintenance debts.

Inner Melbourne Community Legal (**IMCL**) welcomes the opportunity to contribute to the review of the OOH's management of MCATs and supports the Ombudsman's investigation.

**Introduction**

IMCL is a not-for-profit community legal centre that provides legal assistance to people experiencing disadvantage in the City of Melbourne area, including the CBD, Docklands, West Melbourne, North Melbourne, Carlton, and Parkville. IMCL has been assisting the community in Melbourne's inner northern suburbs for nearly 40 years. It is a priority for IMCL to actively engage with the most vulnerable members of our community.

This engagement includes maintaining strong relationships with local organisations who also provide services to our priority clients. Critically, our work involves co-locating lawyers in partner organisations to ensure that we are accessible to those clients most in need of our legal assistance.

As a generalist service, IMCL provides legal support, advice, and representation in a range of areas, including in relation to tenancy laws, MCATs, and the application of the *Residential Tenancies Act 1997* (**RTA**). As an organisation that provides assistance to the most vulnerable members of our community, including individuals experiencing homelessness, mental health issues, drug and alcohol dependency, and family violence, we are well placed to observe the ways that MCATs fail those most vulnerable members of our community.

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**Maintenance Charges**

IMCL considers MCATs to be a systemic issue which poses significant hurdles for often vulnerable public housing tenants and which can place them at risk of homelessness or continued homelessness. Furthermore, it is our view that action taken by the OOH in respect of MCATs is rarely compatible with the OOH's obligation to act as a model litigant as per the Victorian Model Litigant Guidelines.[1]

In IMCL's experience MCAT amounts are often inflated, with tenants charged for the cost of all maintenance to the property in order to get it ready for the next tenant, regardless of whether the damage, repairs or necessary cleaning was caused by the tenant. It is not uncommon, for example, for tenants to be charged for the cost of replacing carpet or repainting walls when they have lived in the property in excess of 10 years and the damage was caused by fair wear and tear. This is notwithstanding that when making orders under section 210 of the RTA, the Victorian Administrative and Appeals Tribunal (**VCAT**) will take into consideration depreciation and fair wear and tear when deciding whether to award compensation and it regularly finds that carpet depreciates after 10 years and loses its value.[2] The OOH is well aware that they are unable to be compensated for items which have depreciated or sustained damage that amounts to fair wear and tear, and have been told as much by VCAT at hearings. Yet despite this, the OOH persists in sending MCATs with charges for carpet or other damage when the tenant has lived at the property for more than 10 years and/or the damage is caused by fair wear and tear.

It is IMCL's experience that even when the OOH are informed that they have charged tenants for items for which it is unreasonable for them to claim and for which they have no chance of success for recovery, OOH staff will insist on proceeding with a VCAT hearing. OOH staff have stated that they want VCAT to make the decision about charges. IMCL submits that the use of VCAT to make decisions is an inappropriate use of resources, as such decisions should be made internally by the OOH. Further we note that this conduct is an abuse of process which is unfair to public housing tenants.

[1] *Victorian Model Litigant Guidelines*, < http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines> accessed 13/9/2016.
[2] Billings J, Kefford, J and Vassie A '*Annotated Residential Tenancies Act'* (2015, No 12) ANSTAT.

We submit that there are several problems with the OOH's approach to MCATs:

1. The OOH is failing to act as a model litigant, which is discussed in this submission in further detail below.
2. The Tribunal is not an even playing field for tenants who are vulnerable. Some tenants will agree to pay the amount sought to avoid litigation regardless of whether they are actually liable.
3. If the tenant does not attend the hearing, VCAT may award all compensation sought to the OOH as the matter is uncontested.

We submit that the OOH should turn its mind to each charge sought rather than charging everything to the tenant, regardless of whether they are liable or whether OOH has any prospect of success with recovery.

Furthermore, the notice given to tenants fails to advise tenants that they may challenge the amount sought at VCAT. It only provides the details of Consumer Affairs Victoria and then provides details of how they can pay the amount. It does not state that if they disagree they can challenge the notice at VCAT. Given that it is not uncommon to see MCATs which are over $10,000, this is highly inappropriate, especially considering that OOH tenants include members of our community who speak English as a second language; have intellectual disabilities; mental health concerns; and are otherwise vulnerable. We submit that the OOH must include information about challenging MCATs at VCAT as tenants may not agree to the charges.

**The OOH as Model Litigants**

IMCL submits that the OOH's approach to MCATs fails to meet its obligation to act as a model litigant in a number of ways.

As a model litigant the OOH is required to:

a) '*act fairly in handling claims and litigation brought by or against the State or an agency';*[3]
b) *'do not take advantage of a claimant who lacks the resources to litigate a legitimate*

[3] Victorian Model Litigant Guidelines, Section 2(a), http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines.

*claim;*[4]

c) *'deal with claims promptly and not cause unnecessary delay';*[5]

d) *'make an early assessment of the State's prospects of success in legal proceedings; and the State's potential liability in claims against the State';*[6]

e) *g) where it is not possible to avoid litigation, keep the costs of litigation to a minimum, including by:*

*(i) not requiring the other party to prove a matter which the State or the agency knows to be true;*

*(ii) not contesting liability if the State or the agency believes that the main dispute is about quantum;*

*(iii) taking such steps, if any, as are reasonable to resolve such matters as may be resolved by agreement and to clarify and narrow the remaining issues in dispute.*[7]

The OOH in many instances fails to act fairly by charging tenants for maintenance which they are aware the tenant is not responsible or liable for. Further, when this is drawn to the OOH's attention they regularly continue to pursue the matter, despite knowing that they do not have a reasonable chance of success, and ignoring the obligation to act fairly and to note take advantage of a claimant who lacks the resources to litigate a legitimate claim.

The majority of OOH tenants lack the financial resources to pay a private lawyer. Victoria Legal Aid and community legal centres, are under resourced and unable to assist due to the sheer number of tenants needing assistance. Many tenants find it very difficult to represent themselves at VCAT due to their vulnerability. Futhermore, many tenants are unaware that the OOH is unable to charge for items which have depreciated in value (as a general rule VCAT considers that most items depreciate in value entirely after 10 years), and are unlikely to raise such arguments if they represent themselves.

Even when reminded that they are unable to charge for pre-existing damage, fair wear and tear, and items which have depreciated in value, the OOH is at times unwilling to adjust the charges sought or withdraw proceedings at VCAT. This is contrary to their obligations as a Model

[4] Section 2(a), *Victorian Model Litigant Guidelines,* http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines.
[5] Ibid. Section 2(c),
[6] *Victorian Model Litigant Guidelines.*Op. cit - Section 2(d),
[7] *Victorian Model Litigant Guidelines.*Op. cit - Section 2(g),

Litigant to deal with claims promptly, to avoid litigation where possible, to avoid requiring the other party to prove a matter where OOH knows it to be true, and the requirement to resolve matters by agreement.

**Homelessness and MCATS**

While compensation claims arising from MCATs have a 6 year limitation period within which they can be pursued in VCAT or the courts,[8] in practice this does not apply for public housing tenants. This is because even if 6 years has passed since the end of the tenancy, the OOH will not provide tenants with a new OOH property until the MCAT debt is paid.[9] The OOH expressly acknowledges this in its Allocations Manual:

> "*[A]lthough the department is unable to pursue statute-barred debts in a court or tribunal, the department as a matter of policy requires that applicants and all other household members pay all outstanding charges in full, or their portion of the debt, prior to being offered housing.*"

The practical effect of this is that there is no limitation period applicable for such debts. While this might not be a problem for tenants who can afford to move into the private market, this is a significant problem for tenants who are priced out of the private rental market, as they can only afford to live in public or social housing.

As a result, tenants who are on a low income are unable to secure housing unless they agree to enter into a payment plan for a debt arising from an MCAT, despite the OOH being outside the 6 year limitation period. We are concerned that this issue may become compounded by the unification of the social and public housing waiting lists, as it may stop tenants from being provided with social housing if they are not placed on the waiting list due to an OOH debt.

**MCATS and Family Violence**

IMCL also considers that MCATs issued in the context of family violence warrant the attention of the Ombudsman. It is our experience that victims of family violence are often charged for damage caused by an ex-partner, even though the OOH is well aware of the situation.

[8] *Limitation of Actions Act 1958* (Vic), s 5 (1)(a)
[9] Allocations manual, Introduction and conditions of public housing offers, p 13.

An example of this problem is highlighted by Wendy's[10] story below.

**Wendy receives an MCAT for $7500 but is found to be only liable for $750**

Wendy had been living in public housing accommodation for a number of years. When her partner moved in, he refused to let her notify the Office of Housing. Her partner was physically and verbally aggressive to Wendy and her daughter and would throw Wendy against the wall and push and shove her against the doors, causing damage to the walls and doors. He also punched holes in the walls. After obtaining an intervention order, Wendy fled to a refuge. The Office of Housing were made aware that she had moved out. Wendy later found out that her partner had continued to live in the property after she left, and that he had "trashed the place". Due to concerns for her safety, the refuge organised for the keys to be returned to the Office of Housing and Wendy ended the lease. She heard nothing further about the property until 5 years later, when she reapplied for public housing and discovered that an order had been made in VCAT in her absence for just under $7,500 for damage and repairs to the property. The order had been made after an MCAT was automatically generated by the Office of Housing. Wendy was not notified of the application as the Office of Housing sent the notice to her last known address, which was the property she had fled. Consequently, Wendy did not attend the hearing. The Office of Housing was aware of the family violence and intervention order, yet when the MCAT was generated she was still deemed responsible for the expenses as tenant on the lease.

Fortunately for Wendy, we were able to have the matter reheard and VCAT ordered that she pay $750 compensation to the Office of Housing, representing half the amount of the costs claimed for rubbish removal and cleaning expenses. All other costs claimed in the MCAT were dismissed.

Wendy's story is troubling for a number of reasons. It is an example of where an MCAT is automatically generated without consideration by the OOH of whether or not the tenant is liable for the maintenance charged. Further, the OOH is arguably sending a message to victims that they are responsible for the actions of perpetrators. Finally, it also does not allow victims to start afresh as the OOH will not provide a new property until the MCAT debt is repaid, placing family violence victims at risk of homelessness.

[10] Name has been changed.

**MCATS and Waitlists**

Finally, IMCL is concerned that MCATs are often not generated until sometime after the tenant has vacated the property. In our experience, it is not uncommon for tenants to receive MCATs several years after they have vacated the premises. This can be a significant problem for tenants because often they will not remember or will have destroyed any evidence which may have assisted them to argue that they are not liable to pay all or some of the charges. Additionally, when tenants do not hear from the OOH after they move out, they assume there are no outstanding issues and only discover that the OOH is seeking maintenance charges against them after they attempt to secure a new OOH property and are unsuccessful. In some instances, residents who were not tenants at the property are asked to pay charges owed by tenants. An example of this problem is highlighted by Theo's story below.

**Theo[11] is removed from the Office of Housing waitlist**

In 2003, Theo was living with his partner Rachel at an Office of Housing property in North Melbourne. Rachel was the tenant at the property with Theo listed as a resident. In 2005, Rachel and Theo moved to a new office of housing property in Carlton. Unfortunately Rachel passed away in 2006 and Theo was informed that the Office of Housing would waive a rental arrears debt owing for the Carlton property.

In 2012, Theo applied for public housing but told that rental and maintenance charges were outstanding for the North Melbourne property. Theo was advised that if he did not enter into a repayment agreement within a months' time that his application would be removed from the waitlist. Theo's application was subsequently removed from the Office of Housing waitlist due even though the debt was statute barred and Theo was not liable. Theo was previously unaware that there was a debt outstanding in relation to the North Melbourne property.

IMCL wrote to the Office of Housing appeals office and outlined that Theo was not liable for the debt as he was not the tenant at the North Melbourne property. Fortunately for Theo, the Office of Housing agreed that Theo should be not held liable for the debt and reinstated his application for public housing.

[11] Names have been changed.

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**Conclusion**

In summary, we would welcome any further opportunity to share our experiences or support the development of recommendations for management of MCATs. We welcome the Ombudsman's investigation into what we consider to be a significant systemic issue for vulnerable tenants.

Please do not hesitate to me on 9328 1885 or dan.stubbs@imcl.org.au if you have any questions at all regarding this submission.

Yours sincerely

**Daniel Stubbs**
Chief Executive Officer