Regulation of property conditions in the rental market

Submission to the Residential Tenancies Act Review

12 August 2016

# About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA lawyers provide phone advice, in person advice and duty lawyer representation to tenants. We prioritise tenants who are homeless or at risk of eviction, living with disability (including mental illness), or who are otherwise socially and economically disadvantaged. We provide duty lawyer services daily in the residential tenancies list at the Victorian Civil and Administrative Tribunal (VCAT) in Melbourne and if able to do so on an as needs basis around the state. We also provide limited casework services for eligible tenants with ongoing hearings at VCAT and occasionally assist people seeking judicial review in the Supreme Court. VLA is represented on the VCAT Residential Tenancies User Group and the Federation of Community Legal Centre’s Tenancy Working Group.

In the 2014/15 financial year we received approximately 3,184 enquiries through our Legal Help telephone line in relation to landlord/tenant disputes and other real estate matters. We provided advice in relation to landlord/tenant disputes and other real estate matters on 2,230 occasions. On 827 occasions the person we provided advice to was born outside of Australia and in just under 28 per cent of these occasions, the person we assisted had arrived in Australia within the last five years. On 390 occasions we provided representation to tenants, and in just over 33 per cent of these occasions the person we represented disclosed having a disability.

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1. Executive summary

VLA supports reforms to the *Residential Tenancies Act 1997* (RT Act) to ensure more sustainable, secure and safer housing for Victorians. This submission focuses on the necessity of introducing minimum standards to ensure rental housing is safe for tenants to live in. It recommends amendments to the form of condition reports to ensure they are fit for their purpose, and that tenants are made aware of the important evidentiary role condition reports play. Recommendations are made that would streamline the repair process and provide accessible remedies to achieve compliance or compensation, and to suggest clarification of the duty on a tenant to keep the premises reasonably clean. The recommendations are focused on ensuring that the condition of a tenant’s home does not adversely impact on their health, and to enable a tenant to fully participate in society from a safe and stable home.

In addition to this submission, we refer to our five previous submissions to this review which support amendments to the RT Act to ensure that tenancies are managed sustainably and evictions occur only as a last resort. These reforms are central to achieving safe and sustainable housing, particularly for tenants experiencing social and economic disadvantage and marginalisation.

1. Summary of recommendations

## Property conditions at the beginning of a tenancy

**Recommendation 1:** Introduce minimum standards for all rental properties in the RT Act.

**Recommendation 2:** Empower CAV to inspect properties at the start of a tenancy on request from a tenant or landlord to determine whether a property meets minimum standards.

**Recommendation 3:** If a property does not comply with minimum standards, amend the RT Act to enable a tenant to:

* terminate a tenancy agreement
* apply for a compliance order in VCAT
* apply for compensation and/or reduced rent until the property meets the minimum standards.

**Recommendation 4:** Amend s. 53(1)(a) of the RT Act to provide that the landlord is liable for initial telephone and internet installation costs.

## Property conditions during the tenancy

**Recommendation 5:** Amend the RT Act and RT Regulations to include a prescribed form condition report which includes:

* a check box as to whether the tenant agrees with the landlord’s section
* more space for both tenants and landlords to provide a description of the room or item
* new sections to identify any health issues, communication facilities, water efficiency devices and when work was last done to the premises
* a new section where a landlord’s promise to undertake work during the tenancy is set out
* ability to attach and refer to photographs.

**Recommendation 6:** Amend section 35(2) of the RT Act to provide tenants with seven days to return the condition report.

**Recommendation 7:** Increase education for tenants about condition reports being binding evidence of the state of premises.

**Recommendation 8:** Provide that a tenant may apply to the Director of CAV for an inspection of the property where there is disagreement on the condition report, and for that to commence the non-urgent repairs process in the RT Act.

**Recommendation 9:** Amend the standard of care for tenants avoiding damage so that it is consistent with the majority of other jurisdictions in Australia, and specifically amend sections 61 and 68(2)(a) of the RT Act to provide that the standard of care for tenants to avoid damage to the rental premises is ‘intentionally or negligently’.

**Recommendation 10:** Amend section 211 of the RT Act to require the Tribunal to consider, when making a compliance order, whether a breach of section 61 of the RT Act arose in a context of family violence.

**Recommendation 11:** Amend section 266 of the RT Act to provide that a notice to vacate under section 249 is invalid if the breach of duty was caused by damage to premises and the damage was caused by a perpetrator of family violence.

**Recommendation 12:** Create a fund to assist tenants experiencing disadvantage to fund costs associated with lease breaking, including costs for repairs caused in the context of family violence (Recommendation 12, Security of Tenure submission) and increased use of the Residential Tenancies Fund (Recommendation 1, Rent, Bond and Other Charges submission).

**Recommendation 13:** Amend the RT Act to allow applications to VCAT where the landlord or rooming house operator unreasonably withholds consent to the installation of fixtures, and amend sections 64 and 115 of the RT Act to incorporate obligations under the EO Act and to allow applications to VCAT where the landlord unreasonably withholds consent.

**Recommendation 14:** Amend the RT Act to non-exhaustively define the term ‘reasonably clean’.

**Recommendation 15:** Amend the non-urgent repairs process to enable a tenant to request the Director of CAV to send an inspector to investigate the existence of mould, despite there being no apparent failure by the landlord to ‘maintain the premises in good repair’.

**Recommendation 16:** Amend s. 211 of the RT Act to include a tenant’s mental health as a relevant consideration for the Tribunal when determining whether to make a Compliance Order.

**Recommendation 17:** Amend the RTA Act to enable the condition report to be considered a request for repairs.

**Recommendation 18:** Amend the RT Act to provide that non-compliance with a repair order permits a tenant to pay reduced rent, and that rent should be paid directly into the Rent Special Account from that date.

**Recommendation 19:** Repeal notices to vacate for no specified reason.

**Recommendation 20:** Amend section 68 (1) of the RT Act to explicitly require the premises to be in good repair at the beginning of the tenancy by including the words ‘provided and’ before the word ‘maintained’.

**Recommendation 21:** Amend the RT Act to require a landlord, or their agent, to notify any tenant seeking repairs of the procedures established in the RT Act.

## Condition of property at the end of a tenancy

**Recommendation 22:** Amend the RT Act to to include a requirement that the tenant delivers up the premises in a reasonably clean condition, and set out guidance on what ordinarily constitutes the property being reasonably clean.

## Responding to breaches of the Act

**Recommendation 23:** Amend theRT Act to provide that tenants can seek compensation due to suffering reduced amenity of the premises, based as a proportion of rent paid to be refunded.

1. Property conditions at the beginning of a tenancy

## Introduce minimum standards for all rental properties

As identified in the Issues Paper, the RT Act does not currently provide for a property to be of a certain standard at the commencement of a tenancy. While at the start of a tenancy a property must be in a ‘reasonably clean condition’, it is our clients’ experiences that rented premises are often of a substandard condition and without basic amenities. As identified by the National Association of Tenant Organisations (NATO), the condition of rental properties can pose real health and safety risks to tenants.[[1]](#footnote-2) This is particularly concerning for tenants on low incomes who have little choice but to accept affordable accommodation in properties that are dilapidated and sometimes dangerous.[[2]](#footnote-3)

In our experience, these faults can include major leaks, faulty wiring, installed utilities that do not work or work poorly, cracking, gaps and rotting in walls, floors, ceiling and carpets, faulty windows and rotten window frames, mould and faulty doors and locks leading to insecure premises. If these faults are identified on the condition report at the start of the tenancy, a tenant is often unable to request that these matters be repaired under the provisions in Division 6 of Part 2 of the RT Act. This is because of the effect of section 36 of the RT Act, which provides that the condition report is evidence of the general condition of the property at the start of the tenancy and the fact that VCAT has at times interpreted the duty in section 68 of the RT Act as imposing a requirement on a landlord to merely maintain the premises in the condition it was at the commencement of a tenancy, irrespective of whether that condition was ‘good repair’.[[3]](#footnote-4)

**Heather’s story**

In 2008 Heather, who suffers from a mental health condition, found herself in a desperate housing situation and was living in her car. She applied for a property in regional Victoria that was in very poor condition, with holes in the walls, mould, water damage, a hole in the bathroom floor, water leaks and faulty doors. Assisted by her mental health support worker, Heather made a number of requests for repairs during her five-year tenancy. Some repairs were attended to, and others were not. Heather was unable to secure a more suitable property. In 2013 Heather requested further repairs and was issued a notice to vacate in response. After vacating Heather claimed compensation for the landlord’s failure to maintain the premises in good repair.

The Tribunal dismissed the compensation application in its entirety, in part as the Member found that the landlord had attended to repairs that arose during the course of the tenancy, and was under no obligation to ‘upgrade’ the property where repairs were required at the commencement of the lease.

Introducing minimum standards for rental premises will result in:

* increased amenity of properties for tenants
* increased security of tenure, as tenants are less likely to stay in premises that are of a substandard condition
* positive outcomes on the health and wellbeing of tenants, which in turn may result in less demand on health and community support agencies
* reduced utility bills for tenants, which may result in reduced instances of rental arrears due to financial hardship caused by competing financial demands
* efficiencies for VCAT, with the need for less reliance and use of VCAT for resolving disputes concerning repairs that arise from property conditions that existed at the start of a tenancy.

**Habibeh’s experience**

Habibeh and her husband escaped Iran with their young daughter TalAyeh. They claimed asylum in Australia and the Salvation Army assisted Habibeh to apply for private rental properties in outer Melbourne. The Salvation Army provided Habibeh with basic furniture and possessions.

When Habibeh moved into the rental property she discovered that there were many urgent repairs that were required. The house had serious roof leaks which caused TalAyeh’s bedroom and the living room to flood when it rained. Much of the furniture she was given by the Salvation Army was destroyed and became covered in black mould which made TalAyeh sick. There was also a problem with the toilet which would overflow and spill sewage throughout the bathroom.

Habibeh tried to negotiate with the landlord and his agent to get these repairs fixed, however after several months nothing had happened. The agent would advise Habibeh that the landlord intended to come to the property and do the repairs himself however often he would not show up or would come and stay for several hours without doing any work.

Habibeh grew frustrated and spoke to CAV who advised Habibeh to apply to VCAT for urgent repairs. Habibeh applied to VCAT for urgent repairs which were ordered by the Tribunal. Neither the landlord or the agent attended the VCAT hearing and they continued to ignore VCAT’s orders. Habibeh renewed her application and further orders were made by VCAT that the landlord carry out repairs. Again neither the agent or the landlord attended the hearing and there was no action taken on these orders.

Habibeh again renewed her application and the Tribunal ordered that she should not have to pay rent until the repairs were completed. The landlord, who had not attended that hearing again, quickly sought a review. The review application was refused as the Tribunal was not satisfied that he had a reasonable excuse for not attending the previous hearing.

Shortly after this hearing Habibeh received a 28-day notice to vacate from the landlord’s mortgagee advising that the bank had obtained a warrant of seizure and sale against the landlord. Habibeh struggled to find alternative accommodation as the she had no prior rental history in Australia and the real estate agent refused to give her a rental reference because of the disputes at VCAT.

It was clear from the outset that the landlord never intended to comply with his duties under the RT Act, nor to continue meeting his mortgage repayments. The short time Habibeh and TalAyeh were at the property caused them great stress, damaged their goods and caused them to get sick. The property should not have been on the market to rent, irrespective of how desperate Habibeh was at that time.

VLA endorses the minimum standards that have been prescribed in Tasmania, namely that premises must:[[4]](#footnote-5)

* be weatherproof and structurally sound
* be clean and in good repair
* provide functioning bathrooms and toilets, including hot water
* provide functioning cooking facilities, including a sink with hot water, oven and a stovetop
* provide connection to electricity and heating
* provide window covering for privacy on bedrooms and living areas
* provide adequate ventilation.

In addition to those prescribed in Tasmania, in light of Victoria’s climate, the minimum standards should also include a functioning cooling system. VLA provides services across Victoria, and clients in regional areas have reported that lack of cooling in rented properties during summer significantly effects of the health of tenants. The need for adequate cooling is particularly important for tenants with physical ill-health, elderly tenants, young children and babies. New South Wales has recognised that cooling is an essential service and a failure or breakdown of a cooling system is treated as an urgent repair.[[5]](#footnote-6) With the availability of affordable split system air conditioners, coupled with rising temperatures across the state, VLA considers that there is no basis for the RT Act to differentiate between heating and cooling.

VLA also recommends expanding the existing inspection powers of Consumer Affairs Victoria (CAV) to enable tenants or landlords to apply for an inspection of the property if there is any dispute as to whether a property complies with the minimum standards. If CAV finds that a property does not meet the minimum standards, and a landlord refuses to take steps to address this, a tenant should be entitled to:

* terminate the tenancy agreement, or
* apply to VCAT for an order:
	+ that the landlord undertakes modifications to the property to meet the minimum standards, and
	+ for compensation and/or reduced rent until the property meets the minimum standards.

This process would ensure that landlords are provided with an appropriate opportunity to rectify any defects in the property. Involvement by CAV inspectors would also ensure that assessments as to whether minimum standards have been meet are determined independently, providing appropriate safeguards for landlords and certainty for tenants as to their rights should a property fail to comply with minimum standards.

**Recommendation 1:** Introduce minimum standards for all rental properties in the RT Act.

**Recommendation 2:** Empower CAV to inspect properties at the start of a tenancy on request from a tenant or landlord to determine whether a property meets minimum standards.

**Recommendation 3:** If a property does not comply with minimum standards, amend the RT Act to enable a tenant to:

* terminate a tenancy agreement
* apply for a compliance order in VCAT
* apply for compensation and/or reduced rent until the property meets the minimum standards.

## Landlord to install telephone and internet connection

As set out in the Issues Paper, 86.2 per cent of Victoria households were connected to the internet in 2014–15 and a vast majority of tenants have internet. With the rollout of the National Broadband Network across Australia, it is likely that this number will continue to increase. With internet and telephone lines being so common, it is VLA’s experience that many tenants assume that a landlord is responsible for providing a telephone line and the ability to connect to the internet. Where there is no internet or telephone connection, and the connection involves the installation of cable or wires through the premises, tenants must seek permission of the landlord for the installation of a fixture at their costs and the landlord gains the benefit of that installation.

Internet and telephone connections should be aligned with other utilities under the RT Act. VLA recommends that section 53(1)(a) of the RT Act be amended to provide that the landlord is liable for the initial installation costs of any telephone line and internet. Given the majority of households already have this connection, this will not create a significant additional burden for most landlords, but will provide clarity within the rental tenancy market as to the responsibility for this connection.

**Recommendation 4:** Amend s. 53(1)(a) of the RT Act to provide that the landlord is liable for initial telephone and internet installation costs.

1. Property conditions during the tenancy

## Improve condition reports

Although there is no standard condition report prescribed in the RT Act, it is our experience that the majority of landlords and agents use the pro forma condition report published by CAV.[[6]](#footnote-7) The document is generally completed by agents on behalf of the landlords, and provided to tenants in hard copy format. We often advise tenants attending VCAT in defence of a claim for bond and compensation at the end of a tenancy agreement. During those interviews tenants commonly report that they were not aware of the importance of the condition report, and the need for them to amend the report to provide their own account of the issues with the property. This is particularly so for vulnerable and disadvantaged tenants, including those who are culturally and linguistically diverse, first time renters, or those who feel they do not have the agency to challenge an assertion by the landlord’s representative. It is our experience that there is a lack of education for tenants as to the importance of, and how to complete, the condition report. Some tenants who instruct they were aware of the importance of amending the condition report state that they had intended to, but could not meet the time limit of three days in which to complete and return the form, as they were preoccupied with moving and settling in to a new property.

The current content of the form is inadequate, with a tenant restricted to providing comments in response to the landlord’s comments. Tenants are unable to check off as to whether they agree that a room or item is clean, undamaged or working. In our experience, common disputes that tenants seek advice for include whether they are responsible for damage to carpet and internal painting, and whether mould and damp issues were pre-existing. There is nowhere on the form to indicate if there are any issues with mould, dampness, pests or vermin or rubbish, and no details of when the premises were painted or the floor coverings such as carpet were last replaced or cleaned.

**Ebi’s story**

Ebi attended the VLA duty lawyer office at VCAT seeking advice on how to defend an application against her bond. She asserted that the landlord was claiming compensation for damage that she did not cause. Ebi had a copy of the condition report that had been filed by the landlord, which indicated that every item at the property had been ticked by the agent as ‘clean’, ‘undamaged’ and ‘working’. The application also contained photos of stained walls and marked floors that were taken at the time Ebi vacated.

Ebi was advised that the Tribunal would take the condition report as binding evidence of the state of the property when Ebi commenced the lease approximately two years earlier. Ebi was adamant that the damage was pre-existing, however she had not completed the condition report. She instructed the duty lawyer that she thought the professional agent knew better and, being unfamiliar with renting in Australia, she had not thought to disagree with the agent’s comments.

The Tribunal was unsympathetic to the assertions made by Ebi, as she did not have contrary evidence of the condition of the property at the commencement of the lease. While the Tribunal took into account depreciation and fair wear and tear, it commenced the claim from the basis that the property was in the condition that the agent had asserted. VLA recommends that the RT Act and *Residential Tenancies Regulations 2008* (Vic) (RT Regulations) are amended to specify a standard mandatory form for the condition report. VLA supports adoption of features of the form used by New South Wales,[[7]](#footnote-8) in particular:

* a check box for tenants to confirm whether they agree that the room or item is clean, undamaged or working;
* sections to identify any health issues, communication facilities and water efficiency devices;
* a section about the date on which certain work appears to have been last completed on key features, such as:
	+ approximate age of carpets;
	+ approximate age of window coverings;
	+ painting of the premises; and
* a section where any promise by a landlord to undertake certain work may be set out.

VLA also supports increasing the space in condition reports for both tenants and landlords to provide a description of the room or item and the ability for photographs of the property to be attached or referred to, as is the case in the Northern Territory.[[8]](#footnote-9)

Tenants are currently required to return condition reports within three business days.[[9]](#footnote-10) This is an inadequate timeframe for tenants to thoroughly inspect the property and return the form amidst what is often a stressful and busy period. VLA recommends this timeframe be amended to a minimum of seven days, in line with other comparable jurisdictions.[[10]](#footnote-11)

VLA also supports CAV providing additional training and education material to tenants about the importance of the condition report. This material should be aimed at educating tenants as to the need to complete their section of the condition report thoroughly and emphasise the impact of failing to identify issues in a condition report.

Finally, we refer to recommendation 2B in VLA’s response to the *Laying the Groundwork* consultation paper where we submitted that repair issues detailed on a condition report ought to be sufficient notification to subsequently engage a CAV inspector as part of the repairs process in the RT Act. To address the low understanding by tenants of the importance of ensuring the condition report is correct, we suggest amendments to the RT Act to provide an ability to apply to the Director of CAV for an inspection for the purpose of both settling the disagreement on the condition report, and preparing a repairs report under section 74 of the Act. This is discussed further below.

**Recommendation 5:** Amend the RT Act and RT Regulations to include a prescribed form condition report which includes:

* a check box as to whether the tenants agrees with the landlord’s section;
* more space for both tenants and landlords to provide a description of the room or item;
* new sections to identify any health issues, communication facilities, water efficiency devices and when work was last done to the premises;
* a new section where a landlord’s promise to undertake work during the tenancy is set out; and
* ability to attach and refer to photographs.

**Recommendation 6:** Amend section 35(2) of the RT Act to provide tenants with seven days to return the condition report.

**Recommendation 7:** Increase education for tenants about condition reports being binding evidence of the state of premises.

**Recommendation 8:** Provide that a tenant may apply to the Director of CAV for an inspection of the property where there is disagreement on the condition report, and for that to commence the non-urgent repairs process in the RT Act.

## Reporting and repairing damage to the property

VLA has previously made submissions in relation to tenant’s liability for damage to property.[[11]](#footnote-12) We refer to and reiterate those submissions.

**Recommendation 9:** Amend the standard of care for tenants avoiding damage so that it is consistent with the majority of other jurisdictions in Australia, and specifically amend sections 61 and 68(2)(a) of the RT Act to provide that the standard of care for tenants to avoid damage to the rental premises is ‘intentionally or negligently’.

## Attribution of damage in cases of family violence

VLA endorses the recommendations made by the Royal Commission into Family Violence, specifically Recommendations 116 and 117.

The Royal Commission recommended that the RT Act be amended to provide a clear mechanism for apportionment of financial liability arising from tenancy situations to ensure that victims of family violence are not held liable for rent and other tenancy-related debts that are properly attributable to perpetrators of family violence.

VLA is of the view that the principles in those recommendations, of ensuring a victim of family violence is not inappropriate burdened with the consequences of a perpetrator’s actions when they are co-tenants, will be properly upheld only if the RT Act is also amended to protect a victim from the consequences of a breach of duty notice issued against a perpetrator who has caused damage to the premises.

**Recommendation 10:** Amend section 211 of the RT Act to require the Tribunal to consider when making a compliance order whether a breach of section 61 of the RT Act arose in a context of family violence.

**Recommendation 11:** Amend section 266 of the RT Act to provide that a notice to vacate under s. 249 is invalid if the breach of duty was caused by damage to premises and the damage was caused by a perpetrator of family violence.

**Recommendation 12:** Create a fund to assist tenants experiencing disadvantage to fund costs associated with lease breaking, including costs for repairs caused in the context of family violence (Recommendation 12, Security of Tenure submission) and increased use of the Residential Tenancies Fund (Recommendation 1, Rent, Bond and Other Charges submission).

## Enable fixtures and alterations to the premises where reasonable

VLA has previously made submissions in relation to tenants’ installation of fixtures. Specifically, we refer to and reiterate Recommendation 8 made in our submission in response to the Rights and Responsibilities of Landlords and Tenants issues paper.

**Recommendation 13**: Amend the RT Act to allow applications to VCAT where the landlord or rooming house operator unreasonably withholds consent to the installation of fixtures, and amend sections 64 and 115 of the RT Act to incorporate obligations under the EO Act and to allow applications to VCAT where the landlord unreasonably withholds consent.

## Tenant’s duty to keep the property reasonably clean

VLA supports amendments to the RT Act to define the phrase ‘reasonably clean condition’. VLA receives many enquiries from tenants at the end of a tenancy who are in dispute with an agent or landlord as to whether premises are reasonably clean. Disputes often include whether professional cleaning is required, whether carpets must be steam cleaned, and whether the tenant has an obligation to return the premises in a cleaner state than when the tenancy commenced.

In our experience, there is significant difference in the way that VCAT Members interpret the phrase ‘reasonably clean’ and this can result in inconsistent decisions in relation to bond and compensation orders at the end of a tenancy. There are certainly varied expectations on the part of estate agents and landlords.

A non-exhaustive definition or list of example of what steps may be sufficient when determining whether a property is reasonably clean would provide tenants, landlords and VCAT with much needed guidance as to what is required. This should include:

* that the tenant is not required to have the carpet professionally cleaned, or pay the cost of such cleaning, at the end of the tenancy, unless the tenant kept an animal on the residential premises;[[12]](#footnote-13)
* vacuuming carpet and sweeping all non-carpeted floors;
* the removal of all furniture and rubbish from the premises;
* the removal of all stains and markings from floor coverings, walls and visible surfaces.

Another common issue on which tenants frequently seek advice relates to mould developing in the property. Mould significantly impacts on the amenity of a property, and can lead to serious health issues. It is our experience that landlords are often slow to respond to requests for repairs relating to mould, as the cause of the mould can be structural and require detailed investigation and significant repair work. Many tenants claim compensation at the end of their lease for having to suffer a mouldy property, only to be told that the landlord has not breached the obligation to maintain the premises in good repair.

A potential solution is an amendment to the non-urgent repairs process in the RT Act to provide that a tenant can request the Director of CAV to send an inspector to investigate whether mould is present. If satisfied that a tenant is using all available ventilation and extraction methods and is otherwise keeping the premises ‘reasonably clean’, the Director could then order the landlord to undertake investigation and rectification works.

Finally, in part due to our practice in mental health and disability law, we are often approached by the tenants seeking advice to prevent being evicted due to ongoing hoarding at their premises. It is the experience of VLA that, when confronted with a tenant who is hoarding, social housing landlords will generally issue a breach of duty notice and seek a compliance order alleging breach of a tenant’s obligation to keep the premises ‘reasonably clean’. This blunt approach fails to appreciate that Hoarding Disorder is a recognised mental illness[[13]](#footnote-14) that is complex to address. The RT Act currently does not provide VCAT with express authority to consider the role a tenant’s mental health may play in considering whether there has been non-compliance with a breach of duty notice. This can lead to the Tribunal making Compliance Orders that a tenant is unable to comply with, leading to imminent eviction. VLA submits that tenants suffering from Hoarding Disorder should be given support, rather than threatened with eviction.

**Recommendation 14:** Amend the RT Act to non-exhaustively define the term ‘reasonably clean’.

**Recommendation 15:** Amend the non-urgent repairs process to enable a tenant to request the Director of CAV to send an inspector to investigate the existence of mould, despite there being no apparent failure by the landlord to ‘maintain the premises in good repair’.

**Recommendation 16:** Amend s. 211 of the RT Act to include a tenant’s mental health as a relevant consideration for the Tribunal when determining whether to make a Compliance Order.

## Improve repair processes

As VLA set out in its Laying the Groundwork Submission, we support reforms to the RT Act to ensure that houses are healthier for tenants in order to facilitate longer-term tenancies. It is inappropriate to impose a burden on tenants to follow difficult and inefficient repair processes, when they are vulnerable to eviction, and may not know or understand their rights.

VLA submits that the condition report should be able to be used by a tenant as proof of repairs having being requested and trigger the landlord’s responsibility to carry out those repairs. Presently, if a condition report notes that there is something at the property that has been damaged or is not-working, unless the tenant follows the procedure for repairs set out in Division 6 of Part 2 of the RT Act, there is no obligation on a landlord to undertake repairs.

On receiving a condition report from a tenant which indicates there is damage or other repairs needed, a landlord is on notice that a tenant considers that there is a defect in the property. In our submission, it is illogical that even after receiving such notice, a tenant is still required to follow the regimented process of requesting either urgent or non-urgent repairs, and then waiting for the relevant time periods should the landlord not undertake the repairs. The repairs process would be greatly enhanced and streamlined by allowing the condition report to be treated as a request for repairs.

While section 76 of the RT Act provides that the Tribunal must impose time limits for repairs to be carried out, it is the experience of VLA that many landlords fail to comply with such a direction. Repairs may obviously differ in the time they take to complete, however it is fundamental for the protection of a tenant’s ability to live comfortably, and for the proper administration of the RT Act, that orders are complied with when they are made. It is our experience that many landlords are motivated by avoiding financial penalties in relation to their investment property. For that reason, we submit that section 76 ought to be amended to provide that, in the event that a repair order is not complied with, a tenant is entitled to pay reduced rent, and that any such rent shall be paid into the Rent Special Account, to be held on trust until all repairs are completed.

Finally, as set out in previous submissions, VLA recommends the removal of 120-day no reason notices to vacate. Allowing for evictions to proceed for ‘no disclosed reason’ effectively enables evictions to take place for reasons that can be petty and retaliatory[[14]](#footnote-15). In our experience, tenants who are given advice about their rights regarding issues like repairs and compensation will regularly decide not to enforce them out of fear of being issued with a no reason notice to vacate. Section 266(2) of the RT Act permits a tenant to seek an order that a no reason notice is of no effect if it was given in response to the exercise, or proposed exercise, by the tenant of a right under the RT Act. However, it is the experience of VLA that this protection is inadequate as a tenant is required to prove the mindset of a landlord, on the balance of probabilities. In defence a landlord is generally able to produce a reason other than retaliation for having served the notice, which the Tribunal generally accepts.

The existence of a no reason notice to vacate creates uncertainty and stress for tenants and can deter them from exercising their rights to request repairs or make legitimate complaints. This is particularly concerning for low-income and disadvantaged households who already suffer disproportionately from a lack of security of tenure given the chronic shortage of low cost housing, and the unequal bargaining power this creates.

**Recommendation 17:** Amend the RTA Act to enable the condition report to be considered a request for repairs.

**Recommendation 18:** Amend the RT Act to provide that non-compliance with a repair order permits a tenant to pay reduced rent, and that rent should be paid directly into the Rent Special Account from that date

**Recommendation 19:** Repeal notices to vacate for no specified reason.

## Landlord’s duty to maintain premises

VLA has previously made submissions in relation to the landlord’s duty to maintain the premises. Specifically, we refer to and reiterate recommendation 4 made in response to the Rights and Responsibilities issues paper, in which we submitted that a landlord ought to be required to put the premises into good repair prior to the commencement of a tenancy agreement.

**Recommendation 20:** Amend section 68 (1) of the RT Act to explicitly require the premises to be in good repair at the beginning of the tenancy by including the words ‘provided and’ before the word ‘maintained’.

## Mechanisms to inform tenants and landlords about repairs

There is no legal obligation on landlords to inform a tenant as to the process for seeking repairs under the RT Act. This contrasts with industries such as insurance, where a service provider has an obligation to facilitate the making of an effective complaint, even where it is not initially made in the proper form.

Where a tenant notifies a landlord of a repair issue, even if it is verbally, a landlord should be required to explain the process and provide a tenant with the formal documents required. It is our experience that, upon contacting the landlord’s representative, a tenant is ordinarily directed to complete an internal ‘maintenance request’ form, or is told that oral notification of the repair issue is sufficient. Many tenants seek advice from VLA when repairs remain outstanding, and are surprised to learn of the process set out in the RT Act, and that they must commence with a formal Notice to Landlord form. This is particularly true with tenants of social housing landlords. In light of the power asymmetry between tenants and landlords, we submit that it is appropriate for estate agents and landlords to be required to inform tenants of the legal process for seeking repairs to their home.

**Recommendation 21:** Amend the RT Act to require a landlord, or their agent, to notify any tenant seeking repairs of the procedures established in the RT Act.

1. Condition of property at the end of a tenancy

## Cleanliness at the end of the tenancy agreement

VLA Legal Help telephone staff, and duty lawyers attending VCAT, are regularly called upon to advise tenants on their legal obligations following the landlord making a claim against their bond. The standard of cleanliness is often in dispute, and our experience reflects that many tenants are unaware of what constitutes ‘reasonably clean’. We advise tenants who have failed to meet the requisite standards by doing too little work, as well as tenants who have incurred unnecessary cost by going to lengths not required by the Act. For example, many tenants pay for professional cleaners, or arrange steam cleaning when carpet could be made ‘reasonably clean’ merely with vacuuming.

Many disputes could be avoided by clearly setting out the standard of cleanliness required at the end of the lease. To that end we reiterate our earlier recommendation that ‘reasonably clean’ ought to be defined through a non-exhaustive list that includes:

* that the tenant is not required to have the carpet professionally cleaned, or pay the cost of such cleaning, at the end of the tenancy, unless the tenant kept an animal on the residential premises;[[15]](#footnote-16)
* vacuuming carpet and sweeping all non-carpeted floors;
* the removal of all furniture and rubbish from the premises;
* the removal of all stains and markings from floor coverings, walls and visible surfaces.

Although the duty to keep the premises reasonably clean extends until the tenant vacates the property, it is our view that expressly setting out the duty in relation to provision of the premises at the end of the lease could go some way to clarifying the obligations on a tenant, and avoiding disputes.

**Recommendation 22:** Amend the RT Act to include a requirement that the tenant delivers up the premises in a reasonably clean condition, and set out guidance on what ordinarily constitutes the property being reasonably clean.

1. Responding to breaches of the Act

## Remedies for reduced amenity of the premises

VLA frequently provides advice to tenants on how to seek compensation for the reduced amenity of the premises that a tenant has suffered as a result of a landlord breaching the duty to maintain the premises in good repair. Although it occasionally awards compensation for inconvenience[[16]](#footnote-17), the Tribunal ordinarily restricts awards of compensation to matters involving direct financial loss. The corollary of such a claim is that a tenant ought to be entitled to compensation expressed as a percentage of rent to be refunded that is commensurate with the reduced amenity suffered. This is always somewhat subjective, as a landlord’s failure to maintain a certain part of the premises will impact upon households differently. For example, in circumstances where the landlord’s failure to maintain the premises results in complete loss of a back yard, it is the experience of VLA that the Tribunal might award 25 per cent of rent to be refunded for the period in which a family with young children was unable to use that yard, but only 10 per cent to a childless professional couple.

Many tenants, landlords and Tribunal Members struggle with a predictable way of measuring compensation claims based on reduced amenity of the premises. Tenants have a right to seek such compensation if the cause of action is enlivened by a landlord breaching one of the duties in the Act. In our experience, while many tenants will claim immediately upon the breach being rectified, other tenants elect not to pursue the matter, and are only prompted into action by a landlord making a claim against their bond that they disagree with. This coincides with the legal relationship having come to an end, a hearing already being listed at VCAT, and the tenant no longer feeling as though they need to forego rights in order to maintain a positive relationship with their landlord.

To provide some measure of certainty, and potentially avoid matters requiring determination by the Tribunal, VLA recommends that the RT Act specifically set out that tenants are entitled to compensation for reduced amenity, expressed as a percentage of rent paid during the period that they did not have the full benefit of what was being paid for. The period commences with the landlord being put on notice of the breach, and ends with the breach being rectified or the tenant vacating. This could be expressed as a standalone provision describing rights at the end of a tenancy agreement, or an express relevant consideration for the Tribunal when considering all compensation claims.

**Recommendation 23:** Amend the RT Act to provide that tenants can seek compensation due to suffering reduced amenity of the premises, based as a proportion of rent paid to be refunded.

1. National Association of Tenant Organisations, *A Better Lease on Life – Improving Australian Tenancy Law* (2010). [↑](#footnote-ref-2)
2. Ibid, 47. [↑](#footnote-ref-3)
3. *Kerr-Lubelski v The Landlord (Residential Tenancies)* [2015] VCAT 326. [↑](#footnote-ref-4)
4. Sections 36I-36O of the *Residential Tenancy Act 1997* (Tas). [↑](#footnote-ref-5)
5. Section 62 of the *Residential Tenancies Act 2010* (NSW). [↑](#footnote-ref-6)
6. https://www.consumer.vic.gov.au/library/forms/housing-and-accommodation/renting/condition-report.pdf. [↑](#footnote-ref-7)
7. The form of condition report in NSW is prescribed under section 29(6) of the *Residential Tenancies Act 2010* (NSW) and regulation 6 of the *Residential Tenancies Regulation 2010* (NSW) and is contained in Schedule 2 of the *Residential Tenancies Regulation 2010* (NSW). [↑](#footnote-ref-8)
8. Section 24A the *Residential Tenancies Act* *1999* (NT) defines a condition report to be either entirely in writing, partly in writing and partly by using images or entirely by using images. [↑](#footnote-ref-9)
9. Section 35(2) of the RT Act [↑](#footnote-ref-10)
10. Tenants in the Northern Territory are provided 5 business days to return the condition report under s 26(3) of the *Residential Tenancies Act* (NT); 7 days in New South Wales under s 29(3) of the *Residential Tenancies Act 2010* (NSW); 7 days in Western Australia under s 27C of the *Residential Tenancies Act 1987* (WA); 2 weeks in the Australian Capital Territory under s 29(3) of the *Residential Tenancies Act 1997* (ACT) and no specified time in South Australia under regulation 4 of the *Residential Tenancies Regulations 2010* (SA). [↑](#footnote-ref-11)
11. VLA Submission, Rights and Responsibilities of Landlords and Tenants, Recommendation 5. [↑](#footnote-ref-12)
12. This is consistent with NSW where section 19(2) of the *Residential Tenancies Act 2010* (NSW) prohibits a residential tenancy agreement containing such a term. [↑](#footnote-ref-13)
13. Diagnostic and Statistical Manual of Mental Disorders-5: 300.3 [↑](#footnote-ref-14)
14. National Association of Tenant Organisations, *A Better Lease on Life – Improving Australian Tenancy Law* (2010) 24. [↑](#footnote-ref-15)
15. This is consistent with NSW where section 19(2) of the *Residential Tenancies Act 2010* (NSW) prohibits a residential tenancy agreement containing such a term. [↑](#footnote-ref-16)
16. For example, see *EL v EA (Residential Tenancies)* [2006] VCAT 2049 [↑](#footnote-ref-17)