
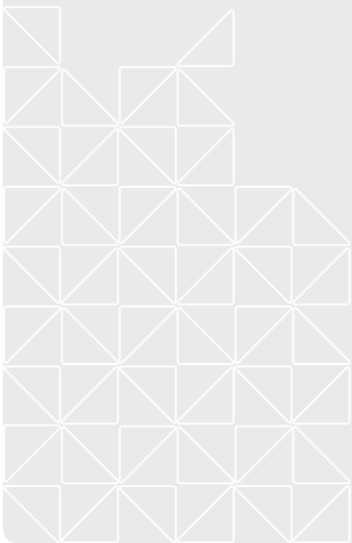


Through the Roof:
Improving the Office of Housing's
policies and processes for dealing
with housing debts

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November 2016



About Justice Connect Homeless Law

Established in 2001, Justice Connect Homeless Law (**Homeless Law**) is a specialist legal service for people who are experiencing or at risk of homelessness.¹ We are an outreach-based, holistic service. In partnership with eight member law firms, we run seven clinics each week at homelessness, health and community services.² We work closely with pro bono lawyers to provide approximately 450 clients with legal representation each year. Our two in-house social workers allow us to meet clients' non-legal needs.³

In the 2014–16 financial year Homeless Law opened 579 tenancy matters and prevented the eviction of 243 clients and their families through legal representation and social work support. Of the 579 tenancy matters, 59 clients had matters which involved the OOH claiming debts for maintenance claims or arrears.

Homeless Law also runs a specialist women's project, the Women's Homelessness Prevention Project (**WHPP**) and from 2014–2016 ran a Debt and Tenancy Legal Help for Prisoners Project (**Prison Project**).

The evidence and insights from this direct casework have informed this position paper.

Acknowledgements

Justice Connect Homeless Law thanks our pro bono lawyers who provide legal representation to approximately 450 Victorians experiencing or at risk of homelessness each year. Throughout 15 years of assisting clients to navigate Victoria's public housing system, Homeless Law has gathered extensive insights about the operation of the Office of Housing's (**OOH**) policies, practices and procedures and their impact on vulnerable Victorians. We're grateful to these lawyers for dedicating their time and expertise to help our clients avoid eviction and address housing debts, and for helping compile detailed data about OOH debt matters for this position paper.

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¹ See Justice Connect Homeless Law (available at: <http://www.justiceconnect.org.au/our-programs/homeless-law>).

² Our firms and outreach locations are: King & Wood Mallesons (Melbourne City Mission), Corrs Chambers Westgarth (VACRO), Allens (Launch Housing), Minter Ellison and Clayton Utz (cohealth Central City Community Health Service), Harwood Andrews and Transport Accident Commission (Salvation Army Geelong), Herbert Smith Freehills (City).

³ For more information about Homeless Law and our work see: <http://www.justiceconnect.org.au/our-programs/homeless-law>.

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1. Executive summary

This position paper is informed by 15 years of running tenancy matters involving the Office of Housing (OOH) for Victorians experiencing or at risk of homelessness. The recommendations aim to make the OOH's policies and practices fairer and more transparent. Ultimately, they aim to make sure that vulnerable Victorians are not inappropriately pursued for housing debts in ways that prolong homelessness and impose significant personal and financial hardship.

1.1 Fifty-two clients facing \$320,766 in housing debts

Throughout a two year period (1 July 2014 – 30 June 2016), Homeless Law provided legal representation to 59 clients in relation to OOH debt matters. Homeless Law has analysed the data for 52 of these clients and this analysis shows:

- The total debt claimed by the OOH was approximately \$320,766.⁴
- The average debt claimed by the OOH was approximately \$6,289 per client.
- 35 clients (67%) were homeless when they received Homeless Law's assistance to deal with their housing debt.⁵

After Homeless Law's legal representation (which generally involves advocating for the OOH to apply their detailed policies and guidelines and proceeding to the Victorian Civil and Administrative Tribunal (VCAT) if negotiations are not successful):

- 93% of the cases resulted in a full or partial reduction of the OOH debt.⁶
- Of the finalised files, approximately \$121,500 was waived of an aggregate of approximately \$181,200 claimed debts (i.e. 67% of the total amount claimed). The average reduction was \$4673 per claim.
- In the case of Homeless Law's Debt and Tenancy Legal Help for Prisoners Project, in two years of operation, of the seven matters that have been finalised where clients were facing a total of \$45,390 in debts, Homeless Law was successful in clearing \$30,578 (i.e. 67%) of this debt either through negotiation with the OOH or through representation of the clients at VCAT hearings.
- In the case of Homeless Law's Women's Homelessness Prevention Project, in two years of operation, Homeless Law has assisted 10 women with outstanding compensation debts to OOH, and of the seven matters that have finalised, claims totalling \$21,978 were withdrawn (four in full and three in part).

⁴ Some clients had multiple claims made against them. Sixty claims were recorded in total against the 52 clients' data we reviewed. However this is an underestimate attributable to the difficulty capturing multiple separate claims against clients within the one legal matter. Of the 60 claims identified: 38 were for maintenance debts; 11 were for rental arrears debts; and 11 were for both rental arrears and maintenance debts.

⁵ Homelessness includes sleeping rough, couch surfing, crisis accommodation, refuge and transitional housing.

⁶ This figure is the percentage of cases where Homeless Law managed to have the OOH debt waived in full or in part. The data used to obtain this figure was limited to cases which were finalised (i.e. negotiations not ongoing) and cases where the OOH debt was challenged. We reviewed the data for 52 clients. Of these, 5 clients did not challenge the OOH debt and 29 clients had matters which were finalised (i.e. negotiations were not ongoing). Of the 29 clients with matters which had been finalised, 2 clients did not have the OOH debt waived in part or in whole. 27 of those 29 clients had their OOH debt waived in part or in full.

These figures paint a picture of significantly inflated compensation claims being pursued against highly vulnerable people, which – if defended – are almost always reduced.

1.2 Seven systemic issues with the OOH's approach to housing debts

Through this work, Homeless Law sees the vulnerability and hardship of current and former OOH tenants being pursued for debts, and identifies the following seven systemic issues with the OOH's approach to quantifying and pursuing debts:

1. Inconsistent application of Department of Health and Human Services (**DHHS**) policies and operational guidelines, including where the damage has been caused by family violence, third parties or fair wear and tear.
2. Limited oversight and transparency in relation to decisions, including decisions about when to reduce amounts claimed and when to pursue matters through VCAT. This encompasses varied levels of understanding of the legal basis for compensation claims under the *Residential Tenancies Act 1997* (Vic), including the requirement to establish a link between a breach by the tenant and loss incurred by the OOH.
3. Over-reliance on VCAT to determine claims, as well as refusal to provide evidence prior to hearings and to negotiate to resolve matters pre-hearing.
4. An unwillingness to exercise discretion to waive or reduce debts, particularly where there is a VCAT order in place (despite VCAT orders frequently being obtained in the absence of the former tenant, and the jurisdictional limitation which means VCAT cannot consider whether or not DHHS policies and guidelines or the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) have been applied).
5. Gaps in detailed DHHS policies and operational guidelines, which can lead to confusion and unjust outcomes (for example, in relation to arrears and costs of rubbish and cleaning attributable to family violence, and guidance regarding use of discretion after a VCAT order is in place).
6. Links between evictions from public housing, which mean people are unable to exit in an organised way, and alleged debts.
7. The way in which debts, including very old debts, act as a barrier to allocation of housing and exiting homelessness.

Even where debts can be resolved for clients through persistent advocacy, significant time and resources of both Homeless Law and the OOH (and, in many cases, VCAT) are invested in these matters, which should be capable of being resolved more efficiently and fairly.

1.3 Ten recommendations for a fairer, more accountable and more consistent approach to housing debts

Informed by our direct casework with hundreds of current and former OOH tenants, including a detailed review of 52 matters where the OOH was making claims for maintenance or arrears debts, Homeless Law makes the following recommendations to improve the accountability, consistency and fairness of OOH's approach to housing debts.

10 RECOMMENDATIONS FOR A FAIRER, MORE ACCOUNTABLE AND MORE CONSISTENT APPROACH TO HOUSING DEBTS

- | | |
|---|--|
| 1 | <p>OOH Debt Checklist</p> <p>To promote the consistent application of DHHS policies and operational guidelines (including not pursuing compensation where damage was caused by family violence, third parties or fair wear and tear, appropriate exercise of discretion, negotiation and proper consideration of human rights), Homeless Law recommends:</p> <ul style="list-style-type: none">• The development and implementation of an 'OOH Debt Checklist' (Annexure 1), which could be included in the decision-making process, and the DHHS computer system, to ensure housing officers act in accordance with the relevant policies before:<ul style="list-style-type: none">– Calculating compensation owed by a tenant or former tenant and entering it onto the OOH system;– Applying to VCAT for a compensation order;– Refusing to reduce or waive a housing debt on request of a tenant, former tenant or their advocate; and– Delaying a housing offer because an applicant has an OOH debt.• Managers within the OOH should be required to supervise the application of DHHS policies in relation to outstanding debts, including by ensuring compliance with the OOH Debt Checklist. |
| 2 | <p>Training and support</p> <p>To support more transparent decision-making and fairer, more appropriate outcomes, all new and existing OOH staff should be trained to:</p> <ul style="list-style-type: none">• Make decisions that are consistent with DHHS policies, the <i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i> and the <i>Residential Tenancies Act 1997 (Vic)</i>, including general compensation principles, evidence, procedural fairness and the obligation to give proper consideration to human rights; and |

	<ul style="list-style-type: none"> • Understand the various complex circumstances that may affect current and former OOH tenants, including homelessness, mental illness, substance dependence, poverty and family violence.
3	<p>Management, oversight and accountability</p> <p>To encourage consistent decision-making, adherence to DHHS policies and operational guidelines and appropriate exercise of discretion, and to identify, address and avoid problematic decisions, managers should be required to approve:</p> <ul style="list-style-type: none"> • All compensation claims being entered on the OOH system; • All applications to VCAT for compensation orders; • All refusals to reduce or waive a housing debt on request of a tenant, former tenant or their advocate; and • Refusal or delay of an offer of public housing on the basis of a debt.
4	<p>Prioritising negotiation and VCAT as a last resort</p> <p>VCAT should be an option of last resort. To promote this, Homeless Law recommends:</p> <ul style="list-style-type: none"> • OOH correspondence and communications should be amended to: <ul style="list-style-type: none"> – Encourage engagement by tenants and former tenants, including clearly informing them of exemptions to liability such as family violence, third party damage and fair wear and tear; – Inform tenants and former tenants of services they can seek advice or assistance from, including community legal centres and Victoria Legal Aid; and – Genuinely attempt to contact tenants or former tenants before raising a debt or commencing proceedings at VCAT (for example via phone, text message, home visit, and correspondence to the most recent address on file). • OOH staff should be required to comply with an ‘OOH Debt Checklist’ to ensure DHHS policies and operational guidelines are followed at every stage of a debt matter, in particular seeking to negotiate and resolve claims before proceeding to VCAT. • All claims should be reviewed by a manager before VCAT proceedings are initiated.
5	<p>The OOH as a model litigant</p> <p>Homeless Law recommends that:</p> <ul style="list-style-type: none"> • Consistent with the Victorian Model Litigant Guidelines, the OOH complies with reasonable pre-hearing requests by a tenant or their representative that aim to resolve debt matters, expedite proceedings and/or support tenants or former tenants to understand and participate in proceedings, including:

	<ul style="list-style-type: none"> - Prompt provision of relevant documents regarding compensation claims, including evidence supporting damage, rental ledgers, documentation on file regarding family violence or damage by a third party, and copies of the cost of repairs notice, any breach notices and previous VCAT orders; and - Consenting to adjournments to allow tenants to participate in hearings or collate evidence required (for example, if needed, reports from Victoria Police regarding family violence or damage by a third party). • Pre-hearing requirements and conduct should be made explicit in the DHHS policies and operational guidelines.
6	<p>Discretion to reduce or waive housing debts after a VCAT order</p> <p>Recognising the limitations of VCAT’s jurisdiction in compensation matters, and aiming to minimise the delay, stress and resource burden of further VCAT hearings, Homeless Law recommends that DHHS should amend its policies and guidelines to expressly stipulate that:</p> <ul style="list-style-type: none"> • Discretion to waive or reduce debts can be exercised after a VCAT order is made (without requiring an application for review under section 120 of the <i>Victorian Civil and Administrative Tribunal Act 1998 (Vic)</i>); and • An ‘OOH Debt Checklist’ is used where a client engages with the OOH after a VCAT order is in place.
7	<p>Debts for rental arrears</p> <p>Homeless Law recommends that DHHS should develop a clear policy regarding the handling of debts for rental arrears. The policy should:</p> <ul style="list-style-type: none"> • Encourage and guide discretion by decision-makers; • Require consultation with the former tenant or their representative regarding the circumstances in which the debt arose; • Specify exemptions to raising and pursuing debts for arrears, including where the arrears accrued in circumstances of family violence, during a temporary absence or as a result of a cancellation of a rental rebate that is subsequently shown to have been inappropriate; and • Encourage workers to link tenants with support services and advice in relation to their debts.
8	<p>Cleaning and removal of rubbish</p> <p>Homeless Law recommends that DHHS policies and operational guidelines are amended to:</p> <ul style="list-style-type: none"> • Include exemptions from liability for cleaning and removal of rubbish, for example, where the rubbish or uncleanliness is caused by family violence or factors beyond the tenant’s control; and • Encourage use of discretion and consultation with the former tenant before pursuing these claims.

9	<p>Housing debts should not delay access to housing</p> <p>An offer of housing should not be delayed or denied on the basis of an alleged outstanding debt. Homeless Law recommends:</p> <ul style="list-style-type: none"> • The DHHS Allocations Manual is amended to remove the requirement to make and maintain a repayment agreement prior to an offer of housing being made; and • When a person (a) applies to be added to the housing register or (b) is being considered for an allocation of housing, an OOH manager should be required to review, and enquire about, the legitimacy and appropriateness of the debt, including with reference to the DHHS policies and operational guidelines and the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic). This process can continue once a person is housed and should not delay the allocation of a property.
10	<p>Avoid debt collection agencies</p> <p>Homeless Law's position is that the OOH should not engage private debt collection agencies to pursue housing debts against current or former tenants. If this practice does continue, Homeless Law recommends that DHHS should publish clear policies setting out the circumstances in which debt collectors may be engaged and, if possible, should require the debt collection company to adhere to DHHS's policies regarding exemptions and payment plans.</p>

In addition to these 10 recommendations in relation to the OOH's policies and practices when calculating and pursuing housing debts, Homeless Law refers to **Annexure 2** for six further areas that would benefit from reflection, review and improvement as part of DHHS's response to the Ombudsman's review.



\$321
thousand

TOTAL DEBT CLAIMED

Total debt claimed by OOH was \$320,766



67
per cent

HOMELESS

35 clients were homeless when they received Homeless Law's assistance



60
per cent

VCAT

32 people already had VCAT compensation orders made against them



\$6.3
thousand

AVERAGE DEBT CLAIMED

On average, the OOH claimed \$6,289 per Homeless Law client



93
per cent

WAIVED

In 93% of finalised cases, the OOH debt was waived in full or part



\$4.7
thousand

WRITTEN OFF

Of the finalised cases, the average reduction was \$4,673 per person (over 4 months income if you rely on Newstart)

2. Housing, homelessness and debts to the OOH

Debts to the OOH for rental arrears, repairs or compensation are a significant barrier to our clients being offered public housing.

Under the DHHS Allocations Manual (**Allocations Manual**),⁷ applicants for public housing with outstanding OOH charges (including debts for compensation claims) will not be offered public housing unless certain repayment conditions have been met.⁸ As a matter of policy, ‘although the department is unable to pursue statute-barred debts in a court or tribunal, the department requires that applicants and all other household members pay all outstanding changes in full, or their portion of the debt, prior to being offered housing’.⁹ The policy applies whether the debt has been legally pursued at VCAT or is only recorded in the OOH’s internal system.

In most cases an applicant for public housing with an outstanding OOH debt must – at a minimum – sign a repayment agreement and acknowledge liability for the debt before they will be offered housing. For example, applicants in the category of “supported housing” must pay \$200 upfront in addition to signing a repayment agreement and maintaining the repayments for three months before they can be offered housing (with exceptions if the applicant is experiencing danger or family violence). For applicants in the category of “homeless with support”, a repayment plan must be entered but there is no minimum repayment period prior to an offer of housing being made.¹⁰ In all cases, the OOH requires the client to acknowledge their liability for the debt.

Thirty-five of Homeless Law’s 52 clients were experiencing homelessness at the time they sought assistance with their housing debts. In this context, where people are desperate for housing, the current Allocations Manual creates a strong incentive for applicants to sign a repayment agreement and accept liability for past debts. However, as our data also shows, if the underlying debt is challenged, 93% of claims have been reduced in part or in full. For clients who do not seek advice or assistance in relation to their debts, there is a significant risk that they are accepting liability for inflated or inappropriate debts, which could be significantly reduced if properly assessed. The vulnerability of former public housing tenants combined with an acute shortage of alternative affordable housing puts people in a weak and uneven bargaining position where they do not assert their rights to challenge the amounts claimed. In this context, it is crucial that the policies and practices of the OOH are developed and implemented in a way that address the current significant and negative impact of housing debts on struggling Victorians.

Rachael’s case study below brings to life a number of systemic issues with the way housing debts are calculated and pursued and the impact these practices have for people and their families.

⁷ Department of Health and Human Services, *Allocations Manual* (available at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/allocations-manual>).

⁸ Department of Health and Human Services, *Allocations Manual: Introduction and Conditions of Public Housing Offers*, 10.

⁹ *Ibid* 13.

¹⁰ *Ibid* 11–13.

Rachael: OOH pursuing a compensation claim against a tenant after wrongful eviction

Rachael is a single mother who lived in an OOH property between 2006 and 2007. Her tenancy was terminated by the Director of Housing on the basis of arrears while Rachael was in rehabilitation seeking help with her substance dependence. Because the tenancy was terminated while she was in rehabilitation, Rachael did not have the opportunity to leave in an orderly way, but the property was generally in good condition when she entered rehabilitation. In May 2008, the Director of Housing sought and obtained, in Rachael's absence, a compensation order for approximately \$8,000 for alleged damage to the property and cleaning.

In December 2015, the OOH sent Rachael a notification that her rebated rent during her tenancy had been recalculated and that this meant her rental balance was in fact in credit by approximately \$200. Essentially, the arrears for which Rachael had been evicted while seeking support with her substance dependence had been inappropriately calculated (she had been consistently paying her rent each fortnight, but had not submitted her rebate paperwork and her rent had been increased to market rate).

Although her rental account balance has been recalculated and credited, the OOH is continuing to pursue Rachael for the maintenance claim. The OOH did not give Rachael an opportunity to negotiate the costs or resolve the claim through a local agreement and payment plan before going to VCAT. The claims do not account for fair wear and tear or the fact that the damage was caused by a third party while Rachael was in rehabilitation.

Rachael has recently been released from a period of incarceration and is currently in a highly vulnerable position in terms of her health and wellbeing. She has applied for public housing but will not be offered future properties until she has consistently made payments for three months to reduce the debt and has made a lump sum repayment of \$200.

As a result of this debt to OOH, Rachael continues to experience homelessness and her relationship with her 10 year old son, as well as her chances of successful reintegration into the community, are jeopardised.

To summarise Rachael's situation:

- While in rehabilitation, she was evicted for an arrears debt that she was subsequently found not to owe.
- Because the locks were changed on her property while she was in rehabilitation, she was unable to exit in an orderly way.
- On exiting rehabilitation, she was homeless and subsequently entered prison.
- On release from prison, she was homeless and unable to be re-housed because of her debts for the previous property. She has entered a payment plan, but has been unable to maintain three months of

consistent payments. She has been unable to exit homelessness, which is impacting on her ability to be reunited with her young son.

Through Rachael's case study and the other case studies set out in this position paper, we see the importance of fair, accountable and transparent policies and practices for dealing with housing debts. Housing officers must be supported to apply policies and to exercise discretion, and there should be oversight in relation to decisions to pursue or refuse to waive debts. Importantly, the point at which a person applies for public housing, or is ready to be allocated public housing, should also be used as a juncture at which the legitimacy and appropriateness of any debt on that person's record is revisited.

Each of these points and recommendations are discussed in more detail throughout this position paper.

3. Inconsistent application of DHHS policies

Homeless Law commends DHHS on efforts made to improve the policy manuals and operational guidelines that shape decision-making in relation to public housing in Victoria. By way of example, the Tenant Property Damage Policy Statement and Tenant Property Damage Operational Guidelines (**TPD Guidelines**):

- Establish an expectation that all OOH staff manage tenant property damage through consistent and transparent decision-making, and in an inclusive and responsive manner;¹¹
- Provide for circumstances where a compensation claim will not be pursued by the OOH, for example where the damage has resulted from, amongst other events, family violence or the criminal acts of a third party;¹²
- Direct OOH staff to reduce the costs for fair wear and tear or depreciation;¹³ and
- Contain an overarching obligation under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to consider the tenant's human rights when making decisions.¹⁴

In Homeless Law's experience, however, these policies and guidelines are inconsistently applied in practice, leading to inappropriate, unjust and unpredictable outcomes. In many cases, the policies are only applied when Homeless Law becomes involved. The inconsistent application of departmental policies and operational guidelines, including where the damage has been caused by family violence, third parties or fair wear and tear, reduces confidence in the system, creates difficulty for support services in managing clients' expectations, causes confusion and inefficiency and means that former tenants are pursued for debts in contravention of the OOH's stated policies and the intention behind them.

Of the 52 client matters Homeless Law reviewed, debts were commonly pursued in contravention of DHHS policies in the following key ways:

- **Family violence:** victims of family violence being held liable for debts caused by their violent ex-partner;
- **Fair wear and tear and lack of evidence:** ambit claims that have limited regard for fair wear and tear and are unsubstantiated;
- **Human rights:** failure by OOH staff to take into account human rights considerations when determining compensation claims; and

¹¹ Department of Health and Human Services, *Tenant Property Damage Operational Guidelines* (available at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/maintenance-manual/5.-tenant-property-damage>) (**TPD Guidelines**).

¹² Ibid 2. Other exceptions to claiming damage include where the damage is a result of natural disasters or works by the Department.

¹³ Ibid 8.

¹⁴ Ibid 3.

- **Consultation and discretion:** tenants not being consulted by OOH staff and not being given the opportunity to discuss the circumstances surrounding the compensation claims.

These are discussed in detail below.

3.1 Holding victims of family violence liable for damage caused by perpetrators

As noted above, the TPD Guidelines provide that the OOH will generally not claim costs from a tenant for damage to property caused by family violence. However, in two years of operation, Homeless Law's Women's Homelessness Prevention Project has assisted 10 women to defend compensation claims made by the OOH and, of the seven matters that have finalised,¹⁵ four claims totalling \$11,228 were withdrawn in full, and a further three were reduced in total by \$10,750.

In total over \$21,000 in claimed debts have been waived through legal representation and advocacy. Of the seven finalised matters, six women had previously experienced family violence, and four of the compensation claims related to damage directly caused by a perpetrator of family violence. Joy's case study is one of these matters. The OOH were aware of her experience of family violence at the property, but failed to apply the TPD Guidelines and proceeded with an application to VCAT for \$7500 in compensation.

Joy: After protracted proceedings, victim of family violence has \$7500 public housing debt waived for damage caused by perpetrator

Joy is an Aboriginal woman who had lived in a public housing property for three years with her young son with a disability. She was recently forced to flee this property due to extreme family violence perpetrated against her by an ex-partner.

While living in a women's refuge, Joy's support worker tried to re-apply for public housing, but was told Joy would first need to address a \$7500 claim for damage that had been lodged against her at VCAT. The housing office that lodged the application against Joy was aware that she had experienced family violence at the property, because Joy had previously applied for an urgent transfer due to family violence shortly before fleeing.

The OOH was also aware Joy was now residing in a women's refuge because they had dealt directly with her support worker. Despite this, they proceeded with their claim at VCAT.

Joy was assisted through the Homeless Law's Women's Homelessness Prevention Project, and her Homeless Law lawyer provided the OOH with further evidence of the family violence including a copy of her IVO, refuge support worker's letter, and further information about Joy's circumstances.

After protracted negotiations, the claim was withdrawn in full by the OOH.

If the TPD Guidelines had been properly applied, Joy would not have been pursued for compensation for damage to the property as the OOH would have identified that the damage was caused as a result of family

¹⁵ Two of these matters are ongoing, and another has been closed due to lost contact with the client.

violence. Appropriate application of the TPD Guidelines would have avoided an injection of resources from Homeless Law, the OOH and VCAT, and reduced the stress and delay caused for Joy who was waiting to exit refuge accommodation and move into housing with her son.

For Bronwyn, in the case study below, her request for an urgent housing transfer for safety reasons was refused because of a housing debt that stemmed directly from an act of family violence.

Bronwyn: victim of violence at risk because of housing debt

Bronwyn is a 30 year old woman with two children who presented to Homeless Law's Women's Homelessness Prevention Project fearing for the safety of her children and herself. She had experienced severe family violence from the father of her first child, which resulted in his incarceration.

Since that time, Bronwyn had re-partnered and had another young baby. Due to the violent history of her ex-partner, the OOH had already relocated Bronwyn's family once, however she'd recently learned that her ex-partner was due for parole and had learned of her new address.

A further request for relocation had been made to the OOH, but the OOH refused this request on the basis that Bronwyn allegedly had a housing debt of \$1600 from her previous property (which she had been removed from due to the risk of violence). The damage which led to this debt had been caused by Bronwyn's ex-partner, and included blood stains on the property's carpet.

The OOH was unwilling to negotiate and Homeless Law lawyers had to apply to VCAT for a review hearing under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*. Bronwyn was subsequently represented at the rehearing in relation to the \$1600 debt.

The Homeless Law lawyers were able to convince the OOH representative to waive the debt and undertake to urgently relocate the family.

As these case studies highlight, failure to properly apply the TPD Guidelines relating to damage caused by family violence, when combined with the application of the Allocations Manual, has the potential to cause severe hardship and, in some cases, to jeopardise victims' safety and wellbeing. It is imperative that OOH decision-makers are trained and supported to properly apply the TPD Guidelines and that there are oversight mechanisms to ensure appropriate decisions are being made about debts, liability and transfers or allocations.

3.2 Inflated, unsubstantiated claims

The TPD Guidelines provide mechanisms for the OOH to reduce the total amount of compensation sought, which align with obligations under the *Residential Tenancies Act 1997 (Vic)*.¹⁶ These include not charging a tenant for damage that is considered 'fair wear and tear' and accounting for depreciation. The OOH must also consider 'whether the cost is reasonable',¹⁷ as well as substantiating compensation claims with evidence (including photos).¹⁸

These policies are often not applied in practice. For example, a review of three finalised Homeless Law files where the OOH brought a maintenance claim against a former tenant which Homeless Law defended on the basis that the OOH did not have evidence to substantiate their claims or was claiming inflated amounts showed that, on average, the OOH's initial debt claimed was reduced by 78% through Homeless Law's advocacy based on the OOH failing to take into account reasonable wear and tear or to substantiate the claims appropriately.

While Homeless Law appreciates the importance of the OOH recouping money for damaged properties, the decision to pursue a current or former tenant for compensation is a serious one and should not be made without rigorous processes and oversight. It is unacceptable to proceed with seeking significant amounts of compensation, resulting in debts that impose financial hardship and prevent people from accessing future housing, without adequate evidence and without confirming that legislative and policy requirements have been met.

The fact that the amounts claimed by the OOH in three relevant finalised matters were reduced by over three-quarters when challenged confirms that the processes by which the OOH makes decisions regarding liability for damage will benefit significantly from review.

Importantly, vulnerable tenants should not be held liable for the 'fair wear and tear' that is an inevitable part of living in a home, particularly a home that may have been in a deteriorating state of repair prior to the tenancy commencing.¹⁹

Andrew: OOH claim against tenant of 13 years fully waived on basis that it did not take into account fair wear and tear

Andrew had been living at his OOH property for 13 years prior to being incarcerated. After he was incarcerated and the tenancy ended, the OOH made a claim at VCAT for damage to the property of over \$4000, including new carpets, painting and door trim. VCAT made an order in favour of the OOH for \$1200 in the absence of the tenant.

Homeless Law lawyers attempted to negotiate with the OOH, however they were unwilling to negotiate. When the matter was reheard at VCAT, the claim was dismissed in full on the basis that the damage was clearly fair wear and tear, as well as the fact that the OOH evidence was not sufficient to substantiate the claim.

¹⁶ *Residential Tenancies Act 1997 (Vic)* ss 210 and 211.

¹⁷ TPD Guidelines, above n 11, 2, 6, 8–11.

¹⁸ See, eg, *ibid*, 6 and 7.

¹⁹ See, eg, Victorian Auditor-General's Report, *Access to Public Housing* (March 2012) 2011-12:24 (**VAGO Public Housing Report**), which estimated that 14% of the public housing portfolio was 'nearing obsolescence and a significant maintenance liability'.

In addition to reducing amounts claimed for fair wear and tear, it is important that the OOH is able to prove, on the balance of probabilities, that a breach of the tenant's obligations has occurred and that loss or damage has resulted. As the Annotated RTA reminds us:

The starting point is not whether the applicant party has suffered loss. The starting point will be proof of a breach of duty or, rarely, of the tenancy agreement. It is important to bear in mind also that the party seeking compensation has a general duty to mitigate loss: see s 211(a). The outcome of any case will obviously depend on the evidence presented to the Tribunal and the Tribunal's assessment of the evidence.²⁰

The TPD Guidelines are designed to support compliance with these legal obligations, but as the case studies in this part highlight, it is too common for the OOH to proceed to VCAT without considering whether the tenant has breached their obligations or whether they have adequate evidence to substantiate their claim.

Lucy (part 1): OOH unable to substantiate compensation claims for damage caused by squatters

Lucy is a 27 year old mother of two who lived in public housing for approximately four years before being incarcerated. Whilst Lucy was incarcerated her OOH property was damaged by squatters. The Director of Housing sought and obtained a compensation order from VCAT for damage to the property for approximately \$7500.

Homeless Law attempted to negotiate with the OOH, to no avail. Homeless Law then applied to have the matter re-opened at VCAT under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and, when presented with the evidence that had previously been put to the OOH, VCAT reduced the claim by approximately \$6000 on the basis that the Director of Housing could not sufficiently prove that the damage occurred during Lucy's occupation of the property.

Chris: OOH withdraws claim in full due to lack of evidence

Chris was incarcerated in early 2012. When he left the property, it was in a good condition. He did not return to the property nor authorise anyone to live in the property while he was in prison. His tenancy was then terminated by the OOH on 4 October 2012. Almost a year later, the OOH made an application to VCAT for compensation of almost \$9000 due to damage and repairs.

Homeless Law negotiated with the OOH, requesting all evidence that the OOH intended to rely on at VCAT. Through this process, it became clear that the main evidence relied on by VCAT were photographs taken on 8 October 2012, 4 days after the tenancy was terminated by the OOH. On this basis, Homeless Law successfully advocated for the claim to be withdrawn in full as the OOH did not have adequate evidence to substantiate their claim.

²⁰ John Billings, Jacquelyn Kefford, Alan Vassie, *VCAT Annotated Residential Tenancies Act (2016) (Annotated RTA)*.

As these case studies highlight, former public housing tenants are too frequently pursued for substantial compensation claims that cannot be justified or substantiated. It is only in a small proportion of cases that former tenants seek advice or assistance in relation to their liability and, in Homeless Law's experience, where they do, the amount payable is substantially reduced or waived in full. It is vitally important that preventative measures are put in place to avoid these claims progressing as far as they currently do.

3.3 Failure to take into account human rights considerations

Victoria's Human Rights Charter requires the OOH, as a public authority, to:

- Act compatibly with human rights; and
- In making decisions, give proper consideration to relevant human rights.²¹

In the context of housing debts, including the homelessness and hardship of individuals and families being pursued for debts and the way in which family violence contributes to these debts, relevant human rights include:

- **Equality** – Every person 'has the right to ... enjoy his or her human rights without discrimination' and 'is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination'.²²
- **Families** – 'Families are the fundamental group unit of society and are entitled to be protected by society and the State'.²³
- **Children** – 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.²⁴

There is a built in mechanism for balancing competing priorities under section 7(2) of the Charter, which sets out factors to be taken into account to determine if any limitation on rights was reasonable and 'demonstrably justified' in the circumstances.

The TPD Guidelines seek to operationalise these human rights obligations: 'all Department staff are required to consider the potential impact of any proposed action on the tenant's (and their household's) rights under the *Charter of Human Rights and Responsibilities (2006) (Vic)*'.²⁵

The Guidelines confirm this 'means that any decisions made that do limit the tenant's human rights must be lawful, necessary, logical, reasonable and proportionate'.²⁶

²¹ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 38.

²² *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 8. In relation to the rights under section 8 of the Charter, we note that in international human rights law, violence against women is considered to be a form of discrimination against women, and that accordingly, governments and public authorities must exercise 'due diligence' to prevent and respond to violence against women: see Committee on the Elimination of Discrimination Against Women, *General Recommendation No 19: Violence Against Women* (1992) 5.

²³ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 17(1).

²⁴ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 17(2).

²⁵ TPD Guidelines, above n 11, 3.

²⁶ *Ibid.*

The TPD Guidelines try to set up a framework that supports OOH staff to consider human rights when making decisions about when to pursue former tenants for compensation. Unfortunately, however, in the absence of training and oversight, it is common for human rights to be overlooked in decision-making.

Importantly, VCAT does not have jurisdiction to determine whether the OOH has given proper consideration to, or acted compatibly with, human rights in hearing an application for compensation.²⁷ The obligation on the OOH still exists, but VCAT cannot play an effective role in overseeing compliance.²⁸ It is therefore vital that OOH staff are equipped and supported to consider human rights prior to proceeding with a compensation claim at VCAT.

Peta's case study below provides an example of the way in which contemplation of a person's human rights under the Charter, and the balancing act that the Charter provides for, can lead to fairer, more appropriate outcomes. It remains the case, however, that human rights are frequently only considered when raised in advocacy, rather than as a matter of course in the processes of OOH staff.

Peta: single mother of four with cancer pursued for \$9000 but reduced to \$600 after human rights taken into account

Peta is a single mother of four children receiving Centrelink payments as her sole income. Peta has breast cancer and her eldest son has a severe medical condition which has resulted in multiple organ transplants and liver failure. Two of Peta's other children suffer ADHD.

Peta had lived in the same OOH property for 13 years and was transferred to another OOH property. During the transfer Peta was undergoing chemotherapy and cleaned the vacated property as best she could in her fragile state.

After Peta was transferred, the OOH sought \$9000 in compensation for repairs at the vacated property. The OOH told Peta she needed to pay the claim or she would be taken to VCAT. The OOH then reduced their claim to \$6000.

Homeless Law became involved and reminded the OOH that, in deciding whether to pursue the claim for compensation, it was required to consider the best interests of Peta's children under section 17(2) of the Victorian Human Rights Charter. Homeless Law argued that the family unit was under significant financial pressure due to the above extraordinary medical circumstances. Homeless Law argued the \$6000 debt was increasing the already significant burden on Peta as a single mother on Centrelink and that the decision to pursue the debt was impacting on Peta's ability to afford her children's medical expenses.

It appeared that the OOH had not engaged with the Victorian Human Rights Charter in managing Peta's case. After months of advocacy, including with reference to Peta's family's human rights, the OOH reduced the amount of debt claimed by a further 90% to \$600.

²⁷ Since the decision of *Director of Housing v Sudi* [2011] VSCA 266 (**Sudi**), VCAT does not have jurisdiction to consider whether a social landlord has complied with its obligations under section 38 of the Charter in certain applications by the OOH (including applications for possession and compensation), and any questions about Charter compliance in these matters must be considered by the Supreme Court.

²⁸ For more detailed commentary on this issue, see Justice Connect Homeless Law, *Charting a Stronger Course: Submission to the Eight Year Charter Review* (2015) (available at: <https://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/preventing-evictions-and-sustaining-tenancies/charting-stronger-course-homeless-law-submission-eight-year-charter-review>).

As with the other case studies in this part 3, Peta's case study is an example of the positive impact that proper application of DHHS policies and the Human Rights Charter can have in guiding difficult decisions involving competing obligations. However, each of these matters has required significant advocacy to make sure the policies and Charter obligations were applied. In the absence of this advocacy, these well thought-out policies and the highly important obligations they set out are frequently overlooked in decisions to pursue housing debts and compensation claims.

3.4 Consultation, negotiation and exercise of discretion

As discussed throughout this position paper, there are a number of features of the TPD Guidelines and other DHHS policies that the DHHS should be commended for. For example, the TPD Guidelines contain a strong focus on negotiation, local resolution and exercise of discretion:

It is expected that all Department staff manage tenant property damage:

- *with a strong focus on local resolution and agreement*
- *in an inclusive and responsive manner including problem solving and negotiation with the tenant as early as possible*
- *through consistent and transparent decision-making with clearly documented evidence of issues, actions taken, decisions made, resolution sought or rationale for escalating, and*
- *with an authorised approach where staff seek approval or decision from senior management at key decision points when necessary.*²⁹

There is a specific statement in relation to discretion: 'An MCAT can be deactivated by the Manager, Tenancy and Property or equivalent at any point prior to being substantiated',³⁰ and these staff can consider linking tenants with appropriate supports, negotiation with the tenant and 'choosing not to pursue repair costs'.³¹

As part of the process for determining responsibility, the TPD Guidelines provide that staff should contact the tenant to discuss the damage (via phone, home visit or an interview in the local office, with a support worker if applicable), to understand why and how the damage occurred. This should include:

- *giving the tenant the opportunity to respond and explaining why and how the damage occurred.*
- *informing the tenant of the information and evidence gathered that will be taken into account (either favourable or unfavourable to the tenant) in making the decision and determining responsibility for the damage.*
- *taking into account any material or information provided by the tenant when making a decision.*³²

Essentially, DHHS have well thought out policies and guidelines for staff which, if adhered to, would significantly increase the number of debt and compensation claims that could be resolved appropriately and fairly without the need for a VCAT hearing.

²⁹ TPD Guidelines, above n 11, 2.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

However, as Clare's case study below shows, OOH staff frequently do not engage with tenants or former tenants and their support workers in determining responsibility for damage and, when approached by Homeless Law, can be unwilling to exercise discretion to reduce or waive amounts claimed even in the face of evidence questioning the tenant's liability.

Clare: OOH refuse to negotiate debt prior to VCAT hearing

Clare and her young daughter resided in an OOH property from 2008. In 2014, Clare went overseas to see her family. Clare informed the OOH that she would be absent from the property. Whilst overseas, Clare was sexually assaulted and the assault resulted in an extended hospital stay which meant Clare did not return to Australia on her anticipated return date. Whilst Clare was in hospital, the OOH evicted her from the property due to alleged abandonment. Later, in 2015, the OOH brought compensation claims against Clare, including for cleaning and damage totalling approximately \$2,400. In Clare's absence, VCAT ordered Clare pay a reduced amount (of \$2000, instead of \$2400) for damage at the property.

When Clare returned to Australia she discovered the situation and found herself homeless and unable to find safe housing. Homeless Law tried to negotiate with the OOH on multiple occasions to reduce the debts on the basis that the OOH did not have sufficient evidence to substantiate the alleged debts. However the OOH officer refused to negotiate, so Homeless Law lodged an application for a rehearing at VCAT. On the day of the rehearing, a different OOH officer attended the Tribunal and, in advance of the hearing, suggested the parties should adjourn the matter to allow time for negotiations. On the basis of this potential to negotiate, Homeless Law agreed to the adjournment.

Following the adjournment, Homeless Law called the OOH to begin the negotiation process. Ultimately Homeless Law was required to negotiate with the original OOH officer. That officer reiterated their initial stance that the OOH would *not* negotiate with Clare, despite what the housing officer at VCAT had said. The housing officer also advised that instead of pursuing the \$2000 VCAT had originally ordered, the OOH would actually pursue the higher amount of \$2400.

In light of this refusal to negotiate, Homeless Law returned the matter to VCAT. VCAT agreed with Homeless Law that the claims could not be substantiated in full. VCAT found Clare needed to pay \$1000 in compensation, not \$2400.

In Clare's case, if OOH had been willing to negotiate prior, the claim could have been potentially reduced when the OOH realised it could not substantiate the debt as well as saving significant resources in not proceeding to VCAT.

In contrast, Josephine's case study below illustrates how the system can work well when the OOH takes a collaborative and consultative approach. For Josephine this resulted in the OOH reducing the debt claimed by over \$5000, and Josephine acknowledging that she was liable for the remaining debt and entering a repayment plan. In this case, both the OOH and Josephine were satisfied with the outcome and were able to reach this resolution without going to VCAT.

Josephine: OOH taking a consultative approach to achieve a fair negotiated outcome

Josephine is an Aboriginal woman who lived in an OOH property for approximately 12 months before leaving the property. Josephine had a history of mental illness, including depression and anxiety and her sole source of income was social security payments. Josephine had three small children and was pregnant when she received a letter from the OOH claiming compensation for approximately \$8700 in compensation for damage to the former property.

Josephine acknowledged she did leave a mattress behind when she vacated the property and that she had damaged one door. Homeless Law negotiated with the OOH on Josephine's behalf and requested that the OOH substantiate their claims with photographic evidence. Through the negotiations, the OOH could see Josephine had not caused all the damage they alleged. The OOH substantially reduced the cost of the claim against Josephine from \$8700 to \$3100. Following this significant reduction Josephine was happy to enter a repayment plan for the balance of the compensation claimed.

Recommendation 1: OOH Debt Checklist

To promote the consistent application of DHHS policies and operational guidelines (including not pursuing compensation where damage was caused by family violence, third parties or fair wear and tear, appropriate exercise of discretion, negotiation and proper consideration of human rights), Homeless Law recommends:

- The development and implementation of an 'OOH Debt Checklist' (**Annexure 1**), which could be included in the decision-making process, and the DHHS computer system, to ensure housing officers act in accordance with the relevant policies before:
 - Calculating compensation owed by a tenant or former tenant and entering it onto the OOH system;
 - Applying to VCAT for a compensation order;
 - Refusing to reduce or waive a housing debt on request of a tenant, former tenant or their advocate; and
 - Delaying a housing offer because an applicant has an OOH debt.
- Managers within the OOH should be required to supervise the application of DHHS policies in relation to outstanding debts, including by ensuring compliance with the OOH Debt Checklist.

Recommendation 2: Training and support

To support more transparent decision-making and fairer, more appropriate outcomes, all new and existing OOH staff should be trained to:

- Make decisions that are consistent with DHHS policies, the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* and the *Residential Tenancies Act 1997 (Vic)*, including general compensation principles, evidence, procedural fairness and the obligation to give proper consideration to human rights; and
- Understand the various complex circumstances that may affect current and former OOH tenants, including homelessness, mental illness, substance dependence, poverty and family violence.

Recommendation 3: Management, oversight and accountability

To encourage consistent decision-making, adherence to DHHS policies and operational guidelines and appropriate exercise of discretion, and to identify, address and avoid problematic decisions, managers should be required to approve:

- All compensation claims being entered on the OOH system;
- All applications to VCAT for compensation orders;
- All refusals to reduce or waive a housing debt on request of a tenant, former tenant or their advocate; and
- Refusal or delay of an offer of public housing on the basis of a debt.

4. Over-reliance on VCAT

The OOH, through claims brought by the Director of Housing, is over represented in VCAT's Residential Tenancies List. As the Victorian Ombudsman noted in announcing this own motion investigation:

*VCAT data shows that over the financial years 2012/13 and 2014/15 the OoH was the second largest litigant in tenant disputes. Such OoH matters comprised approximately 20 per cent of the VCAT Residential Tenancies List in each of those years, equating to between 12,000 and 14,000 VCAT referrals.*³³

In practice, Homeless Law sees that OOH staff frequently rely on VCAT as the first rather than last resort to make decisions in relation to compensation and debts. Rather than turning to VCAT to determine complex matters where resolution cannot be reached, in our experience OOH staff rely on VCAT as a proxy for proper application of the TPD Guidelines, internal escalation and the exercise of discretion.

In addition to the obvious stress and burden of legal proceedings on individuals, this reliance on VCAT imposes a burden on the justice system and services like Homeless Law which become involved in protracted disputes that could be effectively and efficiently resolved through negotiation. Furthermore, because VCAT's jurisdiction is limited to considering provisions under the *Residential Tenancies Act 1997* (Vic), VCAT cannot consider whether DHHS has applied its own policies or the Charter of Human Rights.

This is a significant systemic issue that arises when the OOH is not willing to negotiate outside of VCAT as it means tenants may never get the benefit of the DHHS policies or application of the Charter.

4.1 Pursuing housing debts through VCAT

Homeless Law's experience is that the stated DHHS policy to favour 'local resolution' over VCAT proceedings is not adhered to in practice.³⁴ In over 50% of Homeless Law's OOH debt matters throughout 2014–16, the OOH had already proceeded to VCAT to obtain an order for compensation. These figures indicate that the OOH frequently resorts to VCAT to resolve compensation claims rather than negotiating with tenants and their representatives before commencing proceedings, placing an unnecessary resource burden on VCAT, as well as tenants and their representatives.

This runs contrary both to OOH policy which favours local resolution and agreement, as well as the *Victorian Model Litigant Guidelines*.³⁵ As a model litigant, the OOH is required to act fairly and, in particular, to limit the scope of legal proceedings by taking such steps to resolve the dispute by agreement.³⁶

³³ See Victorian Ombudsman, *Ombudsman investigates Office of Housing management of maintenance debts* (10 August 2016) (available at: <https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Ombudsman-investigates-Office-of-Housing-management>).

³⁴ TPD Guidelines, above n 11, 9.

³⁵ See Department of Justice and Regulation, *Victorian Model Litigant Guidelines* (2011) (available at: <http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines>).

³⁶ *Ibid* ss 2(a) and (f).

This over-reliance on making claims at VCAT presents a number of significant issues for OOH tenants. Many clients are not aware of proceedings at VCAT (particularly where a compensation claim follows an eviction and the former tenant is experiencing homelessness) or are not in a position personally or health-wise to attend and/or represent themselves in the legal proceedings. Furthermore, the correspondence and communication of the OOH does not facilitate or encourage engagement. For example, the cost of repairs notice is difficult to comprehend and does not inform tenants or former tenants that there are exemptions from liability, that they are entitled to negotiate or defend the claim, or that they should consider getting advice or support with the compensation claim.³⁷ It is also common for correspondence regarding compensation claims to be sent to an old address despite the OOH being on notice that the tenant no longer lives there.

As a result, in Homeless Law's experience, a significant proportion of clients we assist have had VCAT compensation orders made in their absence. Homeless Law would welcome the Victorian Ombudsman's consideration of the number and proportion of VCAT compensation orders obtained by the Director of Housing that were made in the absence of the tenant or former tenant (as noted on the compensation orders made by VCAT).

As the case study below highlights, a lack of willingness to negotiate prior to VCAT is particularly problematic where a tenant would not be liable for claims under DHHS policy (for example, because the damage was attributable to family violence), as VCAT does not have jurisdiction to consider these important policy provisions.

Karen: OOH insist on proceeding to VCAT despite knowing damage caused by family violence

Karen lived in her OOH property for three years with her violent ex-partner. Karen was forced to flee the property due to family violence on advice from the police. After she left the property, the OOH applied to VCAT for compensation of over \$2000. Karen was not aware of the VCAT proceedings as all correspondence was sent to the old address she had left. The damage was all caused by family violence from her ex-partner.

Homeless Law lawyers attempted to negotiate with the OOH, however the OOH advised they would not negotiate prior to the matter being reheard at VCAT. This was despite the fact that Homeless Law lawyers indicated they were seeking evidence from Victoria Police regarding the family violence and requested an adjournment of the VCAT proceedings for this evidence to be sought.

Homeless Law has had a number of cases in which the OOH were unwilling to negotiate prior to VCAT. This leaves tenants in a position where they are forced to either try to negotiate with OOH for claims to be reduced consistently with DHHS policy on the day of the hearing, or to rely on VCAT's assessment of the compensation claim knowing that VCAT has no ability to consider the tenant's liability (or lack thereof) under DHHS policies and operational guidelines.

³⁷ For detailed submissions in relation to the documentation of VCAT, see Justice Connect Homeless Law, *There's No Place Like Home: Submission to the Review of the Residential Tenancies Act (2015) part 3.4* (available at: <https://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/preventing-evictions-and-sustaining-tenancies/there%E2%80%99s-no-place-home-submission-residential-tenancies-act-review>).

Recommendation 4: Prioritising negotiation and VCAT as a last resort

VCAT should be an option of last resort. To promote this, Homeless Law recommends:

- OOH correspondence and communications should be amended to:
 - Encourage engagement by tenants and former tenants, including clearly informing them of exemptions to liability such as family violence, third party damage and fair wear and tear;
 - Inform tenants and former tenants of services they can seek advice or assistance from, including community legal centres and Victoria Legal Aid; and
 - Genuinely attempt to contact tenants or former tenants before raising a debt or commencing proceedings at VCAT (for example via phone, text message, home visit, and correspondence to the most recent address on file).
- OOH staff should be required to comply with an 'OOH Debt Checklist' to ensure DHHS policies and operational guidelines are followed at every stage of a debt matter, in particular seeking to negotiate and resolve claims before proceeding to VCAT.
- All claims should be reviewed by a manager before VCAT proceedings are initiated.

4.2 Unwillingness to provide evidence of claims

In Homeless Law's experience, the OOH is often reluctant to provide a tenant or their representatives with the evidence the Director of Housing will be relying on at the VCAT hearing. There have been numerous occasions where OOH employees have informed Homeless Law lawyers that they cannot provide the documents requested (for example, evidence of the damage to the property) except through a request under the *Freedom of Information Act 1982 (Vic)*. An FOI request response can take up to 45 days and is a formal and administratively burdensome process. To require Homeless Law to make an FOI request on behalf of our clients to help them understand the case being put against them is inconsistent with the OOH's role as a model litigant and generates unnecessary inefficiencies and delays.

In a recent Homeless Law case, the OOH refused the following requests from Homeless Law:

- For evidence from the OOH to substantiate a compensation claim being brought by the OOH against a client for maintenance/repair costs;
- For consent to an adjournment to allow Homeless Law sufficient time to receive the results of a freedom of information request which would prove family violence at the property; and
- For the matter to be transferred to a different VCAT location to allow the client to attend the hearing by video link.

In respect of the request for the matter to be heard at a location where video link was available, ultimately the parties were required to attend VCAT where the VCAT member ordered the OOH to transfer the matter to a different OOH office to allow the client to attend the hearing via video link.

These practices slow down resolution and create unnecessary costs for parties and VCAT and additional stress for former tenants.

Recommendation 5: The OOH as a model litigant

Homeless Law recommends that:

- Consistently with the Victorian Model Litigant Guidelines, the OOH complies with reasonable pre-hearing requests by a tenant or their representative that aim to resolve debt matters, expedite proceedings and/or support tenants or former tenants to understand and participate in proceedings, including:
 - Prompt provision of relevant documents regarding compensation claims, including evidence supporting damage, rental ledgers, documentation on file regarding family violence or damage by a third party, and copies of the cost of repairs notice, any breach notices and previous VCAT orders; and
 - Consenting to adjournments to allow tenants to participate in hearings or collate evidence required (for example, if needed, reports from Victoria Police regarding family violence or damage by a third party).
- Pre-hearing requirements and conduct should be made explicit in the DHHS policies and operational guidelines.

4.3 Exercising discretion where a VCAT order is in place

Of the 52 clients with OOH debt matters that Homeless Law assisted throughout 2014–16, 32 people already had VCAT compensation orders in place.

Where a VCAT order is in place, Homeless Law strongly advocates for the OOH to use its discretion to negotiate the debt despite the existence of the order. This is particularly the case where a client did not attend the relevant VCAT hearing and did not present their evidence and circumstances to VCAT. In such instances, Homeless Law's approach is that negotiation is better and more efficient than the costly alternative of applying to VCAT for a review hearing under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* in order for the matter to be reheard.

The OOH is, however, resistant to exercising discretion to waive or reduce debts, instead relying on VCAT's order as conclusive evidence of the debt being owed. Without legal advocacy and representation, most tenants will be compelled to accept the debt on this basis and sign up to a repayment agreement in order to be eligible for an offer of housing.

As Margaret's case study below shows, this obstructive approach to compensation debts that have been heard by VCAT means that the OOH misses the opportunity to revisit matters and more appropriately assess the basis of their claim.

Margaret: OOH repeatedly refused to reduce amount claimed and VCAT subsequently reduced by \$3000

Margaret is a 45 year old Aboriginal woman. She has been a victim of family violence and lives with her young son. She is reliant on the Disability Support Pension.

Margaret's tenancy was terminated for abandonment. She had returned to the property to try to clean it and remove her belongings, but she was afraid for her safety because family members who had been violent toward her were also in the local area. The OOH obtained a compensation order against Margaret for approximately \$4950.

When Margaret sought Homeless Law's assistance, she was homeless and her housing debt was a barrier to her getting rehoused. Homeless Law assisted Margaret to apply for a review of the compensation order under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*.

Homeless Law wrote to the OOH on four separate occasions setting out Margaret's circumstances, referring to the TPD Guidelines and the Human Rights Charter and requesting that the OOH reduce the amount to approximately \$950, which Margaret accepted responsibility for.

On each occasion, the OOH responded with a refusal to negotiate, including one response: 'As your colleague has previously been informed, after a number of discussions, the Director wishes to have the matter of compensation settled at VCAT'.

It was not clear why or on what basis this decision was made.

The matter was adjourned three times, including because of the delay in the OOH providing evidence and Margaret's poor health.

Despite Margaret being unable to attend the final hearing and it going ahead in her absence, VCAT reduced the amount owing to \$1380 based on a lack of evidence.

In Margaret's case, the OOH was given four opportunities to consider their evidence and the legitimacy of their claims and to exercise their discretion to reduce the amount claimed. They refused to do so and instead used their own resources, as well as those of Homeless Law and VCAT, to pursue an unjustified claim that could have been resolved through negotiation.

Homeless Law understands that OOH staff rely on the following element of the TPD Guidelines as the basis for refusals to exercise discretion:

- Maintenance claims against a tenant 'can be deactivated by the Manager, Tenancy and Property or equivalent at any point prior to being substantiated';³⁸ and

³⁸ TPD Guidelines, above n 11, 2.

- 'If VCAT grants an Order for Compensation, the [maintenance claim against tenant] is considered substantiated and the tenant is required to pay for the damage'.³⁹

In Homeless Law's experience, the OOH will refuse to negotiate and advise tenants, or tenants' representatives, that they must apply for the matter to be reheard at VCAT. This leaves tenants in a situation where they are compelled to go to VCAT, with the attendant stress and the accompanying resourcing requirements for the OOH, VCAT and the tenant's representatives. Furthermore, the OOH will generally refuse to negotiate prior to the VCAT hearing, meaning that tenants who may not be liable for compensation under DHHS policies and guidelines do not have the opportunity to negotiate with the OOH to reduce or waive a debt on that basis.

In contrast to Margaret's case, Alice's case study below is an example of the OOH using its discretion despite the existence of a VCAT order, which demonstrates a best practice approach to the fair and appropriate resolution of housing debts.

Alice: OOH exercises discretion to waive debt despite existence of VCAT order

Alice is an Aboriginal woman with two children. When Alice contacted Homeless Law she was living in family violence crisis accommodation and was six months pregnant.

Alice had previously lived in an OOH property with her violent ex-partner who had a heavy ice addiction. Her ex-partner was often destructive in the property as well as violent towards Alice. Ultimately Alice was able to flee the property with police assistance. There were numerous police reports which documented the ex-partner's behaviour and Alice obtained an intervention order against him.

The Director of Housing applied to VCAT for a compensation order for damage to the property, including repairing walls and doors. Alice did not attend the hearing and VCAT made a compensation order in favour of the OOH for approximately \$3500. When Alice later applied for public housing, she learnt about the debt and the fact that it was preventing her and her children from being offered public housing. Alice believed all the damage at the property was caused by her ex-partner and Homeless Law communicated this to the OOH as well as providing the OOH with a copy of the intervention order Alice had obtained against her ex-partner.

Once the relevant OOH officer reviewed the intervention order, he exercised his discretion to waive the entire debt immediately. The officer showed empathy for Alice's circumstances and wanted Alice to know there would be no need to formalise the agreement by reopening the matter at VCAT. The matter was resolved in a total of four days.

Alice's case demonstrates the impact that the OOH can have on a vulnerable person's life by exercising discretion and avoiding the time, cost and stress of re-opening an old VCAT order where there are DHHS policies and guidelines in place to support OOH staff to appropriately respond to a former tenant's circumstances.

³⁹ Ibid.

Recommendation 6: Discretion to reduce or waive housing debts after a VCAT order

Recognising the limitations of VCAT's jurisdiction in compensation matters, and aiming to minimise the delay, stress and resource burden of further VCAT hearings, Homeless Law recommends that DHHS should amend its policies and guidelines to expressly stipulate that:

- Discretion to waive or reduce debts can be exercised after a VCAT order is made (without requiring an application for review under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic)); and
- An 'OOH Debt Checklist' is used where a client engages with the OOH after a VCAT order is in place.

5. Gaps in existing DHHS policies and operational guidelines

5.1 Rental arrears debt policies

Rental arrears are the most common factor putting Homeless Law's clients at risk of homelessness.

By way of example, between 1 July 2014 – 30 June 2015, 89 of Homeless Law's clients were facing eviction from OOH properties and 70% of these were facing eviction for arrears. Furthermore, of the 52 OOH debt matters analysed in preparing this position paper, at least 22 clients had arrears debts (commonly in addition to debts for maintenance and property damage).

As was identified in Rachael's case study in part 2 above, former tenants can find themselves dealing with arrears debts that accrued in circumstances where they should not have been liable for the arrears (for example, where they had fled because of family violence or their rent had been increased to market rate).

Currently, in contrast to the detailed guidelines regarding property damage, there is no OOH policy for managing these rental arrears debts. Without a clear policy on how the OOH manages rental arrears debts, both OOH staff and former tenants are unclear of their rights and obligations, which makes appropriate resolution extremely difficult.

The OOH's policy for addressing debts for rental arrears should include consulting with tenants to understand the circumstances surrounding the debt and waiving or reducing arrears debts in appropriate circumstances (for example, where the arrears accrued in circumstances of family violence, during a temporary absence or as a result of a cancellation of a rental rebate that is subsequently shown to have been inappropriate).

Recommendation 7: Debts for rental arrears

Homeless Law recommends that DHHS should develop a clear policy regarding the handling of debts for rental arrears. The policy should:

- Encourage and guide discretion by decision-makers;
- Require consultation with the former tenant or their representative regarding the circumstances in which the debt arose;
- Specify exemptions to raising and pursuing debts for arrears, including where the arrears accrued in circumstances of family violence, during a temporary absence or as a result of a cancellation of a rental rebate that is subsequently shown to have been inappropriate; and
- Encourage workers to link tenants with support services and advice in relation to their debts.

5.2 Cleaning and rubbish removal

For tenants who are forced to flee their homes to protect their safety, it is common to leave belongings at the property rather than move out in an orderly way. Also, where tenancies are terminated rather than ended by choice, it is less likely that the tenant will be able to facilitate an organised removal process, particularly if they have become homeless.

For example, in Rachael's case in part 2 above, her tenancy was terminated while she was in rehabilitation; for Lucy in part 3.2, her tenancy ended while she was in prison; for Peta in part 3.3, her tenancy ended while she was undergoing chemotherapy after being transferred to another property; and for Joy, in part 3.1, she fled her property with her children to protect their safety.

In each of these cases, there were belongings left at the property that the OOH disposed of. In some cases this will be rubbish, but in others it may be the person's furniture, clothing, white goods and children's toys, which are deemed to be worth less than the cost of removing and storing them under part 9 of the *Residential Tenancies Act 1997 (Vic)*.

Currently, there are no clear exemptions from liability for the costs of cleaning or removals where the rubbish or uncleanliness is caused by family violence or factors beyond the tenant's control.

This gap in clear guidance to support the exercise of discretion means that former tenants find themselves being held liable for these debts where there is a clear policy-based reason why they should not be.

Recommendation 8: Cleaning and removal of rubbish

Homeless Law recommends that DHHS policies and operational guidelines are amended to:

- Include exemptions from liability for cleaning and removal of rubbish, for example, where the rubbish or uncleanliness is caused by family violence or factors beyond the tenant's control; and
- Encourage use of discretion and consultation with the former tenant before pursuing these claims.

5.3 Housing debts as a barrier to getting housing

In addition to being an overwhelming financial burden on our clients, housing debts, including very old debts, act as a barrier to people exiting homelessness. Thirty-five of Homeless Law's 52 clients were experiencing homelessness at the time they sought assistance with their housing debts.

In this context, where people are desperate for housing, the current Allocations Manual creates a strong incentive for applicants to sign a repayment agreement and accept liability for past debts. However, as our data shows, if the underlying debt is challenged, 93% of claims have been reduced in part or in full. For clients who do not seek advice or assistance in relation to their debts, there is a significant risk that they are accepting liability for inflated or inappropriate debts, which could be significantly reduced if properly assessed.

Furthermore, unlike debts to commercial entities such as utilities companies or credit providers, debts owed to the OOH exist outside the well-established legal frameworks of the statute of limitations and the concept of being ‘judgment proof’. Debts to the OOH have no expiry date and continue to impact on a person’s ability to access housing well beyond the six year period recognised at law as a reasonable time for an old debt to be enforceable.⁴⁰ In addition, the vast majority – if not all – of Homeless Law’s clients are judgment proof, meaning they are reliant on Centrelink and have no substantial assets, so a debt could not be legally enforced against them.⁴¹

In an environment where people are getting stuck in family violence refuges, sleeping on couches, dislocated from their families and unable to transfer to a safe property because of an alleged housing debt, it is time to re-think the appropriateness of tying housing allocation to accepting liability for a former debt.

Instead, when a person applies to go on the housing register or is going to be offered a property and a debt shows up on their record, OOH staff should be required to consider, and enquire about, the legitimacy of the debt. This process can continue once a person is housed and should not delay the allocation of a property.

Recommendation 9: Housing debts should not delay access to housing

An offer of housing should not be delayed or denied on the basis of an alleged outstanding debt. Homeless Law recommends:

- The DHHS Allocations Manual is amended to remove the requirement to make and maintain a repayment agreement prior to an offer of housing being made; and
- When a person (a) applies to be added to the housing register or (b) is being considered for an allocation of housing, an OOH manager should be required to review, and enquire about, the legitimacy and appropriateness of the debt, including with reference to the DHHS policies and operational guidelines and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). This process can continue once a person is housed and should not delay the allocation of a property.

5.4 Debt collection

In 2015, the Australian Competition and Consumer Commission published a research report on the Australian debt collection industry and noted:

*Consumers who are contacted by debt collectors can suffer personal stress and real or perceived reputational damage ... While the debt collection industry has seen a notable increase in standards in recent years, a number of problematic practices remain.*⁴²

⁴⁰ *Limitation of Actions Act 1958* (Vic) s 5(1)(a) provides that, if a person has not made a payment on a debt and has not acknowledged the debt in writing for more than six years, this debt will be statute barred.

⁴¹ *Judgment Debt Recovery Act 1984* (Vic) s 12 provides that, an instalment order will not (unless the debtor consents) be made if the income of the judgment debtor is derived solely from a pension benefit allowance or other regular payment under the *Social Security Act 1947* (Cth) or section 24 of the *Children, Youth and Families Act 2005* (Vic). This means that the client can't be forced to pay a debt from his or her Centrelink income and has no assets that the creditor can seize.

⁴² Anteris Consulting Pty Ltd, for the Australian Competition and Consumer Commission, *Research into the Australian Debt Collection Industry* (May 2015).

The acute hardship of former public housing tenants dealing with housing debts has been highlighted by the case studies and data in this position paper. In this context, it is surprising and concerning that the OOH engages debt collectors to enforce their debts.

Currently the TPD Guidelines state only that 'the Director of Housing reserves the right to seek an Order of Compensation at VCAT or through a debt collection agency in the event the tenant breaks the *Maintenance payment agreement*.'⁴³ It is not clear from the DHHS policies when, how or why private debt recovery agencies are engaged to pursue former tenants for debts. For example, it is not clear whether debts are sold or assigned to debt collection agencies or whether the OOH contracts them to pursue the debt on the OOH's behalf.

Homeless Law questions the appropriateness of the OOH outsourcing their debt recovery efforts to a private agency which is not bound by government policies and practices, and reiterates our concerns regarding the pursuit of vulnerable tenants for debts that they may not be liable for.

As Lucy's case below highlights, being pursued by a private debt collection agency causes overwhelming stress for former tenants and can push them into situations where they pay more than they are required to under DHHS policies.

Lucy (part 2): debt collectors harassing a client whilst in prison

Following the VCAT order which required Lucy to repay the balance of the debt (approximately \$1500, reduced from \$7500 originally sought), the OOH engaged a private debt recovery agency, unbeknownst to Lucy.

Lucy suffered anxiety caused by years of sexual abuse. The OOH was aware of both the abuse and Lucy's mental illness (which had been confirmed to the OOH through letters from Lucy's medical professionals).

Nonetheless, the debt recovery agency began sending Lucy letters of demand weekly while she was in prison demanding she pay the outstanding amount. Lucy did not understand why she was receiving the letters of demand. The use of debt collectors added greatly to Lucy's anxiety.

Although under DHHS policies, Lucy would have been able to pay \$5 per week, the stress and pressure caused by being approached by debt collectors caused Lucy to ask her mother to gather together the money (which neither Lucy or her mother could afford) to make a lump sum payment.

This case demonstrates the stress and anxiety which can be caused by the OOH engaging private organisations to pursue housing debts, and the unjust and inappropriate outcomes that can stem from this practice.

⁴³ TPD Guidelines, above n 11, 10.

Recommendation 10: Avoid debt collection agencies

Homeless Law's position is that the OOH should not engage private debt collection agencies to pursue housing debts against current or former tenants. If this practice does continue, Homeless Law recommends that DHHS should publish clear policies setting out the circumstances in which debt collectors may be engaged and, if possible, should require the debt collection company to adhere to DHHS's policies regarding exemptions and payment plans.

Annexure 1 – OOH Debt Checklist

The intention of the OOH Debt Checklist is to promote the consistent application of DHHS policies and operational guidelines and the appropriate exercise of discretion by OOH staff.

The OOH Debt Checklist should be incorporated into the decision-making process, and the DHHS computer system, to ensure the relevant policies have been applied when:

- Calculating compensation owed by a tenant or former tenant and entering it onto the OOH system;
- Applying to VCAT for a compensation order;
- Refusing to reduce or waive a housing debt on request of a tenant, former tenant or their advocate; and
- Delaying a housing offer because an applicant has an OOH debt.

To make sure you are satisfying all legal and policy requirements when calculating and managing a compensation claim, confirm that the following steps have been taken:

- **Contact and communication.** Client has been contacted to discuss the possible debt, including their account of how the debt arose. Attempts at contact and engagement have included: phone, text message, home visit, and correspondence to the most recent address on file.
- **Information about exemptions.** Client has been informed about the existence of exemptions from liability in certain cases and expressly asked whether the damage occurred as a result of family violence, third party damage, police intervention, natural disaster, accidents or actions which could not be reasonably prevented, works completed by the DHHS or where the property is vacant and responsibility cannot be determined with sufficient certainty.
- **Depreciation and fair wear and tear.** Amount claimed has been reduced in line with the Australian Taxation Office's depreciation scale to account for fair wear and tear.
- **Negotiation.** Attempt has been made to negotiate in good faith with the tenant, including discussing the damage with the tenant in an inclusive and responsive manner with a view to avoiding VCAT.
- **Human rights.** Proper consideration has been given to how the OOH's decisions regarding the debt will impact the tenant/applicant's human rights (including the right to protection of families under section 17 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*).
- **Referral for advice and support.** Tenant or former tenant has been referred to legal and/or support services.
- **Collaboration with client and workers.** Factors that contributed to the debt or damage have been considered and support workers have been consulted with to determine an appropriate course of action (including reversing the charges or waiving or reducing the debt).

- **Oversight and approval.** A manager has overseen compliance with the OOH Debt Checklist, including approving:
 - All compensation claims being entered on the OOH system;
 - All applications to VCAT for compensation orders;
 - All refusals to reduce or waive a housing debt on request of a tenant, former tenant or their advocate; and
 - Refusal or delay of an offer of public housing on the basis of a debt.

Annexure 2 – Broader systemic review of DHHS policies and practices

Homeless Law welcomes the Victorian Ombudsman's own motion investigation into the Office of Housing's processes for calculating and pursuing maintenance debts against public housing tenants. We note, however, that a number of the systemic challenges that will be identified throughout the investigation are not limited to maintenance and debt claims.

We encourage DHHS to use this investigation as an opportunity to reflect on, review and improve policies and practices more broadly, particularly in relation to decisions to end the tenancies of public housing tenants.

As the DHHS appreciates, evictions from OOH properties leave people with very few alternative housing options and make homelessness highly likely. In this context, evictions must be a last resort, but through our work we see that there are limited safeguards to prevent unnecessary evictions into homelessness.

This annexure lists six areas that would benefit from review and an investment in improving training, policies, support and oversight that work to avoid unnecessary, preventable evictions of vulnerable Victorians into homelessness.

1. Preventable evictions for arrears and unwillingness to negotiate

In 2014–15, Homeless Law provided legal representation to 62 tenants facing eviction from public housing for rental arrears.

Evictions from public housing for rent arrears should be an absolute last resort; tenants should be provided with early access to supports to help address the arrears, as well as offers of payment plans. Similar to OOH practices in relation to debts, the DHHS policies in relation to evictions for rental arrears provide helpful guidance that support early intervention, negotiation, linking with supports and consideration of human rights, but in practice these policies are not widely adhered to.⁴⁴ There is a heavy reliance on VCAT to order payment plans, a reluctance to negotiate and referrals to services – if they occur – often occur very late, after a possession order has been made or a warrant purchased and where the prospects of salvaging the tenancy are more limited.

Furthermore, where the OOH does agree to enter into a payment agreement after a possession order has been made, it is common for them to require the entire amount of arrears to be repaid within 6 months. This results in unreasonable and unmanageable requests for lump sum payments that set tenants up to fail. Consistent, manageable repayment plans should be accepted by the OOH as part of a commitment to tenancy sustainment.

⁴⁴ Department of Health and Human Services, *Tenancy Management Manual: Arrears* (available at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/tenancy-management-manual/1.-arrears>).

2. Decision-making in relation to prisoners

The Temporary Absence Operational Guidelines,⁴⁵ which allow public housing tenants to pay a reduced rate of rent (\$15 per week) while they are temporarily absent from their property (including due to imprisonment) are an essential component of strategies designed to avoid prisoners unnecessarily exiting prison into homelessness. The temporary absence policy is particularly vital in the current correctional context, which has seen a significant increase in remand prisoners (one quarter of the current prison population) and prisoners serving short sentences (26% of Victorian prisoners are serving sentences of less than 12 months).⁴⁶

As it stands, the current policy allows for a 6 month temporary absence, with the possibility of an extension of up to 6 months in 'exceptional circumstances'.⁴⁷ However, it is no longer exceptional for an extension to be required because, although given a short sentence, together with their time on remand, a prisoner's period away from their home frequently exceeds 6 months. In addition, a stricter approach to parole means that people who may previously have been released into the community within 6 months are spending longer in prison, which then jeopardises their housing.

Homeless Law sees inconsistent application of OOH policies and failure to exercise appropriate, human rights compatible discretion when making decisions in relation to temporary absence.⁴⁸

3. Ending tenancies for alleged abandonment

Homeless Law has seen an increase in the number of tenants evicted from their OOH properties due to abandonment.⁴⁹ The OOH policies outline the steps OOH staff should take to determine whether a property has been abandoned, however, there is limited transparency regarding whether or not these steps are taken, which can lead to arbitrary termination of a person's tenancy. Examples have included matters where tenants have still been paying rent and have only been away from their properties for very short periods, including seeking safety from family violence, spending time with family after the death of a relative and getting support with a disability or mental illness, when the OOH applied for an abandonment order.

4. Compliance orders mental health or disability

Where a tenant breaches a duty provision, the OOH can give a breach of duty notice to the tenant under section 208 of the *Residential Tenancies Act 1997* (Vic). If a breach notice is not complied with or the breach is not remedied within the timeframe, the landlord may apply to VCAT for a compensation order or a compliance order.⁵⁰ If VCAT is satisfied that the landlord was entitled to give the breach of duty

⁴⁵ See Department of Health and Human Services, *Temporary Absence Operational Guidelines* (2015) (available at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/tenancy-management-manual/temporary-absence>).

⁴⁶ See Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (17 September 2015); and Corrections Victoria, *Key statistics on the Victorian Prison System 2009-10 to 2013-14*, Table 6 Historical Trends all prisoners as at 30 June 2014, 12.

⁴⁷ See Department of Health and Human Services, above n 45.

⁴⁸ See, eg, Justice Connect Homeless Law, *Closing the Revolving Door: 12 month report on the Debt and Tenancy Legal Help for Prisoners Project* (2015) (available at: <http://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/closing-revolving-door>).

⁴⁹ See *Residential Tenancies Act 1997* (Vic) s 241.

⁵⁰ *Residential Tenancies Act 1997* (Vic) s 209.

notice and it was not complied with, VCAT may make a compliance order requiring the tenant to remedy the breach and/or require the tenant to refrain from committing a similar breach.⁵¹

Under section 248 of the RTA, the landlord may give the tenant a notice to vacate if the tenant fails to comply with a compliance order and, if the tenant fails to vacate, the landlord may apply to VCAT for a possession order.⁵²

Homeless Law sees that the use of compliance orders by the OOH places a significant burden on tenants, including by creating a – sometimes indefinite – risk of eviction once a compliance order is made. This is particularly the case for tenants who are more likely to be alleged to have breached their duties, including tenants: living in close proximity to neighbours, with children, experiencing family violence, or dealing with mental health or substance dependence issues. In addition to being more likely to be the subject of a compliance order, these tenants are also at greater risk of homelessness in the event of eviction.

Homeless Law sees directly the risks of a careless approach to evictions for non-compliance, including highly vulnerable tenants facing eviction into homelessness because of a disability or mental health issue where it is not clear that any alternatives to eviction had been considered or would have been considered if the clients had not accessed legal representation.

5. Evictions for alleged illegal use

This year we have seen an increase in the number of illegal use eviction matters being referred to Homeless Law.⁵³ In the matters we have seen, the OOH seeks to evict tenants who are alleged to have committed criminal offences, often related to drugs, with minimal consideration of their rights under the Charter of Human Rights or the criminal charges being alleged, and with reference to evidence that is often either unproven or weak.

By way of example, a recent client's property was subject to a search warrant and she was charged by Victoria Police. The OOH subsequently issued her with a notice to vacate for illegal use, citing the list of charges. The notice to vacate didn't give the tenant sufficient information about the alleged illegal use which she could respond to. It didn't give any indication of the alleged illegal use of the property, merely referring to a list of unsubstantiated charges without explanation.

Homeless Law indicated that the notice to vacate would not be legally valid and attempted to negotiate but the OOH declined to withdraw the notice or application for possession, or enter into negotiations with Homeless Law prior to the hearing. At the hearing Homeless Law briefed counsel to appear for the tenant due to the seriousness of the allegations against her. VCAT indicated that they agreed with Homeless Law's submissions and believed the notice to vacate to be deficient. The OOH immediately withdrew the notice to vacate.

It is important that OOH staff are trained and supported to understand the legal requirements of evictions for illegal use and the safeguards in the DHHS policies to prevent these evictions being pursued in the absence of procedural fairness or consideration of the tenant's human rights.⁵⁴

⁵¹ *Residential Tenancies Act 1997 (Vic)* s 212.

⁵² *Residential Tenancies Act 1997 (Vic)* s 322.

⁵³ *Residential Tenancies Act 1997 (Vic)* ss 250 and 250A.

⁵⁴ See, eg, *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648.

6. Hasty execution of warrants

When the OOH has a warrant of possession for a property, the housing officer will make an appointment with the police to execute that warrant. Where clients seek assistance at the last minute, Homeless Law will advocate with the OOH to delay executing that warrant until the client has had legal advice, or exercised their right to apply for a review of the possession order under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) if they weren't able to attend the initial hearing.

In our experience, the OOH have refused to direct the police to put a hold on the execution of the warrant, or stated that it is out of their hands, relying heavily on enforcement or not exercising their discretion to ask police to delay the termination of the tenancy.

Execution of the warrant – done by exiting the tenants from their home and changing the locks – can be extremely traumatic for tenants, particularly those who have no alternative accommodation and may not have been aware of the eviction proceedings until presented with a warrant.

OOH staff should be required to request short delays in execution of a warrant when presented with new information from the tenant or their representative.