

Tenants Union of Victoria © 2004
Cover Illustration by Damian Fitzgerald © 2002
Design by Watson Design

Submission to

Review of the Charter of Human Rights and Responsibilities

June 2011

Prepared by
Maya Narayan

Tenants Union of Victoria Ltd
ACN 081 348 227

55 Johnston Street

Fitzroy 3065



Introduction

The Tenants Union of Victoria (TUV) was established in 1975 as an advocacy organization and specialist community legal centre, providing information and advice to residential tenants and residents in rooming houses and caravan parks across the state. Residential tenants and residents are some of the most vulnerable and marginalized members of society. The sources of disadvantage are complex and inter-related and tenancy legislation often does not adequately protect their interests.

To this end, the TUV has played a significant role in assisting courts and tribunals to define the operation of the *Charter of Rights and Responsibilities Act 2006* (Vic) (Charter) in the field of housing, having acted in proceedings clarifying:

- When the Victorian Civil and Administrative Tribunal (VCAT) will be a public authority for the purpose of s 38(1) of the Charter;¹
- When a non-government housing provider will be a public authority for the purpose of s 38(1) of the Charter;² and
- Whether VCAT has jurisdiction to consider the Charter-compliance of a public authority landlord in determining proceedings brought before it³

Through this experience, the TUV has found the Charter an effective tool for pursuing both substantive negotiated outcomes as well as significant developments in the law of residential tenancies.

Consistent with the TUV's expertise as a tenant advocacy organisation, this submission limits its consideration to the following Terms of Reference:

- Whether additional rights should be included in the Charter, including economic, social, cultural, children's, women's and self-determination rights;
- The effects of the Charter on the provision of services, and the performance of other functions by, public authorities;
- The effects of the Charter on litigation and the roles and functioning of courts and tribunals;
- The effects of the Charter on the availability to Victorians of accessible, just and timely remedies for infringement of rights; and
- Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria (including the inclusion of economic, social and cultural rights).

¹ *Director of Housing v Sudi* [2010] VCAT 328.

² *Metrowest v Sudi* [2009] VCAT 2025

³ *Director of Housing v Sudi*, above n1.

Recommendations

In summary, the Tenants Union of Victoria makes the following recommendations:

- Greater legislative clarity in the drafting of ss 13(a) and 39(1) of the Charter would reduce litigation and encourage pre-trial negotiated outcomes;
- Requiring courts and tribunals to consider relevant law and judgments from other jurisdictions, when interpreting statutory provisions compatibly with human rights, would reduce the need for litigation to determine the scope and content of the rights protected by the Charter;
- The inclusion of a right to adequate housing in the Charter, based on Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), would encourage uniformity of standards across the transitional and public housing sectors;
- The level of protection afforded by the Charter in its current form should not be diminished, as legislative rights-protection instruments provide an effective means of enhancing existing accountability mechanisms, such as those provided by administrative law.

Legislative clarity

During the Charter's first three years of operations the TUV assisted a significant number of tenants to assert their rights under the residential tenancy legislation at VCAT. Many of these claims engaged a right protected by the Charter, whether by way of a public authority being a party to the proceeding, or by the Tribunal itself acting as a public authority in hearing the matter.⁴

While the Charter has been an effective means of enhancing existing accountability mechanisms (discussed in the final section of this submission), the TUV has encountered some difficulty litigating the rights protected by the Charter. This is due to a lack of clarity in the drafting of certain key provisions. Ultimately, this lack of clarity both undermines the ability of vulnerable and disadvantaged persons to access effective remedies in relation to interferences with their rights, as well as increases the need for litigation to clarify the scope and content of the Charter's provisions.

In the context of housing, ambiguities inherent in ss 13(a) and 39(1) have made it difficult for Victorian tenants to effectively assert their rights to home.

Section 13(a) – the right to home

The right to home protected by s 13(a) of the Charter is not an absolute one and its ambiguous meaning has caused some difficulty for courts and tribunals attempting to apply it. This is because s 13(a) only prohibits interference with “privacy, family, home or correspondence” that is in some way “arbitrary” or “unlawful”. In this respect, the provision duplicates the internal limitation contained in Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR).

The terms of s 13(a) of the Charter are otherwise identical to those of Article 17(1) of the ICCPR, however, due to uncertainty surrounding the meaning of these internal limitations, its operation is now quite different.

To this end, the Supreme Court of Victoria has struggled to discern the meaning of “arbitrary” and “unlawful”, as well as the relationship between these limits and s 7(2) of the Charter. This in turn has led to s 13(a) being interpreted more narrowly than its international law equivalent. Specifically, in *WBM v Chief Commissioner of Police*, Kaye J held that “arbitrary” should be given its ordinary grammatical meaning and that a decision will only meet this description when it is ‘*capricious... [and] not based on any identifiable criteria*’.⁵ In contrast, the United Nations Human Rights Committee interprets “arbitrary” in Article 17(1) of the ICCPR as meaning not “reasonable” or “proportionate in the circumstances”.⁶

Justice Kaye's decision was predicated on the court's view that international law was not relevant for the purposes of interpreting s 13(a), despite the fact that s 32(2) of the Charter permits courts to consider such material. While this view has effectively been overruled by subsequent superior court

⁴ The Tribunal is a public authority under s 4(1)(j) when acting in an administrative capacity;

⁵ [2010] VSC 219

⁶ General Comment 16 (32), Doc CCPR/C/21/Rev 1 (19 May 1989)

authority,⁷ Kaye J's definition has not yet been reconsidered by the Supreme Court and VCAT often feels bound to apply *WBM* in tribunal proceedings⁸

Ultimately, lack of clarity in the scope of s 13(a) undermines the ability of tenants to effectively assert the rights conferred by this provision. Moreover, VCAT's role as a low-cost "one stop shop" for administrative justice is weakened by forcing tenants to commence proceedings in the Supreme Court when this appears to be the only way to obtain a more favourable interpretation of s 13(a). To this end, pushing proceedings out of the jurisdiction conferred with authority to conclusively determine tenancy matters and into the Supreme Court's jurisdiction burdens the justice system as a whole and increases the costs and delays associated with housing litigation.

The TUV considers that the internal limitations in s 13(a) are unnecessary to ensure that proportionality is considered by bodies reviewing the decisions of public authorities. Indeed, Article 17(1) of the ICCPR only contains these internal limits because the ICCPR has no general limitations provision similar to s 7(2) of the Charter. Proportionality in the context of Article 17(1) is therefore directly built into the right itself. By importing Article 17(1) into the Charter without removing these internal limits, the Victorian Parliament created what appears to be a second proportionality test, which provides an unjustifiably high barrier for tenants seeking to maintain stable housing.

Recommendation: the internal limitations in s 13(a) should be removed, or their meaning clarified.

Section 39(1) – the remedies provision

Section 39(1) provides:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

The TUV considers that in its current form, it is not clear whether s 39(1) permits a person to seek a remedy for an interference with their human rights only if the act constituting the interference is already unlawful otherwise than because of the Charter, or whether a person may seek a remedy if the court or tribunal hearing a proceeding to which they are a party has jurisdiction to grant it.⁹

In *Director of Housing v Sudi*, the TUV assisted a young single father to avoid eviction, on the grounds that the application for possession of the rented premises made by his public authority landlord constituted an interference with his right to home under s 13(a) of the Charter.

⁷ See *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310; and *Director of Public Transport v XFJ* [2010] VSC 319.

⁸ See for example, *Director of Housing v TK* [2010] VCAT 1839; *Director of Housing v KJ* [2010] VCAT 2026; *Thales Australia Limited and ADI Munitions Pty Ltd* [2011] VCAT 729.

⁹ In *Kracke v Mental Health Review Board* [2009] VCAT 646, for example, Bell J granted a remedy, a declaration, in respect of a breach of s 38(1) because the Tribunal was empowered to do so by s 124 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Director of Housing v Sudi [2010] VCAT 328

Our client, a single father with no family support, moved into a public housing property let to his mother, to care for her when she fell ill. When his mother eventually passed away, the Director of Housing (the Director) made an application to VCAT seeking that our client be removed from the rented premises. Having been forced to give up his former residence, our client and his son faced the immediate prospect of homelessness if the Director's application was successful.

When the matter came before VCAT, the TUV assisted Mr Sudi to submit that the Director's application was unlawful for the purpose of s 38(1) of the Charter as it constituted an interference with his rights to home, family and cultural life under ss 13(a), 17 and 19 of the Charter.

In determining the application in our client's favour, Bell J, sitting as the President of VCAT, found that the Tribunal was able to grant a remedy for the breach of s 38(1) because it had jurisdiction to consider whether the application was validly made and to dismiss the application if it was not. In this way, the unlawfulness of the public authority's actions under s 38(1) of the Charter rendered the application invalid and entitled the Tribunal to dismiss it.

In proceedings prior to *Director of Housing v Sudi*, however, the Tribunal had not considered itself able to grant a remedy for an application that constituted a breach of s 38(1). In *Director of Housing v IF*,¹⁰ another proceeding in which the TUV acted for the tenant, the Tribunal considered that s 39(1) would prevent it from dismissing the application, unless the application was also unlawful on the basis of some non-Charter ground. While *Director of Housing v Sudi* is now followed within VCAT, it took 12 months of litigation for the Tribunal to reach this view.

The TUV considers that individuals should be able to access a remedy in VCAT for an interference with their rights under the Charter, where an application is made to VCAT in breach of s 38(1). This is because the rights protected by s 13(a) are central to many of the statutory schemes under which VCAT has some jurisdiction to adjudicate disputes. Indeed, mental health,¹¹ tenancy¹² and planning¹³ regimes all confer jurisdiction on VCAT, and involve the making of decisions by public authorities that engage rights to privacy, family and home. Removing the ambiguity inherent in s 39(1) would therefore ensure that VCAT Members felt sufficiently empowered to give effect to human rights where such rights were engaged by a proceeding before the Tribunal. For example, s 40C of the *Human Rights Act 2004* (ACT) provides that persons claiming engagement of a right under that Act may commence proceedings in the Supreme Court against the public authority or rely on the right in other legal proceedings. Such a provision enacted in Victoria would provide clear guidance for

¹⁰ [2008] VCAT 2413

¹¹ Section 120 of the *Mental Health Act 1983* (Vic) confers review jurisdiction on the Tribunal.

¹² The Tribunal has a general power to determine disputes under s 452 of the *Residential Tenancies Act 1997* (Vic), as well as specific jurisdiction in relation to eviction proceedings (Part 6), breaches of duty (s 208) and compensation matters (s 210).

¹³ The Tribunal has broad jurisdiction to review planning permits under division 2 of Part 4 of the *Planning and Environment Act 1997* (Vic).

Tribunal users and ensure that tenants have effective protection against unjustifiable interferences with their home.

Recommendation: s 39(1) should be amended along the lines of s 40C of the *Human Rights Act 2004* (ACT), to ensure that Victorian tenants are able to seek an effective remedy for interferences with their home.

The relevance of international law and judgments from other jurisdictions

The Charter currently provides, in s 32(2), that international law and judgments of domestic, foreign and international courts and tribunals *may* be considered by a court or tribunal when interpreting provisions compatibly with human rights.¹⁴ This has given rise to conflicting approaches by courts and Tribunal members to determining when international material may be of relevance. As noted above, Kaye J in *WBM* considered that the UNHRC’s views on the meaning of “arbitrary” in Article 17(1) of the ICCPR was not relevant to the court’s decision, while other decisions, such as *Castles* and *XFI*, have found the opposite.

The TUV considers that greater clarity is needed as to the correct interpretative approach to be taken under s 32 of the Charter. Specifically, redrafting s 32 of the Charter along the lines of 39 of the South African Constitution¹⁵ would provide greater certainty in the interpretation of rights, removing the need for litigation to determine their scope and application.

Specifically, s 39 of the South African Constitution provides that a court or tribunal interpreting the Bill of Rights:

- a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b) must consider international law; and
- c) may consider foreign law.

Recommendation: The Charter should require courts and tribunals to consider relevant decisions and laws from other jurisdictions, or Parliament should clarify the circumstances in which it will be appropriate for them to do so.

¹⁴ Section 32(2).

¹⁵ *Constitution of the Republic of South Africa Act*, No. 108 of 1996.

Best practice in the transitional housing sector

In international law, housing rights can be derived from two key sources: the ICCPR and the International Covenant on Social, Cultural and Economic Rights (ICESCR). The housing rights contained in the ICCPR and ICESCR fall into two broad categories: those concerning access to, affordability and habitability of housing; and those concerning security of tenure. While the former are directed towards ensuring that individuals enjoy an adequate standard of living, the latter are directed towards ensuring that individuals have the stability required for personal development and well-being.

Currently, under s 13(a), the Charter only protects Victorian tenants from arbitrary or unlawful interference with their home. The TUV believes however that the right to home and the right to adequate housing are complementary and mutually-reinforcing mechanisms. Indeed, the right to adequate housing provides the minimum conditions required for individuals to gain full benefit of the right to home. In Victoria, this is particularly relevant to tenants of transitional and social housing providers.

As Bell J noted in *Metrowest v Sudi*:

‘Disadvantaged people in need of social housing and at risk of homelessness are among the most vulnerable in the community. Their human rights are imperilled by their circumstances.’¹⁶

To this end, in *Metrowest v Sudi*, the TUV successfully litigated on behalf of a family of 11 to establish the status of social housing providers as public authorities for the purposes of the Charter.

***Metrowest v Sudi* [2009] VCAT 2025**

Our client, a newly-arrived migrant and father of nine, had been residing with his wife and children in a property let to them by a social housing provider, Metrowest Housing Services Ltd.

Metrowest provided the accommodation as a transitional arrangement, to enable our client to avoid homelessness while his family awaited public housing. Soon after the tenancy commenced, the tenants were issued with a Notice to Vacate under the RTA as a means of encouraging them to find other, non-transitional accommodation. When the Notice to Vacate expired, our client had been unsuccessful at finding accommodation suitable for the 11-person family and faced immediate homelessness if forced to leave the premises. When Metrowest sought an order of possession based on the Notice to Vacate, the TUV assisted the client to put his case to VCAT.

While the applicant ultimately conceded the proceeding, Bell J, sitting as the President of VCAT, saw fit to declare that Metrowest was a public authority under s 4(1)(c) of the Charter and was therefore obliged to give proper consideration to, and act compatibly with, the family’s human rights.

Despite the heightened vulnerability of this group of tenants, the practices of transitional housing providers vary greatly with respect to the provision of housing, and many are not required to adopt

¹⁶ Above n2, at [1].

the policies used by the Office of Housing (OoH) to guide their decision-making. As a result, tenants of social and community housing providers often enjoy considerably less protection from unreasonable decision-making than those occupying public housing.

In this respect, the TUV considers that the inclusion of a right to adequate housing based on Article 11 of ICESCR would facilitate best practice within the transitional housing sector by requiring non-government housing providers to act in accordance with standards of accessibility, affordability and habitability already entrenched within the public housing sector.

Moreover, the inclusion of a right to adequate housing would ensure that tenants, whether of community or public housing providers, are able to substantively enjoy the right to home contained in s 13(a).

Recommendation: the inclusion of a right to adequate housing in the Charter would ensure that non-government housing providers are required to comply with standards already entrenched within public housing policies and practice.

The Charter and existing accountability mechanisms

The TUV has found the Charter most effective in bolstering existing accountability mechanisms, such as those provided by administrative law. In dealing with the Director of Housing, the Charter has proved an effective means of ensuring compliance with the Director's obligation to afford procedural fairness in making a decision that affects a tenant's property rights, as well as ensuring that the all relevant considerations are taken properly into account.

The particular means by which the Director ensures that decision are made consistently with administrative law is the OoH's internal appeals system, which provides public tenants with a right of review in relation to certain types of decisions. Over the past three years, the TUV has found the Charter to be a highly effective means of ensuring that the internal appeals system is both accessible to tenants, as well as used by OoH decision-makers to facilitate just and fair outcomes.

Procedural fairness – giving public tenants a right to be heard

In accordance with the Director's administrative law obligations, housing officers must ensure that procedural fairness is afforded to a person whose interests are affected by the making of a housing decision. This is particularly important where a decision is made to terminate a tenancy. Predominantly, such decisions are made by housing officers with little knowledge of administrative law and no legal training. As a result, it was the TUV's experience prior to the Charter that most termination decisions were not made following the provision to the tenant of a right to be heard. Over the last three years, however, the TUV has noticed a marked increase in the instances of pre-eviction consultation with public tenants, which has in some cases led to the eviction being avoided altogether.

In one such case, the TUV assisted a single mother being evicted for rent arrears to access the internal appeals system, and to ultimately achieve a mutually beneficial negotiated outcome.

VICTIM OF DOMESTIC VIOLENCE AVOIDS EVICTION

Our client, a single mother residing in public housing, was issued with a Notice to Vacate under the residential tenancy legislation on the basis of her being in rent arrears. The TUV assisted the tenant to internally appeal the local housing office's decision to evict her, on the basis that it interfered with her and her children's rights to home.

The housing office, in considering her appeal, was prompted to provide her with an opportunity to explain the reasons for the arrears before progressing the matter to VCAT. Once the tenant had been given an opportunity to discuss her circumstances, it was discovered that the arrears had resulted from her having been held captive overseas by an abusive ex-husband, unable to return to Australia to submit an application for rebated rent. As a result, she had been charged market rent for the property during this period, even though her income entitled her to the rebated rate. Upon learning of her circumstances, the Appeals Office saw fit to let her remain in the rented premises and to reassess her rent on the basis of information provided.

The TUV considers that the Charter, by requiring public authorities to consider the proportionality of their decisions, heightens public authorities' awareness of their general administrative law

obligations and encourages more holistic decision-making. In the case of the client above, had it not been for the dialogic nature of the human rights she asserted on internal appeal, it is likely that she would have been forced to endure the stresses of litigation and, given the size of her debt, been ultimately unsuccessful at avoiding eviction.

Relevant considerations – expanding the scope of the OoH’s internal appeals mechanism

Administrative law also requires that the Director take into account all relevant considerations in making housing decisions. Prior to the enactment of the Charter, the considerations relevant to the making of housing decisions were primarily those found in the *Housing Act 1983* (Vic) concerning the provision of public housing¹⁷ and those contained in the OoH’s own policies concerning the maintenance of public tenancies.

During this time, the TUV often found it difficult to ensure that the consequences of eviction for a public tenant were fully taken into account by a local housing office in deciding whether or not to issue a Notice to Vacate under the *Residential Tenancies Act 1997* (Vic) (RTA). In many cases, where the jurisdictional pre-conditions to the issuing of a Notice under the RTA were satisfied, housing officers would simply proceed to issue the Notice. Where a matter contained in a departmental policy was not considered, the internal appeals mechanism would enable tenants to have certain decisions reconsidered by the Appeals Office. However, as the Housing Appeals Policy limits the scope of decisions that may be reconsidered by the Appeals Office, not all individuals facing eviction had access to the benefits of internal appeal.¹⁸ Relevantly, the policy prescribes that a transfer of tenancy decision, where an occupant of a property (often a dependent of the tenant named on the lease) seeks to have a tenancy transferred into their name, is a non-appealable decision.

In respect of these matters, the TUV has found the Charter to be an effective means of encouraging housing offices to consider the personal circumstances of an individual where the Director’s own policies may not require this. Specifically, the TUV has assisted several tenants to obtain a tenancy agreement where the Transfer of Tenancy criteria¹⁹ were rigidly applied by a local housing office, without consideration for the consequences of eviction.

Four examples can be given of circumstances in which the consequences of eviction for a person were not initially considered, but where, upon assertion of a Charter right, the Director saw fit to enter into a tenancy agreement with our client.

¹⁷ See s 6(1).

¹⁸ Business Practice Manual: Housing Appeals, at 4.5.4.

¹⁹ Tenancy Management Manual: Transfer of Tenancy, from 1.6.4

ORPHANS PERMITTED TO REMAIN IN FAMILY HOME

Our client, a 17-year old girl, had been residing with her two young siblings in a property let to her mother by the Director of Housing.

When the client's mother became terminally ill, her uncle moved into the rented premises to care for the family. Shortly after the tenant passed away, our client discovered that she was pregnant.

Keen to ensure that the grieving family had the stability and support it needed, an application was made by the tenant's sister seeking that the tenancy be transferred into the client's name. The transfer application was initially rejected by the local housing office, as the family was, according to the Department's Housing Size Guidelines, now too small to continue to occupy the house.

The TUV assisted the client to appeal the decision to the Housing Appeals Office, on the basis of the housing office's failure to take into consideration her right to home under s 13(a) of the Charter, as well as the family's right to protection under s 17 of the Charter.

Upon consulting with the client as to the likely consequences of her eviction from public housing, the Office of Housing saw fit to allow the family to continue to reside in the only home that the young children had ever known, and to grant our client a tenancy in respect of the premises.

HIV-POSITIVE MAN ABLE TO UNDERGO TREATMENT IN STABLE HOUSING

Our client, an HIV-positive man, had moved into a public housing property to care for his elderly mother when she fell terminally ill. Being required to undergo weekly treatment, the decision to leave his previous home was a difficult one. Nevertheless, his ability to access medical care was not undermined as long as he was residing in stable accommodation.

When his mother passed away, the local housing office sought possession of the rented premises and the TUV assisted him to appeal the decision to do so. The housing office had reject his application to have his mother's tenancy transferred into his name on the basis of him not meeting the minimum residency requirement contained in the Transfer of Tenancy Policy.

When the TUV assisted the tenant to appeal the decision internally, details were provided of his condition and need for stable housing, as well as in relation to the engagement of his right to home under s 13(a) of the Charter. Upon considering all of the relevant material, the housing office saw fit to reconsider its decision, and to offer our client a tenancy in his own name.

CANCER PATIENT HOUSED FOLLOWING THE DEATH OF HIS PUBLIC TENANT MOTHER

Our client moved into a public housing property to care for his terminally ill mother. Having previously lived at the property for over 25 years, the house was the only home that he had really known.

Upon the tenant's death, the local housing office initiated proceedings to regain possession of the rented premises and rejected his application to have the tenancy transferred into his name. The application had been refused on the basis of the Transfer of Tenancy Policy's requirement that an applicant have been living at the property for at least 12 consecutive months prior to a tenant's death. Shortly afterwards, our client was diagnosed with cancer.

Assisting him to apply to VCAT for the creation of a tenancy in his name, the TUV made submissions based on s 13(a) of the Charter, as well as provided evidence of his medical condition. Following a preliminary hearing in this matter, the Director of Housing agreed to enter into a tenancy agreement with our client and he was able to undergo chemotherapy in a familiar, stable environment.

FAMILY OF INCARCERATED TENANT ABLE TO SUSTAIN TENANCY IN HIS ABSENCE

Our client was the sister of a man who had been incarcerated for 18 months, leaving his young son to occupy the premises alone. While he had been approved for home detention, the local housing office took steps to end his tenancy on the basis of him having been absent from the property for a period longer than the department's policy allowed.

When our client applied to have the tenant's interest in the property transferred to her, so that she could live there and care for her nephew, the local housing office rejected the application.

The TUV assisted the client to appeal the decision internally, making submissions based on ss 13(a) and 17 of the Charter, as well as providing details of the tenant's approval for home detention.

Upon reconsideration of the client's circumstances, as well as those of her nephew, the Appeals Office agreed to enter into a tenancy agreement with her, so that her nephew could remain in the family home, and so that the tenant would have stable housing upon his release.

In each of the above cases, the Charter was an invaluable supplement to the Director's existing administrative law obligation to take account of relevant considerations.

Ultimately, the TUV has found that the Charter and the rights-discourse it facilitates, have encouraged housing workers to think holistically about the circumstances of public tenants and the consequences of housing decisions. The TUV feels that such a shift in the operation of housing offices could not have been achieved by means of service standards or departmental policies alone, as non-legislative mechanisms are susceptible to application in an overly-prescriptive manner.

Recommendation: the TUV considers that legislative rights-protection instruments enhance existing accountability mechanisms, such as those provided by administrative law.