WEST HEIDELBERG
COMMUNITY
LEGAL SERVICE

BANYULE
Community Health

WORKING TOGETHER WITH TRUST AND RESPECT

20 October 2016

Ms Deborah Glass
Victorian Ombudsman
Level 2, 507 Bourke Street
Melbourne VIC 3000
housinginvestigation@ombudsman.vic.gov.au

Dear Ms Glass,

Victorian Ombudsman investigation into Office of Housing management of maintenance debts

West Heidelberg Community Legal Service (**WHCLS**) is a community legal centre that provides assistance to vulnerable and disadvantaged people in the City of Banyule. While our community is diverse, the SEIFA Index (an index of relative socio-economic disadvantage) indicates that suburbs within Banyule such as West Heidelberg, Heidelberg Heights and Bellfield are some of the most disadvantaged in Australia. In these suburbs, close to one third of all residents live in social housing, and the vast majority of these are tenants of the Director of Housing.

The provision of advice and assistance in respect of tenancy matters comprises a significant proportion of our service's caseload. In addition, since March 2015, we have been undertaking a project about the barriers to tenant attendance at the Victorian Civil and Administrative Tribunal (VCAT). "*You'll never know if you never go: improving housing and health outcomes for tenants by understanding and addressing barriers to VCAT attendance",* is a two year project funded by the Victorian Legal Services Board.

It is on the basis of this experience assisting vulnerable clients with tenancy disputes, and with the benefit of our recent focus on tenant engagement with VCAT that we make the following submission to the Ombudsman's important investigation into the Department of Health and Human Services (**the Department**) management of debts.

Case study

In our experience, when assisting clients to defend MCATs, the usual approach of the Department is not at all in keeping with its obligations as a model litigant. In particular, we refer to the Department's obligation to "make an early assessment" of its "prospects of success" and "to consider seeking to avoid and limit the scope of legal proceedings". All too frequently the Department conducts these matters

with an apparent ignorance of, or wilful disregard for, the basic legal and procedural requirements for bringing a compensation claim at VCAT (**the Tribunal**). While it may be excused of an inexperienced or unrepresented landlord or tenant who infrequently engages with the Tribunal, such an approach is unacceptable from a party with the reach and resources of the Department.

A case study based on the circumstances of a woman recently assisted by WHCLS in the course of our VLSB funded project, is illustrative:

Abia and her young son vacated their public housing property in November 2015. Her tenancy commenced some 9 years earlier. She vacated in an orderly manner, providing notice to her local housing office and returning the keys to that office. During the course of her tenancy, Abia had frequently, by telephone and email, requested repairs to the kitchen at the rented premises which had been in a state of significant disrepair since her tenancy began. While no repairs were ever undertaken, approximately 12-24 months prior to her vacating the property a tradesperson attended and measured the kitchen benches and cupboards, Abia assumed, with a view to arranging for their replacement.

At the time Abia vacated the property her rent was paid some weeks in advance. She was advised by the housing office that the sum which had been overpaid would be returned to her after an inspection of the vacated property confirmed that it was left in a reasonably clean condition and without damage attributable to her. An inspection was undertaken and, despite there being no condition report prepared in relation to the property at the commencement of her tenancy, the responsible housing officer appears to have satisfied themselves of all relevant matters and Abia's rent paid in advance was refunded to her bank account.

Some 4 months after this inspection, Abia received a Notice of Cost of Repair which described its contents as (emphasis added): "... a description of repairs recently completed at the above property for damage for which **you are responsible** and the cost of the repairs." The Notice demanded payment of $6,314.12 and attached an itemised SC Order for that amount. The SC Order indicated that the vast bulk of the cost of "repairs" undertaken were for the replacement of the kitchen.

Very concerned, Abia immediately contacted the relevant housing office to point out that these costs were not her responsibility. She reminded the housing services officer that she had frequently requested repairs to the kitchen throughout her tenancy. She was told to email the office any evidence she had about the matter. Abia then re-sent to the office an email she first send around 12 months prior to the tenancy terminating. In this email, Abia requests repairs to

the kitchen, outlines her previous attempts to obtain repairs to the kitchen, details the visit by a tradesperson who took photos of the kitchen, and includes her own photos of the very poor state of the kitchen. Abia received no response after she re-sent her earlier email.

However, 4 months later, Abia received a copy of a VCAT order which ordered that she pay to the Department the sum of $6314.12 to compensate it for her alleged failures to avoid damaging the rented premises (s.61 RTA) and keeping it clean (s.63 RTA). Abia did not receive a Notice of Hearing and was not in attendance at the hearing of this matter. However, she contacted our office in August, and we were able to assist her to file an application with VCAT to review the order.

This matter has not yet been finalised. Abia's application to review the VCAT order for $6314.12 has been granted, however, the Department's application for compensation has been adjourned, at its request. The Department sought an adjournment after our office suggested in pre-hearing discussions at VCAT that the available evidence did not support its decision to claim compensation against Abia and would not be sufficient to substantiate its claim at a contested hearing.
In short, after it was made clear to the Department that it would be required actually to establish with evidence, the breach it alleged and the loss it claimed, it was forced to seek an adjournment in order to patch together evidence that might justify its claim.

We note that the Department's request for additional time to obtain evidence to prove its claim against Abia was made 10 months after she vacated the property, 6 months after it issued a Notice of Cost of Repair, 4 months after it filed an application for compensation and 3 months after it was first awarded compensation at VCAT.

In our experience, the Department's approach in Abia's case is reflective of its usual approach to compensation claims against the tenant. More often than not, there is no indication at any stage of the process, that the Department's staff have considered whether and how a tenant has breached the RTA or the tenancy agreement. There is also generally no indication that the Department's staff have considered what, if any, loss is attributable to any alleged breach, after appropriate allowances for depreciation, fair wear and tear and an assessment of the connection between the loss and the alleged breach. Rather, the usual practice is for all maintenance expenditure incurred by the Department between tenancies to be deemed by the Department the "responsibility" of the vacating tenant and pursued accordingly.

This deeming of responsibility appears to occur by operation of a largely automatic administrative process. It begins with expenditure on maintenance and the receipt of an SC Order detailing works undertaken at a cost of 'x'. It then proceeds to the service upon the former tenant of a Notice for Cost of Repair declaring that they "are responsible" for the amount of 'x'. If the tenant does not pay in accordance with the Notice, the process moves to the filing of an application for compensation at VCAT for 'x' amount. Not only by the operation of its usual practice does the Department regularly evidence a failure to "make an early assessment" of its "prospects of success", in most instances it shows a complete failure to consider whether there is any proper basis to initiate legal proceedings at all. Similarly, its process regularly evidences a failure to "limit the scope of legal proceedings". In fact, as outlined above, it is most often the case that the Department's process ensures that the scope of these claims is usually much broader than the evidence supports.

Lawyers and advocates who represent tenants at VCAT often report that during or immediately prior to a contested hearing, Department staff will "cross out" many (sometimes dozens) of the items it seeks compensation for on the basis that the tenant isn't in fact liable for those costs. There is rarely an explanation provided as to why its assessment of its claim against the tenant has changed so significantly from the time of lodgement to the date of hearing. We suggest that this is because no reasonable explanation can be provided. The only intervening event is that immediately prior to the hearing of matter, a Department staff member has turned their mind to the claim and undertaken some assessment of its merits. However, this does not occur reliably and in any event, we submit, that the appropriate time for such an assessment is *prior* to the service of a Notice for Cost of Repair, and certainly *prior* to an application for compensation being made against a tenant.

Similarly, sometimes but certainly not always, when prompted by a lawyer, advocate or VCAT Member, the Department will make concessions about the impact of depreciation on the loss it can reasonably claim where it can establish breach. Again, it is unsatisfactory that such concessions, where they are made, are made so late in the proceedings and not properly considered by the Department in the formulation of its claims. Our concerns about partial and late concessions on matters that the Department well knows it should factor into its formulation of claims is compounded by the well known low tenant attendance rates at VCAT. Where the tenant does not attend VCAT, our experience shows that the Department is far less likely to make any concessions at all, even where it should.

As part of our VLSB funded project we have been observing residential tenancies list hearings at VCAT's Preston venue. Between September 2015 and August 2016 we have observed and collected data from approximately 400 hearings. Initial collation of data from the first 220 hearings observed shows the following in relation to the Department's compensation claims against tenants:

Of the 220 hearings, 16 were in respect of an application by the Department for compensation against the tenant;

- The tenant hearing attendance rate at these 16 hearings was 24%;

- Where the matter was determined (i.e. substantive orders made) the attendance or non-attendance of the tenant had a significant impact on the outcome. Where the tenant did not attend the Department was substantially successful in 76% of matters. Where the tenant did attend the Department was substantially successful in 34% of matters (though this figure is gleaned from only 3 hearings).

Conclusion

It appears that the current practice of the Department is to account for maintenance expenditure is to automatically attribute a liability to tenants by way of a compensation claim. The practice pays little regard to the Department's obligations as a model litigant or the requirements for bringing a compensation claim. It is a practice which frequently results in unjust awards of compensation being made against public housing tenants who are among some of the most vulnerable in the community.

We would be glad to provide any further detail about our submission if it would be of assistance. Please do not hesitate to contact me on 9450 2029 or stephanie.price@bchs.org.au.

Yours sincerely,

Stephanie Price
A/Principal Lawyer
West Heidelberg Community Legal Service