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Investigation into the management of maintenance claims against public housing tenants

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The Victorian Ombudsman respectfully acknowledges the Traditional Owners of the lands throughout Victoria and pays respect to them, their culture and their Elders past, present and future.

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my *Investigation into the management of maintenance claims against public housing tenants*.

Deborah Glass OBE
Ombudsman

30 October 2017

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Foreword

This investigation is into a single – some might think minor – issue: how the department responsible for public housing deals with repair and maintenance at the end of a tenancy.

Some 165,000 Victorians live in public housing, and another 35,000 households are on the waiting list. Public housing is a hugely important asset for the state, worth around half a billion dollars. Originally designed to support people with low incomes, it now houses some of the state's most disadvantaged people. Housing allocation processes are sensitive to people with backgrounds of hardship and special needs; as a result, many households have at least one member with a disability, or tenants who have been homeless as a result of family violence.

So far, not surprising. But what is surprising, and deeply disturbing, is the way fairness goes out the window at the end of the tenancy. To take an example, a tenant experiencing family violence is forced to flee, the accommodation is trashed, either by a former partner or a later squatter. The department eventually visits, raising a charge for tens of thousands of dollars against the former tenant for the cost of repairs. No allowance is made for who caused the damage, or even fair wear and tear. Notices are posted to the address the tenant has vacated. Eventually, an order is made by VCAT. The former tenant may not even become aware of the debt until they seek services again, years later, and is told that any services will be withheld until the debt, now greatly expanded, is settled.

How is that fair? This example is not a one-off: last year the department raised maintenance claims against 38 per cent of vacating tenants, claiming over 90 per cent of the total cost of repairs. The Director of Housing is the largest single litigant on VCAT's Residential Tenancies list, where some 80 per cent of claims proceed uncontested.

The evidence of this investigation is that department staff wrongly assess debts beyond a tenant's liability, send correspondence to an address they know the tenant has left, and routinely use VCAT to determine a debt – in breach of their requirement to be a Model Litigant. As one witness put it, the department's responsibilities have been 'outsourced to VCAT'. Public resources are wasted by proceeding against people who may be 'judgment proof' because their sole income derives from benefits.

There is no doubt that some public housing tenants maliciously damage public property and they should of course be held to account. But the official response to damage is so inept it is impossible to assess how much is indeed malicious.

The effect on the lives of already disadvantaged people caught up in the department's egregiously unfair processes cannot be overstated. The stress of a huge debt which could arrive at random, years after the end of a tenancy often comes on top of the social, economic and other challenges already faced by those dealing with disadvantage. There is the powerlessness of the already powerless, pitted against the State: the refusal of services until they enter a payment plan must be one of the more unconscionable acts of a government department I have encountered.

It's time to inject both common sense and humanity into the bureaucracy here. To its credit, the department recognises the need to change. But more is needed than simply improving policies and guidance. All those involved need to recognise that they are dealing with people, many of them vulnerable, and must do so with the fairness we should all expect.

Deborah Glass

Ombudsman

Executive summary

1. On 10 August 2016, the Ombudsman announced an investigation into the way the Department of Health and Human Services (the department) manages and pursues maintenance debts against public housing tenants. The investigation was prompted by a complaint from a tenant advocacy service alleging that the department had unreasonably raised and pursued a maintenance debt of over $20,000 against their client, a victim of family violence. Following failed negotiations between the two parties, the department escalated the matter to the Victorian Civil and Administrative Tribunal (VCAT) which ultimately determined that the former tenant was liable for just over $1,000, or around five per cent of the costs the department had told them they owed.

2. The issues raised in this complaint suggested there may be systemic problems in the department's administration of its debt recovery practices, and this was borne out by the investigation.

3. The investigation received numerous submissions from current and former public housing tenants, along with advocacy groups, detailing their experiences of the department's maintenance claims practices. These submissions included 46 detailed case examples, from which the investigation examined 19 public housing tenancy files for closer review. These case studies, drawn from each of the department's geographic regions, revealed unfair management of maintenance claims over many years.

4. The issues explored by the investigation have been the subject of ongoing communication between the department and a number of tenant advocacy services which represent people from an increasingly vulnerable public tenant population. Despite changes to the department's policies and procedures, the investigation identified there has been little to no change in practices on the ground.

Public Housing in Victoria

Vulnerable tenants

5. The system in Victoria is complex. The Director of Housing provides housing for Victorians who are most in need, especially those who have recently experienced homelessness or have mental and physical ill health, disabilities or who need protection from family violence.

6. The department manages Victoria's 64,196 public housing residential tenancies through 17 local housing regions across the state.

7. The rights and obligations of landlords and tenants are set out in the *Residential Tenancies Act 1997* (Vic) and associated regulations. Unlike private landlords, however, the Director of Housing and the department acting on the Director's behalf is also bound by human rights legislation and treaties that protect tenants.

8. As a self-described 'social landlord' the department must operate in the context of the *Housing Act 1983*, the Residential Tenancies Act and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The department has developed policies and procedures to guide housing service officers (local housing staff) in their management of public housing tenancies.

9. Despite capturing a large amount of personal data relating to its tenant group, the department is unable to meaningfully use that data to understand the demographics of its tenants, such as age, gender, income, or the number of those with a physical disability or mental health condition. The department was only able to provide the investigation with some limited data suggesting that:

    - about four per cent of public housing tenants have reported experiencing family violence
    - 29 percent of public housing properties have been designed or modified to cater for people with a disability
    - three per cent of its tenants speak a first language other than English.

10. Through their submissions and interviews, advocacy groups reported frequently voicing their concern with the department about its management of end of tenancy maintenance claims. These groups reported that housing staff regularly make unreasonable decisions about a tenant's responsibility for damage and repairs, and then escalate the claim to VCAT before giving the tenant a right to be heard.

11. Responding to these concerns, the department introduced a revised set of guidelines in early 2015 (2015 Guidelines) which required local housing staff to:

    - engage with tenants to discuss the circumstances surrounding damage
    - consider the tenant's human rights
    - take into account any special circumstances that would reduce the tenant's liability for the damage.

12. However, the investigation found these revised guidelines have not affected the way local housing staff manage vacated maintenance claims. They continue to be managed transactionally, with the department failing to take tenants' circumstances into account, resulting in unreasonable decisions and unjust outcomes for tenants.

Unreasonable maintenance claims against tenants

13. The rights and obligations of the department and the tenant are set out in an agreement prescribed under the Residential Tenancies Act. The tenancy agreement imposes duties on the tenant to avoid damaging the premises, to keep the premises clean, and not to install fixtures without the department's consent.

14. Despite not taking a bond, department policy requires local housing staff to prepare a tenancy condition report at the start of each tenancy and update it at the end of the tenancy as proof of any breach.

15. When inspecting vacant premises, department staff photograph all items in the property that are worn or damaged and need repair or replacement. After the inspection, staff arrange necessary works with the department's contractors to have the property ready for the next tenant within 28 days.

16. Once the contractor's invoice is paid, staff assess costs to be claimed back from the tenant. This assessment forms the basis of the maintenance claim against the former tenant. At this stage, the department does not discuss the cause of the damage with the former tenant.

Special circumstances

17. Department policies state that special circumstances such as the mental or physical health of the tenant or their household, indications of family violence, or evidence of third party criminal damage must be taken into account when assessing the maintenance claim. Some of this information is already available from the tenancy file, but staff are also expected to engage with the tenant directly or via their support networks before determining liability.

18. Despite this expectation, the investigation found local housing staff make minimal effort to contact the tenant to discuss any circumstances that might mitigate their liability. This is especially evident where the tenant has not provided a forwarding address or cannot be readily located; even in these circumstances the department often makes little or no attempt to contact them. The department's failure to engage with the tenant at this stage has a direct impact on the tenant's right to be heard, and breaches the department's obligation to act as a Model Litigant.

19. As a 'social landlord', the department must ensure tenants are informed of the basis for the claim against them, the policies regarding special circumstances and their right to seek a review of the department's decision. They should also be provided with contact details for tenant advocacy services.

Fair wear and tear and depreciation

20. The department's policies state that any items due for replacement or due to be repainted are not to be included in the vacated maintenance claim. The department's policies and the Residential Tenancies Act also require the department to give proper consideration to the fair wear and tear and depreciated value of fittings and fixtures in the property.

21. Case studies reviewed by the investigation and statistics provided by the department suggest this step is regularly overlooked by local housing staff. As a result, tenants are being charged the full cost of repairs, without accounting for fair wear and tear or depreciation, which at times can amount to thousands of dollars.

22. Department staff interviewed state that local housing staff are often uncertain about how to calculate and apply depreciation costs. They also complained that the internal processes for getting information about past maintenance works, or the age of items in the property, is inefficient and time consuming. As a result, local housing staff are motivated to skip this step and rely on VCAT to calculate fair wear and tear and depreciation.

23. Statistics provided by the department confirm this. Between 2014 and 2016, the department claimed the full cost of repairing or replacing damaged items from the tenant in over 90 per cent of compensation applications made to VCAT.

24. There is a clear need for the department to develop practical guidance for local housing staff when applying policy to the assessment and pursuit of end of tenancy maintenance claims. The information held by the department about public housing tenants, their tenancy history and property history, is disjointed, decentralised and cumbersome for staff to access and draw together. This makes attempts to source information relevant to fair wear and tear and depreciation a time-consuming process and operates as a disincentive to properly assess damage and liability.

Communication

25. While the department's formal communication with vacated tenants may comply with relevant legislation, it is unfair. The Residential Tenancies Act permits service of documents by post to the tenant's last known address. Despite routinely recording other contact details for a former tenant, such as a mobile phone number and e-mail address, the department's practice is to simply post documents to the tenant at the address of the property they have just vacated. This occurs even when the department is aware that the tenant has already left or been evicted from that address.

26. If and when the department's correspondence does reach a former tenant, the template letter used to inform the tenant of the maintenance claims against them is intimidating and fails to provide the tenant with:

    - evidence supporting the claim
    - information regarding the special circumstances that can be considered when determining their liability
    - contact details of support services such as tenant advocacy groups
    - information regarding their right to seek a review of the decision.

Improper use of VCAT

27. The investigation identified the department's default practice of abrogating responsibility to genuinely consider a tenant's liability for damages and fair wear and tear by applying direct to VCAT to recoup vacated maintenance costs. Many of these applications to VCAT were for the full replacement or repair cost of all works to a vacated property, without accounting for any fair wear and tear, depreciation or evidence that the former tenant may not be entirely responsible.

28. Because of the department's reliance on the service of documents at the tenant's last known address, the tenant is often unaware of the vacated maintenance claim or the related VCAT hearing, and the claim often goes uncontested. VCAT data shows public housing tenants only attended about 20 per cent of vacated maintenance claim applications brought by the department in 2014–15 and 2015–16.

29. This practice breaches the department's obligation as a Model Litigant and is also contrary to the VCAT Rules, which require the department to mitigate any claim for loss or damage by factoring in fair wear and tear and depreciation before making the application to VCAT.

30. Even where a tenant or their advocate attends the VCAT hearing, the investigation found that local housing staff are reluctant to disclose all documents supporting the application, or negotiate a reduction in the maintenance claim, preferring to leave the decision to VCAT. This is unreasonable, bearing in mind that VCAT has no jurisdiction to review the exercise of discretion by the department, or any failure by the local housing staff to consider a tenant's special circumstances or human rights.

31. The department places responsibility for managing vacated tenancy maintenance claim processes, including the prosecution of these matters at VCAT, on a relatively junior and untrained staffing group. These staff are not provided with any formal training, and most appear to have no understanding of the department's obligations as Model Litigant.

32. The department is far less likely to be awarded costs in vacated maintenance claims when a former tenant attends the hearing. Research conducted by the West Heidelberg Community Legal Service in 2015 shows that the department was successful in 92 per cent of compensation applications heard at VCAT where the tenant did not attend. This drops to 50 per cent where the tenants did attend. This significant discrepancy suggests the department is in the practice of making ambit claims for compensation.

Debt collectors and unreasonable withholding of services

33. In certain circumstances, the department engages private debt collectors to recover maintenance claim debts and enforce VCAT orders. Debt collectors are paid a commission based on the amount repaid or agreed to be repaid by the tenant when they sign a repayment plan.

34. There is currently a disincentive for debt collectors to refer the tenant back to the department if they wish to dispute the debt, as no commission is paid in these circumstances. The case studies detailed in this report demonstrate the need to require debt collectors to comply with public sector values and codes of conduct and refer tenants back to the department.

35. The current practice of requiring a tenant to agree to a repayment plan by withholding future services is unconscionable, particularly where they were unaware of the debt and dispute its validity. There is a clear need for department policy to acknowledge the spirit of the *Limitations of Actions Act 1958* (Vic) when pursuing and enforcing maintenance claims that are more than 15 years old.

36. There is also a need to amend current policy and procedures that may be failing to protect a tenant's right to a home and the protection of their family in accordance with the Charter of Human Rights and Responsibilities Act.

37. The investigation also identified that the department's policies and practices around the recovery of maintenance fails to acknowledge a large percentage of its tenants would meet the definition of being 'judgment proof' by virtue of their tenuous financial position. A judgment proof debtor is one against whom a creditor, including the department, cannot enforce an order for compensation made in its favour owing to the fact the debtor derives their sole income from Centrelink benefits.

Improving guidance, skills and oversight

38. The department does not currently measure the impact of policy change and is ill-equipped to accurately determine staff knowledge and implementation of policies and procedures. There is very little supervision and oversight of the predominantly lower classified staff who determine tenant liability and prosecute vacated maintenance debts at VCAT.

39. Finally, there is also a clear need for the department to implement a robust change management 'package'. This should include ongoing training programs aimed at local housing staff, team leaders and managers to provide these staff with the necessary knowledge, skills and resources to effect changes consistent with the 2015 Guidelines' expectations, and the department's role as a Model Litigant in its delivery of a public service to some of the most vulnerable in our community.

Investigation Scope and Methodology

40. In February 2016 the Ombudsman received a complaint from the Tenants Union of Victoria (TUV) on behalf of its client (Tenant A). The complaint alleged Housing Victoria – a division of the Department of Health and Human Services (the department) – unreasonably raised and pursued a debt against a public housing tenant for maintenance costs when they vacated the property. The TUV raised issues that were possibly systemic in nature, a view shared by other advocacy groups and which prompted the investigation.

Case study: Tenant A

Tenant A lived in a Housing Victoria property for about nine years from 2003 to 2012.

In October 2012, Tenant A reported being a victim of family violence and, on the advice of police, hastily vacated the property due to significant concerns for her immediate safety. Tenant A's children had previously been removed from her care by the department as it was unsafe for them to remain at the property due to the actions of her ex-partner and associates.[1] Department records show it was informed that Tenant A was under physical threat in the months preceding her urgent departure from the property. Tenant A reports having been homeless for the week immediately after she left her public housing property.[2]

In November 2012, the department was alerted to the vacated property by a neighbour who said Tenant A had not been at the house for about six weeks. A home visit by a department staff member found the property abandoned and significantly damaged.

About two weeks later, a maintenance charge was created on the department's database 'HiiP' against Tenant A. However, a letter notifying Tenant A of the cost of repairs was not sent to her until March 2014; about 15 months after the department had conducted its end of tenancy inspection.

Three separate notices of cost of repairs were sent to Tenant A alleging she was liable for a total of $20,558.80 in maintenance repairs.

The department was charging Tenant A for repairs, maintenance and replacement of assets such as:

- smoke alarms, ceiling exhaust fans, light switches, replacement TV aerial, letterbox, blinds, carpet
- a full electrical check
- removal of an air conditioner and rubbish
- securing windows and doors after property vacated
- weed removal, grass cutting and cleaning of garden beds
- cleaning the property
- repairing damage to windows, walls and doors
- internal painting.

There was nothing on Tenant A's file to show the department sought to contact her to assess responsibility for the damage. There was also no evidence of the department's consideration of Tenant A being a victim of family violence.

In the complaint, the TUV stated the property had not been damaged at the time Tenant A left and the damage must have been illegally caused by someone after that time.[3]

1 Letter from the Tenants Union of Victoria to the Victorian Ombudsman (2 February 2016).

2 Interview with Tenant A (telephone, 19 April 2017).

3 Tenants Union of Victoria, above n 1.

Tenant A told the investigation she reported this to police and provided evidence to the department through her advocate that a report had been made to police. There is no indication in the department's files that it attempted to obtain the full police report to confirm the circumstances and determine whether a third party was liable for the damage.

Department records also show no attempt to negotiate the debt with Tenant A prior to the involvement of the TUV in May 2014 or to contact her to discuss circumstances surrounding the damage identified at the property. This is despite Tenant A keeping the department up to date regarding her whereabouts and maintaining contact with child protection.

Tenant A reported having been in contact with the department as the subject of regular drug tests by child protection services. She reported that housing staff did not contact her throughout this period though she maintained the same mobile phone contact details as when she was living at the property.[4]

The TUV sent a negotiation letter to the department in May 2014. In June 2014 the department advised that the claim for $20,558.80 was issued in error. In September 2014, a revised claim of $3,602 was sent to Tenant A. The tenancy advocate disputed the revised claim in December 2014 on behalf of Tenant A. In January 2015, the department applied to VCAT seeking about $19,000, rather than the previously revised amount of $3,602.

Tenant A stated:

> I felt like I'd been picked up out of my life and put into the middle of the ocean and made to swim back and not knowing how to swim.[5]

VCAT made an order in favour of the department for $1,067 for cleaning and rubbish removal. In response to that order, Tenant A told the investigation:

> I was just willing to accept it and I just figured it was part of the past and to move on. I may as well get rid of it and pay it and move on to the next stage.[6]

The VCAT order is 5.19 per cent of the original amount the department sought from Tenant A.

Jurisdiction

41. Housing Victoria is an office managed by the department.

42. The Ombudsman has jurisdiction to investigate the administrative actions of Housing Victoria under the *Ombudsman Act 1973* (Vic).

43. Jurisdiction to initiate an 'own motion' investigation is set out at section 16(A)(1) of the Ombudsman Act subject to various conditions, none of which apply to this matter. The Ombudsman decided the issues raised by the TUV required investigation under section 16A.

44. On 27 July 2016, the Ombudsman notified the Secretary of the department and the Hon Martin Foley MP, Minister for Housing, Disability and Ageing of her intention to formally investigate.

4 Interview with Tenant A, above n 2.

5 Ibid.

6 Ibid.

Terms of Reference

45. The specific terms of reference for the investigation were to examine:

    - the administrative actions of the department in relation to maintenance and repair issues at the end of a tenancy
    - whether the department is meeting its obligations as a Model Litigant in respect of action taken relevant to maintenance and repair issues at the end of a tenancy.

46. The terms of reference considered the following:

    - department policy and procedures for dealing with alleged breaches of tenancy agreements as they relate to maintenance and repair issues upon the conclusion of a tenancy and the practical implementation of these
    - department policy and procedures in creating and pursuing debts against current and former public housing tenants, specifically as those debts relate to maintenance and repair issues upon the conclusion of a tenancy and their practical implementation.

Methodology

47. The investigation involved:

    - requesting submissions from the public in relation to maintenance debts from vacated tenancies
    - reviewing and analysing 14 detailed submissions received from the public and advocacy groups
    - analysing statistics received from the department, tenant advocacy groups and VCAT
    - examining material from the department, including the Tenancy Management Manual, Allocations Manual, Maintenance Manual, Tenant Property Damage Guidelines and other internal policies and procedures, and written responses to the investigation.
    - examining the Victorian Model Litigant Guidelines
    - reviewing relevant legislation
    - meeting and consulting with four tenant advocacy services
    - meeting with the current VCAT President, the Hon Justice Greg Garde; the current Chief Executive Officer of VCAT, Ms Keryn Negri; and former VCAT president, the Hon Justice Kevin Bell
    - interviewing 16 witnesses on a voluntary basis, comprising:
        - five department Tenancy and Property Managers or Team Leaders representing all geographical regions covered by Housing Victoria, who manage staff responsible for the execution of functions relevant to this report
        - a department Manager from the Service Implementation and Support Branch of the Department of Health and Human Services
        - a department Manager from the Finance and Infrastructure Branch of the Department of Health and Human Services
        - nine public housing tenants (telephone interviews)
    - examining relevant scholarly articles, discussion papers, and reviews
    - providing a draft report to the Secretary of the department for comment.

Case file reviews

48. Among submissions received by the investigation were 46 detailed case examples exhibiting elements consistent with the Terms of Reference of the investigation. This office made independent enquires under section 13A of the Ombudsman Act in relation to nine of these matters. One other was the subject of a separate investigation under section 15B of the Ombudsman Act.

49. Nineteen of the 46 case examples were selected for closer review by the investigation, and the department's tenant and property files and relevant databases were inspected. Selection of cases for review was based on:

    - cases exhibiting elements consistent with the investigation's Terms of Reference
    - geographic diversity to ensure a fair examination of cases across the state
    - the willingness of former tenants to have their experiences examined and potentially reported on by the investigation.

Standard of proof and adverse comments

50. In reaching the investigation's findings, the standard of proof applied is the balance of probabilities. In determining this, we have applied the High Court decision of *Briginshaw v Briginshaw*[7] and considered the seriousness of the allegations made and the gravity of the consequences that may flow from an adverse finding.

51. In accordance with section 25A(3) of the Ombudsman Act, any persons who are or may be identifiable from the information in this report are not the subject of any 'adverse comment' or opinion and:

    - the Ombudsman is satisfied that it is necessary or desirable in the public interest that the information that identifies or may identify those persons be included in this report
    - the Ombudsman is satisfied this will not cause unreasonable damage to those persons' reputation, safety or wellbeing.

7 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Background

The Department of Health and Human Services

52. The role of the department is to develop and integrate health and social care policies, programs and services to improve the health, wellbeing and safety of Victorians.[8] In doing so, the department provides the following services across the state:

    - health
    - housing
    - disability
    - children, youth and families
    - mental health
    - ageing
    - sport and recreation.

53. The department's services are provided through operational divisions located in four regions across 17 geographical areas of the state.[9] The operational division relevant to this report is Housing Victoria, which operates under delegation from the Director of Housing, subject to the direction and control of the responsible Minister.[10]

54. The Director of Housing's position is established under section 9 of the *Housing Act 1983* (Vic) and is appointed by the Governor-in-Council for a period of seven years. The position of Director of Housing also embodies and facilitates the operations of the entity as a body corporate.[11] The powers of the Director of Housing include the acquisition, disposal, development and management of land and to enter into residential leases.[12]

55. The Director of Housing was consolidated into the former Victorian Department of Human Services, which itself was transferred to the department on 1 January 2015 as a result of the machinery of government changes.

Housing Victoria

The role of Housing Victoria

56. Housing Victoria's *Housing Register Guide* states that it manages public housing for people most in need, especially those who have recently experienced homelessness or have other special needs.[13]

57. Public housing dwellings are owned (or leased) and managed by the Director of Housing.

58. Housing Victoria also works with registered not-for-profit organisations to provide community housing for disadvantaged groups, such as people with a disability, women, and older people. Applications for social housing (including public housing and community housing) are made through the Victorian Housing Register which is managed by Housing Victoria on behalf of the Director of Housing.[14]

59. The investigation considered the management of public housing tenancies by Housing Victoria.

8 Department of Health and Human Services (DHHS), *What We Do* (27 September 2017) <https://www.dhhs.vic.gov.au/what-we-do>.

9 Ibid.

10 *Housing Act 1983* (Vic) s 10(1).

11 Ibid s 9.

12 Ibid s 14(1)(g).

13 DHHS, *Victorian Housing Register Guide* (2016) < http://www.housing.vic.gov.au/sites/sh.dhsvc/files/Victorian-Housing-Register-guide_2016-08-19.pdf>.

14 *Housing Act 1983* (Vic) s 142A.

Historical origins

60. Slum housing in inner-city Melbourne was identified as a major issue and became the focus of a public campaign by social reformers in the 1930s and 1940s. The shortage of adequate housing stemmed from the suspension of construction during the Great Depression and Second World War.

61. The Housing Commission of Victoria (HCV) was established under the *Housing Act 1937* (Vic) and operated within the framework of the *Slum Reclamation and Housing Act 1938* (Vic) for the purpose of improving existing housing conditions and providing adequate housing for people of limited financial means.[15]

62. Due to various machinery of government changes the entity formerly known as HCV has evolved since 1938, eventually becoming Housing Victoria. Despite title and position changes throughout the decades, the purpose and role of Housing Victoria remains the same: to provide housing assistance for the homeless and other vulnerable people in Victoria.

Current practice – Scope of eligibility for public housing

63. Victoria's public housing system was originally targeted at individuals and families experiencing financial hardship who were unable to afford private accommodation. Waiting times for public housing were originally dictated by when an applicant was approved to the waiting list and the availability of the appropriately sized accommodation in the geographical areas the applicant had selected.

64. Public housing tenants still need to be experiencing financial hardship, but eligibility for public housing now takes into account a wider spectrum of clients with more diverse social needs. This includes those experiencing homelessness; families with limited financial means; the widowed; unemployed; single parent families; victims of family violence; and individuals requiring specialised housing for mental health and physical disabilities. Despite the variety of individual circumstances and needs of public housing tenants, the scope of eligibility is uncomplicated.

65. To be eligible for public housing through Housing Victoria an applicant must:

    - live in Victoria
    - be an Australian citizen or a permanent resident
    - meet income and asset tests
    - not own or part-own a property.[16]

66. While the landscape of social issues may have changed since 1938 and the inner-city slums have been cleared since the 1940s, the department remains the entity responsible for providing housing options to vulnerable and disadvantaged sectors of the community within Victoria.

A snapshot of public housing tenants

67. From 1 July 2013 to 21 April 2017, the department managed 64,196 public housing properties and provided services to 83,152 public housing tenants across Victoria.[17] The department's tenants comprise a diverse demographic.

68. The department states about four per cent of public housing tenants report experiencing family violence.

15 National Library of Australia, *Housing Commission Victoria* <http://trove.nla.gov.au/people/623662?c=people>.

16 DHHS, above n 13.

17 Email from DHHS Manager E to Victorian Ombudsman (26 April 2017, 5:46pm).

69. Despite advice from the department that it collects and records specific details for tenants via the Victorian Housing Register, it was unable to provide the investigation with figures relating to:

    - age of tenants
    - gender
    - income
    - physical disability or mental health condition
    - number of tenants who were homeless at the time of housing allocation.

70. The Australian Institute of Health and Welfare reports that in 2014–15, 364,000 households in Australia were in various forms of social housing, with 80 per cent of those public housing. This figure has dropped from 87 per cent in 2007–08.[18]

71. In 2015–16, 105,287 people were assisted by specialist homelessness services in Victoria.[19] Of these, 38 per cent were homeless on presentation to the service. The top three reasons for clients seeking assistance were:

    - domestic and family violence (42 per cent)
    - financial difficulties (39 per cent)
    - housing crisis (39 per cent).

    A proportion of clients were affected by more than one of these circumstances.

72. The most recent National Public Housing Survey[20] indicates that:

    - 11 per cent of public housing tenants had experienced homelessness
    - around one in ten public housing tenants had experienced homelessness more than ten times in the previous five years
    - 20.9 per cent of public housing tenants (between the ages of 15 and 64) were in the labour force, with only six per cent employed full time
    - 70 per cent of public housing tenants accessed community and health services, and 20 per cent accessed mental health services
    - around six in ten public housing households surveyed reported at least one member with a disability.

73. The department reports full-time equivalent (FTE) staffing trends, including ongoing and fixed term, as a total of 11,448 positions in June 2016. Of those, about 519 FTE are front-line public housing staff.[21]

74. Staff employed to execute the functions of Housing Victoria are referred to in this report as Housing Services Officers (HSOs). Their Team Leaders and Managers are referred to as 'department Managers' and 'department Team Leaders'. As different functions relevant to the Director's obligations are executed across the Department of Health and Human Services, all references to the Director of Housing and its previous iterations including reference to the Office of Housing, are referred to as 'the department' in this report.

18 Australian Institute of Health and Welfare, *Specialist homelessness services 2015–16: Victoria fact sheet* (2017) <http://webarchive.nla.gov.au/20170816050200/http://www.aihw.gov.au/homelessness-publications/>.

19 Ibid.

20 Australian Institute of Health and Welfare, *National Social Housing Survey: a summary of national results 2016* (6 September 2017) <https://www.aihw.gov.au/reports/housing-assistance/national-social-housing-survey-summary-2016/contents/table-of-contents>.

21 Letter from Secretary DHHS to Victorian Ombudsman (24 August 2017) attachment – *Issues Log.*

Legislation, policy and guidelines

Legislation

75. The investigation considered the actions of the department in light of relevant legislation, policies and procedures and other guidance material.

76. Legislation and guiding documents relevant to the investigation include:

- *Residential Tenancies Act 1997* (Vic)
- *Residential Tenancies Regulations 2008* (Vic)
- *Housing Act 1983* (Vic)
- *Victorian Civil and Administrative Tribunal Act 1998* (Vic)
- *Victorian Civil and Administrative Tribunal Rules 2008* (Vic)
- *Service and Execution of Process Act 1992* (Cth)
- *Limitation of Actions Act 1958* (Vic)
- *Judgment Debt Recovery Act 1984* (Vic)
- *Victorian Model Litigant Guidelines* 2011
- *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- *Australian Consumer Law and Fair Trading Act 2012* (Vic).

Residential Tenancies Act

77. The Residential Tenancies Act is the overarching legislation that governs the landlord/tenant relationship in Victoria. Relevant sections are detailed throughout this report.

Charter of Human Rights and Responsibilities Act

78. The decisions and actions of the Director and the department are subject to the Charter of Human Rights and Responsibilities Act (the Charter). The Charter sets out the human rights Parliament specifically seeks to protect and promote, and imposes an obligation on all Victorian public authorities to act compatibly with those human rights[22]. The Charter right most relevant to this investigation is the section 17 right to protection of families and children. It states:

> **17 Protection of families and children**
>
> (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

79. In *Burgess v Director of Housing*[23], the Victorian Supreme Court found:

- the Director is, for the purpose of the Charter, a public authority
- a tenant must be informed about the matters the Director is bound to consider under the Director's guidelines
- a tenant must be given an effective right to be heard before a decision is made that will affect their human rights.

22 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 1(2)(a), (c).

23 *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 [200] [202] [209].

80. Section 5 of the Charter provides for the extension of human rights beyond those directly listed in its content. In this context, Article 11 of the *International Covenant on Economic, Social and Cultural Rights*[24], to which Australia is a signatory, describes the right to adequate housing.[25]

81. The department's policies and guidelines of 2010 and 2012 make no mention of the Charter, despite these obligations being in place since 2006.

82. The department implemented the *DHHS Tenant Property Operational Guidelines 2015* in February 2015 (2015 Guidelines), which refer to the Charter as follows:

> 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].
>
> By taking a human rights approach, the Department is able to ensure the tenant is at the centre of all decisions made. It does not mean that tenant's human rights can never be limited. It means that any decisions made that do limit the tenant's human rights must be lawful, necessary, logical, reasonable and proportionate.[26]

83. The 2015 Guidelines also provide guidance about making decisions through a 'human rights' lens[27] (see Figure 1, page 20).

84. The following excerpt from a paper by the Hon Justice Kevin Bell sums up the human rights landscape for public housing tenants:

> The public housing provider is not just a landlord but a public authority with human rights obligations.
>
> The tenant is not just a renter but a person of inherent value and worth, of potential capability and bearer of human rights.[28]

> *The tenant is not just a renter but a person of inherent value and worth, of potential capability and bearer of human rights.*
>
> Justice Kevin Bell

24 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

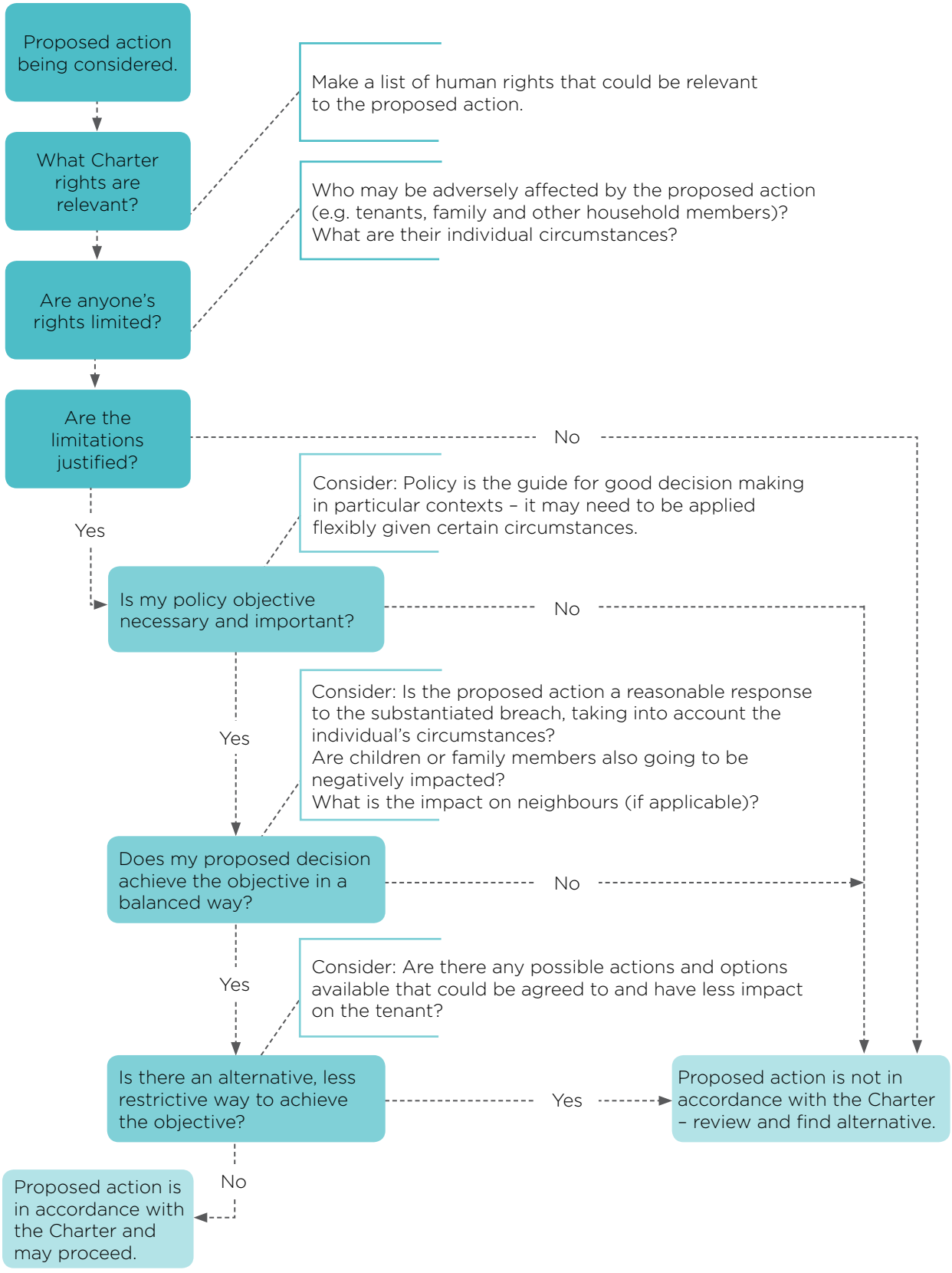
25 Ibid art 11, 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

26 DHHS,*Tenant property damage operational guidelines* (2015) <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/maintenance-manual/5.-tenant-property-damage>.

27 Ibid 4.

28 Justice Kevin Bell, 'Protecting Public Housing Tenants In Australia From Forced Eviction: The Fundamental Importance of the Human Right To Adequate Housing and Home' (2013) 39(1) *Monash University Law Review* 1.

Figure 1: DHHS Tenant Property Operational Guidelines 2015 – Human Rights Considerations.



The department's policies and guidelines

85. Historically, the department has relied on the *Tenant Property Damage Policy 2010* when executing its functions relating to end of tenancy maintenance and repair. Introduced in July 1997, it was revised on five occasions resulting in a final iteration in 2010. The Tenant Property Damage Policy guided staff actions for 15 years until replaced by the *Tenancy Management Manual 2012* which, in turn, was replaced by the 2015 Guidelines.

86. The investigation examined this policy as it was the guiding policy relevant to many public complaints and submissions to this office. It also shaped staff behaviour for 15 years and is therefore important in the context of comparing current and historical activities of department staff executing functions on behalf of the Director of Housing.

87. The department also provided the investigation with documents relevant to the execution of these functions, including:
    - *DHHS Tenant Property Operational Guidelines 2015*
    - *Tenant Property Damage Policy 2010*
    - *Tenancy Management Manual 2012*
    - *Maintenance Product Durability Manual 1994*
    - *Introduction to maintenance claims workbook 2012*, version 2.02
    - *HiiP Tenancy Service Delivery 2012*, participant workbook
    - *Tenant Property Damage, Effective Life Table 2014–2015*
    - *Tenant Property Damage HiiP Practice Instruction 2015*
    - *Tenant Property Damage Operational Guidelines Learning and Development Resource*
    - *Maintenance Claim HiiP User Guide 2016*
    - *Ministerial Approval of Housing Act 1983 Delegation 2016.*

88. The investigation also assessed the following publicly available documents:
    - *Allocations Manual 2012*
    - *Allocations Manual 2016*
    - *Maintenance Manual 2015,* Chapter 3, Responsive Maintenance
    - *Tenant Property Damage Policy Statement, 9 February 2015.*

The Housing Integrated Information Program (HiiP)

89. The Housing integrated information Program (HiiP) is an information technology platform used by the department to manage client, property, financial and lending information.

HiiP Repairs

90. The Housing integrated information Program Repairs (HiiP Repairs) is another platform, which contains the details of all property maintenance across housing stock managed by the department, including maintenance requests by tenants, vacated tenancy repairs, programmed works and upgrades.[29]

29 DHHS, *Maintenance Charge Against Tenant(s) HiiP User Guide* (2016).

Property tenancy cycle

Beginning of tenancy

91. Once an individual is offered and accepts a property, they enter into an agreement under the Residential Tenancies Act (the tenancy agreement) with the Director of Housing[30] on behalf of the department.

92. The agreement sets out the rights and obligations of landlords and tenants and is a prescribed document under the Residential Tenancies Act.[31]

Obligations regarding maintenance and repair

93. Obligations regarding the maintenance and repair of a rental property are set out under the provisions of the Residential Tenancies Act. In signing tenancy agreements, the department and its tenants agree to these obligations. Particularly relevant to the investigation are sections 61, 63 and 64, which state:

> **61 Tenant must avoid damage to premises or common areas**
>
> (1) A tenant must ensure that care is taken to avoid damaging the rented premises.
>
> (2) A tenant must take reasonable care to avoid damaging the common areas.
>
> **63 Tenant must keep rented premises clean**
>
> A tenant must keep the rented premises in a reasonably clean condition except to the extent that the landlord is responsible under the tenancy agreement for keeping the premises in that condition.
>
> **64 Tenant must not install fixtures etc. without consent**
>
> (1) A tenant must not, without the landlord's consent—
>
> (a) install any fixtures on the rented premises; or
>
> (b) make any alteration, renovation or addition to the rented premises.
>
> (2) Before a tenancy agreement terminates, a tenant who has installed fixtures on or renovated, altered or added to the rented premises (whether or not with the landlord's written consent) must—
>
> (a) restore the premises to the condition they were in immediately before the installation, renovation or addition, fair wear and tear excepted; or
>
> (b) pay the landlord an amount equal to the reasonable cost of restoring the premises to that condition.
>
> (3) Subsection (2) does not apply if—
>
> (a) the tenancy agreement otherwise provides; or
>
> (b) the landlord and the tenant otherwise agree.

94. Sections 65(1) and 67 provide the following in relation to landlords:

> **65 Landlord's duty in relation to provision of premises**
>
> (1) A landlord must ensure that on the day that it is agreed that the tenant is to enter into occupation, the rented premises are vacant and in a reasonably clean condition.

30 *Residential Tenancies Act 1997* (Vic) s 26.

31 *Residential Tenancies Rules 1997* r 7.

68 Landlord's duty to maintain premises

(1) A landlord must ensure that the rented premises are maintained in good repair.

(2) A landlord is not in breach of the duty to maintain the rented premises in good repair if—

(a) damage to the rented premises is caused by the tenant's failure to ensure that care was taken to avoid damaging the premises; and

(b) the landlord has given the tenant a notice under section 78 requiring the tenant to repair the damage.

95. Clause 8 of the tenancy agreement further stipulates:

> Landlord to ensure premises reasonably clean on the date the tenant moves in. Tenant to maintain reasonably clean condition.

96. The department has acknowledged this responsibility in its *Maintenance Product Durability Manual.*[32]

97. As well as a tenancy agreement, since 2014 public housing tenants have been required to sign a 'Neighbourly Behaviour Statement' requiring their compliance with a number of conditions. The statement notes:

> Tenants who do not meet their obligations and responsibilities risk losing their public housing tenancy.[33]

98. Under this statement, they are, in part, required to:

- take responsibility for their actions and those of their family and visitors
- avoid failing to keep the rented property in a reasonably clean condition including the outdoor areas
- keep the rented property reasonably clean both inside and outside
- avoid damaging the property or common areas.[34]

99. Consequences of a failure to meet these requirements include a 'Breach Notice' should the tenant, a household member or visitor:

- damage the rented property or common areas
- fail to keep the rented property in reasonably clean condition
- install any fixtures or make any alteration, renovation or addition to the rented property.[35]

100. Three breaches of the same category may result in a decision by the department to terminate the tenancy under the Residential Tenancies Act and compensation may be sought.[36]

32 DHHS, *Maintenance Product Durability Manual* (1994) 3.

33 DHHS, Neighbourly *Behaviour Statement* (undated).

34 Ibid.

35 Ibid.

36 Ibid.

Condition reports

101. Section 35 of the Residential Tenancies Act requires the provision of a Tenancy Condition Report at the start of a tenancy:

    - If a tenant pays a bond, the landlord must, before the tenant enters into occupation of the rented premises, give the tenant two copies of a condition report signed by or on behalf of the landlord specifying the state of repair and general condition of the premises on the day specified in the report.
    - Within three business days of entering into occupation of the rented premises, the tenant must return one copy of the condition report to the landlord
        - signed by or on behalf of the tenant; or
        - with an endorsement so signed to the effect that the tenant agrees or disagrees with the whole or any specified part of the report.[37]

102. The obligation of a landlord to undertake this process is linked to the tenant's payment of a bond. Although the department does not collect rental bonds, its policies still require local housing staff to conduct a property condition inspection and prepare a Tenancy Condition Report at the beginning of a tenancy as though this requirement of the Residential Tenancies Act applied.[38]

103. The department's Housing Practice Support Branch explained the process as follows:

> …local area staff inspect fittings and fixtures, and internal and external finishes to record the condition of the property. 'Internal and external finishes' refers to the general appearance of internal and external components, such as walls, ceilings, doors, paving and clotheslines.
>
> Each of the fittings, fixtures and internal and external finishes is given a grading. The condition of each fixture is graded as good, fair or poor.
>
> If the fixtures or fittings are in a satisfactory and safe condition, and the property meets the department's reletting standards, the condition is graded as 'good'.
>
> If there is some general wear and tear (fixtures or fittings are marked, chipped or worn), the condition is graded as 'fair'.
>
> If there is substantial wear and tear, for example, the carpet is threadbare or has holes, the condition is graded as 'poor'. Generally, however, if a component of a property is considered poor or a health and safety issue, it is likely it will be repaired or replaced during vacant works. The tenant is required to return a signed copy of the Tenancy Condition Report to the local area office within three days of the sign up… In some cases, tenants may choose to sign immediately but they are not required to do so. The department will accept a Tenancy Condition Report that is returned later than three days after sign up.[39]

37 *Residential Tenancies Act 1997* (Vic) s 35.

38 Department of Human Services (DHS), *Maintenance Manual* (2012) 5.

39 Email from DHHS Manager E to Victorian Ombudsman (16 November 2016, 1:40pm).

104. Consistent with the Residential Tenancies Act[40] the department requires three copies of the pre-tenancy Tenancy Condition Report to be created. One is to be retained by the department and two are provided to the tenant who is requested to check the accuracy of the document, and:

- Where the document is accurate, the tenant is requested to sign and send one copy back to the department.
- Where there is dispute over the accuracy of the document, the tenant is required to alert the HSO.
- Where the document is not returned, local housing staff consider the tenant has accepted its accuracy. Local housing staff then determine whether any repairs are required.

105. Local housing staff are then required to enter the rating of the various fixtures and fittings recorded on the Tenancy Condition Report into the HiiP management system by the relevant HSO.[41]

106. All department Team Leaders and Managers interviewed during the investigation confirmed that where the local housing staff member does not accept the tenant's assessment of the accuracy of the Tenancy Condition Report, no record, other than the tenant's comments on the document, is made of this disagreement.[42]

107. The investigation's review of the 19 department tenancy and property files revealed that all files had completed Tenancy Condition Reports and signed 'Commencement' sections. However, more than half of the inspected files had not been signed by or on behalf of the tenant.

40 *Residential Tenancies Act 1997* (Vic) s 35.

41 DHS, above n 38, 6.

42 Interview with DHHS Manager C (27 February 2017); Interview with DHHS Manager D (21 March 2017); Interview with DHHS Manager A (7 February 2017); Interview with DHHS Manager B (17 February 2017); Interview with DHHS Team Leader A (7 March 2017).

During tenancy

Property assessment

108. In order to execute its obligations as a landlord under the Residential Tenancies Act, the department is entitled to conduct six monthly tenancy inspections during the life of a tenancy, notwithstanding certain exceptional circumstances.[43]

109. The department said it may inspect properties during a tenancy when:

- A maintenance issue is raised by a tenant. The issue is resolved through the maintenance call centre and may prompt an inspection by local housing staff.[44]
- Programmed works are pending. Programmed works are the department's planned refurbishment of a property after a set time frame.
  - They occur every three years through the Property and Asset Services Branch.
  - The head external contractor inspects selected properties and produces a Property Condition Report outlining upgrade works required.
  - Local housing staff can also conduct these inspections.
  - Results of inspections are listed in HiiP Repairs.[45]

43 *Residential Tenancies Act 1997* (Vic) s 86(1).

44 Email from DHHS to Victorian Ombudsman (16 November 2016) attachment – *Victorian Ombudsman own motion investigation, Departmental responses to questions, November 2016*.

45 Ibid.

110. Department staff acknowledged this requirement to conduct tri-annual tenancy inspections although commented that these are not routinely put into practice and often do not occur with tenants who do not otherwise come to their attention. One regional manager told the investigation:

> There's not a regular inspection program, there used to be many, many years ago.
>
> ...there's no regular check-up of properties, [it would] be nice if you could do that I suppose but there's also a big focus on human rights and not interfering with people's lives.[46]

111. A department Manager from a metropolitan office said:

> We used to carry out inspections called the 'tri-annual' where we'd go out there every three years, but that doesn't mean we won't go out there if a tenant asks or calls us and says can you please have a look at my carpet or my paint for example.
>
> ...from my knowledge, they are bringing [the tri-annual inspection] back.
>
> I'm not fully sure [why it went away] ...at the time I was a housing officer, so you just go with the advice...
>
> It will now [come up on the HiiP system as a reminder].[47]

112. When asked whether a tri-annual property inspection was frequent enough, the same Manager said:

> ...no but the amount of properties we have ... it would be very difficult for a housing staff member to visit every single property every year for example. We just don't have the capacity to do that. But if it is every three years it is very realistic.[48]

113. Any maintenance issues reported by tenants during a tenancy are recorded on the HiiP Repairs system.[49]

End of tenancy

114. Data provided by the department shows the number of public housing properties vacated between 2013 and 2016 *(see Table 1 below)*.

115. In practice, public housing tenants generally end their tenancies in a number of ways, represented by Graph 1 on page 27.

End of tenancy condition assessment

116. The process for establishing the condition of a property at the end of a tenancy is set out in the *DHS Maintenance Manual 2012,* (Maintenance Manual, Chapter One).

117. The Maintenance Manual requires staff to conduct a 'vacant unit inspection', and complete a Tenancy Condition Report at the end of a tenancy as a record of the condition of the property. Where possible, department staff are required to conduct this inspection in the presence of the former tenant.

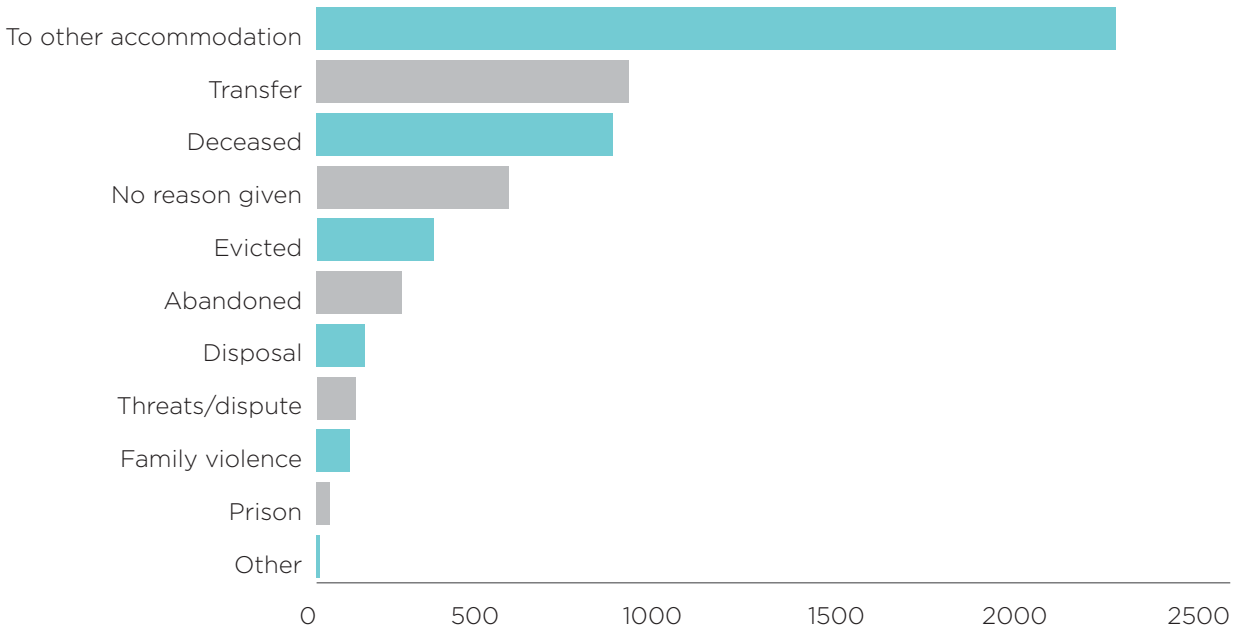
118. Where the tenant is unavailable or otherwise does not attend the inspection, staff are still required to complete this report in the tenant's absence[50] and take photographs of the property to compare with the condition report from the beginning of the tenancy.[51] Department staff are prompted to consider the effect of fair wear and tear when conducting this inspection and assess the likely liability of the tenant for any damage or disrepair.[52]

Table 1: Number of public housing vacated tenancies for 2013–14 to 2015–16

	2013–2014	2014–2015	2015–2016
No. of vacated tenancies	5,555	5,245	5,190

46 Interview with DHHS Manager D (21 March 2017).
47 Interview with DHHS Manager A (7 February 2017).
48 Ibid.
49 DHHS, above n 29, 10.
50 DHS, above n 38, 6.
51 Ibid 11.
52 Ibid.

Graph 1: Major recorded reasons for public housing tenancies ending during 2013–14 to 2015–16.[53]



119. At interview, most Team Leaders and Managers stated that end of tenancy inspections are routinely undertaken in the absence of the tenant in the days after they have vacated the property. They also confirmed that local housing office staff rarely complete the end of Tenancy Condition Report document as the record of this inspection, despite this policy requirement.[54] The department confirmed that HSOs do not receive formal training in conducting condition assessments other than ad hoc on-the-job instruction from colleagues.[55]

120. Of the 19 department files inspected by the investigation, only three (16 per cent) were found to contain a completed end of tenancy condition report. The failure to complete this record is significant for former tenants, as the final inspection is used by department staff to determine liability for the cost of any maintenance and repair.[56]

53 Email from DHHS to Victorian Ombudsman (20 December 2016) attachment – *Victorian Ombudsman own motion investigation, Departmental responses to questions.* DHHS data averaged across financial years summarised into Ombudsman-developed groupings.

54 Interview with DHHS Manager C (27 February 2017); Interview with DHHS Manager D (21 March 2017); Interview with DHHS Manager A (7 February 2017); Interview with DHHS Manager B (17 February 2017); Interview with DHHS Team Leader A (7 March 2017); Interview with DHHS Manager E (25 January 2017).

55 Meeting with DHHS Manager E (19 July 2017).

56 Interview with DHHS Manager C (22 February 2017); Interview with DHHS Manager D (21 March 2017); Interview with DHHS Manager A (7 February 2017); Interview with Manager B (17 February 2017); Interview with DHHS Team Leader A (7 March 2017); Interview with DHHS Manager E (25 January 2017).

Determining who is responsible for damage to a public housing property

What is a maintenance claim?

121. When determining responsibility for any maintenance or repair items at the end of a tenancy, department staff have the option to assign costs to:

    - the department
    - the former tenant
    - both.

122. The department has developed policies and operational guidelines[57] to help local housing staff determine if the cost of property damage should be recovered from a tenant as a maintenance claim against the tenant.

123. A maintenance claim is:

> ...the recorded cost of maintenance works carried out on a tenant's rented premises which the [department] believes to be the responsibility of the tenant...[58]

124. All policies reviewed by the investigation state the department will take steps to recover costs if repairs to the property are necessary as a result of damage or neglect caused by the tenant, another household member, or a visitor who enters the property with the tenant's permission.[59]

125. However, the policies also state that the department will not claim costs where:

    - the damage is a result of an accident
    - a household member's health condition is a major contributing factor to the cause of the damage
    - a disability or frailty prevents the tenant from undertaking an action to prevent damage occurring that an able-bodied person would normally be able to undertake
    - the damage is a result of family violence
    - the damage is minor, unrepeated and attributable to the tenant's children
    - previously completed works by the department's contractors are not up to standard
    - fixtures or fittings installed by the department do not meet the required standards
    - the damage was a result of the criminal actions of a third party and a police report is provided
    - damage was caused by storm activity
    - damage was a result of police actions
    - the repairs are required as a result of fair wear and tear
    - the property is vacant and it cannot be determined with certainty who caused the damage.[60]

57 DHS, *Tenant Property Damage,* Version 3.0 (2010); DHS, *Maintenance Manual Chapter 5 – Tenant property damage* (2012); DHS, *HiiP Tenancy Service Delivery – Plus, Participant Workbook* (2012); DHHS, *Tenant property damage operational guidelines* (2015); DHHS, *Maintenance Charge Against Tenant(s) HiiP User Guide* (2016).

58 DHS, *HiiP Tenancy Service Delivery – Plus, Participant Workbook*, (2012) 16

59 DHS, *Tenant property damage,* Version 3.0 (2010)2–6; DHS, *Maintenance Manual Chapter 5 – Tenant property damage* (2012) 5; DHHS *Tenant property damage operational guidelines* (2015) 6.

60 DHHS, *Tenant property damage,* Version 3.0 (2010) 2–6, 2–7; DHS, *Maintenance Manual Chapter 5 – Tenant property damage* (2012) 6; DHHS, *Tenant property damage operational guidelines* (2015) 6.

126. The *Tenant property damage HiiP practice instruction* was released in February 2015 as an interim measure to guide the creation and management of tenant property damage claims until HiiP functions were enhanced. It states:

> Where maintenance is to be raised as a maintenance claim against the tenant (MCAT), the attached maintenance order should only have maintenance claim items.
>
> Any items which are not going to be claimed from the tenant should be raised as a separate maintenance order.[61]

127. One department Manager interviewed during the investigation explained that due to the limitations of the HiiP system, two separate work orders, known as 'tickets', need to be raised when managing repairs on a vacated property:

- one 'normal ticket' for the repairs that will be paid for by the department
- one 'maintenance claim ticket' for the costs to be claimed against the former tenant.[62]

128. The Manager also explained that any items due for replacement or due to be repainted are not to be included in the maintenance claim ticket, and the contractor is not authorised to vary the maintenance claim ticket when completing the work.[63]

129. Department policy has, over the period examined by the investigation, required staff to take steps to confirm the cause of property damage identified at end of tenancy inspections and determine whether any special circumstances are relevant to the maintenance claim. It suggests that discussions with neighbours, police, support workers and, most importantly, the former tenant, as avenues for determining the presence of mitigating circumstances where raising a maintenance claim may not be appropriate.[64]

130. The 2015 Guidelines emphasise the requirement for department staff to engage with former tenants when determining the cause of the damage and liability for the repair costs.[65]

131. The department asked all Managers to support their staff to 'embed' the 2015 Guidelines. They were also provided with learning and development resources and the new HiiP practice instructions.[66] The learning resources[67] provided to staff described a five-stage process (see Figure 2 over page).[68]

61 DHHS, *Tenant property damage – HiiP practice instruction* (2015) 1.

62 Interview with DHHS Manager B (17 February 2017).

63 Ibid.

64 DHS, *Tenant property damage,* Version 3.0 (2010) 2-17; DHS, *Maintenance Manual Chapter 5 – Tenant property damage* (2012) 13; DHHS, *Tenant property damage operational guidelines* (2015) 6.

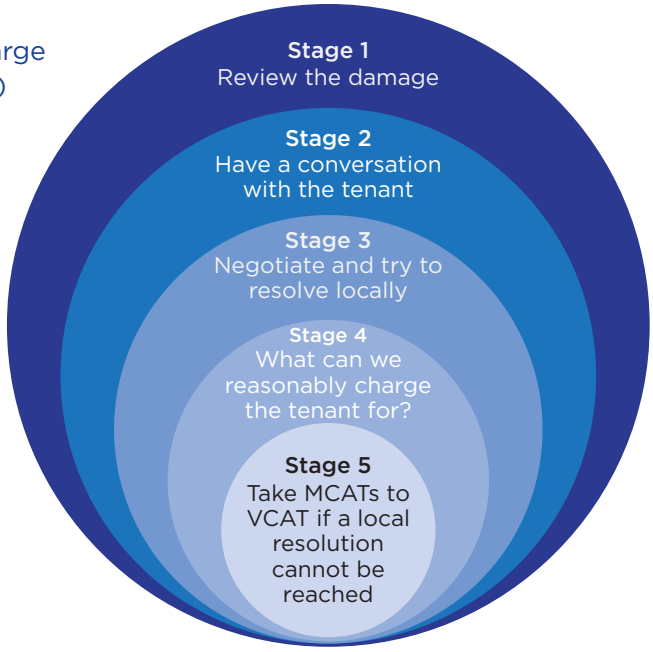
65 DHHS, *Tenant property damage operational guidelines* (2015); DHS, *Maintenance Charge Against Tenant(s) HiiP User Guide* (2016).

66 Email from DHHS Manager E to DHS-M-Division-Tenancy & Property Managers, DHS-M-Division-Residential Client Service Managers (9 February 2015).

67 DHHS, *Tenant property damage operational guidelines Learning and development resource* (undated).

68 Email from DHHS Manager E to Victorian Ombudsman (19 August 2016) attachment.

Figure 2:
DHHS Maintenance Charge Against Tenant (MCATs) process on a page.



132. This five-stage process requires the collection of information and evidence to assess the cause and contributing factors surrounding any damage, including the special considerations that mitigate a tenant's liability.

133. The training materials instruct staff to have a conversation with the tenant and note their explanation of the circumstances leading to damage. If damage appears deliberate, the process also provides the following guidance:

> It is important to remember that serious antisocial behaviour is usually a result of significant mental and physical health issues including addiction, family violence or complex tenancy issues...
>
> Always consider fair wear and tear (carpet which has not been changed for a number of years could not reasonably be charged to the tenant)...
>
> Works completed by departmental contractors did not meet the required standards (not something a tenant would actually know or consider)...
>
> When determining what is 'reasonably clean' consider the tenant's support needs.[69]

69 Ibid.

134. Where it is clear a former tenant is responsible for the damage, the training materials instruct staff to negotiate with the former tenant in an effort to resolve locally through signing a formal payment agreement.[70] That negotiation is expected to provide both parties with an equal opportunity to present their case and result in an outcome that is clear to both parties.

135. The 2015 Guidelines instruct that maintenance claims should be escalated to VCAT as a last resort. It states:

> Staff will proceed with a VCAT application only after all avenues for local resolution have been exhausted.[71]

136. Despite the department's policies acknowledging there may be circumstances where the tenant cannot reasonably be held accountable for the damage or neglect, evidence obtained by the investigation suggests the department regularly fails to take reasonable steps to make enquiries and collect information to determine the full circumstances as required by the policies.

70 Ibid.

71 Ibid.

137. Tenant advocacy services commented positively about the content of the 2015 Guidelines, but reported a lack of practical application. Victoria Legal Aid commented:

> I think they [the Guidelines] are sound. I think there are certainly ways they can be improved but I think the core issue is that they don't always appear to be followed.[72]

138. Justice Connect Homeless Law added:

> Generally, we think they are good and comprehensive. Apart from a few gaps. The policy is there but what we see mostly is a lack of application of the policy.
>
> We openly commend [the department] on the work [it has] done in putting those policies together, but now we just need the next step which is the consistent application.[73]

139. Department Team Leaders and Managers interviewed confirmed it is not common for their staff to contact former tenants to discuss end of tenancy maintenance and repair issues prior to raising a maintenance claim, citing resources as the reason for this.[74]

> *No [we do not contact tenants prior to raising a maintenance claim], and that's sort of the lack in the process, where the department's not very good … at the moment.*
>
> Department Team Leader

140. One Manager said:

> In an ideal world, we would do that but we don't have the resources to do that, we wouldn't be able to do it, we wouldn't have time … finding the tenant is not very easy … but, we haven't attempted it…
>
> …You've got to have people with the time to do that and you've got to have a clearly defined process about what you're going to do … if I'm going to try someone's mobile phone number … I've got to find their number, then I'm going to try it, then I've got to go in and make a file note that I've done it, and then if I think well … I've tried it once, how many times am I going to try this? Do I try it twice, do I try it three times? Every time I do that I have to make a file note.[75]

141. When asked about the process for contacting former tenants prior to raising maintenance claims, a Team Leader from a regional office admitted:

> No [we do not contact tenants prior to raising a maintenance claim], and that's sort of the lack in the process, where the department's not very good at that at the moment.[76]

142. The same Team Leader stated the process for contacting current and former tenants was different:

> With a current maintenance claim the tenant is obviously notified at the time they are calling for maintenance that they are going to be charged… With a vacated one, currently the system is not set up to [notify tenants that they will be charged]. What we are actually looking at doing is an automated letter that can be sent out. It's currently with legal services. We've come up with one at a local office. So to let them know an inspection is happening … you are possibly going to be charged. But at this stage we don't call the tenant or anything like that.[77]

72 Interview with Victoria Legal Aid (24 October 2016).

73 Interview with Justice Connect, Homeless Law (2 November 2016).

74 Interview with DHHS Manager C (27 February 2017); Interview with DHHS Manager (21 March 2017); Interview with DHHS Manager A (7 February 2017); Interview with DHHS Manager B (17 February 2017); Interview with DHHS Team Leader (7 March 2017).

75 Interview with DHHS Manager D (21 March 2017).

76 Interview with DHHS Team Leader A (7 March 2017).

77 Ibid.

143. Another Team Leader from a different region expressed frustration with a lack of clarity in the 2015 Guidelines about this requirement:

> It's just become far more fluid. And I suppose for myself, and a lot of people within my team, we would like it a little bit more structured. Tell me what's the right way. Little more detail to it. The fluidity has been a little frustrating at times.[78]

144. All Team Leaders and Managers confirmed their staff do not habitually take steps to determine the cause of damage at end of tenancy inspections. Instead, they generally raise maintenance claims as a matter of course.

Considering special circumstances

145. Department policies require local housing staff to determine whether there are any special circumstances that would reduce or remove the tenant's liability for the damage to the rented property. Special circumstances include the presence of family violence, criminal damage by third parties, and the mental or physical health of a tenant or a member of their household.

146. Failure to take steps to confirm the circumstances surrounding property damage can lead to maintenance claim debts being raised against former tenants for damage that is not their responsibility. The investigation identified the following factors as the most likely to be overlooked by department staff when raising maintenance claims:

- family violence
- third party damage
- mental and physical health.

78 Interview with DHHS Manager C (22 February 2017).

Family violence

147. The 'Children, Families, Disability and Operations' division of the department collects and maintains data of reported family violence in Victoria. The division reports:

> Family violence directly affects one in five Victorian women over the course of their lifetime. It is the leading contributor to preventable death, disability and illness in Victorian women aged 15 to 44 years.[79]

148. Previously, public housing tenants were required to provide police reports in support of a domestic violence claim related to property damage. The 2015 Guidelines removed this requirement in favour of advice from the victim's family violence worker or other relevant support worker.[80] It appears this change in policy is not being consistently applied, and that department staff are still requiring tenants to provide police reports before accepting a claim of family violence.

149. Where the department becomes aware of family violence as a potential mitigating factor, advocacy groups say this policy continues to be ignored by department staff. The TUV said:

> Many of the tenants in public housing properties have mental health and/or physical health issues and some tenants experience the added impact of family violence. It appears the [department] culture has come to regard these as the norm and therefore not an issue for consideration.[81]

79 DHHS, *Families & children, What is family violence?* (2017) <services.dhhs.vic.gov.au/what-family-violence>.

80 DHHS, above n 26, 7.

81 Email from Tenants Union of Victoria to Victorian Ombudsman (4 October 2016) attachment – *Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts 2.*

150. Inner Melbourne Community Legal said:

> It is our experience that victims of family violence are often charged for damage caused by an ex-partner, even though the [department] is well aware of the situation.
>
> …the [department] is arguably sending a message to victims that they are responsible for the actions of the perpetrators.[82]

151. The TUV stated that even where victims of domestic violence come forward, department staff were not applying the guidelines consistently, with some not accepting a statement from a family violence worker as evidence to support the victim's claim.[83]

152. Justice Connect Homeless Law said:

> From what we see, the training that the housing officers receive doesn't equip them well to deal with the really challenging circumstances that they are facing day to day. The high rates of family violence, high rates of trauma, mental illness, experience of poverty, complex lives, where a knowledge of the policy and an ability to exercise discretion appropriately, and understanding of human rights and human rights obligations would really help them in their decision making, and it seems from what we see [local housing staff] are not being trained in that or supported in those respects…
>
> …Under the Guidelines it doesn't have to be [a police report]; they can accept evidence from a support worker as well. But again, there is this distinction between what the guidelines say and what will be accepted.
>
> Recently we've faced push back or unwillingness to accept the evidence provided by a specialist family violence service that the tenant had experienced family violence, but in the absence of a police report they wouldn't accept that evidence.[84]

153. Victoria Legal Aid stated:

> …a lot of people who are affected by family violence may not want to go and get an intervention order or report it to the police and will prioritize their own safety and the safety of their family as opposed to some sort of nebulous, vague threat of compensation.[85]
>
> …there could be an increased role for housing officers to almost proactively enquire into this and maybe draw inferences where the tenant says, 'I'm not responsible for the damage but this is why' and being a bit vague in their language.[86]

154. The findings from the Victorian Royal Commission into Family Violence highlight the propensity for family violence to go under-reported. It states:

> Although much has been done to improve our understanding of the extent to which family violence is occurring in our community, a great deal of the violence remains hidden. This is largely because many people, and some victims, do not recognise that what is happening is in fact family violence, others choose not to report it or are unable to, and sometimes incidents are not recorded as family violence or are not recorded at all.[87]

155. Department Managers and Team Leaders explained they find it difficult to assess claims of family violence. One Manager was unsure if family violence considerations are always appropriate. For example, if the property damage resulted from violence between co-tenants compared to damage caused by a visiting family member who was violent.[88]

82 Email from Inner Melbourne Community Legal to Victorian Ombudsman (3 October 2016) attachment – *Submission for the Ombudsman's own motion investigation into maintenance charges against tenants (Maintenance Claims)* 5–6.

83 Interview with the Tenants Union of Victoria (2 November 2016).

84 Interview with Justice Connect, Homeless Law (2 November 2016).

85 Interview with Victoria Legal Aid, above n 72.

86 Ibid.

87 State of Victoria, Royal Commission into Family Violence, *Summary and recommendations* (2016).

88 Interview with DHHS Manager D (21 March 2017).

156. In contrast, another Manager said:

> There may be tyres left in the backyard, but it may not be her fault – it may be the perpetrator's property.
>
> …I don't charge someone if they are a victim of family violence and there is a hole in the wall.[89]

157. Of the 19 files reviewed by the investigation where maintenance claims had been raised, six had clear evidence of family violence as the cause of the damage. In four other cases, the tenants were charged for damage to their properties even though there was evidence on the tenants' files showing a history of family violence. Despite this, steps were not taken to determine whether it had contributed to the damage claimed by the department.

158. The following case study was submitted by a tenant advocacy service.

Case study: Tenant B

Tenant B lived in a public housing property for about seven years from December 2007 until August 2014.

As a victim of family violence, Tenant B left the property, on advice from police, due to safety concerns. The department was aware of the family violence, which had resulted in property damage in the past. As a result of the safety concerns, Tenant B was transferred to another public housing property.

The department issued Tenant B with three Notice of Cost of Repairs letters in September 2014 for the property she had left. These letters requested Tenant B pay a total of $8,885.49 for:

- reglazing a window
- supplying and fitting new locks
- removing rubbish
- supplying new doors
- replacing carpet
- repairing holes in walls
- painting.

The department issued these letters to the address Tenant B had left instead of her new public housing address. As a result, Tenant B did not receive these letters and was unaware of the alleged debt at that time.

In October 2014, the department applied to VCAT seeking compensation from Tenant B for $8,708. The VCAT application was correctly served to Tenant B's new address via registered post. The matter was adjourned at VCAT given Tenant B had not been provided relevant documentation before the hearing, and to allow the parties to negotiate.

Attempts were made by Tenant B's advocate to negotiate with the local housing office. The HSO and the Manager were unwilling to negotiate, preferring to have the matter heard and determined by VCAT. The advocate also experienced a delay in obtaining the relevant documentation from the department.

In January 2015, the department provided the required documentation to the tenancy advocate, and the Housing Manager reduced the maintenance claim to $1,180 after taking depreciation and family violence into account for the first time.

The matter was heard at VCAT in March 2015 and Tenant B was ordered to pay the department $590.34 for maintenance costs.

The amount ordered by VCAT is 6.78 per cent of the original amount the department was seeking from Tenant B.

89 Interview with DHHS Manager B (17 February 2017).

159. There appears to be confusion about how to assess claims of family violence when determining whether it has had an impact on housing damage and if so, when and how to apportion liability.

Third party damage

160. In ten of the 19 cases reviewed, tenants were initially charged for damage allegedly carried out by a third party.

161. Like the department's family violence policies, other policies provide that a former tenant will not be liable for costs associated with repairing damage caused by third parties outside the former tenant's control. The policy states that the tenant is not responsible for damage resulting from:

- the criminal actions of a third party and a police report is provided
- police actions, or
- where the property is found to be abandoned and it cannot be determined with certainty who caused the damage.[90]

162. Despite this, tenant advocacy services told the investigation local housing staff are holding former tenants responsible for the cost of damage resulting from the criminal acts of third parties, or where they were unable to determine the party responsible.[91]

163. One Team Leader stated that when the local housing staff member responsible for all vacant property inspections in her area assesses a property:

> He doesn't know who did the damage. [He] goes in looking at what needs to be done, he'll say 'hole in wall not fair wear and tear; it's an MCAT [maintenance claim]'.[92]

90 DHS, *Tenant property damage,* Version 3.0 (2010) 2–7; DHS, *Maintenance Manual Chapter 5 – Tenant property damage* (2012) 6; DHHS, *Tenant property damage operational guidelines* (2015) 6.

91 Email from Justice Connect, Homeless Law to Victorian Ombudsman (November 2016) attachment – *Through the roof: Improving the Office of Housing's policies and processes for dealing with housing debts*; Email from Tenants Union of Victoria to Victorian Ombudsman (4 October 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts*.

92 Interview with DHHS Team Leader A (8 March 2017).

164. A tenant advocacy service submitted the following case study:

Case Study: Tenant E

Tenant E lived in a public housing property for about 26 years. In April 2013, she moved into private housing due to serious health needs.

Department records show it was aware of Tenant E's intention to move prior to April 2013. In May 2013, the department was made aware that Tenant E had not been living at the address for at least a month. The department confirmed this with Tenant E the following day.

Department staff did not, however, inspect the property until November 2013. Photographs taken at the time of the inspection showed signs of damage to the front, back and laundry doors indicating forced entry into the premises.

On the same day the department inspected the property, local housing staff raised a maintenance claim totalling $13,012.37. Correspondence regarding this maintenance claim was subsequently sent to Tenant E in March 2014, almost one year after they had vacated the property. Also on the same day the department raised the maintenance claim, it applied to VCAT seeking the full amount in compensation from the tenant for the following work:

- removal of window bars
- replacement of security screen doors and fly screens
- reglazing windows
- supplying and fitting new locks
- supplying new doors
- fitting rails in shower and toilet
- removing rubbish
- cleaning property
- painting.

Department records do not show any attempt to negotiate maintenance costs with Tenant E or the department's consideration as to whether the property damage may have been caused by a third party after the tenancy ended.

Tenant E described her reaction to receiving the maintenance claim:

> 'I was a bit shocked'
>
> 'I just went, I gave the keys, I gave my last papers that I was vacating and I never heard for a whole year. And then all of a sudden, I get a letter, $13,000, I thought I beg your pardon! I left the place clean as, shut the door and gave you the key back.'[93]

The matter proceeded to a VCAT hearing in June 2014 despite Tenant E being unable to attend as the hearing conflicted with a medical appointment. In Tenant E's absence, VCAT ordered Tenant E pay $3,778.14 to the department. Tenant E subsequently applied to VCAT for a review.

In July 2014, Tenant E's advocate contacted the department and requested a copy of the Director of Housing's claim. The department declined, stating the VCAT member had reviewed the evidence provided and estimated an amount he saw reasonable for repayment. Tenant E received letters from the department seeking payment of $3,000.

The advocate again wrote to the department in September 2014 outlining Tenant E's position. That correspondence stated that the maintenance claim was vexatious, misconceived and an abuse of process.

93 Interview with Tenant E (telephone, 21 April 2017).

The tenant advocate noted that the department's photographs showed signs of forced entry and squatting in the property and requested that the VCAT rehearing application be adjourned to further negotiate and settle the matter.

Tenant E described her disappointment when she saw the department's photographs:

> 'I said, well hang on a minute! I mean I did not leave it with a mattress, and Maccas [sic] and alcohol cans in there."
>
> 'I just got so shocked. There was writing on the walls, everything. The carpets were filthy, you know. Absolutely filthy, you know, on the photos. I just could not believe it, that that was my unit'.[94]

The matter went to VCAT in October 2014, about 18 months after the tenant had moved out of the property. The advocate argued that the department's application was vexatious because it had issued proceedings without giving proper consideration to depreciation and liability, and had not acted as a Model Litigant.

The VCAT member only required 10 minutes to review calculations for the decision and determined that the department had not proved its entire claim.[95]

Tenant E was ordered to pay a total of just $200 for cleaning, modifications, repair and removal of items from the property.

This amount is 1.53 per cent of the original amount of $13,012.37 claimed by the department.

94 Ibid.

95 Email from Tenants Union of Victoria to Victorian Ombudsman (4 October 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts*.

Mental and physical health

165. The department's recognition of mental and physical disability as mitigating influences on damage to public housing properties reflects the changing demographic of public housing tenants and their needs.

166. The 2010 and 2012 policies state:

> The department will not claim cost from the tenant if a household member's health is a major contributing factor to the cause of the damage. The term health condition is to be interpreted as a departure from a state of physical or mental well-being as confirmed or documented by the person's treating physician or support worker.[96]

167. The 2015 Guidelines are less prescriptive but still consider mental health conditions and physical disability when determining liability for end of tenancy maintenance and repair. They state:

> The department will generally not claim costs for a tenant in relation to property damage if: the damage is a result of an accident or actions which could not be reasonably prevented taking into account the individual needs and circumstances of the tenants or the household members remaining in the property, for example, the tenant has a disability...[97]

'I said, well hang on a minute! I mean I did not leave it with a mattress, and Maccas [sic] and alcohol cans in there."

'I just got so shocked. There was writing on the walls, everything. The carpets were filthy, you know. Absolutely filthy, you know, on the photos. I just could not believe it, that that was my unit'.

Tenant E

96 DHS, *Tenant Property Damage: Version 3.0* (2010) 2–6; DHS, *Maintenance Manual, Chapter 5 – Tenant Property Damage* (2012) 6.

97 DHHS, above n 26, 6.

168. There is no specific guidance for local housing staff about how to assess the impact of mental health and physical disability on property damage, or when to apply discretion in these cases. As a result, staff told the investigation it is difficult to know when these mitigating factors should be considered. One Team Leader commented:

> Family violence is the one that is sort of... the big thing at the moment. But with the mental illness and disability, like it mentions that in the policy but then there's nothing, what evidence?
>
> ... with disabilities, I think that's really hard because there is nothing ... as a guide for us and for staff to use and that makes it hard.[98]

169. When asked if local housing staff are equipped to deal with tenants who may have high needs, a Team Leader from a different region stated:

> To be honest, I don't think so. I think there is a change of the type of client that we have had over the last five years.
>
> For example, you've mentioned they're a lot more vulnerable, it's more so now than ever. I remember starting eight or nine years ago the type of clients, their needs have definitely changed.
>
> The department, I understand they try their hardest to give us some training, especially in the family violence space, but by the same token, housing workers can't expect to be social workers.
>
> But we are trained in making, you know, proper referrals to agencies, also identifying that the home space might not be the kind of place to provide information to the client, [if] the perpetrator comes and finds ... brochures that might cause a problem. The [local housing staff] are trained to have that conversation in the proper place, but not to provide any kind of advice as that is not their role.[99]

170. As previously reported, the department told the investigation it is unable to accurately determine the number of tenants or their household members affected by a mental health condition or physical disability, as:

> ...information about mental health would be as free text [in the HiiP system] or in letters [correspondence], a manual task to retrieve. Therefore, in light of that, the search is not conducted re: mental health. The data for Disability is captured under 'Modified Properties'.[100]

171. The department informed the investigation that there are currently 18,869 (29 per cent) modified properties as part of its housing stock that cater for tenants or their household members with physical disabilities. The department relies on these figures to estimate the number of tenants with disabilities. This indicates the department has only limited information about mental health conditions or physical disabilities affecting a member of the tenant's household when considering raising a maintenance claim.

172. The following case study was submitted by a tenant advocacy service. It illustrates the department's failure to mitigate the former tenant's liability for property damage resulting from mental or physical disability.

98 Interview with DHHS Team Leader A (7 March 2017).

99 Interview with DHHS Manager A (7 February 2017).

100 Email from DHHS Manager E to Victorian Ombudsman (28 April 2017).

Case study: Tenant G

Tenant G moved into a public housing property in May 2013 after experiencing recurring homelessness and ongoing mental illness. In September 2013 and August 2014, she was admitted as an in-patient to a psychiatric facility. The department's records demonstrate it was aware of Tenant G's history of mental illness and both hospital admissions at the time they occurred.

In August 2015, the department received two statutory declarations from neighbours stating they had only seen Tenant G at the property about six times and that it appeared someone else was now living there. The department obtained a VCAT order to terminate the tenancy on the grounds Tenant G had abandoned the property. Tenant G became aware of this development when rent ceased being deducted from their bank account.

In December 2015, the department raised a maintenance claim and issued correspondence to the tenant seeking the cost of repairs totalling $2,895.50. This included:

- removal of rubbish, including drug paraphernalia
- clean up of rubbish
- reglazing windows
- gardening
- replacement of carpet
- painting.

In January 2016, the department applied to VCAT for the full cost of the repairs.

From February to April 2016, the maintenance claim was reviewed by a Housing Manager, who looked at the file recording Tenant G's historical and ongoing mental health condition. Despite acknowledging evidence of the tenant's mental illness and reducing the maintenance claim by 14 per cent to $2,477.47, the Manager decided the tenant was still responsible for the damage claimed because she had breached her duty to keep the property clean, secure and report any damages.

At the VCAT hearing in June 2016, Tenant G's advocate argued she should not be liable to pay the full amount as the damage was caused by the criminal actions of a third party, and Tenant G had experienced unforeseen mental health issues which resulted in her having to leave the property. VCAT ordered Tenant G pay the Director $891.79 for the cost of rubbish removal and cleaning, but that the tenant was not liable for the cost of replacing the carpet or painting. VCAT, however, was not able to take Tenant G's mental health into account when making its order as this is not within its jurisdiction.

The amount ordered for payment by Tenant G is 30.79 per cent of the original amount sought by the department.

173. At interview, advocates from the Victorian Public Tenants Association commented on the limitations of the HiiP database as described to them by local housing staff when they sought information for their clients about maintenance claim liability:

> The HiiP system is limited … it doesn't readily give you information about the circumstances of the tenant. It holds very basic information, so if I was going to enquire about the circumstances of a tenant, the [local housing staff member] could not tell me much beyond when he moved in. [The local housing staff member] can't tell much beyond the maintenance issues, not that [the tenant] had counselling or had support.
>
> HiiP tells about the asset rather than the person, so DHHS might have a lot of information about the person, but if you're a housing officer looking on HiiP, you just go 'right they're behind $20 on their rent' because you get a limited range of information because the system was set up to manage the house and the tenancy, but nothing to do with those broader issues the department deals with. In terms of the [2015] Guidelines, one of the things they said they had to do was to look into circumstances of the tenant and the tenancy and to look back at how we got to where we got, and [HSOs] are physically incapable of doing that with HiiP.[101]

Sub-standard maintenance repairs, fixtures or fittings

174. The department's policies stipulate that tenants may not be liable for property damage where:

> …previously completed works by the department's contractor do not meet the department's standards;
>
> Fixtures or fittings installed by the Department do not meet the required standards of the Department.[102]

175. There seems to be few checks on the adequacy of repairs during tenancy and therefore little to rely on to assess whether repairs identified at the end of a tenancy are the result of earlier poor maintenance work done by the department's contractors.

176. The department advises that appropriately qualified staff do not regularly check completed maintenance works to ensure the repairs have been properly completed prior to payment. The department told the investigation it is common for the tenant to sign for maintenance repairs completed during the tenancy.[103] This practice means this work is not properly assessed by a qualified employee before it is accepted as complete and satisfactory.

177. The following case study was submitted by a tenant advocacy service.

101 Interview with Victorian Public Tenants Association (26 October 2016).

102 DHS, *Tenant Property Damage,* Version 3.0 (2010) 2–7; DHS, *Maintenance Manual Chapter 5 – Tenant property damage* (2012) 6; DHS, *Tenant property damage operational guidelines* (2015) 6.

103 DHHS, above n 44, 4.

Case study: Tenant N

Tenant N lived in a public housing property with her disabled daughter for seven years from March 2007 until February 2014 before moving into a private arrangement. Tenant N's preferred language is Vietnamese and department records confirm that an interpreter is required for communication with Tenant N.

In April 2014, the department issued Tenant N with a Notice of Cost of Repairs letter seeking total costs of $4,352.18 for:

- cleaning
- removal of rubbish
- mould treatment in lounge, family, dining and bedrooms
- fitting door stops
- painting.

The letter was sent with 'LanguageLink' information including Vietnamese translation to the forwarding address for Tenant N. The department made an application to VCAT on the same date for the full $4,352.18.

The investigation's review of department records found that the property was known to have a mould problem. A general inspection report conducted in July 2003, prior to Tenant N's tenancy at the property, reports mouldy ceilings and walls requiring treatment and painting. The department's condition assessment of the property done in November 2007 includes photographs of the mould.

At that time $32,779 worth of repairs was conducted. The condition assessment also indicated the remaining life of the doors, fittings and internal painting were three years. In September 2011, a property inspection was conducted at Tenant N's request. The maintenance assessment noted that the property is on a block that 'has a history of mould and was upgraded to address mould issue'.

The tenant advocacy service assisted Tenant N to contact the department and dispute the maintenance claim. The advocate told the investigation that, as the department declined to discuss the matter with them, they referred Tenant N to community legal assistance.[104]

The matter was to be heard at VCAT in early May 2014. Prior to the hearing, Tenant N's advocate negotiated with the department, and the department agreed to waive $4,269.34 of the maintenance claim.[105] The VCAT order was made by consent, with Tenant N only required to pay $82.84 for replacement of goods or fixtures.

The final compensation order is two per cent of the original amount the department sought from Tenant N.

104 Email from Victorian Public Tenants Association to Victorian Ombudsman (26 August 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing.*

105 Ibid.

Failure to consider Depreciation and Fair Wear and Tear

178. Another key consideration for asset value required by the department is the assessment of depreciation and fair wear and tear.

179. Evidence suggests that depreciation and fair wear and tear calculations are not being regularly considered by local housing staff when raising maintenance claims.[106]

Depreciation

180. The department's policies define depreciation as:

> The decline in value [of an asset] as a result of age.[107]

181. Prior to 2012, neither the department's policies nor its procedures required the consideration of depreciation when calculating alleged maintenance claim debt.

182. In 2012, the department released process guidance[108] to assist local housing staff calculate depreciation for end of tenancy maintenance claims, including a depreciation schedule from the Australian Taxation Office's *Guide to Depreciation* (ATO Guide).

183. The ATO Guide is updated annually and provides an estimated effective life for most types of assets. The ATO Guide is also used by VCAT when calculating the value of a depreciating asset[109] in compensation claims submitted by landlords, including the department.

184. In 2014 the department produced its *Tenant Property Damage – HiiP, Effective Life Table* (2014–15), which included a schedule of rate codes for nearly 2,000 items and the effective life of each, based on ATO determinations.[110] However, it was only in 2015 that a calculation of depreciation was a stipulated requirement under the department's policy when calculating maintenance claim debt.[111]

185. Prior to March 2016, local housing staff were required to manually calculate depreciation of assets relevant to maintenance claim charges. From 19 March 2016, staff have been able to enter the depreciation years in HiiP, which then automatically calculates the 'depreciation amount' and 'revised amount' that may be claimed from the former tenant.

106 Email from Justice Connect, Homeless Law to Victorian Ombudsman (November 2016) attachment – *Through the roof: Improving the Office of Housing's policies and processes for dealing with housing debts* 5, 14;
Email from Inner Melbourne Community Legal to Victorian Ombudsman (3 October 2016) attachment – *Submission for the Ombudsman's own motion investigation into maintenance charges against tenants (Maintenance Claims)* 2;
Email from the Tenants Union of Victoria to the Victorian Ombudsman (4 October 2016) attachment – *Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts* 2;
Email from West Heidelberg Community Legal Service to Victorian Ombudsman (20 October 2016) attachment – *Victorian Ombudsman investigation into Office of Housing management of maintenance debts* 4.

107 DHHS, above n 29, 24.

108 DHS Introduction to Maintenance Claims (2012).

109 John Billings, Jacquellyn Kefford, Alan Vassie, *VCAT Annotated Residential Tenancies Act*, (2016) [210.02].

110 Australian Taxation Office, Effective Life of an Asset (24 June 2015) <https://www.ato.gov.au/Business/Depreciation-and-capital-expenses-and-allowances/General-depreciation-rules---capital-allowances/Effective-life-of-an-asset/>.

111 DHHS, above n 26, 7.

186. Regardless of the method, when calculating depreciation, the age of the asset at the time of the calculation must be known. Team Leaders reported this being quite difficult. They stated it is time consuming and labour intensive because:

- the information required to calculate depreciation and fair wear and tear is kept on a separate database called 'HiiP repair' or in a hard copy file
- the information from HiiP repair does not automatically populate the database HiiP and as a result, housing officers are required to manually search either the HiiP repair database, or the physical property file, to ascertain when the asset was last repaired or replaced; only then can they enter the age of the asset into HiiP, where the system will 'automatically' apply depreciation and calculate the amount to be sought from the tenant.[112]

187. One Manager said the HiiP database creates the potential for housing staff to overlook depreciation before preparing and serving the tenant with a maintenance claim. The Manager was concerned about the lack of prompting from the HiiP system to remind staff of the need to consider depreciation when calculating maintenance claims.

Fair Wear and Tear

188. The department's policies define fair wear and tear as:

> ...the gradual deterioration of a property or its fixtures and fittings as a result of reasonable use of the property over time.[113]

189. Earlier guidance on fair wear and tear was provided in the 2010 and 2012 policies:

> ...the gradual and expected deterioration of a property or its fixtures and fittings as a result of reasonable residential use of the property over time.[114]

190. The policies require staff to consider the following when assessing fair wear and tear in light of end of tenancy damage:

- information provided in the *Maintenance Product Durability Manual* (1994) as a guide to determine the life expectancy of that item
- the size of the household, particularly the number of children
- the standard of the fixtures and fittings.[115]

191. An assessment of fair wear and tear may require information from the tenant as there may be reasons why an item has worn more rapidly than anticipated, such as high levels of household traffic or poor quality fittings, for example.

192. The *Maintenance Product Durability Manual* provided an expected physical life span of individual components of a property and a replacement cost for each at the end of that life span. This differed from the financial, depreciated value of an asset, and was provided to assist staff when attempting to gauge fair wear and tear.[116]

112 Interview with DHHS Manager A (7 February 2017); Interview with DHHS Team Leader A (7 March 2017).

113 DHS, *Tenant Property Damage,* Version 3.0 (2010) 2–1; DHS, *Maintenance Manual Chapter 5 – Tenant Property Damage* (2012) 13.

114 DHS, *Tenant Property Damage,* Version 3.0 (2010) 2–17; DHS, *Maintenance Manual Chapter 5 – Tenant Property Damage* (2012) 13.

115 DHS, *Tenant Property Damage,* Version 3.0 (2010) 2–17, 2–18.

116 Department of Planning and Development, *Maintenance Product Durability Manual* (1994) 1.

193. The Maintenance Product Durability Manual was superseded by the *Housing Standards Policy Manual 2010* and other maintenance and re-letting guides. However, the department's policies have not been updated to provide guidance for local housing staff on how to use these documents when assessing fair wear and tear.[117] The 2015 Guidelines do not include specific instructions for local housing staff about how to consider the tenant's individual circumstances when assessing damage to items that have deteriorated more quickly than normal fair wear and tear.

194. For the most part Team Leaders and Managers interviewed during the investigation were uncertain about the calculation and application of depreciation and fair tear and tear to maintenance claims. One Manager indicated the source of this confusion:

> Fair wear and tear is left up to individual assessment. It's common sense based on the occupants. For example, six kids in the family versus elderly and alone. There's no training on how to apply discretion or how to apply policy. The issue is it is all subjective; it's about a person's interpretation of what it is because there really is no guidance.[118]

195. One Manager commented that they don't know how colleagues in other areas work, saying that the 2015 Guidelines are very broad and differ from the prescriptive nature of the previous policies. The Manager commented that the 2015 Guidelines require managers and staff to apply their own judgment and stated:

> It is a subjective thing and each person looks at it very differently.[119]

196. A Manager from the department's Housing Practice Support Branch said:

> What I think department staff struggle with is fair wear and tear, because that's subjective.
>
> … I don't know if we have equipped our staff with enough knowledge, because it is discretionary sometimes… Sometimes the decisions are made very quickly.[120]

197. Advocacy groups were critical of the department's inconsistent application of fair wear and tear. Consistent with the view of others, the Tenants Union of Victoria commented:

> A lot of housing workers will misunderstand that they can't claim for something that is worthless because of fair wear and tear, even if the tenant has smashed it with a hammer. You know, if a tenant has graffitied a wall where the paint job hasn't been painted for 20 years, well you can't claim that from the tenant.[121]

198. The following case study was submitted by a tenant advocacy service.

117 Email from DHHS Manager E to Victorian Ombudsman (19 July 2017).

118 Ibid.

119 Ibid.

120 Interview with DHHS Manager E (25 January 2017).

121 Interview with Tenants Union of Victoria (2 November 2016).

Case study: Tenant J

Tenant J, a single parent, lived in a public housing property for six years with her five children from April 2008 until mid-June 2014.

Four days after the tenancy ended, photographs were taken by local housing staff showing pen marks and children's drawings on the walls.

In August 2014, the department issued a Notice of the Cost of Repairs letter to Tenant J seeking total cost of $7,148.65. The majority of these charges related to the cost of painting walls and replacing carpet.

A review of the department's files revealed the carpet had not been replaced during the six-year tenancy and the property had not been painted for 10 years. A property condition inspection in 2010 listed the internal painting as having one year of life remaining, and the carpet as having seven years of life remaining.

There was no evidence of a fair wear and tear or depreciation assessment being completed by the department when the maintenance claim was raised in 2014.

There was also no evidence the department considered 'other factors' when raising the claim, such as the property housing five young children.

Tenant J received assistance from a tenancy advocate and the maintenance claim was subsequently amended by the department. The circumstances around the amendment are not clear, however, the initial cost claimed for replacing the carpet was crossed out on the Notice of Cost of Repairs. The revised total of $4,720.02 was handwritten on the bottom of the letter to the former tenant.

Tenant J continued to dispute the maintenance claim. The matter was heard at VCAT in September 2014. VCAT ordered the tenant to pay a total of $98.14 as compensation for replacement of goods and fixtures but not for internal painting or carpet replacement.

The amount ordered by VCAT is 1.4 per cent of the department's original maintenance claim.

199. Adding to the confusion for local housing staff when assessing end of tenancy depreciation and fair wear and tear, are the properties scheduled for programmed works. Programmed works are the department's planned refurbishment of a property after a set time frame.

200. One Manager described the difficulties experienced in trying to obtain information about a property and the age of its assets when that property has been scheduled for programmed works and how that hinders the calculation of depreciation and fair wear and tear:

> A lot of the time when you click on HiiP repairs it will just say 'villa upgrade'. It doesn't give you the works and then we'll have to speak to a … team Manager …and then [they'll] have to go out and request for this file [to] be sent back to us… When you have this and when you have, you know, the other facets of the job… it kind of slips. I think that's an area of improvement that we need to sort of look at.
>
> …
>
> It's a separate file entirely. We used to have it at our office, but now we have to collect [the upgrade file] from archives.[122]

122 Interview with DHHS Manager A (7 February 2017).

201. A Team Leader from a different region also described the time-consuming process of having to manually check an 'upgrade book' relevant to programmed works, to confirm whether the upgrade mentioned in HiiP repairs database has actually been completed:

> I think there could be improvements, what those improvements could be I'm not too sure. But it would be good just to have the ability … to just be able to go in, to be able to click on something and oh yeah, the carpet was done here, the paint was done here …[123]

202. A property scheduled for programmed works is having assets replaced; the assets have been deemed by the department to no longer be useful or of any financial value. In 2017 the Victorian Auditor-General reported that 60 per cent of public housing stock is now over 30 years old and the maintenance liability costs are higher for dwellings aged between 31 and 40 years.[124]

203. Statistics provided by the department indicate that in 2015–16, 2,420 properties were scheduled for programmed works. The department pursued maintenance claims against former tenants for 93 of those properties.[125] The investigation did not review the circumstances leading to those 93 maintenance claims. The difficulties reported by department staff in accessing information regarding scheduled programmed works when calculating tenant liability does however cast doubt on the legitimacy of some of these 93 claims.

204. Prior to the 2015 Guidelines, the department was submitting claims to VCAT for compensation against former tenants for 100 per cent of costs incurred in the repair of vacated properties, without considering fair wear and tear or depreciation.

205. An officer from the Housing Practice Support Branch said that prior to the 2015 Guidelines' development, staff were 'relying on VCAT to depreciate'. That officer also said that, since the implementation of the 2015 Guidelines, staff had been given more guidance in relation to depreciation and fair wear and tear and there had been a 'noticeable improvement' in their application of both when calculating maintenance claim debt.[126]

Table 2: Cost of repairs sought by the department through vacated maintenance claims and the amount escalated to VCAT between 2012 and 2016.

Financial year	Cost of repair for vacated properties	Amount sought at VCAT relevant to those properties	% repair costs sought
2012–13	$5,193,746.10	$5,193,746.10	100%
2013–14	$10,584,775.28	$10,584,775.28	100%
2014–15	$11,455,323.40	$11,285,273.22	99%
2015–16	$9,958,112.57	$9,234,041.01	93%

123 Interview with DHHS Team Leader A (7 March 2017).

124 Victorian Auditor-General's Office, *Managing Victoria's Public Housing* (2017) 14.

125 Email from DHHS Manager E to Victorian Ombudsman (20 December 2016) attachment – *10*.

126 Interview with DHHS Manager E (25 January 2017).

206. Statistics provided by the department suggest that there has been minimal change in the approach to calculating depreciation and fair wear and tear since the introduction of the 2015 Guidelines (see Table 2).[127]

207. The failure to properly assess fair wear and tear and depreciation, and its effect on the VCAT process is discussed later in this report.

Service of maintenance claim documents

208. Ensuring the former tenant is made aware of the formal maintenance claim and how the department has arrived at the assessment is a matter of natural justice and procedural fairness. As stated in *Burgess*:

> If, as I was told he was, the Director was bound to consider criteria for making decision and the procedure for obtaining the tenant's response, as set out in the manual, it follows that those parts of the manual must influence the particular content of the rules of natural justice to be afforded [to the tenant].[128]

209. Section 79 (2) of Residential Tenancies Act permits landlords to serve upon *current* tenants:

- written notice identifying damage the landlord believes to have been caused by the tenant
- actions required of the tenant
- the circumstances under which the landlord can repair the damage at the tenant's expense.[129]

210. Where a landlord identifies damage to a property they believe to be the responsibility of a *former* tenant, the Residential Tenancies Act also allows the landlord to seek compensation for the costs of repairing the damage.[130]

211. Under VCAT rule 7A.10, the landlord must specify the loss or damage caused by the former tenant and must include a copy of the Tenancy Condition Report. The creation of this report, however, is contingent upon the payment of a bond, something not required of public housing tenants.

212. As a result, the department is not required to produce a tenancy condition report for these proceedings.

213. Despite this, all the department's policies reviewed by the investigation require the department to advise former tenants in writing of maintenance claims raised against them. This is done through a Notice of Cost of Repairs letter (also previously known as a Cost of Repairs letter), the same letter used to comply with section 78 and 79(2) when communicating with current tenants.

214. For current tenants, department policies require 17 days to elapse after the service of the Notice of Cost of Repairs letter before an application can be made to VCAT. This is not applicable for vacated tenancies, so legal proceedings at VCAT can commence immediately, something that was expressly permitted under previous department policy.[131]

127 Email from DHHS Manager E to Victorian Ombudsman (12 September 2016).

128 *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 [199].

129 *Residential Tenancies Act 1997* (Vic) ss 78(1), 79(2).

130 *Residential Tenancies Act 1997* (Vic) s 210.

131 DHS, *Tenant Property Damage,* Version 3.0 (2010) [2.5.7] – [2.5.8].

215. The *Maintenance Charge Against Tenant HiiP user guide*[132] issued in April 2016, states that the Costs of Repairs letter is served on the former tenant by registered post. This guide states:

> To begin legal action the maintenance claim status must be "Served cost of repairs" or "Signed acceptance of liability received".[133]

216. Service of VCAT documents to former tenants is addressed in the VCAT section of this report.

217. Regardless of the timing of service, all advocacy groups that made submissions to the investigation identified the service of letters as a consistent issue. They stated that former tenants were not receiving maintenance claim related correspondence because the department sends it to an incorrect address, often the public housing property the tenant has vacated.[134]

218. Team Leaders and Managers interviewed confirmed this to be standard practice.[135] One Team Manager said:

> ...when it's vacated and we don't know where they go, that's where we fall really short because then we only serve it to the last known address, which is our property.[136]

219. A Team Leader from a different region said:

> ...if they have provided a forwarding address we send it there or if not we send it to the vacated address.
>
> ...At the moment, if we've got the address in front of us, that's what we send it to.[137]

220. Although the practice of sending correspondence to the respondent's last known address is technically compliant with relevant legislation,[138] that the department often does so in full knowledge that the respondent no longer resides there appears token. A Team Leader said:

> It's the last known address that we had... We know they didn't get it, but we have followed the process. This is the last known address that we have for them.[139]

221. None of the Managers or Team Leaders interviewed knew whether they could source a former tenant's current contact details from other divisions of the department, such as Child Protection, Disability Services or the Victorian Housing Register.[140]

...when it's vacated and we don't know where they go, that's where we fall really short because then we only serve it to the last known address, which is our property.

Department Team Manager

222. The following case study was submitted by a tenant advocacy service.

132 DHHS, above n 29, 36–37.

133 Ibid.

134 Email from Justice Connect, Homeless Law to Victorian Ombudsman (November 2016) attachment – *Through the roof: Improving the Office of Housing's policies and processes for dealing with housing debts* 26.

135 Interview with DHHS Manager C (27 February 2017); Interview with DHHS Team Leader A (7 March 2017); Interview with DHHS Manager B (17 February 2017); Interview with DHHS Manager A (7 February 2017).

136 Interview with DHHS Manager A (7 February 2017).

137 Interview with DHHS Team Leader A (7 March 2017).

138 *Residential Tenancies Act 1997* (Vic) s 506(1)(c).

139 Interview with DHHS Manager C (27 February 2017).

140 Interview with DHHS Team Leader A (7 March 2017); Interview with DHHS Manager B (17 February 2017); Interview with DHHS Manager D (21 March 2017).

Case study: Tenant L

Tenant L lived in a public housing property for five years from October 2010 to January 2015.

In January 2015, she was living at the property with her partner and four young children when their home was invaded by a neighbour who damaged the property with weapons.

Tenant L and her family left the property and moved in with her parents. The incident was reported to police and a protection order was arranged for Tenant L and her family.

That same month, Tenant L's support worker wrote to the department requesting an urgent transfer for the family. The letter included a copy of the police report and the investigating officer's contact details.

In April 2015, the department met with Tenant L to discuss terminating her tenancy. Tenant L expressed her fears about returning to the property and said she had been told that child protection services would remove her children if she and her partner returned there. Tenant L did not want to terminate the lease until she had been transferred to another property. Tenant L also provided the department with contact details for her disability outreach worker.

In May 2015, the department applied to VCAT for possession of the property based on Tenant L's tenancy breaches and rental arrears. All correspondence was served at the property the department knew Tenant L was not living in. Tenant L did not attend the hearing, which was adjourned to allow Tenant L's support worker to attend.

In May 2015 Tenant L's children were removed from her care, and she and her partner moved into a caravan park.

The department issued Tenant L with a Notice of Cost of Repair letter seeking $869.12 for replacement of the gas stove at the property. Once again, the letter was served on Tenant L by registered mail to the property she had left.

In June and July 2015 further incidents of violence occurred at the property. Tenant L's parents were threatened by a third party and her cousin was fatally stabbed. In July 2015 Tenant L sought the assistance of a tenant advocacy service. Her advocate applied for an urgent property transfer for Tenant L and her family on the basis that their housing was unsafe.

In August 2015 VCAT ordered Tenant L pay the $869.12 claimed by the department for the replacement of the stove. Tenant L did not appear at the hearing.

Department records indicate the tenant's application for a transfer was approved in October 2015 but no transfer arranged as the department was unable to find a suitable property in her preferred area. In November 2015 the department obtained further VCAT orders to evict Tenant L from the original property for rental arrears.

In March 2016 the department applied to VCAT for the further cost of repairs to a heater at the property. The department again served the Notice of Cost of Repairs on the tenant by registered post at the same property they had been evicted from the previous year. Tenant L did not appear at the VCAT hearing in March 2016 at which costs were ordered against her for $1,457.89 for replacement of the heater.

In June 2016 the tenant wrote to the Minister for Housing, Disability and Ageing complaining she had still not been transferred to safe housing. Tenant L and her children were eventually allocated another public housing property in July 2016.

In July 2016 Tenant L's advocate applied to have the maintenance claim matter reheard at VCAT, but the application was dismissed in September 2016 after Tenant L failed to appear on three occasions.

In September 2016 the advocate contacted the Ombudsman, complaining about the department's conduct in relation to the maintenance claim. After enquiries with the department the maintenance claim debt was reviewed and waived.

223. The department's practice of only communicating with current and former public housing tenants via post was considered during the 2010 *Inquiry into the Adequacy and Future of Public housing in Victoria*. This report by the Family and Community Development Committee of the Parliament of Victoria (the Committee) noted:

    - Evidence from the Mental Illness Fellowship and Justice Kevin Bell (who was then VCAT President) illustrated that a reliance on postal correspondence to communicate matters regarding rental affairs by the department and VCAT is not ideal for some public housing residents, who are often reluctant to open mail from the department.
    - Department policy includes processes that encourage housing staff to make contact with tenants by phone.[141]

224. The Committee recommended the Victorian Government introduce greater flexibility in its communication with tenants, such as the introduction of short message service (SMS) alerts.[142]

Quality of correspondence

225. The investigation reviewed correspondence sent by the department relating to maintenance claims. Prior to 2016, this correspondence did not clearly inform a former tenant of the reasons for the decision or their right to seek a review.

226. The correspondence:

    - provided a list of the items and cost of their repair or replacement
    - stated that the department believed the former tenant was responsible for these costs
    - provided contact details for the relevant HSO, who could provide the tenant with a list of tenancy services available in their area
    - informed the former tenant that VCAT action will be taken if the tenant did not accept liability for the cost of repairs
    - provided contact details for Consumer Affairs if the former tenant needed help with the letter.[143]

227. Up until 2014, the department's Notice of Cost of Repairs letters were written only in English.[144] In 2014, a page of translated information in ten languages was included, consistent with the demographic of public housing tenants. It states:

> If you need help to complete (fill out) this letter, contact your Housing Office to get help. Also, you could call the Public Housing Language Link on 9280 0796 to connect you with the Housing Office through an interpreter.[145]

141 Family and Community Development Committee, Parliament of Victoria *Inquiry into the Adequacy and Future of Public Housing in Victoria,* (2010) 246–247.

142 Ibid 247.

143 DHS, *Tenant Property Damage,* Version 3.0 (2010) 2–28; DHS, *Maintenance Manual Chapter 5, Tenant Property Damage* (2012) 22; DHS, *Introduction to Maintenance Claim's Workbook,* Version 2 (2012).

144 DHS, *Tenant Property Damage,* Version 3.0 (2010) [2–28]; DHS, *Maintenance Manual Chapter 5 Tenant Property Damage* (2012) 22; DHS, *Introduction to Maintenance Claims Workbook,* Version 2 (2012) 24.

145 DHHS, Notice of Cost of Repair letter sent to former tenant (14 July 2016).

228. Until 2016, the Notice of Cost of Repairs letters were more like a letter of demand and did not clearly set out the options available to a former tenant if they disputed the charges. An advocate from Justice Connect Homeless Law said:

> Given that literacy can be a real issue for people, it's receiving a letter that … here's this list of items that you are responsible for and here is the debt. It's not a very effective way of engaging anyone because people are just overwhelmed instantly if they are actually able to read the letter.[146]

229. The 2016 version of the Notice of Cost of Repairs letter goes some way to rectifying the shortcomings detailed above by including information about the options available to former tenants who want to dispute the maintenance claim:

> If you do not agree that you are responsible for the damage and its associated cost, or have additional information that might show that you are not responsible for the repair costs, please contact the [local housing office] on [phone number] as soon as possible. You will need to provide evidence to support your claim.
>
> For further information, you can contact Consumer Affairs Victoria on [phone number]. You may also choose to have an independent representative or support person to support you if you wish to discuss the items you are being charged with.[147]

230. The current Notice of Cost of Repairs letter also gives the former tenant 17 days (14 days + 3 days delivery) to respond to the Notice of Costs of Repairs Letter and accompanying Acceptance of Liability form before an application is made to VCAT.[148]

231. Despite these improvements the letter does not include any information about how the department made the decision, or what rights the former tenant has to seek a review.[149]

232. On this issue, Victoria Legal Aid commented:

> [The] VCAT letter, could inform them of their rights rather than just accusing them of owing money.[150]

233. Victoria Legal Aid suggested that the correspondence to former tenants could be improved by:

- including a copy of the condition report from the start of the tenancy
- including an additional column in the table that identifies the alleged breach by the tenant
- including a standardised factsheet that sets out what the department can and cannot claim in a maintenance claim.[151]

234. Justice Connect Homeless Law also suggested using other means of communication, such as phoning or texting, to close the current communication gap with former tenants, rather than a 'very official looking letter'.

146 Interview with Justice Connect, Homeless Law (2 November 2016).

147 DHHS Notice of Cost of Repair letter sent to former tenant (14 July 2016).

148 Ibid.

149 Ibid.

150 Interview with Victoria Legal Aid (24 October 2016).

151 Ibid.

Review prior to VCAT

235. Where the former tenant does become aware of the maintenance claim debt and wishes to dispute it, department policy and procedures have always permitted staff to review, alter or withdraw the maintenance claim charges up to and including the date of the scheduled VCAT hearing.[152] The former tenant can address this dispute as a formal appeal or otherwise as a less formal approach to the department.

236. The Housing Appeals Office provides an avenue for appeal for a tenant (in highly limited circumstances):

> … when they disagree with a decision made by the Department.[153]

237. The circumstances under which the Housing Appeals Office can hear appeals relevant to maintenance claims are highly restricted and discussed later in this section of the report.

238. It is unclear from the department's policies and procedures however, how an 'appeal' differs from a less formal 'local resolution' or 'negotiation'. In the absence of any formal distinction, the department's policies and procedures further confuse the issue when they state:

> The appeals process is not intended to replace existing local practices of negotiation and resolution.[154]

239. Further, there is no guidance in the policies and procedures reviewed by the investigation as to how an informal request for any such review or negotiation should be submitted to the department, or how it should be recorded.

240. Up until February 2015, the decision to reverse a maintenance claim charge could be made by staff with appropriate financial delegation as follows:

- up to $10,000 – Team Manager
- between $10,000 – $15,000 – Housing Services Manager
- between $15,000 – $25,000 – Housing Manager.[155]

241. The local housing office could reverse charges if:

- the tenant was not responsible for the maintenance works
- the damage is found to be beyond the reasonable control of the tenant
- the damage was attributable to the gradual and expected deterioration of the property or its fixtures and fittings as a result of reasonable residential use of the property over time
- there are mitigating circumstances under which the tenant cannot reasonably be held accountable for damage
- there is insufficient evidence to support the claim.[156]

152 DHS, *Tenant Property Damage,* Version 3.0 (2010) [2–13], [2–15]; DHS, *Maintenance Manual Chapter 5 – Tenant Property Damage* (2012) 10 – 11; DHHS, *Maintenance Charge(s) against the Tenant(s) (MCA) HiiP User Guide* (2016) 41; DHHS, *Tenant property damage operational guidelines* (2015) 9.

153 DHHS, *Business Practice Manual – Housing Appeals Business Practice Manual, Housing Appeals* (2015) 6.

154 Ibid 9.

155 DHS, *Introduction to Maintenance Claims Workbook,* Version 2 (2012) 13.

156 Ibid 10.

242. Since the implementation of the 2015 Guidelines, department staff are expected to exhaust all avenues for a local resolution before applying to VCAT. Regarding negotiation, department policy states:

> Where the tenant is not disputing the entire claim, HSOs are able to negotiate a reduced claim amount with the tenant.
>
> In negotiating a reduced claim, HSOs must consider any mitigating circumstances put forward by the tenant, together with factors that would ordinarily be contemplated by VCAT such as fair wear and tear.[157]

243. This emphasis on reviewing and negotiating is consistent with the Victorian Government Model Litigant Guidelines, which require public authorities to:

> …consider seeking to avoid and limit the scope of legal proceedings by taking such steps, if any, as are reasonable having regard to the nature of the dispute, to resolve the dispute by agreement, including participating in appropriate dispute resolution (ADR) processes or settlement negotiations.[158]

244. Data provided by the department indicates however, that formal appeal of maintenance claims is uncommon, with only six 'appeals' relevant to maintenance claims recorded between 2014–15 and 2015–16.[159]

245. It appears the more common requests the department receives, often through tenant advocacy services, is to 'locally resolve' or 'negotiate' the value of a maintenance claim.

246. Of the 19 case files reviewed by the investigation, 18 involved negotiation. The investigation was made aware of many more cases where negotiation was sought by a former tenant or their advocate. As mentioned, the department's correspondence fails to inform former tenants of their right to submit an appeal against such decisions, and this is likely a key reason this formal avenue of review is underused.

247. Regardless of the category of review or appeal, tenant advocacy services reported the department habitually denies former tenants the right of review or negotiation once a VCAT application has been submitted.[160]

248. Advocates also provided evidence that the department is often unwilling to provide former tenants with the information it relies on to support its maintenance claims to VCAT, and instead directs them to submit a Freedom of Information request.

157 DHS, *Tenant Property Damage,* Version 3.0 (2010) [2–13]; DHS, *Maintenance Manual Chapter 5 – Tenant Property Damage* (2012) 10; DHHS, *Tenant property damage operational guidelines* (2015) 2.

158 Department of Justice and Regulation, *Victorian Model Litigant Guidelines* (2011).

159 Email from DHHS Manager E to Victorian Ombudsman (25 November 2016,4:15pm).

160 Interview with Justice Connect, Homeless Law (2 November 2016); Email from the Tenants Union of Victoria to Victorian Ombudsman (October 2016) attachment – *Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts*; Interview with the Victorian Public Tenants Association (26 October 2016); Email from the Victorian Public Tenants Association to Victorian Ombudsman (August 2016) attachment – *Victorian Ombudsman 'own motion' investigation into the Office of Housing*; Email from Victoria Legal Aid to Victorian Ombudsman (October 2016) attachment – *Investigation into Office of Housing management of maintenance debts, Submission to the Victorian Ombudsman* 5–6.

249. Justice Connect Homeless Law reported:

> ...the [department] is often reluctant to provide a tenant or their representatives with the evidence [they] will be relying on at the VCAT hearing. There have been numerous occasions where [department] employees have informed Homeless Law that they cannot provide the documents requested except through a request under the Freedom of Information Act. 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 [department's] role as a model litigant and generates unnecessary inefficiencies and delays.[161]

250. An advocate with the Tenants Union of Victoria commented:

> I have had matters where I've, more than once, had to FOI their documents to obtain the information that I need because they won't give it to me. So, my client is saying 'I didn't' do that, I asked them to fix that seven times and they just patched it, never fixed it', or 'I reported that family violence – they should have that on their records' .... and [I] ask housing to check their system, and they say, 'no I can't give you that' [so] I have no choice but to FOI the documents to defend the claim that they should have checked in their own system in the first place.
>
> ...I understand why they're not giving file notes, but they should be applying their policy with the file notes that [they] have.[162]

251. An advocate with Justice Connect Homeless Law stated at interview:

> I think it's much more difficult for our clients. I mean, I think we [advocates] have enormous difficulty [obtaining information from the department] and it worries me that as lawyers if we're having such difficulty, sometimes even getting a response from [the department] ... well then how is it for our clients? And the feedback really is ... for the most part, they don't get anywhere.[163]

252. The following case study was submitted by a tenant advocacy service. It illustrates the department's failure to negotiate prior to, and after, the VCAT hearing despite their ability to do so.

161 Justice Connect, Homeless Law, *Through the roof: Improving the Office of Housing's policies and processes for dealing with housing debts* (November 2016) 27.

162 Interview with Tenants Union of Victoria (9 November 2016).

163 Interview with Justice Connect, Homeless Law (2 November 2016).

Case Study: Tenant D

Tenant D lived in a public housing property for about 14 years, from April 1999 to November 2013, when she was transferred to another public housing property to allow the department to sell her initial home.

Tenant D said:

> ... the lady that we spoke with [from the department] said 'just leave the house as it is. You're not going to be charged anything. Don't worry because we want you to move because we want to sell this house.[164]

Tenant D and her partner still cleaned the property and contacted the local council to ensure the rubbish bins were collected before they vacated the property.

The tenancy was terminated with keys returned in late November 2013. Department files indicate the property was inspected and photographs taken by local housing staff in late November, four days after the property was vacated.

In March 2014, the department applied to VCAT seeking $1,182.70 compensation from the tenant for rubbish removal, trimming of trees and cutting grass. There is no indication in the department's file that discussion or negotiation took place with the tenant in the interim. The tenant's partner contacted the department to discuss the maintenance claim when they received the VCAT letter but was told that it was now up to VCAT to determine.

At the VCAT hearing in May 2014 the department relied on the photographs showing rubbish and overgrown grass. Tenant D disputed the claim. After considering the evidence, the VCAT member ordered Tenant D to pay $40 for mowing the grass. Tenant D made the payment and believed the matter had been finalised.

In July 2014, two months after the original VCAT decision, and seemingly without the tenant's knowledge, the department successfully applied to VCAT to have the initial orders amended, leaving Tenant D to pay the department $1,124.25.

Tenant D advised:

> ...We didn't leave it in a mess. Like I said, we rang the Council to get rid of the rubbish and all this, and then seven months later, out of the blue, to get a thing from VCAT to say that we owe them $1,120, was just, we couldn't believe it.[165]

After making an initial payment of $20 towards the debt in August 2014, Tenant D was contacted by a debt recovery agency about making further repayments. Tenant D then sought the assistance of a tenant advocate who discovered the July 2014 amended application.

The tenant advocate requested a copy of the audio transcript of the original May 2014 hearing on behalf of Tenant D to clarify the issue. A review of the transcript confirmed that the original verbal orders from the VCAT Member were:

> ...having heard the evidence of the tenant, I order the tenant to pay the landlord as per works order dated 26 November 2013 and I am going to reduce it to $40.00 which will be about the cost of the lawn mowing and that will be your liability.

In December 2014, the tenant advocate requested the department consent to having the orders amended to reflect the orders made on 7 May 2014.

In January 2015, the department responded to the tenant advocate adamant that the amended order from July 2014 was correct and that the tenant owed it $1,124.25. The tenant advocate applied to VCAT seeking the correction of mistakes.

In March 2015, the amended orders were sent via email showing that VCAT's order from May 2014 stood and Tenant D was no longer required to make payments to the department.

The initial claim was $1,182.70 but VCAT ordered Tenant D to pay $40; 3.38 per cent of the initial claim.

164 Interview with Tenant E (telephone 20 April 2017).

165 Ibid.

253. While emphasising negotiation and review, the 2015 Guidelines are written in such a way as to indicate that these options are only available to current tenants. The process for vacated tenants is covered in a separate section that does not include any reference to negotiation and review.[166] At interview, a department Policy Manager acknowledged this ambiguity, stating:

> ...[the] vacated tenancy section is unclear; not written well. It is not supposed to be separate from the normal tenancy area.[167]

254. The same Policy Manager said there is also confusion among department staff about the options available to them to resolve maintenance claims:

> I still find people that didn't know that for vacants [sic] you don't have to go to VCAT.
>
> ...
>
> We need to be clearer about not going to VCAT.[168]

255. Further adding to the ambiguity around negotiation and review is the implementation of the department's *Business Practice Manual* of July 2015. The manual came about because of the Victorian State Government's obligations under the *Commonwealth State Housing Agreement (2003–2008)* which was subsequently superseded by the *National Affordable Housing Agreement* of January 2009.[169] The manual's purpose is to provide a formal, consistent process of review for housing clients around decisions made by the department and the proper application of policy around these appeals. It offers the following advice:

> Issues relating to tenant responsibility maintenance charges can be appealed, regardless of whether or not the matter has gone to VCAT, if the charges are being contested on the basis that damage was caused as a result of criminal activity or a medical condition. **If the tenant is contesting the charges on other grounds (i.e. fair wear and tear, not responsible for the damage, etc) the matter is considered non-appealable and referred to VCAT for resolution.**[170] [Emphasis added]

256. This clearly conflicts with previous policy and the prevailing emphasis on local resolution that is the cornerstone of the 2015 Guidelines. While the Business Practice Manual provides a process for review, in reality it recognises very few grounds under which former tenants would be contesting a maintenance claim.

166 DHHS, *Tenant property damage operational guidelines* (2015) 11.

167 Interview with DHHS Manager E (25 January 2017).

168 Ibid.

169 See Department of Social Services (Cth), *National Affordable Housing Agreement* (2009).

170 DHHS, *Business Practice Manual – Housing Appeals* (2015) 10.

257. Where the former tenant is able to appeal, but is still dissatisfied with the outcome, the Business Practice Manual alerts staff to external avenues of complaint available to the applicant, namely:

- the Minister
- VCAT
- the Victorian Ombudsman
- Victorian Equal Opportunity and Human Rights Commission.[171]

258. Six of the eight department Managers and Team Leaders interviewed said it is common for department staff, when receiving maintenance claim appeals, to tell appellants that their dispute has to be decided in VCAT.[172] Again, this is contrary to department policies on local resolution. It is also not the action of a Model Litigant.

259. The views provided by advocacy services to the investigation on this issue are best summarised by the Victorian Public Tenants Association, which said:

> … [the department's] decision making as to who should be held responsible for repairs has been outsourced to VCAT.[173]

260. One department Manager commented that when recent practice instructions were circulated among staff, many responded they were unaware they could resolve maintenance claims without involving VCAT, despite this having been a long-standing policy within the department.[174]

261. At interview, an advocate from Victoria Legal Aid said:

> What I find frustrating is an unwillingness or seeming inability [for the department's representative] to provide further evidence or get into the actual liability on the part of the tenant, and quite often you hear 'we'd prefer the member to make the decision' or 'leave it to the Tribunal' or 'we require an order for the file' … there's no vetting of liability, there's just a transferal to VCAT to decide the issue.[175]

262. If a review does take place and a reduced debt is agreed by both parties, department policy has historically required staff to still have the agreed amount ratified by VCAT.[176] Despite this requirement having been removed from the department's policies since early 2015,[177] the investigation identified that ratifying agreements via VCAT continues to be a common practice.

263. This practice needlessly consumes the resources of the department, VCAT, the former tenant and their advocacy group. Simply having the tenant sign a 'Liability Acceptance Form' avoids this.

171 Ibid 12.

172 Interview with DHHS Manager C (27 February 2017); Interview with DHHS Manager D (21 March 2017); Interview with DHHS Manager B (17 February 2017); Interview with DHHS Manager E (25 January 2017).

173 Email from Victorian Public Tenants Association to Victorian Ombudsman (August 2016) attachment – *Victorian Ombudsman 'own motion' investigation into the Office of Housing*.

174 Interview with DHHS Manager E (25 January 2017).

175 Interview with Victoria Legal Aid (26 October 2016).

176 DHS, above n 131, [2–13].

177 DHS, *Maintenance Manual Chapter 5 – Tenant Property Damage* (2012) 10; DHHS, *Tenant property damage operational guidelines* (2015).

VCAT

Legislation and policy

264. The Residential Tenancies Act provides for both landlords and tenants to apply to have alleged breaches under the Act heard and determined by VCAT if they consider the other party has breached its obligations under a formal tenancy agreement.[178] In relation to property damage, landlords such as the department can apply for compensation where they consider the former tenant has breached their obligations to:[179]

- avoid damaging the rented premises
- maintain the cleanliness of the rented premises
- avoid installation of fixtures to the rented premises without consent.[180]

265. VCAT has jurisdiction to hear and determine an application under the Act relating to:

(a) any matter arising in relation to a tenancy agreement or a proposed tenancy agreement of premises situated in Victoria; and

(b) any matter arising in relation to a residency right under this Act [the RTA].[181]

266. VCAT is restricted to hearing matters up to $10,000,[182] unless all parties to the application authorise it in writing to hear matters involving larger amounts.[183] Despite this, the Residential Tenancies Act provides an avenue for landlords to bypass this requirement for written consent[184] and apply for compensation from former tenants for amounts in excess of $10,000. This is a practice referred to in department procedures and ratified by case law.[185]

267. Under the Limitation of Actions Act,[186] a landlord has six years to pursue legal action for compensation from a former tenant for damage to a rental property. This timeframe is referred to in earlier department policies, but is not mentioned in the 2015 Guidelines.

Model Litigant Guidelines

268. Where the department believes it has a legislative basis for pursuing a debt through VCAT, it should first consider whether any such action is consistent with its obligations under the Model Litigant Guidelines.

178 *Residential Tenancies Act 1997* (Vic) s 452(1).

179 *Residential Tenancies Act 1997* (Vic) s 210(1)(a).

180 *Residential Tenancies Act 1997* (Vic), ss 61, 63, 64.

181 Ibid s 446.

182 Ibid s 447(1A)(a).

183 Ibid s 447(3).

184 *Residential Tenancies Act 1997* (Vic) s 507A(2) states that the provisions of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) apply to the Residential Tenancies Act, allowing a person who suffers loss or damage to bring a claim in accordance with section 217 of the Australian Consumer Law and Fair Trading Act.

185 DHS, *Introduction to Maintenance Claim's Workbook,* Version 2 (2012) 17; *Director of Housing v Young (Residential Tenancies)* [2002] VCAT 227.

186 *Limitation of Actions Act 1958* (Vic) s 5(1)(a).

269. The Model Litigant Guidelines set out the standards for how the State of Victoria and its departments and agencies should behave as a party to legal proceedings. They include requirements to:

- act fairly in handling claims and litigation brought by the State or an agency[187]
- consider seeking to avoid and limit the scope of legal proceedings by taking such steps, if any, as are reasonable having regard to the nature of the dispute, to resolve the dispute by agreement, including participating in appropriate dispute resolution processes or settlement negotiations.[188]

270. When dealing with vacated tenancies, the Tenant Property Damage Policy requires local housing staff to seek an order for compensation from VCAT[189] when:

a) there are any unsubstantiated charges (maintenance claims) on the vacated account

b) there are any TR [Tenant Responsibility] charges on the account that have not yet been ratified by VCAT, or

c) when there is a mixture of both substantiated (TR) and unsubstantiated (MCAT) charges on the account.[190]

271. In short, this policy requires the use of VCAT to ratify all vacated tenancies where dispute remains about the debt and where the former tenant has not signed a payment plan settling that debt.

272. The department's 2012 Maintenance Manual and the 2015 Guidelines are consistent with the requirements of the Tenant Property Damage Policy in this regard, albeit with reference to 'unsubstantiated maintenance claims' when describing ongoing dispute around maintenance claims and lack of a formal payment arrangement.[191] The 2015 Guidelines also emphasise alternatives to VCAT, including negotiation and consideration of human rights.

Propensity to use VCAT

273. Between 2013–14 and 2015–16 the department was the largest individual litigant of residential tenancy claims. On its own, the department comprised over 20 per cent of the VCAT Residential Tenancies List, about a third of the total matters brought by all real estate agents representing private landlords combined.[192] This is despite the department as a landlord only being responsible for about 12 per cent of Victorian rental tenancies. Of the 15,990 public housing tenancies vacated over that period, the department submitted 5,866 (37 per cent) applications to VCAT relevant to vacant tenancy maintenance claims.[193]

187 Department of Justice and Regulation, *Victorian Model Litigant Guidelines* (17 January 2017) 2(a) < http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines>.

188 Ibid (2)(f).

189 Pursuant to s 210 of the *Residential Tenancies Act 1997* (Vic).

190 DHS, *Tenant Property Damage,* Version 3.0 (2010) [2–21].

191 DHS, *Maintenance Manual Chapter 5 – Tenant Property Damage* (2012) 5; DHHS, *Tenant property damage operational guidelines* (2015) 10.

192 Victorian Civil and Administrative Tribunal, *Annual Report 2015–16* (2016).

193 Email from DHHS Manager E to Victorian Ombudsman (21 April 2017, 4:32pm); Email from DHHS Manager E to Victorian Ombudsman (12 September 2016, 4:41pm).

Applying to VCAT and service of VCAT documents

274. The process to apply to the VCAT Residential Tenancies List is set out in the *VCAT Residential Tenancies List Application: Landlords Guide (General Application Form)*. The guide is referenced in department policies as the relevant guide for department staff making an application to VCAT.[194] The guide has been developed to provide advice consistent with requirements under the *Victorian Civil and Administrative Tribunal Rules 2008,* and requires an applicant to send a copy of the completed application to VCAT and:

> ...serve it on the other side/s (the respondent), preferably by registered post.[195]

275. The guide requires 'reasonable efforts' be made by the applicant to locate the address of all parties to the VCAT proceedings and emphasises the importance of providing accurate respondent details when it states:

> ...VCAT must send a notice of the hearing date to the address of the parties as provided by you in the application.[196]

276. Until 2015, department policies required staff to apply to VCAT immediately following repairs having been completed to a vacated property and upon receipt of the relevant contractor invoice.[197] Despite the VCAT Guide and department policy requiring staff to engage with former tenants around end of tenancy property damage as a first step, tenancy advocacy services reported a regular, ongoing practice of applications being submitted to VCAT on the same day end of tenancy maintenance claims are raised.[198] In its review of the 19 department files, the investigation confirmed an application had been made to VCAT on the same date the maintenance claim was raised in six, or one third, of those cases. In the words of one policy Manager:

> It's easier to go to VCAT, it takes less time.[199]

277. This practice does not accord with the department's obligations as a Model Litigant.

278. Whilst the HiiP database restricts local housing staff from generating a VCAT application within 17 days of sending a Notice of Cost of Repair letter in current tenancies, there is no such system restriction on the creation of VCAT applications for vacated tenancies.[200] This means for vacated tenancies, the Notice of Cost of Repair letter and the application to VCAT can be sent on the same day.

194 DHHS, *Maintenance Charge(s) against the Tenant(s) (MCA), HiiP User Guide* (2016) 37.

195 Victorian Civil and Administrative Tribunal, *Residential Tenancies List Application: Landlords Guide (General Application Form)* 1 <https://www.vcat.vic.gov.au/resources/application-form-general-application-residential-tenancies-list>.

196 Ibid 2.

197 DHS, *Tenant Property Damage,* Version 3.0 (2010) [2–21]; DHS, *Maintenance Manual Chapter 5 – Tenant Property Damage* (2012) 15–16; DHS *HiiP Tenancy Service Delivery – Plus, Participant Workbook* (2012)*;* DHS *HiiP Tenancy Service Delivery – Plus, Participant Workbook* (2013) 29.

198 Email from Tenants Union of Victoria to Victorian Ombudsman (October 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts*; Email from Carlton Legal Service to Victorian Ombudsman (August 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts*.

199 Interview with DHHS Manager E (25 January 2017).

200 DHHS, *Maintenance Charge Against Tenant HiiP User Guide* (2016) 26.

279. The VCAT guide also suggests using registered post as the best means for an applicant to serve a respondent with the application. The guide states:

> **Handy Tip:** always serve the VCAT application to the respondent by registered post. At the hearing, a registered mail receipt will prove service of the application.[201]

280. The guide provides tips on how to locate a respondent, including use of the electoral roll, phone book and communicating through phone or text.[202] This is not replicated in any of the department's relevant policies and procedures reviewed by the investigation. Few of the Managers and Team Leaders nominated these avenues as sources of information to check the accuracy of contact details.

281. The department's policy for service of VCAT documents on former tenants through registered post is consistent with the direction provided by VCAT,[203] but does not provide guidance for local housing staff about any steps they need to take to confirm the accuracy of a former tenant's current contact details prior to service of these documents.[204]

282. Team Leaders and Managers acknowledged that the address for service of VCAT documents is often the vacated public housing property subject to the VCAT proceedings,[205] an address the tenant left several months or sometimes years earlier. This practice is not questioned by VCAT. One Team Leader said:

> At VCAT we just need to show we are sending by registered post and they accept that.[206]

283. Team Leaders and Managers stated that former tenants often move on without leaving forwarding contact details, and local housing staff are not provided with specific guidance about using other methods for locating former tenants, such as cross checking current contact details with other divisions of the department, or accessing the Victorian Housing Register.[207]

284. The case studies in this report include several examples where the department's failure to adequately confirm the respondent's contact details resulted in former tenants being unaware of the maintenance claim or VCAT proceedings.

201 Victorian Civil and Administrative Tribunal, *Residential Tenancies List Application: Landlords Guide (General Application Form)* 13 (30 August 2017) < https://www.vcat.vic.gov.au/resources/application-form-general-application-residential-tenancies-list>.

202 Ibid 2.

203 DHS, *Tenant Property Damage Policy,* Version 3.0 (2010) [2–22]; DHS, *Maintenance Manual Chapter 5 – Tenant Property Damage* (2012) 15; DHS, *Introduction to Maintenance Claims Workbook,* Version 2 (2012) 15.

204 Ibid.

205 Interview with DHHS Manager A (7 February 2017).

204 Ibid.

207 Interview with DHHS Team Leader A (7 March 2017); Interview with DHHS Manager B (17 February 2017); Interview with DHHS Manager D (21 March 2017).

285. Both the department and tenant advocacy services reported that a high proportion of the department's applications to VCAT are heard in the absence of the former tenant.[208] It was also acknowledged that the current procedures for serving the respondent contribute to their non-attendance. Data from VCAT confirms the non-attendance rate by former tenants in applications brought by the department between 2014 and 2016 was 80 per cent.[209]

286. The investigation was also provided with examples where department staff went ahead with VCAT proceedings despite knowing the tenant could not attend due to other serious commitments. A tenant advocacy service provided this example:

Case Study: Tenant X

Tenant X lived in a public housing property for nearly 25 years. Upon vacating, the department sent Tenant X two maintenance claims totalling $13,012.37. The department lodged an application with VCAT the same day, claiming the full amount.

At the time, Tenant X had serious health issues following a stroke and was awaiting triple bypass heart surgery. As a result, Tenant X could not attend the hearing in 2014 because of an appointment with a surgeon.

Tenant X made the department aware of this, however it proceeded with the VCAT hearing and was granted an order for compensation of $3,778.14.

Tenant X applied to VCAT for a review, which was granted and heard. At the rehearing, the Tribunal was not satisfied the department had proved their claim; awarding only $50 for cleaning and $150 for modifications, repair and removal of items.

The $200 ordered by VCAT is 1.5 per cent of the total originally sought by the department.

208 Email from Inner Melbourne Community Legal to Victorian Ombudsman (October 2016) attachment – *Submission to the Ombudsman's own motion investigation into maintenance charges against tenants (Maintenance Claims)* 6; Email from West Heidelberg Community Legal Service to Victorian Ombudsman (October 2016) attachment – *Victorian Ombudsman Investigation into Office of Housing management of maintenance debts* 5; Interview with Justice Connect, Homeless Law (2 November 2016); Interview with the Victorian Public Tenants Association (26 October 2016).

209 Email from VCAT to Victorian Ombudsman (13 April 2017).

287. The VCAT Rules allow for all parties to apply for an adjournment of proceedings,[210] however the procedures for local housing staff about when to seek an adjournment or withdraw a VCAT application were only included in department procedures as recently as April 2016.[211] Earlier procedures provided guidance on how to renew a VCAT hearing following an adjournment, but did not provide guidance on when an adjournment may be appropriate or how to go about arranging one.[212]

288. A tenant advocacy service said the example of Tenant X seeking a re-hearing at VCAT is rare, because generally public tenants feel powerless and are unaware of their right to seek a review. Consequently, these tenants are not challenging their liability or seeking a rehearing at VCAT, despite having grounds to do so.

289. By proceeding with a VCAT hearing knowing a former tenant cannot attend for legitimate reasons, or without ensuring sufficient effort was made to ensure correspondence had been accurately addressed, the department may be denying its former tenants their right to a fair hearing. Section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* states:

> ...a party to a civil proceeding has a right to have the charge decided by a competent, independent and impartial tribunal after a fair hearing.[213]

290. This right is also articulated in the VCAT *Practice Note – Fair Hearing Obligations* which state:

> The State of Victoria, its Departments and agencies have an obligation to act as a model litigant. In essence, being a model litigant requires that the State, its Departments and agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and Rules of the Tribunal. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.[214]

291. Where the former tenant fails to attend VCAT, VCAT generally makes an order for compensation in the department's favour based on the proceedings being undefended.[215]

292. In March 2015, the West Heidelberg Community Legal Service (WHCLS) began a two-year project examining the attendance rates and co-related outcomes for tenants at VCAT for various claims, including those relevant to maintenance claims. WHCLS found that the department was successful in 92 per cent of the compensation applications where the tenant did not attend, compared to a 50 per cent success rate where the tenants did attend.[216]

293. The WHCLS project also found that the reasons for tenant non-attendance were closely related to the complex health needs and social disadvantage of public housing tenants, who were likely to disengage with the legal processes.[217]

210 *Victorian Civil and Administrative Tribunal Rules 2008* (Vic), r 4.26, 9.01.

211 DHHS, *Maintenance Charge(s) against the Tenant(s) (MCA), HiiP User Guide* (2016) 41.

212 DHS, *Tenant Property Damage,* Version 3.0 (2010) [2–15]; DHS, *Maintenance Manual* (2012).

213 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

214 Victorian Civil and Administrative Tribunal, *VCAT practice note – PNVCAT3 – Fair Hearing Obligation* (2013) <https://www.vcat.vic.gov.au/resources/vcat-practice-note-pnvcat3-fair-hearing-obligation>.

215 West Heidelberg Community Legal Service, *Improving housing and health outcome by understanding and addressing barriers to VCAT attendance* (2017) Appendix B.

216 Ibid.

217 Ibid 32.

294. The WHCLS project trialled a holistic service delivery model to improve attendance rates for their clients. This involved linking legal services to health and community support services. The project found that the most effective way to ensure that those who need legal help can access it was to integrate the offer of legal assistance with other services or organisations with whom disadvantaged and marginalised people are already in contact.[218]

Evidence and disclosure

295. VCAT Rules[219] set out the documents and particulars required for applications for compensation regarding alleged tenancy breaches as follows:

> An application made under section 210 of the **Residential Tenancies Act 1997** must specify—
>
> (a) the date on which the tenant delivered up vacant possession or abandoned the rented premises;
>
> (b) the breach of duty alleged;
>
> (c) the loss or damage caused by the breach; and
>
> (d) the amount of compensation claimed.
>
> An application made by a landlord under section 210 of the **Residential Tenancies Act 1997** for payment of compensation for loss or damage to the rented premises or a failure to keep them in a reasonably clean condition must be accompanied by a copy of the condition report as required by section 35 of that Act prepared in respect of the rented premises.

296. The department provides guidance for local housing staff regarding the preparation and presentation of matters at VCAT. The Tenant Property Damage policy provides staff with a list of items considered to be appropriate evidence at VCAT. These include:

- copies, dates and registered post details of notices served
- photographs
- file notes
- copy of the SC [Schedule of Contract] order
- maintenance claim/TR account action screen dump; and
- details of previous damage.[220]

297. This policy also sets out the information the department expects its officers to present at the VCAT hearing to assist the Tribunal's assessment of the claim. These include:

- the date the subject of the claim was installed or completed e.g. When the carpet was laid, when the stove was installed, when the walls were painted;
- the tenancy start and end date;
- how long a fitting, fixture or surface is expected to last according to the Department's Product Durability Manual;
- notes of discussions with the tenant about the claim, and details of any agreement made with the tenant to reduce the claim;
- an assessment of the depreciated value of items listed on the claim (if any).[221]

218 Ibid 20.

219 *Victorian Civil and Administrative Tribunal Rules 2008* (Vic), r 7A.10.

220 DHS, above n 131, [2–22] – [2–23].

221 Ibid.

298. The Maintenance Manual expands on this list by requiring the production of the beginning of tenancy condition report. The 2015 Guidelines are less prescriptive and require local housing staff tell VCAT about:

- age
- condition
- depreciation (using the Australian Taxation Office depreciation rules)
- fair wear and tear, and
- whether the cost is reasonable.[222]

299. VCAT also expects the applicant to provide the respondent with copies of any supporting documents when serving them with the VCAT application.[223] The VCAT guide for applicants states that all parties to the proceedings:

> ...have a right to know the details of your claim and must receive a copy of ... any supporting documents.[224]

300. Despite this, none of the department's procedures reviewed by the investigation require local housing staff to provide copies of all supporting documents to the respondents in VCAT applications for compensation. Rather, department policy requires staff to send the following information to the former tenant, by registered post:

- a copy of the VCAT application
- a copy of the 'Schedule of Contract' order (i.e. the contractor's scope of works).[225]

301. The department's 2012 *Introduction to maintenance claims Workbook* goes only some way to reflecting the apparent full disclosure intent of the VCAT guide, by listing information required at VCAT in the section on 'Maintenance Claim File and VCAT Preparation Checklist'. This checklist requires local housing staff to have copies of relevant documents in triplicate at the hearing, and implies that earlier service of these documents on the respondent is unnecessary. The checklist indicates documents are not provided unless requested at the hearing. It requires:

> 3 copies ... (one for you, one for chairperson and one for the tenant if requested at hearing).[226]

302. Submissions by tenant advocacy services say it is uncommon for the department to fully disclose to the former tenant (or their advocates) all documents supporting their application.[227]

303. Team Leaders and Managers confirmed that the respondent is provided only the VCAT application and the Schedule of Contract order, unless further information is then sought by either the respondent or their advocate. The department will then provide copies of photographs of the property taken at the final inspection and in some cases, a copy of the initial Tenancy Condition Report.[228]

222 DHHS, above n 26, 9.

223 Victorian Civil and Administrative Tribunal, *Residential Tenancies List Application: Landlords Guide (General Application Form)* (30 August 2017) 13–14 <https://www.vcat.vic.gov.au/resources/application-form-general-application-residential-tenancies-list>.

224 Ibid.

225 DHS, above n 131, [2–22].

226 DHS, above n 155, 18.

227 Email from Justice Connect, Homeless Law to Victorian Ombudsman (November 2016) attachment – *Through the roof: Improving the Office of Housing's policies and processes for dealing with housing debts* 27; Email from Tenants Union of Victoria to Victorian Ombudsman (4 October 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts* 3.

228 Interview with DHHS Manager C (27 February 2017); Interview with DHHS Manager A (7 February 2017); Interview with DHHS Team Leader A (7 March 2017).

304. By failing to disclose all relevant evidence to the respondent (or their advocate) in a timely manner, the department is unnecessarily restricting the potential for negotiation and resolution outside of VCAT, contrary to its own policies and contrary to its obligation as a Model Litigant. This denial of procedural fairness places the respondent at a distinct disadvantage in terms of being able to dispute the maintenance claim.

Applying for the full amount of repair costs

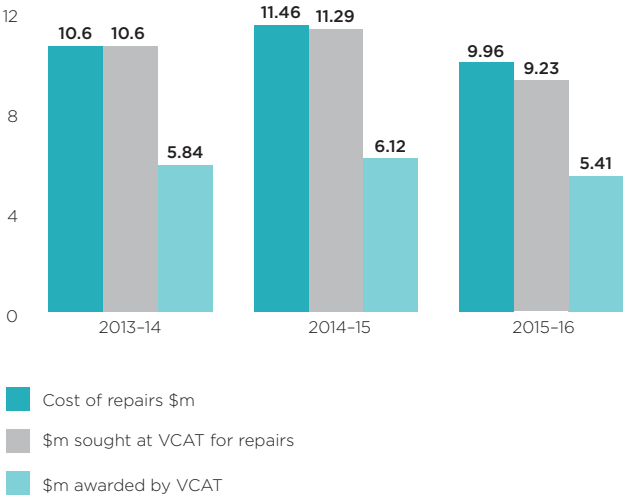
305. If local housing staff fail to consider depreciation and fair wear and tear when assessing the maintenance claim, the application made to VCAT will claim compensation for the full value of all repair and replacement works undertaken. This approach aligns with departmental policies to seek full costs when applying to VCAT.[229]

306. However, when the application is heard at VCAT, it is common for the compensation claim to be significantly reduced or otherwise declined by the Tribunal.

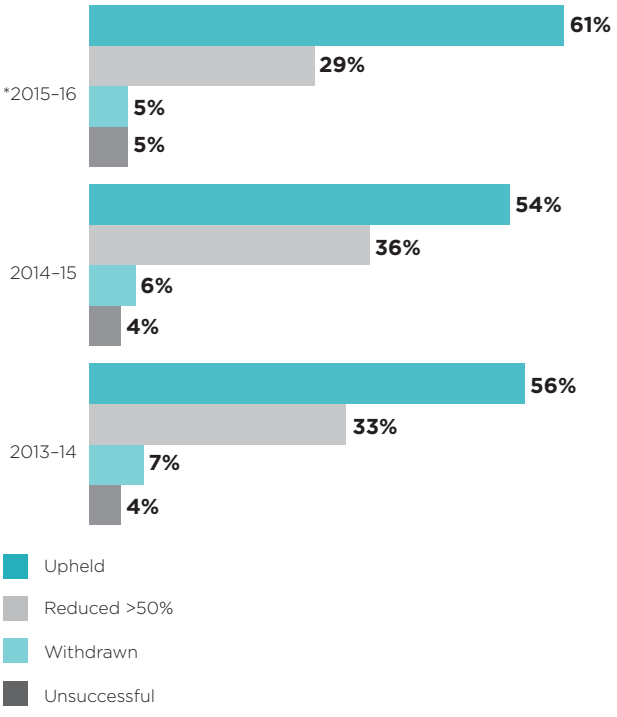
307. Since 2013, about 40 per cent of maintenance claims escalated to VCAT were:

- reduced by VCAT by over 50 per cent
- unsuccessful in that the entire application was dismissed, or
- withdrawn by the department prior to the VCAT hearing.

Graph 2: Cost of Repairs for vacated properties; the amount of cost of repairs sought by the department at VCAT and the amount awarded 2013–14 to 2015–16.[230]



Graph 3: VCAT outcomes for department maintenance compensation claims between 2013–14 and 2015–16.[231]



*60 applications not finalised at the time of writing

229 DHS, *Tenant Property Damage,* Version 3.0 (2010) 11; DHS, *Maintenance Manual Chapter 5 – Tenant Property Damage* (2012) 9.

230 Email from DHHS Manager E to Victorian Ombudsman (12 September 2016, 4:41pm) attachment.

231 Ibid.

308. Tenant advocacy services submitted that these reductions are largely due to VCAT making allowance for fair wear and tear and depreciation not previously deducted by the department.[232]

309. His Honour Justice Greg Garde AO RFD, President of VCAT told the investigation that:

> ...many claims to VCAT are based on the replacement or repair cost as disclosed in invoices obtained by the department from tradespersons without first excluding fair wear and tear or damage for which the tenant was not responsible. Allowance also needed to be made for depreciation having regard to the age and period of use of the item replaced or repaired. As a result, VCAT found it necessary to make deductions from the amounts claimed by the department having regard to these matters.

310. The department's failure to apply these calculations prior to applying to VCAT is contrary to the VCAT Rules, which require an applicant to mitigate any claim for loss or damage by factoring in fair wear and tear and depreciation.[233] It is particularly unfair to respondents who are unaware of the VCAT hearing and do not have an opportunity to dispute the maintenance claim.

311. One tenant advocacy service submitted:

> ...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.[234]

312. The Tenants Union of Victoria added:

> And you would be cynically thinking that all they are doing is going 'we get away with so many of these claims we're not going to turn our mind to it until somebody tries to defend it'.[235]

And you would be cynically thinking that all they are doing is going 'we get away with so many of these claims we're not going to turn our mind to it until somebody tries to defend it'.

Tenants Union of Victoria

232 Email from Inner Melbourne Community Legal to Victorian Ombudsman (October 2016) attachment – *Submission for the Ombudsman's own motion investigation into maintenance charges against tenants (Maintenance Claim's)* 2; Email from Tenants Union of Victoria to Victorian Ombudsman (October 2016) attachment – *Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts* 3; Interview with the Tenants Union of Victoria (2 November 2016); Interview with Victoria Legal Aid (24 October 2016); Interview with the Victorian Public Tenants Association (26 October 2016).

233 *Victorian Civil and Administrative Tribunal Rules 2008*, r 7A.10.

234 Email from West Heidelberg Community Legal Service to Victorian Ombudsman (October 2016) attachment – *Submission to Victorian Ombudsman investigation into Office of Housing management of maintenance debts* 4.

235 Interview with Tenants Union of Victoria (9 November 2016).

313. A tenant advocacy service provided the following case study.

Case study: Tenant K

Tenant K and his spouse lived in the same public housing property for 23 years, from 1991 to 2014.

A review of the department's files revealed that the floor finishes in each room were assessed as being in a 'fair' condition in November 1994, as were the kitchen benchtops and tiling. The property was inspected again in December 2001 and scheduled for programmed works the following year. The property was painted in 2007, and a property inspection in 2009 assessed the remaining life of the carpet as being one year.

In 2013 Tenant K requested the flooring, carpet and benches be replaced, and the property be painted, however the maintenance work order was subsequently cancelled.

In July 2014, Tenant K advised the department he was vacating the property to move into private rental. After cleaning the property and removing their belongings, Tenant K contacted local housing staff to arrange an end of tenancy inspection. Tenant K's advocate told the investigation that the department's response was, 'no inspection would be possible because it was not in accordance with the policy'.[236]

In September 2014, Tenant K was served with a Notice of Cost of Repairs totalling $9,375.77 for:

- removal of rubbish
- cleaning
- new kitchen benchtop
- replacement of drawer
- fitting door stops
- installing blinds
- fitting locks
- replacement of carpet
- painting.

A review of the department's files revealed no evidence of any negotiation with Tenant K prior to lodging a compensation application with VCAT for an order that Tenant K pay the cost of these repairs.

The matter was heard at VCAT in October 2014. The Tribunal ordered the tenant to pay a total of $300 to the department as compensation for the cost of removing rubbish. The other items claimed by the department were dismissed or withdrawn.

The total amount ordered by VCAT is 3.2 per cent of the original maintenance claim issued by the department against Tenant K.

314. The investigation also found that local housing staff continue to refer matters to VCAT for ratification, even where the former tenant has agreed to repay the maintenance debt. The department's practice of using VCAT to ratify the agreement, rather than resolving the dispute locally is contrary to the Model Litigant Guidelines, specifically the obligations of the department to:

> ...consider seeking to avoid and limit the scope of legal proceedings,[237] [and]
>
> ...not requiring the other party to prove a matter which the State or the agency knows to be true.[238]

236 Email from Victorian Public Tenants Association to Victorian Ombudsman (26 August 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing.*

237 Department of Justice and Regulation, *Victorian Model Litigant Guidelines* (30 August 2017) (2)(f) <http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines>.

238 Ibid (2)(g)(i).

Enforcement

315. Once the department has obtained a VCAT order for compensation, it has 15 years to enforce the judgment.[239]

316. The 'Vacated Tenant Arears' division of the Revenue and Accounts Receivable Section (RARS), Finance Services Branch of the department is responsible for vacated tenancy debts.[240] RARS can pursue those debts only where the former tenant has accepted liability or where VCAT has made an order for compensation.[241]

Payment options

317. A debtor and a creditor can make arrangements for the settlement of a debt of their own accord.[242] Department policy provides for the repayment of debts through cheque, direct debit, or a payment card through Australia Post.[243]

318. In the absence of an agreement, a debtor may apply to the Magistrates Court for an order stipulating how the debt is to be repaid and how repayment is to be enforced.[244]

319. The department has the power to write off debts under section 55 of the *Financial Management Act 1994* (Vic).[245] The department defines a debt that has been written off as:

> ...an existing debt that has been archived for accounting purposes only; it remains an active debt repayable to the Director of Housing.[246]

320. In the case of maintenance claims for vacated tenancies, department policy states that a debt can be written off where:

- the former tenant is deceased or bankrupt
- the debt is less than $50
- the debt is less than $200 and the address of the former tenant is unknown[247]
- the debt is deemed unrecoverable.[248]

321. Where the debt exceeds $200 and a current address for the former tenant is not known, RARS are required to conduct an internal database search and attempt to locate the former tenant.[249]

322. A senior Manager of the Accounting Services Division of the department told the investigation that if RARS cannot find a current address for the former tenant, it is department policy for staff to send this correspondence to the last known address; often the public housing property the debtor has recently vacated.

239 *Limitation of Actions Act 1958* (Vic) s 5(4) provides that an action shall not be brought on any judgment after the expiration of fifteen years from the date on which the judgment became enforceable.

240 Director of Housing, DHS, *Instrument of Delegation* (7 December 2012); Director of Housing, DHS, *Instrument of Delegation (Housing Act 1983)* (20 October 2015); Director of Housing, DHS, *Instrument of Delegation (Housing Act 1983)* (19 May 2016); *Ministerial Approval of Delegation, Housing Act 1983* (5 December 2012); *Ministerial Approval of Delegation, Housing Act 1983* (20 October 2015); *Ministerial Approval of Delegation, Housing Act 1983* (11 May 2016).

241 DHS, *Tenancy Management Manual Chapter 18 – Vacated Accounts* (2012) 7 [18.3.5].

242 *Judgment Debt Recovery Act 1984* (Vic) s 11(1).

243 DHS, above n 241, 9.

244 *Judgment Debt Recovery Act 1984* (Vic) s 6.

245 Ibid.

246 DHS, above n 241, 10.

247 Ibid 9.

248 Ibid.

249 Interview with DHHS Manager F (21 April 2017).

323. The same senior Manager told the investigation that RARS obtain this information from the HiiP system and rely upon local housing staff having entered accurate contact details for the former tenant, as RARS do not take steps to confirm the accuracy of these details.[250]

Withholding services

324. The investigation identified that as a result of debt write off or correspondence to former addresses, it is common for former tenants to be unaware of a maintenance debt against them until they require further services from the department.[251] Department policies state that tenants attempting to reengage will have services withheld until they either settle these debts in full, or otherwise enter into a payment agreement.[252] These policies also state:

> Where a tenant vacates with outstanding debt to the Department, any future assistance sought from the Department will be subject to compliance with Departmental debt repayment policies.
>
> Tenants seeking early allocation transfers (e.g. the Homeless with Support category) will be required to meet the outstanding debt repayment requirements applicable to those categories, as outlined in the relevant chapters of the Allocations Manual.
>
> Tenants being transferred under the Department's Relocation Policy are subject to the debt recovery provisions of that process, as detailed in that manual.[253]

325. Further, the Allocations Manual provides for public housing applicants to be denied a place on the Victorian Housing Register based solely on their having not signed a repayment agreement for outstanding debt to the department, even if this debt is still disputed.[254]

326. The practice of withholding the provision of services until a former tenant either pays the debt or enters into a formal repayment agreement was acknowledged as being a widespread practice.[255] One department Manager simply explained this process as:

> If that person's [former tenant] making contact again, they want a service from the department, they're told 'you've got an outstanding debt, you'll have to go on a repayment agreement'.[256]

327. Emergency management housing[257] is the one exemption to this rule and applies when an application relates to:

- emergency housing
- temporary housing
- short-term housing
- donated housing.[258]

250 Ibid.

251 Email from Inner Melbourne Community Legal to Victorian Ombudsman (October 2016) attachment – *Submission for the Ombudsman's own motion investigation into maintenance charges against tenants (Maintenance Claims)* 6; Email from Tenants Union of Victoria to Victorian Ombudsman (October 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts* 12.

252 DHHS, *Allocations manual – Introduction and conditions of public housing offers* (2016) 10.

253 DHS, *Tenancy Management Manual Chapter 18 – Vacated Accounts* (2012) 7.

254 Ibid.

255 Interview with DHHS Manager A (7 February 2017); Interview with DHHS Manager C (27 February 2017).

256 Interview with DHHS Manager C (27 February 2017).

257 The Emergency Management Housing category is for people who have a home that is no longer safe or habitable due to an emergency; a bushfire, flood or storm, for example. It is intended that people can be quickly rehoused if they are unable to return to their home in these circumstances.

258 DHHS, *Allocations manual, Introduction and conditions of public housing offers* (2016) 11.

328. Services will not be withheld by the department for applicants categorised as requiring 'Supported Housing'[259] if the applicant is experiencing family violence or other physical danger, however the requirement to enter into a repayment agreement remains.[260]

329. The requirement to either settle an outstanding debt or otherwise commit to a payment agreement also remains in all other circumstances including where:

- the applicant is currently 'homeless with support'
- the applicant's current residence is 'unsafe', or 'uninhabitable'
- the applicant has urgent medical needs.[261]

330. As noted earlier in this report, the lack of engagement by the department with vacating tenants and minimal attempts to ensure they receive details of pending VCAT hearings and subsequent orders can result in the tenants being unaware of the debt. The department's allocation policy prevents these people accessing safe and affordable housing. As Justice Connect Homeless Law submitted to the investigation:

> Debts, including very old debts, are acting as a barrier to allocation of housing and exiting homelessness.[262]

331. This was an issue brought to the department's attention in the 2010 *Inquiry into the Adequacy and Future of Public housing in Victoria.* The report noted that there were numerous examples of applicants for public housing who, due to mental health issues, alcohol and drug issues and family violence, have a history of outstanding debts that limit them from applying for further public housing. The report also noted:

> A cycle of tenants moving in and out of public housing and holding a history of outstanding debt is emerging as a potential issue. Allocation figures reveal that in July 2009, nearly 73 per cent of all allocations were made from the early housing waiting list (an increase of almost 3 percent from the previous year). This suggests that increasing numbers of public housing tenants will have an experience of recurring homelessness, poor tenancy histories and evictions.[263]

332. The report recommended that the Victorian Government explore the feasibility of introducing options for waiving or reducing outstanding debts in specific circumstances, such as where there is a history of family violence, mental illness or disability.[264]

333. At interview, a Justice Connect Homeless Law advocate stated:

> We've got clients that, you know, have been camping by a river basically, … with debts overhanging them, waiting to be rehoused…. in that situation, you are not necessarily going to be financially able to start repaying a debt.[265]

259 Supported Housing is for people who live in an unsuitable home and have a disability or long-term health issue requiring major structural modifications and/or personal support to live independently.

260 DHHS, *Allocations manual, Introduction and conditions of public housing offers* (2016) 12.

261 Ibid 11–13.

262 Email from Justice Connect, Homeless Law to Victorian Ombudsman (November 2016) attachment – *Through the roof: Improving the Office of Housing's policies and processes for dealing with housing debts* 4.

263 Family and Community Development Committee, Parliament of Victoria *Inquiry into the Adequacy and Future of Public Housing in Victoria* (2010) 99.

264 Ibid 100.

265 Interview with Justice Connect, Homeless Law (2 November 2016).

334. A case study was provided by a former tenant who contacted the investigation.

Case Study: Tenant C

Tenant C held tenancy of a public housing property until August 2005. The department was aware that Tenant C had left the property in July 2005 due to harassment by her daughter's partner and was living in a caravan park.

Tenant C was at risk of homelessness. In August 2005 Tenant C was assisted to find emergency housing before being permanently re-housed by the department in December 2005.

In January 2006, the department raised a maintenance claim against Tenant C for the cost of repairs to the property for $6,521.32. The department also applied to VCAT for compensation for the damage to the property. The Notice of Cost of Repairs letters and the VCAT application were served on Tenant C by registered post on the same day.

However, the address used for service on Tenant C was incorrect, as it was the emergency housing address rather than Tenant C's current public housing address. Consequently, Tenant C was unaware of the maintenance claim or the VCAT hearing.

In February 2006, the matter was heard at VCAT but Tenant C did not appear. The department relied on the Notice of Cost of repairs letters, photographs of the property taken in September 2005, and evidence of service on Tenant C by registered post. VCAT ordered that Tenant C pay $6,521.32 for the cost of cleaning and rubbish removal, plaster repairs and painting the property.

Although Tenant C eventually signed a repayment plan in 2009 for this and another smaller maintenance debt dating from 1994, these payments were not maintained. In 2014, Tenant C applied for further public housing, and was told that she needed to sign another repayment plan before services would be provided. She then applied to have the debt reviewed by the Housing Appeals Office, but was told that it did not have jurisdiction to review the matter now that it had been determined by VCAT.

Tenant C was still on the waiting list in 2016 as a 'priority' when she contacted the investigation. She was living in insecure private rental accommodation, caring for her grandchild. Tenant C complained that the department would not allocate her further public housing until she signed a new repayment plan. She said she did not want to sign the repayment plan because she disagreed with the amount claimed by the department.

The investigation of this complaint found that Tenant C had been incorrectly charged for pre-existing plaster damage in the property and for painting of the property. The investigation found that the paintwork was 20 years old when the maintenance claim was raised and should have been excluded as the effective life of paint work is only 10 years.

The department acknowledged the administrative errors and apologised to Tenant C. The department also waived all of Tenant C's outstanding maintenance debts totalling $7,699.34, and the rental arrears relating to this tenancy.

335. The department's 2016 annual report states as at 30 June 2016, there were 32,250 public housing applicants awaiting allocation of a property.[266] The report also indicates that 'priority access' public housing applicants wait an average of 10.4 months for public housing property.[267] The annual report does not indicate the average waiting time from application to allocation for other classes of public housing applicants.[268]

336. These long waiting periods may induce vulnerable applicants to accept liability for a maintenance debt, rather than question or challenge the amount claimed by the department.

337. Justice Connect Homeless Law observed:

> People are in a desperate position, they will accept liability, they will sign that repayment agreement because they're homeless and their first priority is getting housing.[269]

338. During the investigation, the department reported having 1,865 active payment agreements with tenants that involve maintenance claim issues either in part or in whole. Of those:

- 1,129 (60.5 per cent) relate solely to vacated maintenance claims
- 394 (21.1 per cent) are 'Debt Collection Agreements' related solely to maintenance.[270]

339. It is unknown how many of these agreements have been entered into by a former tenant to avoid homelessness or further disadvantage, rather than disputing the debt, as no such data is available.

340. The Charter provides:

> Families are the fundamental group unit of society and are entitled to be protected by society and the State.[271]

341. Withholding services from applicants and their families until they agree to repay a maintenance debt may be in breach of the Charter.

342. Justice Kevin Bell also commented:

> Public housing tenants have relevant human rights that are protected by law, including the human right to family and home. Where a public housing provider uses recovery of rental arrears as a civil debt as a barrier to accessing public housing, this raises serious issues in relation to those rights. While public housing providers are responsible for managing their rental housing stock, they also have responsibilities as public authorities under the Charter to act compatibility with the human rights of tenants. Rent collection and housing allocation decisions and policies that fail to take the individual personal and family needs and circumstances of tenants into account may breach the Charter, especially where they result in barring access to housing. The less flexible the decisions and policies, the more serious are the issues arising in relation to compatibility with human rights.[272]

People are in a desperate position, they will accept liability, they will sign that repayment agreement because they're homeless and their first priority is getting housing.

Justice Connect, Homeless Law

266 DHHS, *Annual Report 2015–16* (2016) 58.

267 Email from DHHS Manager E to Victorian Ombudsman (20 July 2017, 5:05pm).

268 Ibid.

269 Interview with Justice Connect (2 November 2016).

270 Email from DHHS Manager E to Victorian Ombudsman (20 December 2016) attachment – 6.

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

272 Interview with Justice Kevin Bell (27 February 2017).

343. A lack of clarity about when old debts are written off by the department also presents difficulties for applicants. The Allocations Manual states:[273]

- Applicants or household members who have a pre-September 1991 maintenance debt that has been written off are not excluded from rehousing due to this debt.
- Applicants who have a pre-14 June 1997 maintenance charge are not excluded from rehousing due to this debt if:
  - the charge is past the statute of limitations and has not been substantiated, or
  - the charge has not been substantiated at VCAT.

Judgment proof

344. The investigation found that many former tenants who are signing repayment agreements would likely be considered 'judgment proof'. The *Judgment Debt Recovery Act 1994* (Vic) prevents a creditor from enforcing an order for compensation made in its favour if the debtor derives their sole income through payments made under the *Commonwealth Social Security Act 1947* or section 24 of the *Children, Youth and Families Act 2005*. That is, the debtor's sole income is derived from social security or child welfare benefits.[274]

345. The department's policy of withholding services from an applicant until they sign a repayment plan is concerning, particularly when the applicant is judgment proof, as is likely to be the case.

346. Where the debt is more than 15 years old, the department's policy also appears contrary to the spirit of the Limitation of Actions Act.

347. The Tenants Union of Victoria commented:

> What's the point of establishing a debt against someone who's judgment proof, really is the first question, but what's the point of pursuing one against someone who's judgment proof?[275]

348. When asked about assets at the time of receiving a maintenance claim from the department, one former tenant stated:

> I had nothing … I had a car which was on hire purchase … which was just to get me from where I had to go for the kids. The market value of the car was something like $5,000 but the repayments were just ridiculous – it was something like $1,000 a month …. And I would have originally put probably $2,000 maybe [toward the vehicle].[276]

349. This tenant stated that aside from the car, they had additional assets valued at:

> …maybe $1,000 if that. Probably not even that because I really had nothing.[277]

350. The department's Allocation policy recognises the financial fragility of applicants, as it permits debtors who sign a repayment plan to make minimum weekly repayments of $5 towards the debt.[278]

273 DHHS, *Allocation Manual* (2012) 10.

274 *Judgment Debt Recovery Act 1984* (Vic) s 12.

275 Interview with the Tenants Union of Victoria (2 November 2016).

276 Interview with Tenant A (telephone, 19 April 2017).

277 Ibid.

278 DHHS, above n 273, 11–12.

Debt Collectors

351. The department also tries to settle debt through commercial debt collection agencies. Department policy provides for debts to be allocated to debt collection agencies where:

    - the account balance is more than $50 with a forwarding address to which correspondence has been sent but not received a response
    - the debt exceeds $200 and no forwarding address is available.[279]

352. The role of debt collection agencies is stipulated in department policy as follows:

> Debt Collection Agencies are contracted to make contact and coordinate legal action (if applicable) with clients who have debt and are not on a repayment agreement.
>
> Debt collection agencies are also regularly sent lists by RARS of vacated clients who cannot be located…Debt collection agencies will only commence legal action with the authority of RARS.[280]

353. Further, department policy provides for debt collectors to organise direct debit payments to the department and to collect and forward money to the department.[281]

354. Over the period reviewed by the investigation, the department engaged one commercial debt collection agency.[282] The activities and associated service levels relevant to this arrangement are set out in correspondence and a subsequent service level agreement. That agency continues to provide debt collection services to the department.[283]

355. The documents formalising this arrangement provide for remuneration to be paid at:

> 15% plus GST Commission upon acceptance by DOH that the Services have been completed as required under this Agreement.[284]

356. In relation to the recovery of maintenance claim debts, the service level agreement provides three 'process workflows' to guide debt collection activities: one relevant to general recoveries and two relevant to recoveries pertaining to Aboriginal clients. The general workflow is shown on the next page.[285]

> *What's the point of establishing a debt against someone who's judgment proof, really is the first question, but what's the point of pursuing one against someone who's judgment proof?*
>
> Tenants Union of Victoria

279 Email from DHHS Manager F to Victorian Ombudsman (23 May 2017, 2:06pm) attachment – *Bad Debt Write off Processes.*

280 DHS, *Tenancy Management Manual Chapter 18 – Vacated Accounts* (2012) 10.

281 Ibid 8–9.

282 Interview with Manager F (21 April 2017).

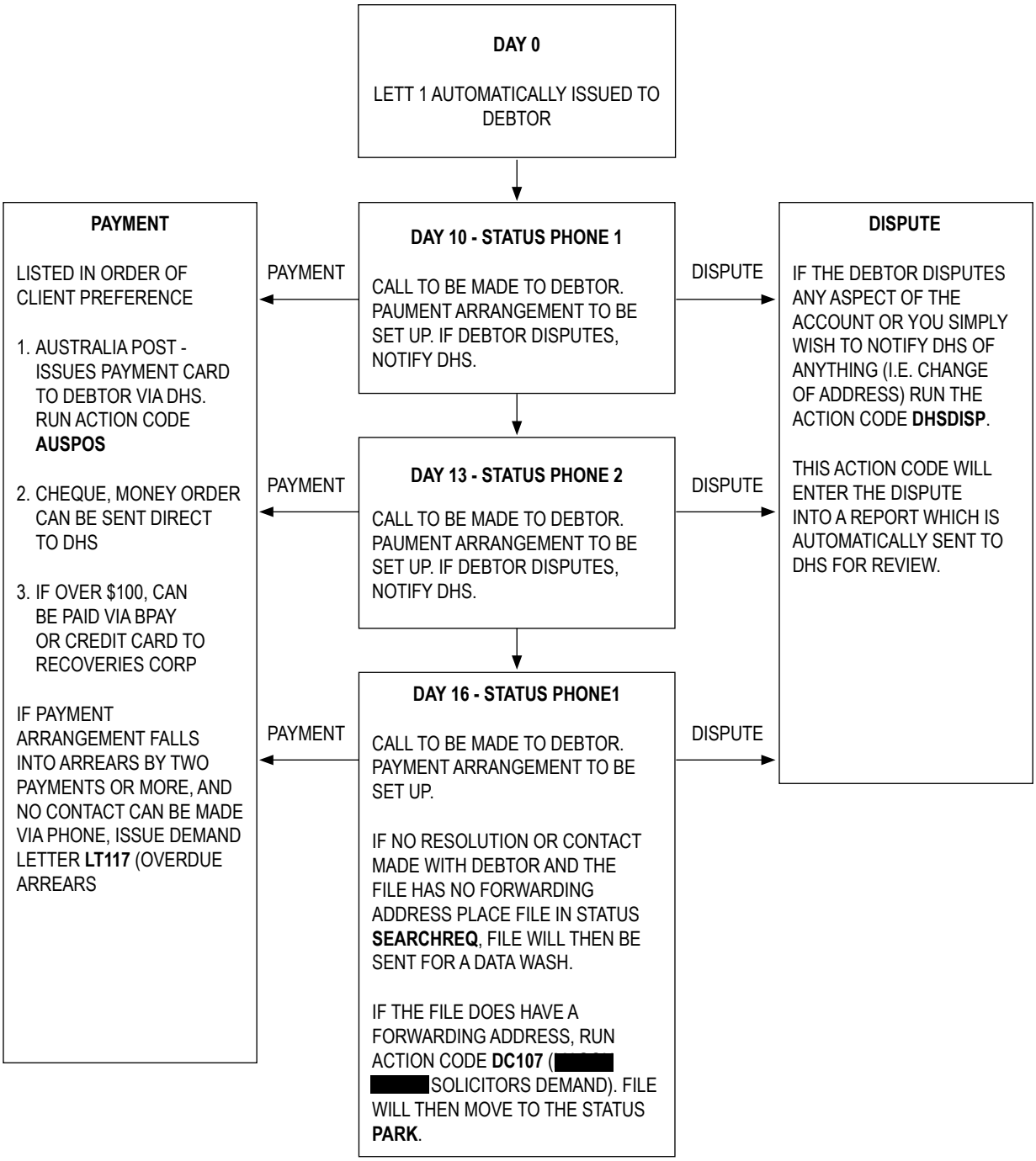
283 Email from Manager F to Victorian Ombudsman (10 May, 2017) attachment – *Correspondence to Recoveries Corp Pty Ltd (1 December 2008)*; Recoveries Corporation Group Ltd, *Service Level Agreement* (19 March 2009); Interview with DHHS Manager F (21 April 2017).

284 Recoveries Corporation Group Ltd, *Service Level Agreement* (19 March 2009).

285 Ibid.

Figure 3: DHHS Debt Collection Service Level Agreement.

CG 26 - RGS/RMU - RENT GENERAL SCHEME & REMOVABLE UNIT (WITH & WITHOUT FORWARDING ADDRESSES)



357. The service level agreement indicates a 'data wash' is scheduled for day 16 of this process where the former tenant has not been located. A data wash is an online search for an individual's up-to-date contact details.[286] It is unclear why, if that service is available at this stage of the process, it has not been used earlier by the department to confirm accurate contact details for former tenants prior to raising a maintenance claim in the first instance.

358. Further, the service level agreement acknowledges that many former tenants are 'probably unaware' of the maintenance claim having gone to VCAT.[287] As noted earlier, the investigation was informed of several cases where former tenants have become aware of an existing debt only when approached by debt collectors engaged by the department.[288]

359. At interview, a Senior Accounts officer said that where a former tenant becomes aware of a debt under these circumstances and wishes to query its legitimacy or value, debt collection agencies are required to refer the debt back to the department (Finance Division) for review and forwarding to the relevant housing office.[289] The debt collection process is supposed to cease whilst this review takes place. The process workflow however, indicates the debt collection process continues whilst the department review is ongoing. The investigation has been made aware of occasions when that has occurred.[290]

360. The service level agreements state that the contractor will abide by the Australian Consumer and Competition Commission guidelines and section 60 of the *Trade Practices Act 1974* (Cth). This legislation has been replaced by the *Australian Consumer Law and Fair Trading Act 2012* (Vic) and sections 45(1) and 45(2) cover the activities of debt collectors. Specifically, these sections prohibit the use of physical force, undue harassment or coercion,[291] or communicating with a person in a manner that is unreasonable in its frequency, nature or content.[292]

361. Such methods, if used by debt collectors, breach regulations relevant to the debt collection industry and by extension, the department, as a creditor, may be responsible for the activities of the debt collection agency, irrespective of whether the practice is contrary to an agreement or understanding between the creditor and the agent about how the collection is to be undertaken.[293]

362. The senior Manager of the Accounting Services Division of the department confirmed that debt collection agencies are not paid on matters they refer back to the department for review. When queried on this, the Manager said they did not consider this may provide an incentive for debt collectors to delay referring the queried debt back to the department, if at all, adding that this was not something she had encountered.[294] The same Manager confirmed, however, the department has no measures in place to audit or otherwise monitor the compliance of debt collectors to the service level agreement.[295]

286 See, e.g. Datawash, *About Us* (2017) <https://www.datawash.com.au/About-Us>.

287 DHHS Debt Collection, *Service Level Agreement* (1 December 2008) 2.

288 Interview with the Tenants Union of Victoria (2 November 2016).

289 Interview with DHHS Manager F (21 April 2017).

290 Email from Tenants Union of Victoria to Victorian Ombudsman (October 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing maintenance debts* 9; Interview with the Tenants Union of Victoria (2 November 2016).

291 *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 45(1)(a).

292 Ibid s 45(1)(p).

293 Australian Competition and Consumer Commission and Australian Companies and Securities Commission, *Debt collection guideline: for collectors and creditors* (February 2016) 1.

294 Interview with DHHS Manager F (21 April 2017).

295 Ibid.

Culture and training

Training and change of local housing staff

363. A consistent issue raised by interviewees was a lack of sufficient communication, training, and follow-up provided to local housing staff about the changes to the maintenance claim processes outlined in the 2015 Guidelines. In response to the investigation, the department provided:

- Tenant Property Damage Practice Workshop Agenda, 14 October 2014
- Tenant Property Damage operational guidelines, Learning and development resource, undated
- Maintenance Claim Process on a Page, undated
- Housing Practice Support: Practice Workshop, 5 March 2014.

364. All of the Team Leaders and Managers responsible for the implementation of the 2015 Guidelines interviewed by the investigation confirmed having received an email from the relevant policy area within the department advising of their implementation. That email reportedly contained a power point presentation and instructions to discuss the implementation of the 2015 Guidelines with staff. Team Leaders and Managers commented however, that this email was received at the same time as many other items of relative importance and so was overlooked.[296]

365. At interview, a department policy Manager acknowledged implementation of the 2015 Guidelines suffered from a lack of adequate communication and learning support around the change and an inadequate change management process.[297]

366. The investigation identified that the department has as little as two training and development staff to service the entire department of seven operational divisions across 17 areas of Victoria[298] and 11,448 FTE employees.[299] The policy Manager commented that roll out of new policy is often unsophisticated and underwhelming due to the existing workload demands on these officers.

367. Similarly, the department's policy division does not currently measure staff exposure to new policies and procedures as they are released, or measure the implementation and effectiveness of new policies and procedures, other than by informal and ad hoc staff and client feedback. The same policy Manager commented:

> I wish I had more resources to be able to then say OK how are we travelling? We learn about it in a more ad hoc fashion with staff calling in.[300]
>
> The Performance and Reporting area of the department maintains data on business operations, and this may assist in improved data collection on these important operational issues.

368. The policy Manager acknowledged shortcomings with policy creation and implementation:

> Good policy is monitoring and evaluation. I don't have the capacity to do this...
>
> ...I don't have the resources to analyse the data in a meaningful way.[301]

296 Interview with DHHS Manager C (27 February 2017); Interview with DHHS Team Leader A (7 March 2017).

297 Interview with DHHS Manager E (25 January 2017).

298 Ibid.

299 DHHS, *Annual report 2014–2015* (2015); DHHS, *Annual report 2015–16* (2016).

300 Interview with DHHS Manager E (25 January 2017).

301 Ibid.

369. The Victorian Public Tenants Association commented:

> Part of the problem is there seems to be some turnover [of department staff] and unawareness of policy. Some awareness of it, but not sure how to apply it.[302]

370. One Manager from a busy metropolitan office said:

> ...some of the guidelines being so broad, that [staff] can't really define what can be charged as an MCAT [maintenance claim] and what doesn't need to be charged.[303]

371. One Manager said she had tried to get the department's lawyers to clarify how discretion should be exercised under the guidelines. The Manager said she was provided with a legal opinion that differed from the 2015 Guidelines, leaving it up to the local Manager to decide how the discretion should be applied in each case. She said:

> I need guidelines about how I make that decision and about what that discretion really means.[304]

372. Department staff interviewed about the way maintenance claims are being managed locally, all described different organisational approaches with various team structures. One Manager said:

> We don't really talk to anyone really outside the [....] division so I don't know what they do.[305]

373. A number of tenant advocacy services said they had not seen any changes to the department's practices since the 2015 Guidelines were implemented.[306] The Tenants Union of Victoria summarised this:

> I don't think the policy is distinctly different from the first time we raised the issue. They've probably put ... in some more words about depreciation, about the charter, about some other things of that nature, but I don't think that's changed the practice a great deal at all. So I think the practice is pretty much still what it was. We get the works order, we allocate almost all of the works order to the tenant unless we can see something bleedingly obvious that's not the tenant's problem.[307]

374. A department policy Manager acknowledged the influence of historical policy on current practice when stating:

> Culture change takes time. I'm still finding people surprised about the importance of local level resolution.[308]

375. While the 2015 Guidelines appear to be attempting to steer department staff into work practices that acknowledge and allow for the higher proportion of social disadvantage amongst public housing tenants, it appears training and development are not keeping pace.

We don't really talk to anyone really outside the [....] division so I don't know what they do.

Department Manager

302 Interview with the Victorian Public Tenants Association (26 October 2016).

303 Interview with DHHS Manager B (17 February 2017).

304 Interview with DHHS Manager D (21 March 2017).

305 Ibid.

306 Interview with Justice Connect, Homeless Law (2 November 2016); Interview with Victoria Legal Aid (24 October 2016).

307 Interview with the Tenants Union of Victoria (2 November 2016).

308 Interview with DHHS Manager E (25 January 2017).

376. The 2010 Family and Community Development Committee inquiry into the quality of service and workforce capacity of the department (the Office of Housing) reported:

> For staff with a specific understanding of their role as administrators of public housing, it is difficult to be regularly confronted by tenants with high and complex support needs. Often staff do not have the qualifications or skills to respond to people with a diverse range of support needs. Furthermore, their position description does not require HSOs to have these skills.[309]

The Committee considered there was merit in introducing specialist roles within housing offices, and noted that an earlier DHS initiative, the 2004–2009 strategy *Partnerships for better housing* had indicated an intention to improve services to tenants by:

- introducing Housing Support Coordinators
- supporting regional housing staff to attain nationally accredited qualifications (Certificate IV in Public housing and Graduate Certificate in Housing Management).

377. The Committee also recommended the Victorian Government review the level of knowledge and skills required by staff in regional housing offices to better reflect the increasingly complex needs of tenants.[310]

378. The investigation did not see evidence to suggest any such steps have been taken. Department Team Leaders and Managers report training of local housing officers to be minimal and not in keeping with the evolution of their role into social services rather than as mere landlords.

Staff experience and training in relation to VCAT

379. Tenancy advocacy services suggested a lack of experience and training in those officers representing the department at VCAT as a significant contributor to the issues raised in this report.[311] Department Managers and Team Leaders interviewed advised that most officers representing the department at VCAT are HSO2 and HSO3 level, both lower classified levels within the department.[312]

380. One Manager commented:

> They are very low [experience] level … but we ask them to do a lot for those levels.[313]

381. Department interviewees stated that no formal training is provided to HSOs regarding their attendance at VCAT and they are commonly rostered to appear on behalf of the department with little knowledge of the case they are presenting.

309 Family and Community Development Committee, Parliament of Victoria, *Inquiry into the Adequacy and Future of Public Housing in Victoria* (2010) 280.

310 Ibid 283.

311 Interview with Justice Connect, Homeless Law (2 November 2016); Interview with the Victorian Public Tenants Association (26 October 2016); Interview with the Tenants Union of Victoria (2 November 2016); Email from Victorian Public Tenants Association to Victorian Ombudsman (August 2016) attachment – *Submission to Victorian Ombudsman 'own motion' investigation into the Office of Housing* 15.

312 Interview with DHHS Manager E (25 January 2017); Interview with DHHS Manager C (27 February 2017); Interview with DHHS Manager D (21 March 2017); Interview with DHHS Manager A (7 February 2017); Interview with DHHS Manager B (17 February 2017).

313 Interview with DHHS Manager E (25 January 2017).

382. Advocates have corroborated this, reporting that HSOs representing the department at VCAT are often not the officers responsible for managing the relevant tenancy and are unfamiliar with the background of the case. They report this as having led to officers being unable to:

- provide information beyond the documents and file notes available
- answer fundamental questions at the hearing
- adequately negotiate outcomes prior to a hearing and are often unaware they are allowed to do so.

383. The Tenants Union of Victoria reported:

> I have had more than one housing worker say to me, when I've received their documents and I've said, 'can you explain to me what the breach is and how you are intending to prove this at VCAT', and they say, 'I don't really do the law, the law is not my thing.[314]

384. At interview, a department policy Manager suggested that 80 per cent of staff representing the department at VCAT are insufficiently qualified or experienced to do so.[315]

385. The investigation was made aware of recent training provided to department staff that included topics such as how to present evidence at VCAT; file noting; human rights; and natural justice. This training was reportedly provided to Managers only and not the HSOs responsible for progressing maintenance claims to VCAT and representing the department at subsequent hearings.

386. The policies and guidelines relevant to the period reviewed by the investigation did not require HSOs to seek approval from Team Leaders or Managers before applying to VCAT. Several witnesses said that Team Leaders and Managers rarely become involved in this process, including not assessing the appropriateness of proceeding with VCAT action and not reviewing evidence to be presented at VCAT when a compensation application proceeds to hearing.[316]

387. As observed by Justice Connect Homeless Law, there is:

> Limited oversight and transparency in relation to decisions including decisions about when to pursue matters through VCAT.[317]

388. The investigation was told that HSOs observe more experienced colleagues present cases at VCAT before conducting the applications themselves under observation from their colleague until deemed competent.[318] This training method may entrench poor work practices, and it does not provide an independent assessment of the competency of the HSO performing these functions on behalf of the department.

314 Interview with the Tenants Union of Victoria (2 November 2016).

315 Interview with DHHS Manager E (25 January 2017).

316 Interview with DHHS Manager A (7 February 2017).

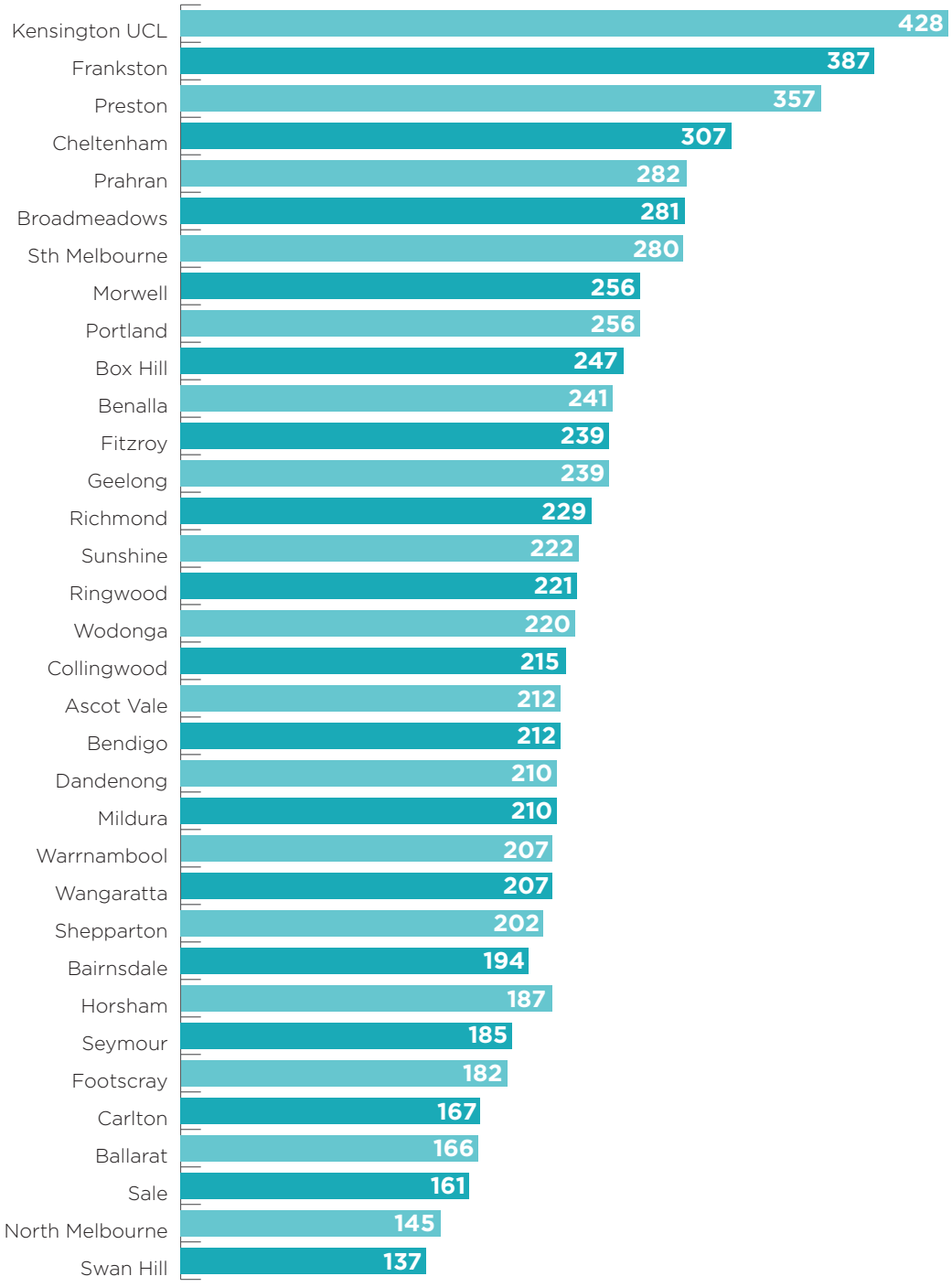
317 Email from Justice Connect, Homeless Law to Victorian Ombudsman (September 2016) attachment – *Victorian Ombudsman's investigation into Office of Housing management of maintenance debts Justice Connect Homeless Law: Six Cases for investigation* 4.

318 Interview with DHHS Manager E (25 January 2017); Interview with DHHS Manager C (27 February 2017); Interview with DHHS Manager D (21 March 2017); Interview with DHHS Manager A (7 February 2017); Interview with DHHS Manager B (17 February 2017); Interview with DHHS Team Leader A (7 March 2017).

Staff workload

389. The department provided data showing the number of individual tenancies being managed by its staff in local housing offices on 30 June 2014, 30 June 2015 and 30 June 2016. This data has been averaged for this period and is represented below:

Graph 4: Average yearly number of tenancies per HSO for 2014–16.[319]



319 Email from DHHS Manager E to Victorian Ombudsman (31 May 2017, 5:40pm).

390. The data indicates that local housing staff manage, on average, 230 tenancies a year. If each of these staff worked 38 hours per week over 46 weeks in the year (allowing for leave, illness and other allowable absences), they would have an average of 7.9 hours available to them, per year, to attend to all tasks required to manage each individual tenancy for which they are responsible, not just the end of tenancy function. This equates to 10.3 minutes per tenancy per week.

391. A policy Manager compared this case load to:

> ...community housing officers who have caseloads of about 50 properties each.[320]

392. The Manager also acknowledged the changing demographic of public housing tenants:

> HSOs have more extensive and complex tasks than their private enterprise and community housing colleagues, for example, referring tenants to support services etc.[321]

393. The effect of this high workload was articulated by one Team Leader:

> We definitely need more staffing resources to put [local resolution and the 2015 Guidelines] in place. I think it would be a great idea to be able to have that ability to be able to call somebody and tell them alright we are looking at charging you, then they'll tell you if there is family violence or ... what's happened.[322]

Impact of performance measures

394. The Key Performance Indicators (KPIs) relevant to managing maintenance claims, as provided by the department, require staff to:

- have a property to be ready for reletting within 28 days after the previous tenant has vacated (or they become aware the property is vacant)
- have all tenant damage claims of $250 and above either accepted by the tenant or otherwise ratified by VCAT within 60 days of the relevant work order being approved for payment.[323]

395. In practice, these KPIs require the department's staff to, within 60 days:

- locate the former tenant
- discuss the damage with that person
- seek other evidence
- assess depreciation and fair wear and tear
- consider special circumstances
- engage a maintenance contractor
- await repairs to be completed
- communicate the maintenance claim costs to the former tenant
- allow them time to respond
- consider and discuss any new considerations raised by the former tenant, and
- where necessary, run through the VCAT process.

320 Interview with DHHS Manager E (25 January 2017).

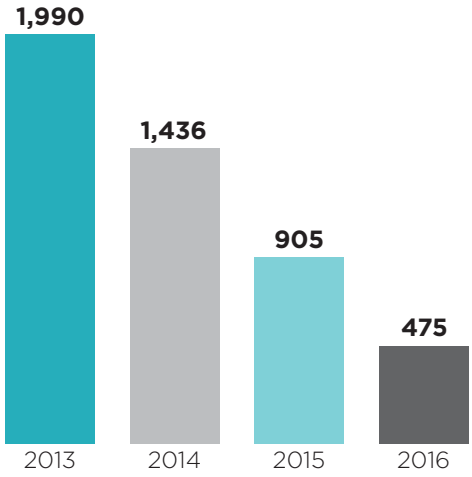
321 Ibid.

322 Interview with DHHS Team Leader A (7 March 2017).

323 Email from DHHS Manager E to Victorian Ombudsman (1 May 2017) attachment – *All Housing Service Officer KPIs for financial years from 2013/14/to 2015/2016*.

396. The 60 day KPI was introduced to reduce the number of 'unsubstantiated' tenant damage claims. Since the KPI was introduced in 2013, the number of unsubstantiated maintenance claims has decreased each year.

Graph 5: Number of unsubstantiated maintenance claims across Victoria for the period 2013 to 2016.[324]



397. The 60 day KPI provides very little time for local housing staff to contact the former tenant, assess any special circumstances and negotiate any disputed costs with the tenant or their advocate. One Manager said:

> KPIs are set by head office, who may not have a full understanding of logistics.[325]

398. A Team Leader from a different region said:

> What we had issue with was … all the contact that's expected before we take the initial action. It may be my interpretation of it that, hang on, we're delaying and then we're going to get hit over the head because we aren't meeting our KPIs.
>
> I think it's restrictive, 30 days extra would make a difference. It is restrictive.[326]

324 Email from DHHS Manager E to Victorian Ombudsman (4 November 2016, 4:32pm) attachment. Note: these figures are point in time data taken at 30 June each year.

325 Interview with DHHS Manager B (17 February 2017).

326 Interview with DHHS Manager C (27 February 2017).

Conclusions

Failure to meet the obligations of a social landlord

399. The department is charged with housing some of the state's most vulnerable and disadvantaged people. Since its inception, Victoria's public housing system has catered for a tenant group whose income and assets have placed them perilously close to the poverty line. In more recent times, the system has been altered to recognise, and give priority to, Victorians who are also experiencing homelessness or family violence, or have physical disabilities or mental health issues that are not catered for in the private system. This is recognised in the department's role as a social landlord.

400. However, while the department's waiting list and housing allocation processes are sensitive to people with backgrounds of disadvantage and special needs, it appears that these considerations are almost completely disregarded when it comes to calculating and pursuing maintenance related debts when a tenant leaves their property.

401. There is no doubt that there is a cohort of tenants who cause damage to public housing properties, either maliciously, or just through sheer neglect. These tenants should clearly be held to account for that damage. The investigation identified however, that the department regularly fails to differentiate between these parties and those who are not responsible for the damage caused by either third parties, or in many cases, through wear and tear and depreciation.

Improper use of VCAT as a decision maker

402. The investigation identified a default practice by the department of lodging claims against former tenants for almost the entire cost of repairing a vacated property. In 2013–14 the amount claimed by the department at VCAT against its former tenants represented 100 per cent of the total cost for these works. Despite attempts to modify this behaviour following the introduction of new guidelines in early 2015, this percentage only reduced to 98.5 per cent in 2014–15 and 92.5 per cent in 2015–16.

403. Despite the high proportion of costs claimed by the department against its former tenants, VCAT consistently awarded the department only around half of what it claimed over the same period. This suggests that the department is in the practice of making exaggerated claims.

404. The department has made attempts to redress some of these practices in particular through the development of the 2015 Guidelines, which place a greater emphasis on properly considering the tenant's special circumstances, fair wear and tear and depreciation and surrounding factors that may have contributed to a vacated property being damaged or in a state of disrepair.

405. Evidence shows, however, that the new guidelines have had little to no effect in practice. The department makes little effort to investigate the cause of property damage or consider whether any mitigating special circumstances apply, or to contact the former tenant, their neighbours, support workers or, when relevant, police. This leads to an operating assumption that tenants are 'guilty until proven innocent' of tenancy damage and repairs.

406. Despite policy requirements to the contrary, the investigation identified that it is common practice for local housing office staff to submit applications to VCAT on the same date a maintenance claim is raised. This is a transactional approach which disregards the new policy requirements. It also demonstrates a preference to seek the path of least resistance in such matters.

407. Even when the department does become aware of potential mitigating circumstances surrounding a former tenant's liability for property maintenance there is evidence that housing staff still rely on outdated and superseded policy and procedures by requiring such things as the production of police reports to substantiate claims of family violence.

408. Other examples identified suggest that local housing staff are either unaware they can negotiate and settle maintenance claims without involving VCAT, or are unwilling to do so.

Failure to consider depreciation and other causes of damage

409. Depreciation and fair wear and tear are largely ignored by local housing staff when calculating claims against former tenants. This is particularly egregious considering the age and condition of many public housing properties. It leads to the department wrongfully pursuing and receiving payments towards the costs of fixtures and fittings that had already exceeded their depreciable or useful life, often well before the tenant vacated the property.

410. The failure by local housing staff to properly consider and apply current policy and guidelines has resulted in unreasonable and unjustifiable maintenance claims against former tenants for damage and repairs.

411. However, their work is made more difficult and time consuming because the information kept by the department about public housing tenants and properties are located in different databases and hard copy files. Access to the information is disjointed and decentralised, making it difficult to assess maintenance claims fairly and efficiently.

Inadequate attempts to contact former tenants

412. The investigation identified a longstanding, widespread practice of the department sending correspondence to a former tenant at an address it knows the former tenant has already left. The correspondence is designed to ensure the former tenant is afforded procedural fairness and informed of their legal rights and obligations in relation to debt claimed against them. It includes the initial Notice of Cost of Repair documents and correspondence informing them of what is meant to be a later, but in practice is often a concurrent, application to VCAT to have the debt arbitrated. These practices are plainly wrong, and inconsistent with the department's obligations under Victoria's Model Litigant Guidelines.

413. The investigation identified that department staff are largely unaware of alternative avenues to confirm the accuracy of contact details for former tenants, and do not take steps to source such information.

414. How the department informs former tenants of a maintenance claim is also outdated and ineffective. The findings of the *Inquiry into the Adequacy and Future of Public Housing in Victoria – September 2010* should have informed the department of the inadequacy of relying solely on letters to communicate with public housing tenants. Despite this, the department has not introduced alternative means of communication, such as phone, text and email.

415. Even when the department's correspondence regarding maintenance claims and VCAT applications does find its way to the former tenant, the language and tone used is both legalistic and intimidating and does not inform former tenants of their right to seek a review.

Unreasonable ambit claims for compensation

416. The department's failure to take reasonable steps to contact former tenants is a significant contributor to the about 80 per cent of matters proceeding to VCAT uncontested by former tenants. In 90 per cent of the uncontested matters, the department is successful in securing an order for compensation (though often for a much lower amount than it claims).

417. Where the former tenant does attend at VCAT to defend these claims, compensation awarded to the department drops to just over 50 per cent of the original claim.

418. The fact the department is consistently awarded no more than half of the amount it claims at VCAT also suggests that it makes unreasonable compensation claims for damage and repairs to vacated properties. This practice is contrary to the department's obligations as a Model Litigant, and is unconscionable conduct by a social service provider.

419. The department is also a disproportionate applicant to VCAT. Although public housing properties in Victoria only account for around 12 per cent of the rental market, the department is the highest sole litigant, accounting for over 20 per cent of the VCAT Residential Tenancies list.

420. The department's reliance on VCAT to arbitrate is a dereliction of its duty as a social landlord. This is particularly the case as only the department, and not VCAT, has the discretion to consider a range of special circumstances when determining whether a former tenant is responsible for the cost of repairs. By referring matters direct to VCAT the department is effectively rejecting mitigating factors, such as damage caused by domestic violence, to be considered.

421. The investigation also identified examples of local housing staff denying former tenants access to the evidence it relies on at VCAT to support the maintenance claim, instead requiring the former tenant to go through the Freedom of Information process. This is contrary to the principles of fair administrative practice, and again a breach of the Model Litigant Guidelines.

Pursuing debts against people considered 'judgment proof'

422. The department's policies and practices around the recovery of maintenance and other debts fails to acknowledge that a large percentage of its tenants would meet the definition of being 'judgment proof' by virtue of their tenuous financial position. Although the department is able to source Centrelink information and could identify those who are likely to fall into the judgment proof category, it continues to pursue debts against this group, again in breach of its obligations as a Model Litigant.

423. Once in possession of an order for compensation from VCAT, the department withholds future services, particularly the allocation of public housing, until the former tenant makes arrangements to settle the debt. This practice means already vulnerable people are exposed to a higher risk of homelessness. It may also be incompatible with the right of protection of families and children under the *Charter* and Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, the right to adequate housing.

424. The department's practice of withholding services where such debts exceed 15 years of age is also contrary to the spirit of the *Limitations of Actions Act 1958* (Vic).

425. The investigation also identified evidence of a general reluctance by local housing staff toward discussing or negotiating disputes around maintenance claims that have only come to the attention of the former tenant many years after the claim has gone to VCAT.

426. The combined effect of these practices is the effective coercion of vulnerable people into agreeing to repay a debt for damage and repairs that may not be their responsibility.

Failure to address embedded cultural and historical practices

427. The manner in which the 2015 Guidelines for managing maintenance claims were communicated to local housing staff was inadequate, and underestimated that existing culture and practices were entrenched at the local level.

428. Underpinning the many issues identified by the investigation is a lack of targeted training and proper oversight around the end of tenancy maintenance and repair process and the pursuit of maintenance claims against former tenants. Little to no effort is made at either the local housing office level, or the department's head office, to ensure the 2015 Guidelines are adhered to by housing staff. The department does not appear to have effectively ushered in and embedded the 2015 Guidelines and acknowledged this is common with other policies and guidelines.

429. The investigation identified gaps in the oversight of local housing staff who manage end of tenancy maintenance claims. It was clear that junior level staff are required to manage significant caseloads, and deal with tenants who have increasingly complex needs, with minimal intervention by a manager or team leader.

430. The evidence indicates that HSOs appearing at VCAT receive limited training and are unable or unwilling to negotiate with the former tenant or their advocate.

431. This practice does not assist the Tribunal, and the situation is unfair to both the tenant and HSO representing the department. It can result in an inconsistent and transactional approach to managing compensation applications at VCAT, and limit the likelihood of resolving the dispute before the hearing.

Failure to act as a Model Litigant

432. There appears to be very limited awareness among local housing staff of the department's obligations under the Model Litigant Guidelines. The investigation identified breaches of the Model Litigant Guidelines including:

- failing to make reasonable attempts to resolve maintenance claims through negotiation prior to proceeding with VCAT action
- applying to VCAT for compensation that exceeds the amount it is entitled to claim, by failing to calculate and deduct costs associated with fair wear and tear, depreciation or faulty workmanship by department contractors
- failing to consider the tenant's special circumstances before applying to VCAT for amounts that should have been excluded under the department's policy and guidelines
- effectively denying the former tenant an opportunity to dispute the maintenance claim at VCAT by knowingly serving notices and documents to an address where the tenant no longer resides.

Impact of performance measures

433. The average number of tenancies managed by local housing staff at any one time is excessive given the breadth of tasks required across a tenancy. This case load restricts the time available to staff to adequately attend to end of tenancy functions.

434. Adding to this dynamic is a KPI requiring maintenance claims to be accepted by former tenants or otherwise be the subject of a VCAT order within 60 days of the maintenance claims being raised. This KPI appears to be unreasonable and leaves little time for local housing staff to undertake all the activities necessary to satisfy their obligations under department policy and the Model Litigant guidelines. This also creates a disincentive for local housing staff to follow the 2015 Guidelines.

435. The department has engaged a debt collection agency to pursue maintenance claims debts from former tenants. The debt collector is remunerated by receiving a percentage of the amount of money repaid to the department. Commission-based remuneration is a disincentive for the debt collector to refer a disputed debt back to the department for review, and any mitigating circumstances the tenant may raise may not be communicated to the department.

Conduct incompatible with the Charter of Human Rights and Responsibilities Act 2006

436. The administrative actions and decisions of the department in its management of end of tenancy maintenance claims can have a lasting and significant impact on the lives of former tenants. Some of these actions and decisions appear to be taken without proper consideration of the department's obligations under the *Charter of Human Rights and Responsibilities Act 2006*, and raise serious issues in relation to relevant human rights of tenants and their families.

Opinion – section 23(1) of the Ombudsman Act 1973

437. On the basis of the evidence obtained in the investigation and in relation to the particular maintenance claims considered, there were instances where:

- The Department of Health and Human Services appears to have acted in a manner that is unreasonable and unjust by:
  - raising maintenance claims without considering the special circumstances of the former tenant as required by department policy or guidelines
  - making decisions that will affect the human rights of former tenants without giving them an effective right to be heard as required by the Charter of Human Rights and Responsibilities Act
  - claiming compensation for maintenance costs without taking into account depreciation or fair wear and tear
  - failing to act as a Model Litigant
  - requiring former tenants to repay debts that are more than 15 years old, contrary to the spirit of the Limitation of Actions Act
  - requiring former tenants to pay debts that are unlikely to be enforceable under the Judgment Debt Recovery Act.
- The Department of Health and Human Services appears to have acted in accordance with a rule of law, but in a manner that is unjust by:
  - serving notices or other documents on former tenants by post to their last known address in accordance with the Residential Tenancies Act when the department was aware the tenant had previously left or been evicted from that address
  - relying on proof of such service at the VCAT hearing when the former tenant did not appear.
- The Department of Health and Human Services appears to have acted in a manner that is wrong by:
  - failing to effectively oversee the administration of maintenance claims
  - failing to have adequate systems in place for the management of complex end of tenancy maintenance claims.

Recommendations

Broad policy and operational changes

Recommendation 1

To embed within policies, guidance and training the principle that the Department is a social landlord.

Department's Response

The department accepts this recommendation.

Recommendation 2

Policy and procedures be amended to ensure compliance with the *Charter of Human Rights and Responsibilities Act 2006* including removing the requirement for applicants to make and maintain a debt repayment plan prior to an offer of public housing where that debt remains in dispute.

Department's Response

The department accepts this recommendation, noting that:

A review of the department's Allocations and Tenant property damage operations guidelines is underway to ensure compliance with the Charter of Human Rights and Responsibilities Act 2006. The review will include removing the requirement for applicants to make and maintain a debt repayment plan prior to an offer of public housing where that debt remains in dispute.

Recommendation 3

Consistent with the spirit of the *Limitation of Actions Act 1958*, policy be amended to cease pursuing vacated maintenance debts older than 15 years from when the department obtained an order from the Victorian Civil and Administrative Tribunal and was unable to contact the former tenant.

Department's Response

The department accepts this recommendation.

Recommendation 4

Establish a high-level user group for public housing services to monitor the implementation of new and improved guidance.

Department's Response

The department accepts this recommendation.

Improving current guidance

Recommendation 5

Amend guidance to facilitate involvement of the tenant in end of tenancy property inspections including:

- Involvement in the completion of Tenancy Condition Reports.
- Development and promotion of processes that increase the likelihood that tenants will provide notice before they end their tenancy.

Department's Response

The department accepts this recommendation.

Recommendation 6

Amend guidance to ensure compliance with the department's obligations under the Model Litigant Guidelines including full disclosure of all documents and information the department intends relying upon at VCAT.

Department's Response

The department accepts this recommendation, noting that:

Specific guidelines were developed and released in February 2017 to provide staff with practical guidance to behave as model litigants when considering property damage.

Support materials are being developed to guide staff to practices consistent with the model litigant guidelines. The model litigant guidelines will be embedded in future training programs, including focus on full disclosure of all documents and information the department intends relying upon at VCAT.

Recommendation 7

Amend the *Business Practice Manual, Housing Appeals* of July 2015 to allow current and former tenants to seek and have reviewed, an appeal of any maintenance claim decisions made by the department.

Department's Response

The department accepts this recommendation.

Recommendation 8

Develop processes to ensure all reasonable efforts are made to obtain correct contact details for former tenants to facilitate end of tenancy communication. These may include:

- the use of data washing services
- the implementation of information sharing protocols with other divisions within the department and/or external entities including other government departments, advocates and support services
- the use of other modes of communication such as email and SMS
- the use of 'person to person' registered post when sending letters.

Department's Response

The department accepts this recommendation.

Recommendation 9

Remove the 'Vacated Tenants' section of policy and guidelines to eliminate any distinction in treatment between current and former tenants.

Department's Response

The department accepts this recommendation.

Embedding guidance

Recommendation 10

Implement a robust change management package, including ongoing training programs, aimed at HSOs, team leaders and managers, that properly equips these staff with the necessary knowledge, skills and resources to effect changes consistent with the expectations of the 2015 Guidelines.

- Devise and implement metrics that measure the effectiveness of this change management package, including the relevant training programs.

Department's Response

The department accepts this recommendation, noting that:

The department conducted Family Violence forums for all staff through May to September 2017. The forums in part discussed how to consider property damage when family violence contributed to damage.

The department has commenced developing a cultural change program to further support public housing front line staff.

In late 2017 information sessions about behaving as a model litigant and tips to negotiate outcomes with tenants will be rolled out for all staff.

The department is developing operational reporting tools that will make it possible to determine how staff are completing tasks for tenant property damage.

Recommendation 11

Develop practical guidance for staff in the process of applying policy to the assessment of end of tenancy maintenance and repair and the raising and pursuit of maintenance claims.

Department's Response

The department accepts this recommendation, noting that:

The department is considering future training programs that will include the practical assessment of fair wear and tear, damage, reasonably clean and how to account for the special circumstances of tenants, such as family violence, disabilities and mental health conditions.

Recommendation 12

Improve file management/information sharing to ensure seamless and efficient access to information relevant to a property's condition history and the relevant tenant's history and special needs.

Department's Response

The department accepts this recommendation.

Recommendation 13

Ensure maintenance claim correspondence informs tenants and former tenants of:

- the basis for the department's claim
- the relevant guidelines
- their right to seek a review of the department's decision
- their right to formalise an appeal, and
- contact details for tenant advocacy services.

Department's Response

The department accepts this recommendation, noting that:

- *A review of maintenance claim correspondence is underway.*
- *A notice letter has been trialled to provide former tenants with an early warning that the department is considering making a maintenance claim against them, inviting contact to reach an early resolution. The department will seek consumer feedback as part of the trial.*

Recommendation 14

Change end of tenancy maintenance claim KPIs from timeframe-dependent to qualitative, based around requirements under the 2015 Guidelines.

Department's Response

The department accepts this recommendation, noting that:

- *In October 2016, the department increased the financial KPI trigger to pursue maintenance claims at the Victorian Civil and Administrative Tribunal. This has reduced the number of maintenance claim matters referred to the tribunal.*

Recommendation 15

Explore process improvements and/or resourcing to reduce current workloads for HSOs such that these workloads no longer provide an incentive for HSOs to ignore responsibilities under the 2015 Guidelines.

Department's Response

The department accepts this recommendation.

Oversight

Recommendation 16

Ensure Managers and Team Leaders provide greater oversight of the activities of HSOs at specific junctures throughout the end of tenancy maintenance and repair process and implement mechanisms by which to measure this oversight, to include:

- When a HSO intends on raising a maintenance claim
- When a maintenance claim is to be the subject of a VCAT application
- Before the results of a review or appeal are communicated to a former tenant
- Where a former tenant disputes a VCAT order made in their absence.

Department's Response

The department accepts this recommendation.

Recommendation 17

Ensure greater oversight of VCAT litigation. This may include:

- practical applications that guide the process for escalating a maintenance claim to a VCAT application and which acknowledge relevant legislative and policy requirements
- the implementation of an accreditation process for staff representing the department at VCAT that covers the legislative and policy requirements of that role and which is subject to regular review and refresher training.

Department's Response

The department accepts this recommendation, noting that:

- *The department is developing tools that will guide staff to follow key steps before escalating a maintenance claim to the Victorian Civil and Administrative Tribunal.*
- *In 2016, the department recognised the need for improved training for staff managing VCAT matters. Since late 2016, specialised training for all housing staff has been offered and this training focused on presenting cases to VCAT.*
- *The department will review its training for public housing staff representing the department at VCAT, including any future accreditation processes.*

Recommendation 18

Reconsider contract arrangements with debt collection agencies to:

- remove the disincentive for debt collectors to refer disputed claims back to the department for review
- require compliance with public service values and codes of conduct.

Department's Response

The department accepts this recommendation.

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