

THE RIGHT TO HOME UNDER THE VICTORIAN CHARTER

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In the recent decision of *Homeground Services v Mohamed*,¹ the Victorian Civil and Administrative Tribunal ('VCAT') dismissed an application for possession by a public housing provider as being incompatible with the Victorian *Charter of Human Rights and Responsibilities Act 2006* ('the Charter'). VCAT held that the applicant had acted unlawfully in giving a no-reason notice to vacate, and seeking a possession order based on that notice, in circumstances where the respondent would be made homeless through no wrong-doing or fault on his part.

Mohamed is a ground-breaking decision in terms of the application of the Charter. As Justice Bell stated in *Metro West v Sudi*,² '[d]isadvantaged people in need of social housing are among the most vulnerable in the community. Their human rights are imperiled by their circumstances.' The decision acknowledges the extreme consequences of an eviction, particularly when this results in a person being made homeless. It also highlights the lack of procedural protections for a tenant when eviction is based on a no-reason notice to vacate. Essentially, a tenant may be made homeless without having any prior opportunity to challenge the grounds for giving the notice.

Mohamed does not however adequately address important issues regarding the application of the Charter in legal proceedings. Tenants (and their representatives) who rely on the decision will need to be aware of these issues, and also the general principles for interpreting and applying the Charter.

Background

The *Residential Tenancies Act 1997* ('the Act') sets out mandatory procedures where a landlord seeks to evict a tenant³ (from public or private housing). The first step is service of a notice to vacate. The notice must specify the grounds for seeking eviction, and the period within which the tenant must vacate the premises. The Act sets out a number of grounds for eviction, and the notice period required for each. When the notice alleges that a tenant caused danger to neighbours, for example, the tenant may be required to vacate on the day the notice is given.⁴ If the tenant does not vacate by the nominated date, the landlord may apply to the Residential Tenancies List of VCAT for a possession order.

The no-reason notice to vacate⁵ is unique in that it does not require a landlord to provide any grounds for evicting the tenant. A landlord may simply serve the notice, wait for the expiry of 120 days, and then

(if the tenant remains in the rented premises) apply for a possession order.

On several occasions, VCAT has stated that it has no jurisdiction to consider the personal circumstances of a tenant who is facing eviction, or to dismiss or delay an application for possession based on hardship to the tenant. In *Director of Housing v JE*,⁶ VCAT stated that it could not take into account the tenant's mental illness, although the conduct relied on by the landlord was solely caused by the illness, and eviction would be likely to cause serious harm to the tenant's mental health and well-being.

The only protection available in relation to a no-reason notice to vacate is that such notices are 'of no effect if given in response to the exercise, or proposed exercise, by the tenant of a right under the Act.'⁷ However, a tenant has only sixty days after the date the notice is given to apply to VCAT to challenge the notice. The tenant must also prove to VCAT that the notice was given in response to the exercise, or proposed exercise, by the tenant of a right under the Act. Such information is usually in the landlord's possession, and such challenges are rarely successful.

Charter of Human Rights

Unlike the United States' Bill of Rights, the Charter does not permit courts to declare inconsistent legislation to be invalid. The Charter does however require courts and tribunals to interpret all legislation compatibly with the rights listed in the Charter.⁸ The Charter also requires 'public authorities' to act compatibly with human rights, and to consider relevant rights when making decisions.⁹ Similar charters have operated in the United Kingdom since 1998 and the Australian Capital Territory since 2004.

Part 2 of the Charter sets out the human rights that parliament specifically seeks to protect and promote. Section 13 provides that:

A person has the right –
a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

The Charter contains a general limitations provision in s 7(2). This section provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
a) the nature of the right; and

REFERENCES

1. *Homeground Services v Mohamed (Residential Tenancies)* [2009] VCAT 1131 ('Mohamed').
2. *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025, [1].
3. The Act applies to rented premises, rooming houses, and caravan parks. Those residing in a rooming house or caravan park are referred to in the Act as 'residents'. In this article, the term 'tenant' refers to both 'tenants' and 'residents'.
4. Section 244.
5. A no-reason notice may be given in relation to a rented premises (s 263), a rooming house (s 288), and a caravan park (s 314).
6. *Director of Housing v JE* [2007] VCAT 871.
7. Sections 266(2), 289(1) and 315(1). A no-reason notice is of 'no effect' if it purports to terminate a fixed term tenancy earlier than the specified termination date (s 266(1)).
8. Section 32(1).
9. Section 38(1).

- b) the importance of the purpose of the limitation; and
- c) the nature and extent of the limitation; and
- d) the relationship between the limitation and its purpose; and
- e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The decision of Bell J in *Kracke v Mental Health Review Board*¹⁰ established that Charter problems are approached in the following way:

1. Engagement – is a Charter right engaged (by legislation or the decision or conduct of a public authority)?
2. Justification – can the limitation be justified in accordance with s 7(2)?

The Charter came into operation in two stages: the obligation to interpret legislation compatibly with human rights commenced on 1 January 2007, while the obligations on public authorities commenced more recently, on 1 January 2008.

Early issues

Although the Attorney-General announced the introduction of the Charter as ‘an historic day for Victoria’,¹¹ tribunal members sitting in the Residential Tenancies List of VCAT were initially cautious in applying the Charter. The decision in *Director of Housing v IF*¹² is a good example. Although the tenant raised an argument based on s 13(a) of the Charter in opposition to the director’s application for possession, VCAT stated that it had ‘no jurisdiction’ to examine the director’s decision on Charter grounds. It seems that this conclusion was reached because the Charter is not in the list of enabling enactments conferring jurisdiction on the Residential Tenancies List of VCAT.

In the recent decision of *Director of Housing v Sudi*,¹³ however, Bell J held that in determining an application for possession, the tribunal can and must determine whether the application before it is valid, for only a valid application can properly enliven its jurisdiction. If the making of the application is itself unlawful under s 38(1) of the Charter, it is not a valid application and the tribunal has no jurisdiction to determine such an application. Such an application must be dismissed.

Section 39(1) of the Charter provides:

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

It has been argued that s 39(1) limits the circumstances in which relief is available under the Charter. In *Sabet v Medical Practitioners Board of Victoria*,¹⁴ Hollingworth J stated:

The Charter was not intended to create new causes of action against public authorities, additional to those already available outside the Charter... Rather, s 39 of the Charter provides that if a person otherwise has a right to seek relief or a remedy on the basis that a public authority’s decision was unlawful, then the person may seek that same relief or

remedy on the ground that the act or decision was unlawful because of the Charter.

This argument does not however prevent a tenant from opposing an application for possession on Charter-compatibility grounds. In such circumstances, the tenant is clearly not arguing a cause of action (new or otherwise), but is merely opposing the application brought by the landlord. Such a person is arguably not even claiming any relief. The issue raised by the tenant is simply whether the landlord, as a public authority, has acted compatibly with the Charter in giving the notice to vacate, and in seeking an order for possession. If the landlord has not acted compatibly with the Charter, VCAT arguably has no jurisdiction to grant a possession order. Section 39 has no application to such an argument.

More importantly, Bell J held in *Kracke* that s 39(1) extends (rather than limits) the power of courts and tribunals to grant relief or remedies where a public authority has acted unlawfully.¹⁵ In relation to VCAT’s jurisdiction to grant relief based on the Charter, Bell J stated:

It is of the utmost importance that the human rights of the community, especially of those who are vulnerable, are applied to the fullest... Human rights arguments based on the Charter come squarely within the authority of statutory tribunals to consider all the legal and factual issues which are relevant to the case before it. People must be able to come to tribunals and rely on human rights which are relevant to their case. It is contrary to the principle of access to justice that people should have to bring their administrative applications to a tribunal and take their Charter arguments somewhere else, such as a court. It is contrary to the principle of giving cheap, prompt and final resolution of legal problems to split cases up like that. The tribunal’s decision should reflect the whole of the applicable law. All the issues should if possible be resolved in the one justice institution at the one time.¹⁶

It is submitted that the approach of Bell J is both sensible and practical. VCAT is required by statute to conduct each proceeding with as little formality and technicality, and with as much speed, as a proper consideration of the matter before it permits.¹⁷ VCAT was established to provide cheap, accessible dispute resolution. A practical approach to the issue of VCAT’s jurisdiction to hear Charter arguments, and to grant relief based on the Charter, is therefore appropriate.

The right to home

As outlined above, the first issue is whether the right to home is engaged (or limited). According to Bell J in *Kracke*, Charter rights are interpreted broadly and purposively, by reference to the fundamental values protected by the right.¹⁸ Section 13 of the Charter is based on and virtually identical to Article 17 of the *International Covenant on Civil and Political Rights* (‘ICCPR’). The jurisprudence of the United Nations Human Rights Committee (‘UNHRC’) is the primary resource for the interpretation of the ICCPR.¹⁹

The meaning of ‘home’ is straightforward. According to the UNHRC, it is ‘the place where a person resides’.²⁰ The other key terms are ‘unlawful’ and ‘arbitrary’. According to the UNHRC, ‘unlawful’ means ‘no

10. *Kracke v Mental Health Review Board (General)* [2009] VCAT 646 (‘Kracke’).

11. Victoria, *Parliamentary Debate*, Legislative Assembly, 4 May 2006, 1289 (Rob Hulls).

12. *Director of Housing v IF (Residential Tenancies)* [2008] VCAT 2413 (‘IF’).

13. *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328.

14. *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, [104].

15. *Kracke* [801].

16. *Ibid* [793]–[794].

17. *Victorian Civil and Administrative Tribunal Act 1998*, s 98(1)(d).

18. *Kracke* [34]–[35].

19. Section 32 (2) of the Charter provides that international law may be considered in interpreting a statutory provision (which includes the Charter (s 3(1)).

20. General Comment No 16, Thirty-second session, 1988, [5].

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interference can take place except in cases envisaged by the law'.²¹ The UNHRC has stated that:

the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.²²

In *Kracke*, Bell J held that 'arbitrary' in s 13(a) is in fact part of the justification analysis, rather than an issue of engagement.²³ This has the important consequence that the onus of proving that an interference with the home is not arbitrary is on the defendant to the Charter claim, rather than on the person alleging infringement of the right.

Section 13 of the Charter is similar to Article 8 of the *European Convention on Human Rights*. The European Court of Human Rights has held that:

the loss of one's home is a most extreme form of interference with the right... Any person at risk of an interference of such magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.²⁴

The European Court has held that the existence of adequate procedural safeguards is central to the protection of the right to home. In *McCann*, for example, the court held that Article 8 was violated where a tenant was dispossessed of his home without any possibility to have the proportionality of the measure determined by an independent tribunal.²⁵ Logically, this would also entail a right to challenge the factual grounds on which an eviction is said to be based.

In *Kracke*, Bell J stated that 'the presence of safeguards is an important consideration in determining whether an interference is unlawful or arbitrary'.²⁶ The importance of safeguards, such as review by an independent tribunal of the grounds for a proposed eviction, is that it ensures that the power may be used only for its designated purpose and may not be abused.

Homeground Services v Mohamed

In *Mohamed*, the landlord was a private welfare agency that provided transitional housing to indigent tenants pursuant to a contract with the Director of Housing. VCAT held that the landlord was a 'public authority' and therefore bound to make decisions and to act compatibly with the Charter.

The landlord had a policy with respect to tenants less than 24 years of age. The policy required youth tenants to have an 'exit strategy' (a long-term housing plan) in place within 14 months of the commencement of the tenancy. The policy provided that, unless the tenant had applied for and been approved for public housing within the 14 month period, a notice to vacate would be given.

The tenant, Abdi Mohamed, was aged 21 years. Neither he nor his support service applied for public housing in the 14 month period. This appeared to be an oversight by his support service, as he was in receipt of Newstart allowance and appeared to be otherwise eligible for public housing. VCAT found that he was conscientious in his rent payments, and that he maintained the rented premises appropriately. In accordance with the policy, however, he was given a no-reason notice to vacate, giving him 120 days to vacate the premises. When the period of the notice expired, the landlord applied to VCAT for a possession order.

VCAT held that the landlord's application for possession engaged s 13(a) of the Charter, and that the interference with the tenant's right to home was 'arbitrary'. This was because the tenant would be made homeless through no wrong-doing or fault on his part. The implementation of the landlord's policy, as applied to this tenant's circumstances, was arbitrary.²⁷

Mohamed has significant ramifications in terms of evictions by public authorities, especially those based on a no-reason notice to vacate. Such notices, by their nature, do not allege any fault or wrong-doing on the part of the tenant. Based on the Tribunal's reasoning (which is consistent with international law), every application for possession based on a no-reason notice to vacate will engage the right to home (provided, of course, that the rented premises constitutes the complainant's 'home'). Every such eviction will therefore need to be justified by the landlord in accordance with s 7(2) of the Charter.

In *Mohamed*, VCAT linked the relief sought by the tenant (dismissal of the application for possession) with the terms of the Act. The provision granting VCAT power to grant a possession order requires (among other matters) that the landlord is 'entitled' to give the notice to vacate.²⁸ Because the landlord acted incompatibly with the Charter by giving the notice to vacate, VCAT reasoned, it was not 'entitled' to give the notice. This reasoning, however, ignored previous

21. *Ibid* [3].

22. *Ibid* [4].

23. *Kracke* [109]–[110].

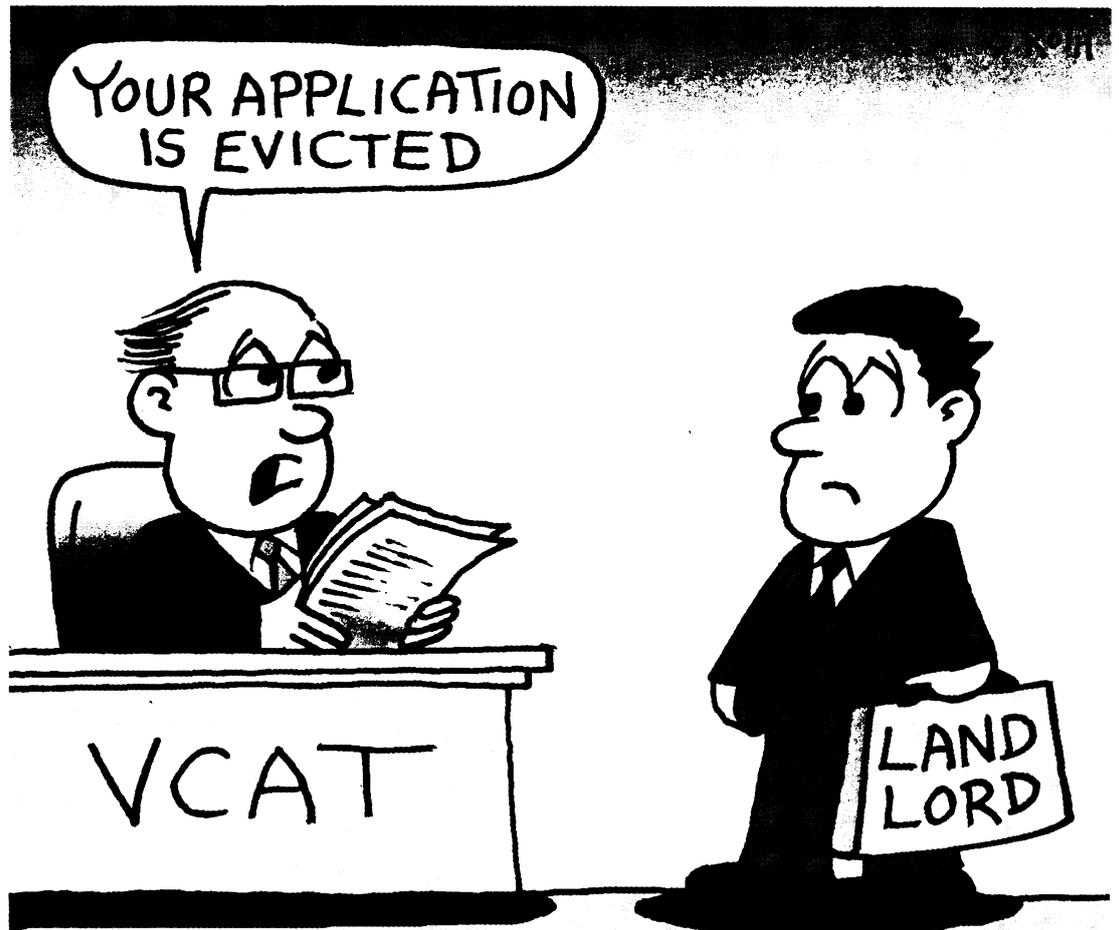
24. *McCann v United Kingdom* [2008] ECHR 19009/04, [50] ('*McCann*').

25. *McCann* [55].

26. *Kracke* [187].

27. *Mohamed* [18]–[21].

28. Section 330 (1)(a)(i).



29. *Director of Housing v Pavletic* [2002] VSC 438 ('Pavletic').

30. *Ibid* [18].

VCAT decisions under which 'entitled' has a well-established and very different meaning.

The other weakness in VCAT's reasoning in *Mohamed* is the absence of any consideration of whether the limitation on the tenant's rights was justified in accordance with s 7(2) of the Charter. According to Bell J in *Kracke*, when a Charter right is found to be engaged, the court or tribunal must then go on to consider whether the limitation is justified in the particular circumstances of the case. In eviction cases, justification will be the most important issue.

The meaning of 'entitled'

'Entitled' is a key term in the provision granting VCAT power to make a possession order. It is also an essential part of VCAT's reasoning in *Mohamed* — it is the link between the infringement of the tenant's right to home and the remedy of dismissing the application for possession. The term is not defined however in the definitions section of the Act, or in the second reading speech or explanatory memoranda.

The decision of Smith J in *Director of Housing v Pavletic*²⁹ is commonly referred to in relation to the meaning of 'entitled' in the Act. In *Pavletic*, Smith J suggested that 'entitled' means simply that the preconditions in the particular section giving a landlord power to give a notice to vacate are satisfied. VCAT has on occasion

relied on *Pavletic* as authority that this is *all* that 'entitled' means.

It must be noted however that *Pavletic* concerned the meaning of 'endangers' in s 244 of the Act. Smith J's comments regarding the meaning of 'entitled' are therefore strictly comments made whilst considering the parties' arguments on the central issue. Furthermore, Smith J does not say that 'entitled' means only that the preconditions for the giving of the notice have been satisfied. In one part of the judgment, his Honour in fact indicates that the term may include some administrative law grounds, such as lack of bona fides in exercising a statutory power.³⁰

More fundamentally, *Pavletic* was decided in 2002, before the commencement of the Charter. The Charter requires that all legislation be interpreted compatibly with Charter rights, in so far as this is consistent with the legislative purpose. 'Entitled' must therefore be interpreted consistently with the right to home. This would mean, as held in *Mohamed*, that a public authority is not 'entitled' to give a notice to vacate if this would be incompatible with its obligations under the Charter.

It is arguable that this interpretation is required even in the absence of the Charter. In *Kracke*, Bell J held that the enactment of the Charter does not exclude ordinary principles of statutory interpretation, such as the presumption that parliament does not intend

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to override fundamental rights.³¹ In decisions such as *Pavletic*, courts have held that the Act should be interpreted purposively, taking into account the 'serious consequences' flowing from eviction for the tenant, and the need to avoid an 'unfair or harsh result'.³² Essentially, any ambiguity in tenancy legislation must be interpreted beneficially for tenants, and landlords' powers must be read restrictively.

In *Pavletic*, for example, the power to evict a tenant for endangering the safety of neighbouring tenants was interpreted to require that the danger must exist at the time the notice to vacate was given. Otherwise, the notice was invalid and could not be relied on as a basis for evicting the tenant. Similarly, 'entitled' should be interpreted beneficially for tenants, meaning that the giving of the notice must be done in a way that is compatible with the Charter, and particularly the right to home.

Justification

The key issue in eviction cases where the right to home is engaged is whether the eviction is justified in accordance with the Charter. This will involve a close analysis of the particular circumstances of the case, including the reasons given for eviction.

In terms of the nature of the right, the importance of protection from unlawful and arbitrary interference with the home cannot be overstated. The Constitutional Court of South Africa has stated:

[A] home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquility in what (for poor people in particular) is a turbulent and hostile world.³³

Having a secure home is central to the achievement of many other human rights in the Charter, such as privacy and security of the person. It is also central to the values of human dignity, freedom and equality, on which the Charter is based.³⁴

The importance of the purpose of the limitation will be different in every case, depending on the reasons given for the proposed eviction. Regarding the nature and extent of the limitation, eviction which results in homelessness constitutes a complete denial of a tenant's rights under s 13 of the Charter. In this regard, it is important for legal advisers to obtain full information from their client regarding alternative accommodation available, should the client be evicted. Legal advisers should also obtain written statements

(preferably from a qualified medical practitioner) regarding the client's health and medical status, and how this would be affected by eviction and possible homelessness.

In *Kracke*, Bell J emphasised the importance of looking at the overall situation:

[h]uman rights are about the rights of people and the further you get away from the human dimension of the impact of the limitations the less likely you are to properly apply the rights.³⁵

This approach emphasises the practical effect of eviction on a tenant, not just the legal effect. This includes the psychological and emotional consequences, such as loss of self-respect, sense of disempowerment, and loss of dignity.

The availability to a landlord of other means to achieve the purpose sought by the eviction will often be an important issue in terms of justification. The Act provides for several different types of notices to vacate, most of which allege some form of fault or wrong-doing on the part of the tenant, or at least facts which a tenant may challenge. The Act also provides a landlord with options that do not involve an application for possession. This includes the giving of a breach of duty notice, and the ability to apply to VCAT for a compliance order.³⁶ Arguably, all of these options are less restrictive of a tenant's rights than applying for possession based on a no-reason notice to vacate. Options not involving an application for possession are less restrictive because they do not involve the possibility of eviction or homelessness. Options involving a 'show cause' notice to vacate are less restrictive because they enable the tenant to challenge the grounds for the eviction.

Essentially, justification comes down to a question of proportionality; the greater the limitation of the right, the more compelling must be the justification.³⁷ Although s 7(2) of the Charter lists a number of specific factors, the relevance of each factor will depend on the circumstances of each case. Other factors may be relevant in a given case. An important contextual factor, it is submitted, is the current 'acute housing shortage' noted by VCAT in *IF*.³⁸ This refers, it is submitted, to the current shortage of affordable rental properties in Melbourne for persons on a low-income, and the long waiting period for public housing. These are crucial background facts in all eviction cases.

Another important contextual issue is the lack of security of tenure, and the generally restricted housing

31. *Kracke* [38].

32. *Pavletic* [16], [18].

33. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), [17].

34. Preamble.

35. *Kracke* [727].

36. Sections 208, 209 and 212.

37. *Kracke* [150], [210].

38. *IF* [36].

options of people on a low income. Such people generally have a higher risk of homelessness if evicted. It is important however to obtain detailed and credible evidence of such factors when they are relevant in a particular case.

In this regard, it is sometimes argued that a no-reason notice to vacate provides sufficient protection to tenants because it provides a period of 120 days to find alternative accommodation. This argument ignores several important facts. First, a landlord may give a 'show cause' notice to vacate and still give the tenant 120 days (or more) to vacate the rented premises. The provision of 120 days to vacate is not limited to no-reason notices to vacate. Second, VCAT should take into account the acute housing shortage referred to in *IF*, and the fact that 120 days to vacate does not necessarily justify what would otherwise be an arbitrary interference with a tenant's present home.

The history of the 120-day time period also sheds light on this issue. Under the 1980 Act, tenants and rooming house residents were given six months to vacate where a no-reason notice was given.³⁹ The 1997 Act reduced the period to 90 days. In 2002, it was increased to 120 days. The Minister's second reading states that this amendment was intended to 'increase the security of tenure for tenants and residents' and to 'deter property owners from using the no-reason notice to vacate inappropriately.'⁴⁰ Accordingly, it is submitted that the provision of 120 days to vacate should not in itself be regarded as sufficient justification for giving a no-reason notice.

Conclusion

Landlords and their representatives are likely to argue that allowing Charter arguments to be raised in proceedings for possession will undermine their right to terminate a tenancy at will. However, the right of a landowner to evict a tenant has always been subject to limits. The right to protection from unlawful and arbitrary interference with the home, like all human rights contained in the Charter, is a right which has widespread acceptance in the community.⁴¹ These rights are enshrined in the ICCPR and are widely recognised as fundamental to a democratic society based on the rule of law.

For many years, the Act has provided well-understood processes for a landlord to apply for possession of rented premises. The introduction of Charter arguments may bring about some uncertainty regarding the respective rights of landlords and tenants regarding eviction. The Charter was intended however to bring about change. Its introduction was described by the Attorney-General as nothing short of 'historic'.

It is important to recall that the Charter is itself an exercise of Parliamentary sovereignty. Charter arguments, although relatively new, should not be treated as exotic, or as inimical to the more established rights and processes set out in the Act. It is not a matter of disregarding one piece of legislation or the other. In many circumstances, both pieces of legislation will apply. In such circumstances, the two should be read together, harmoniously when possible.

The Charter does however impose certain overriding obligations. Court and tribunals must, so far as it is possible to do so consistently with their purpose, interpret all legislation compatibly with Charter rights. Public authorities must act compatibly with Charter rights and give proper consideration to relevant human rights. These obligations provide an avenue for tenants and their legal advisers to oppose an application for possession, particularly an application by a public authority based on a no-reason notice to vacate.

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39. *Residential Tenancies Act 1980*, s 123(1); *Rooming House Act 1990*, s 32(1).

40. Victoria, *Parliamentary Debate*, Legislative Assembly, 14 May 2002, 1399 (Ms Pike).

41. Victoria, *Parliamentary Debate*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls).