

# Domestic violence provisions in the Residential Tenancies Act

December, 2022



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## 1. About the Tenants' Union of NSW

The Tenants' Union of NSW is the peak body representing the interests of tenants in New South Wales. We are a Community Legal Centre specialising in residential tenancy law and policy, and the main resourcing body for the state-wide network of Tenants Advice and Advocacy Services (TAASs) in New South Wales.

The TAAS network assists more than 25,000 tenants, land lease community residents, and other renters each year. We have long-standing expertise in renting law, policy and practice. The Tenants' Union NSW is a member of the National Association of Tenant Organisations (NATO), an unfunded federation of State and Territory-based Tenants' Unions and Tenant Advice Services across Australia. We are also a member of the International Union of Tenants.

## 2. About this submission

Thank you for the opportunity to provide comment on the statutory review of the domestic violence provisions of the *Residential Tenancies Act 2010* (RTA).

In providing comment we have consulted closely with advocates from the statewide network of Tenants' Advice and Advocacy Services and draw on their experiences supporting renters to use the domestic violence provisions within the RTA.

Along with Women's Legal Services NSW and Domestic Violence NSW we also collected information via a survey open to renters who had ended their tenancy using a domestic violence termination notice (DVTN), and anyone who supported someone to do this (advocates, support workers, etc). The Domestic Violence and Renting Survey (the DV & renting survey) collected information about how the current provisions and supports in place are working, and sought to help us identify issues with the current operations of the domestic violence provisions within the Act.

The survey was conducted between 31 October 2022 and 16 November 2022. The survey received 70 responses in all, 68 respondents who had supported someone to end a tenancy, 2 respondents who had used a DVTN to end their tenancy. Overall 39% of responses (27 respondents) reflected on the experiences of renters from the Sydney metropolitan area, 59% (41 respondents) from regional NSW.

In this submission we identify a range of ongoing issues and concerns with the operation of the domestic violence provisions. We discuss issues in relation to:

- Awareness and understanding of the ability to end a tenancy because of domestic violence
- Experiences with real estate agents and landlords
- Expanding the list of competent persons
- Serving a domestic violence termination notice
- Assisting victim-survivors to remain in their home

- Recognising occupants
- Claims on rental bond
- Limits on liability for damages
- Protection against blacklisting
- Securing a new home
- Privacy and Confidentiality

Our recommendations have been developed after consultation with the TAAS network, Women's Legal Service NSW and Domestic Violence NSW.

We thank the staff in Regulatory Policy, Better Regulation Division at the Department of Customer Service for their work coordinating this consultation. We look forward to further discussions about how the domestic violence provisions within the Residential Tenancies Act (RTA) are working, and how best to implement changes required to ensure renters experiencing domestic and family violence and abuse are better supported and have adequate protections in place within the RTA when escaping violence and abuse and its impacts.

For more information regarding this submission, contact Jemima Mowbray, Policy and Advocacy Manager at the Tenants' Union of NSW.

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### 3. Recommendations

#### **Recommendation 1: Resourcing of community education about DV provisions in RTA**

Ongoing resourcing be provided for community education projects to develop resources and training on the domestic violence provisions within the *Residential Tenancies Act 2010*, including specific resources and training for advocates and support workers who provide assistance and support to victim/survivors, as well as resources for the general community.

#### **Recommendation 2: Mandatory training requirement for landlords and agents**

Landlords and real estate agents undergo mandatory training about domestic and family violence and abuse on the nature and dynamics of domestic and family abuse. Training should also provide a clear understanding of the domestic violence provisions in the RTA and the rights and obligations of landlords and tenants in relation to these, including though not limited to confidentiality requirements and limits on liability for a tenant who is a victim of a domestic violence offence as specified at 54A and 105D(1).

#### **Recommendation 3: Accessible complaint process that prioritises DV victims-survivors**

Consideration should be given to how victim/survivors can best be supported by Fair Trading/Services NSW where real estate agents or landlords demonstrate a lack of adequate understanding of the domestic violence provisions in the RTA. This could include, for example, the introduction of a specific and prioritised complaints form and process for tenants who are victim-survivors of domestic violence.

#### **Recommendation 4: Competent persons**

The list of competent persons be expanded to include:

- disability advocates and support workers working for an organisation or services partially or wholly funded by state and/or Commonwealth government
- community access workers from services partially or wholly funded by state and/or Commonwealth government
- workers from Aboriginal Corporations registered by the Office of the Registrar of Indigenous organisations that are partially or wholly government funded by state and/or Commonwealth government
- homelessness or housing workers from services partially or wholly funded by state and/or Commonwealth government
- tenancy workers/advocates from services partially or wholly funded by state and/or Commonwealth government

#### **Recommendation 5: Serving of Domestic Violence Termination Notice (DVTN)**

To cease requiring a tenant to serve any other co-tenants with a copy of the Domestic Violence Termination Notice. Instead where a DVTN is served by the tenant to the landlord or their agent, the landlord or agent should be required to advise any remaining co-tenants that a co-tenant's tenancy has ended, and if relevant, any rights the remaining

co-tenants have with respect to the amount of rent payable under section 105D(3) and (4) of the RTA.

#### **Recommendation 6: Safely terminating a perpetrator's co-tenancy**

Mechanisms to safely terminate a perpetrator's co-tenancy, that do not require a final AVO, be considered to assist victim-survivors to remain in their home.

#### **Recommendation 7: Recognising occupants as tenants**

Where a tenant is excluded from a residential premises by a final AVO, any remaining occupants should have the option of being recognised as a tenant without having to apply to NCAT. There should be a presumption in these circumstances that the occupant will be recognised as a tenant on their request.

#### **Recommendation 8 & 9: Repayment of rental bond**

A co-tenant who ended their tenancy using a DVTN be able to apply for a portion of the bond directly from the Rental Bond Board at the point at which their agreement ends.

NCAT be given explicit powers to order repayment of bond to former co-tenants upon termination of a person's tenancy due to domestic violence.

#### **Recommendation 10 & 11: Role of the Tribunal**

NSW Civil and Administrative Tribunal (NCAT) Tribunal Members undergo mandatory training about domestic and family violence and abuse, including the nature and dynamics of domestic and family abuse and all sections of the RTA relating to responding to domestic and family violence and abuse, particularly section 54A of the RTA.

NCAT consider Member specialisation within the Tribunal in relation to matters relating to DVTN, database listings where the tenant was in circumstances of domestic violence at the end of the tenancy, and/or claims on bond and/or general claims for tenant damage where the tenant is an exempted tenant under section 54A of the RTA. Specialisation may assist the Tribunal implement trauma-informed judicial/Tribunal practices within the hearing process when appropriate.

#### **Recommendation 12: Expansion of protection against blacklisting for all tenants who ended their tenancy in circumstances of domestic violence**

The restriction on tenancy database listing be extended to include all tenants who are victim-survivors of domestic violence and ended their tenancies in circumstances of domestic violence.

#### **Recommendation 13: Protection against discrimination**

Being a victim-survivor of domestic violence be included as a protected attribute in the *Anti-Discrimination Act 1977*.

#### **Recommendation 14: Privacy obligations with respect to tenants' personal information**

Increase the penalty attached to section 105C(3) to facilitate improved compliance with

protection of the sensitive and personal information of victim-survivors

**Recommendation 15 - 17: Consent for publication of photos or videos**

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The law require landlords and their agents obtain a tenant's consent before taking photographs of their home when accessing the residential premises for any reason. Tenants be provided copies on request of any photographs or video recordings taken in which the tenants' possessions are visible.

Consent for publication of any specific photograph or visual recording in which tenants' possessions are visible be obtained within a reasonable timeframe prior to publication, and each time the landlord or their agent would like to publish photographs or video recordings.

The RTA continue to ensure that a tenant is able to withhold consent to photographs or video recordings if it is reasonable to do so. We do not recommend any limiting at 55A(2).

## 4. Ending a tenancy because of domestic violence

### 4.1 Awareness and understanding of the domestic violence provisions in the *Residential Tenancies Act 2010* (RTA)

Domestic violence reforms were introduced on 28 February 2019 to provide stronger protections for renters experiencing domestic and family violence and abuse. The new laws allowed victim-survivors to immediately end their fixed term or periodic tenancy in circumstances of domestic violence without penalty. This includes protection against blacklisting, and limits on liability for damage to rental property where the damage occurred as a result of a domestic violence offence.

In relation to ending a tenancy, the reforms also ensured victim-survivors were able to provide a declaration as evidence of domestic violence, and in December 2020 the list of 'competent persons' able to provide a declaration was expanded from medical practitioners, to include a range of other health practitioners and relevant support workers.

Since their introduction these reforms have provided urgent and essential protections for people experiencing domestic and family violence and abuse. They have generally been working well, especially where a victim-survivor wishes to leave. We especially commend the responsiveness the Government demonstrated with the expansion of the list of 'competent persons' in December 2020.

#### **An enormous difference to tenants' lives: 'She literally wept with joy'**

"The capacity to end the co-tenancy agreement quickly and effectively has made an enormous difference to tenants' lives. After advising a tenant of the process she literally wept with joy that she could extract herself from the perpetrator." Q22R2

While the reforms made it much easier for survivor-victims to end their tenancy, immediately and without penalty, many people are still unaware of the provisions. Survivor-victims and/or their support workers are sometimes still only finding out about the protections after the fact, or can feel the provisions are too complicated or overwhelming to navigate.

Additional and ongoing resourcing is required to ensure ongoing and appropriate community education on the domestic violence provisions within the *Residential Tenancies Act 2010* can be developed and made available. This should include resourcing for ongoing training for advocates and support workers who provide assistance and support to victim-survivors, as well as general resources for the general community.

#### **Recommendation 1: Resourcing of community education about DV provisions in RTA**

Ongoing resourcing be provided for community education projects to develop resources and training on the domestic violence provisions within the *Residential Tenancies Act 2010*, including specific resources and training for advocates and support workers who provide assistance and support to survivor-victims, as well as resources for the general community.

## 4.2 Experiences with real estate agents and landlords

While 61% of respondents to the Domestic Violence and Renting survey reported the landlord or their agent had been supportive/cooperative when the tenant served a DVTN, a significant number (33%) reported experiencing difficulties with their landlord or their agents when using a domestic violence termination notice to end their tenancy. This was particularly significant for tenants in regional NSW: 44% of real estate agents and landlords in regional NSW were reported to not be cooperative or supportive vs 18% in the Sydney metropolitan area.

"There was some hesitancy in giving [the DVTN] to the real estate as the reaction was unknown, it was also unclear if future prejudices would be held."  
Q11R11

"The agent made threats about the tenant needing to pay break lease costs and that she would still be responsible for any damage or arrears accrued by the perpetrator who stayed behind, even after the tenant had issued the termination notice and returned her keys." Q13R8

"The agent told the tenant she had to give 21 days notice and would be liable for rent for that period (which the tenant could not afford). Made threats about making a claim on the bond." Q13R9

"I have had several clients where the real estate have chosen not to recognise the domestic violence evidence and have told the client they are unable to break the lease. I have had other agent's elongate the process despite considerable evidence that the client was leaving a dangerous domestic violence situation. No action was taken by the real estate until intervention by our service or tenancy service support." Q13R12

"No difficulties. I have supported several clients with a termination and agencies/landlords were always prompt in their response." Q13R19

"It was shockingly horrible, it was so hard. [There is] not a lot of understanding when it comes to DFV." Q13R27

"Red tape and lack of empathy." Q13R29

"At first they wouldn't accept it [the DVTN] and we had to quote the legislation."  
Q13R20

"[The landlord/agent] questioned the validity of the Notice and initially wanted proof of the incident" Q13R24

The lack of knowledge and understanding of some landlords and their agents can mean tenants are having their notices challenged. Tenants are being charged break fees inappropriately in some cases, and can have trouble claiming their bond - reporting agents and landlords are unaware of the limits on liability for damage resulting from a domestic



violence incident (see further discussion of this at section 4.7). Some report being threatened with a blacklisting or actually being listed on a tenant database after using a DVTN (see further discussion of this at section 4.9).

We recommend training on the domestic violence provisions of the RTA be made a mandatory requirement for real estate agents, and made available to all landlords. This training must also provide more general information about domestic and family violence and abuse, including the nature and dynamics of domestic and family abuse.

We believe it is appropriate that survivor-victims who experience difficulties with the landlords and/or their agents in relation to any of the DV provisions within the RTA should have a prioritised and easily accessible and identifiable complaints process through Fair Trading. This would better ensure timely resolution of misunderstandings and education of landlords and agents where appropriate. We also encourage Fair Trading and the Better Regulation Division to consider how compliance and enforcement may be strengthened for matters involving tenancies where domestic violence is involved and where the agent or landlord's behaviour or conduct is egregious and possibly in breach of any relevant Code of Conduct, e.g. the general rules of conduct set out in the [Property and Stock Agents Regulation 2022](#). This may include, for example, where an agent has consistently failed in relation to their knowledge and understanding of the Act, in their exercise of care and diligence, or where they have conducted themselves unconscionably.

#### **Recommendation 2: Mandatory training requirement for landlords and agents**

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*Landlords and real estate agents undergo mandatory training about domestic and family violence and abuse on the nature and dynamics of domestic and family abuse. Training should also provide a clear understanding of the domestic violence provisions in the RTA and the rights and obligations of landlords and tenants in relation to these, including though not limited to confidentiality requirements and limits on liability for a tenant who is a victim of a domestic violence offence as specified at 54A and 105D(1).*

#### **Recommendation 3: Accessible complaint process that prioritises DV victims-survivors**

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*Consideration should be given to how victim/survivors can best be supported by Fair Trading/Services NSW where real estate agents or landlords demonstrate a lack of adequate understanding of the domestic violence provisions in the RTA. This could include, for example, the introduction of a specific and prioritised complaints form and process for tenants who are victim-survivors of domestic violence.*

### **4.3 Expanding the list of competent persons**

The list of competent persons able to make a declaration as evidence that a tenant is in a domestic violence situation expanded after 11 December 2020. The expansion of the 'competent person' definition beyond medical practitioners has proved extremely beneficial. It is now much easier for survivors and the advocates assisting them to access the DV provisions as intended. In particular, permitting caseworkers at Domestic Violence

services to complete the declarations has assisted to ensure the speedy termination of tenancies.

The Fair Trading End of Tenancy survey collects information about why a tenancy ends. The survey is voluntary, and the responses here should not be considered necessarily representative, especially as responses relevant to the domestic violence provisions may be limited as domestic violence victims could self-select out of completing such a survey, given their vulnerability and the difficult circumstances they may experience after ending a tenancy. Nonetheless, the survey provides the most comprehensive data available to us about why tenancies are ending.

Survey data collected between 3 August 2021 through 30 June 2022 identified 108 tenancies ended due to Domestic Violence. This included 106 respondents who indicated the tenancy was ended by the tenant with notice, 1 who indicated their tenancy ended by consent of landlord and tenant with no notice as a result of domestic violence, and 1 who indicated the tenancy ended by order of Tribunal due to domestic violence.

Of those tenancies that respondents indicated had ended using a domestic violence termination notice:

- 48.15% (51) relied on a declaration as evidence
- 51.85% (55) relied on a Domestic Violence Order (DVO) as evidence.

The Domestic Violence and Renting survey undertaken by TUNSW, WLS NSW, and DV NSW had similar proportions in relation to evidence relied on when tenants used a DVTN. Of the 70 respondents reporting on the use of DVTNs:

- 44% (31) reported tenants relied on a declaration as evidence
- 51% (36) reported tenants relied on a DVO as evidence.

The Domestic Violence and Renting survey asked respondents who completed the declaration, with a significant proportion indicating the competent worker was a domestic violence or sexual assault worker (43%), a General Practitioner (17%), and a refuge/emergency accommodation worker (15%).

In general, respondents reported it was not difficult to find a competent person (75% of respondents). However, two respondents indicated that a competent person the tenant approached refused to complete the declaration, and 16% (8 respondents) reported it was difficult to find a competent person. 5 of these 8 respondents were people who had supported a tenant to end their tenancy with a DVTN in regional areas of NSW.

We are aware there are a range of support workers in specialist or targeted support services who provide support to people experiencing domestic and family violence who are not yet captured by the list in the regulations at Schedule 3. In the Domestic Violence and Renting survey there was also strong support from respondents for the list of competent persons to be expanded. Respondents indicated the following workers would usefully be added to the list of competent persons:

- homelessness or housing workers (86% respondents indicated)
- workers from Aboriginal corporations (68% respondents indicated)
- tenancy advocates (62% respondents indicated)
- disability advocates / support workers (59% respondents indicated)
- community (access) workers (46% respondents indicated).

We recommend a further expansion of the list of competent persons to support people experiencing domestic and family violence who are accessing support from specialist or targeted services, and who may not be engaging with more generalist services. Timely access to a competent person for victim-survivors is essential. Where there is not an existing relationship between a victim-survivor and a 'competent person' they will possibly have to seek a referral and/or wait some time for a first appointment. Appropriately expanding the list of competent persons acknowledges that where an established relationship already exists between the victim-survivor and a 'competent person' it is much easier and quicker for a termination to take place and the victim-survivor to escape a situation of violence.

#### **Recommendation 4: Competent persons**

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*The list of competent persons be expanded to include:*

- *disability advocates and support workers working for an organisation or services partially or wholly funded by state and/or Commonwealth government*
- *community access workers from services partially or wholly funded by state and/or Commonwealth government*
- *workers from Aboriginal Corporations registered by the Office of the Registrar of Indigenous organisations that are partially or wholly government funded by state and/or Commonwealth government*
- *homelessness or housing workers from services partially or wholly funded by state and/or Commonwealth government*
- *tenancy workers/advocates from services partially or wholly funded by state and/or Commonwealth government*

#### **4.4 Serving a domestic violence termination notice**

For victim-survivors the requirement that they serve notice on a co-tenant when they may be their perpetrator presents significant problems, including concerns for safety. We are also concerned that some victim survivors may hesitate or delay serving notice due to these concerns.

In the Domestic Violence and Renting survey the majority of respondents (82%) indicated the perpetrator had been a co-tenant. Many shared that the process of serving a DVTN was often fraught, and very stressful for the tenant.

■ "The client was terrified of what the perpetrator would do to her once he

received the notice.” Q11R18

“[There were serious] concerns [shared] by the tenant about how to have it served on perpetrator safely and without contact.” Q11R6

“The timing was crucial, as it was felt the issuing of that notice would cause risk, so every arrangement to remove goods etc had to be in place prior.” Q11R2

“[Serving the DVTN] put the women’s safety more at risk for talking” Q11R9

While in some instances respondents reported that the real estate agent had assisted the victim-survivor by passing on the notice to the co-tenant (perpetrator), others reported they could not rely on the landlord or agent. We are aware of at least once instance in which a victim-survivor failed to serve the DV notice on a perpetrator due to safety concerns, with the result that her landlord then sought arrears from her on the basis they believed she was still a co-tenant and liable for the rent.

Any remaining co-tenants do need to be notified that their co-tenant’s tenancy has ended. However, the responsibility for advising remaining co-tenants should be shifted to the landlord or their agent who should also inform the remaining tenants of any rights they may have relating to rent payable immediately following the ending of their co-tenant’s tenancy (for a period of 2 weeks) and after this.

#### **Recommendation 5: Serving of Domestic Violence Termination Notice (DVTN)**

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*To cease requiring a tenant to serve any other co-tenants with a copy of the Domestic Violence Termination Notice. Instead where a DVTN is served by the tenant to the landlord or their agent, the landlord or agent should be required to advise any remaining co-tenants that a co-tenant’s tenancy has ended, and if relevant, any rights the remaining co-tenants have with respect to the amount of rent payable under section 105D(3) and (4) of the RTA.*

## **4.5 Assisting victim-survivors to remain in their home**

A key problem identified by advocates from Tenants’ Advice and Advocacy Services, as well as by respondents in our survey arises where the victim-survivor and perpetrator are co-tenants, or where the perpetrator is a tenant and the victim-survivor an occupant and the victim-survivor wishes to stay in the premises and exclude the perpetrator.

### **Victim-survivors need the option to remain in the property**

“Due to the lack of housing options for victims, most victims who are contacting us are wanting advice and assistance on terminating the perpetrator’s tenancy. They want to remain at the property. This is quite difficult to do if the victim does not have an AVO, we are finding they don’t want to pursue the avenue through the Tribunal. It would be good if the victim could provide a report from a DV specialist. Victims often don’t want to take out an AVO as this can place them at further risk.” Q22R5

“The primary issue that our clients have had is when they are wanting to remain in the premises and terminate the tenancy of the perpetrator. This is very common given the current state of the rental market. The current legislation will only terminate the perpetrators tenancy if a final AVO excluding the perpetrator has been provided. There are many issues that can delay and prevent a victim of DV from getting a final AVO. A preferable arrangement would be to allow the termination of the perpetrators tenancy with a letter from a 'competent person'.”  
Q22R4

This problem is particularly acute in regional areas where low vacancy rates and severely limited availability of affordable rentals means victim-survivors are not in the position to vacate using a DV notice of termination because they are not able to secure alternative accommodation.

Currently in the *Residential Tenancies Act*, section 79 provides that where a final Apprehended Violence Order (AVO) is made that prohibits a co-tenant or tenant (perpetrator) from accessing the premises their tenancy is immediately terminated. However, we understand section 79 is rarely if ever applied. This is at least in part because final AVOs take significant time to obtain, if at all, and where granted may not include an exclusion order. Further, as the 2019 reforms recognised, many victim-survivors do not involve the police or courts.

Section 102 which allows termination for a co-tenant is also not practical in a lot of cases, as it requires a generally prohibitive level of evidence to establish domestic violence (again generally requiring some form of AVO to demonstrate the 'special circumstances' of the case). It also requires both the co-tenant/perpetrator and the landlord or agent to be party to those proceedings. Tenants are often dissuaded from making such an application, due to safety concerns or particularly where some may hold concerns that the perpetrator will exploit or manipulate the law and courts to re-traumatise and/or continue to abuse them.

We believe there is a need for reform to make it easier for victim-survivors to end the tenancy of the perpetrator who is a co-tenant or tenant. Consideration could be given to introducing provisions within the RTA to allow victim-survivors to end a perpetrator's tenancy or co-tenancy in circumstances of domestic violence, referring for example to those set out at 105B(2). This would allow a victim-survivor to end the perpetrator's tenancy or co-tenancy if they provided the Tribunal with evidence in the following form, –

- (a) a copy of the certificate of conviction in proceedings against the relevant domestic violence offender for the domestic violence offence, or
- (b) a copy of the relevant DVO made against the relevant domestic violence offender, or
- (c) a copy of the relevant injunction granted under section 68B or 114 of the [Family Law Act 1975](#) of the Commonwealth in favour of the tenant or co-tenant in proceedings against the relevant domestic violence offender, or
- (d) a declaration made by a competent person that—

- (i) is in the form prescribed by the regulations, and
- (ii) contains the matters prescribed by the regulations.

The Tribunal should also be given power to end the tenancy of a tenant or co-tenant (the perpetrator) where circumstances of domestic violence as set out at 105B(2) are demonstrated on application *by an occupant*. Where the victim-survivor is an occupant the Tribunal be given power to make an order recognising the victim-survivor (the remaining occupant) as a tenant under the residential tenancy agreement, and on such terms as the Tribunal thinks appropriate having regard to the circumstances of the case.

There may be, under such reforms, a need to join the tenant or co-tenant perpetrator as a party to proceedings. Consideration should be given to how best to balance both the need for the tenant/co-tenant perpetrator to be made aware of the application and possibly address or provide evidence to the Tribunal, alongside the need to ensure access to justice for victim-survivors and to protect against and minimise any traumatic impacts involved in this process. This may involve flexibility in relation to hearings so that parties would not have to attend together.

Financial support may be necessary to ensure a person can remain in the premises. Current programs like DCJ's Rent Connect Start Safely are open to people with existing tenancy agreements and help to ensure a sustainable tenancy and alleviate any concerns all parties may have about the financial viability of the tenancy. Any gaps in coverage or eligibility should be considered and addressed, to ensure these programs are as effective as possible at continuing agreements following the removal of a perpetrator of violence.

#### **Recommendation 6: Safely terminating a perpetrator's co-tenancy**

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*Mechanisms to safely terminate a perpetrator's co-tenancy, that do not require a final AVO, must be considered to assist victim-survivors to remain in their home.*

## **4.6 Recognising occupants**

As discussed above, section 79 provides that where a perpetrator is prohibited by a final apprehended violence order from having access to the residential premises their tenancy agreement is terminated. This section also provides that an occupant can be recognised as a tenant in these circumstances. We feel this could be usefully strengthened to ensure that recognition of an occupant is presumed where the occupant requests this.

This could be achieved by explicitly articulating that occupants in these circumstances can request recognition as a tenant from their landlord, and the landlord cannot withhold consent unless it is reasonable to do so.

If the presumption is articulated clearly and explicitly within the RTA this should have the effect that occupants would less often be required to apply to the Tribunal to be recognised once they have requested this.

## Recommendation 7: Recognising occupants as tenants

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*Where a tenant is excluded from a residential premises by a final AVO, any remaining occupants should have the option of being recognised as a tenant without having to apply to NCAT. There should be a presumption in these circumstances that the occupant will be recognised as a tenant on their request.*

### 4.7 Claims on rental bond

#### ***I could take the perpetrator to Tribunal [...] but I am scared to do that***

“The Agent said they would get bond from the perpetrator and then never did. He then left the house with arrears and some damages. The agent added me as a co-respondent in their claim for the bond plus \$3k compensation. I had paid the whole bond initially, and had evidence of this. NCAT found that while I was not liable for the amount owing over bond that the landlord had priority to the bond claim over myself. I was told that I could take the perpetrator to the Tribunal to recover the bond, but I am scared to do that.” Q16R9

In our experience victim-survivors find it very difficult to get back bond from a perpetrator in circumstances where they were a co-tenant with the perpetrator and paid the bond – in part or in full - at the start of a tenancy. Many do not attempt to get the bond back at all as this would require further contact with the perpetrator.

In the Domestic Violence and Renting survey almost 80% of respondents (55 respondents) reported the tenant had contributed to the bond. Of those who attempted to recover their bond many reported having trouble - the agents in a number of instances keeping the bond in full and sometimes referencing damage that had been done during a domestic violence office, as well as instances where delays or fear of the perpetrator (co-tenant) led the victim-survivor to abandon their claim.

#### ***Difficulties recovering bond***

“The victim wasn’t able to obtain any of the bond, due to the POI [perpetrator] being incarcerated.” Q16R6

“The tenant wrote to the co-tenant to request her share of the bond back. That request was not complied with. The tenant did not feel safe in applying to NCAT to get an order for her part of the bond to be returned to her.” Q16R7

Many victim-survivors do not even attempt to claim the bond. In the Domestic Violence and Renting survey less than a third of respondents indicated the tenant attempted to recover their bond from the perpetrator, and 50% reported the tenant did not attempt to recover the bond. From shared responses regarding why, the following were identified as common reasons many were dissuaded from claiming the bond:

- fear of violence and continued abuse,
- too high a risk to physical safety and mental health

- ongoing trauma and anxiety, feelings of being overwhelmed
- potential difficulty and/or resources involved in making a claim.

### **Sample of responses: Why was there no attempt to recover the bond?**

“Fear, did not want to face perpetrator in NCAT and was concerned that demand would have issue with ADVO” Q17R2

“She went into hiding” Q17R7

“Fear of violence escalating” Q17R8

“Victim intimidated by perpetrator and real estate and were in housing crisis with children” Q17R10

“Fear” Q17R12

“Risk” Q17R15

“Safety issues” Q17R16

“Did not want to have any further contact with perpetrator” Q17R

“She chose not to so the perpetrator had less to come at her about.” Q17R23

“Too hard” Q17R27

“Not wanting to anger the perp, client too overwhelmed” Q17R30

“The client did not want to cause anymore issues and have the perpetrator go at her anymore” Q17R31

Concerns are not necessarily alleviated by intervention from a real estate agent or landlord and many are still unclear on the legal process, and limitations on liability for damage (see also section 4.6).

### **Attempting to recover bond**

“The agent said that they would have the perpetrator pay bond and then they would return my bond, but this never happened.” Q13R21

“The agent stated it was too hard to separate the money.” Q13R32

Victim-survivors leaving circumstances of domestic violence will very often need easy and quick access to funds to pay for a new bond and secure alternative accommodation. Delays in recovering the bond can be a barrier to leaving violence, and/or to allowing victim-survivors and their families to transition into recovery. Victim-survivors who make use of DVTNs should be able to recover their bond directly from the Rental Bond Board at the end of their tenancy.

Currently under the *Residential Tenancies Act 2010* it may be possible for a victim-survivor to make a claim for refund of their portion of the bond when they end their tenancy. In a recent case (July 2022) at Tribunal, a victim-survivor applied for access to their portion of the bond after giving a DV termination notice. The Tribunal found the victim-survivor’s tenancy came to an end when the DVTN was given. At that point they found the tenant had performed all her obligations, and the landlord had failed to establish a claim on the



victim-survivor's portion of the bond. The Tribunal Member in their decision noted if the landlord fails to prove their claim the bond is the tenant's money and the tenant is entitled to be refunded their share of the bond. They made an order directing renting services to pay the victim-survivor their share of the bond.

However, in our experience this interpretation has not been widely or consistently applied. Few victim-survivors are likely aware of the possibility of claiming the bond in this way. It is still generally understood that a victim-survivor who is a co-tenant with the perpetrator must attempt to claim the bond directly from the co-tenant.

We propose the victim-survivor's entitlement to their portion of the bond be more clearly articulated in the *Residential Tenancies Act*. This could be achieved by amending Division 3 Release of rental bonds to insert the following, or similar, after section 175 Powers of Tribunal:

#### 175A Powers of Tribunal - Domestic Violence

(1) This section applies if a person's tenancy was terminated under Division 3A of Part 5 and the residential tenancy agreement continues in force in relation to one or more other co-tenants.

(2) The Tribunal may, on application by a former co-tenant in circumstances of domestic violence who has an interest in the payment of a rental bond, **make an order as to the payment of an amount of the rental bond whether or not the residential tenancy agreement continues in force in relation to one or more other co-tenants.**

#### Note

Section 54(1A) and (1B), 54A are provisions that relate to, or have relevance for, the determination of liability of tenant for actions or other tenants occurring during domestic violence offences.

Amending the RTA in this way would make clear the intention is that victim-survivors who have ended a tenancy due to circumstances of domestic violence are entitled to their portion of the bond and that the Tribunal can make orders for the repayment of bond to former co-tenants upon termination of a person's tenancy due to domestic violence.

This would also then allow for the establishment of a more straightforward process for applying to have the bond refunded, including the ability for the victim-survivor to apply directly to the Rental Bond Board to have their bond refunded at the point at which their tenancy agreement ends.

### **Recommendation 8 & 9: Repayment of rental bond**

*A co-tenant who ended their tenancy using a DVTN be able to apply for a portion of the bond directly from the Rental Bond Board at the point at which their agreement ends.*

*NCAT be given explicit powers to order repayment of bond to former co-tenants upon termination of a person's tenancy due to domestic violence.*

## 4.8 Limits on liability for damage to rental property

In the experience of advocates assisting tenants, many landlords are still unaware of protections against liability in circumstances where the damage occurred as a result of a domestic violence offence. Survivor-victims continue to regularly seek advice from local Tenants' Advice Services because their landlord or agent is seeking compensation from the tenant even once circumstances of domestic violence are flagged, and even where evidence has been provided regarding the damage having been done during a domestic violence offence. Advocates often report landlords or their agents withdraw their initial claim for compensation once they have been made aware of the provisions in the Act by an advocate, but this nonetheless results in victim-survivors facing delays in accessing their bond and being overwhelmed or retraumatised by the process of challenging the claim.

### ***Victim-survivors told they are responsible for damage***

"The agent made threats about the tenant needing to pay break lease costs and that she would still be responsible for any damage or arrears accrued by the perpetrator who stayed behind, even after the tenant had issued the termination notice and returned her keys." Q13R8

"The real estate agents told our client that they were not entitled to the bond due to the amount of damage done to the unit - which was directly related to the domestic violence incident which resulted in an ADVO and charges." Q16R10

Half of all respondents to the Domestic Violence and Renting survey told us that there had been damage to the rental property as a result of a domestic violence incident. Over a third of those who responded to the question (36% or 16 respondents) of whether they had been able to persuade the landlord or the Tribunal they were not responsible for the cost of repairs reported they had been unsuccessful. Some of those who reported being unsuccessful with their landlord and Tribunal said the tenant had relied on evidence including AVOs, police records, photos, and support letters. Advocates at Tribunal report similar experiences regarding liability for property damage, that is when evidence such as AVOs, photographs and police records have been provided this has not necessarily been sufficient for the tenant to successfully challenge liability.

Victim-survivors are experiencing particular problems in relation to the evidence requirements needed at Tribunal to substantiate damage occurred as a result of a DV offence, often being asked to provide excessive evidence including e.g. police incident reports. Even where a victim-survivor has involved police and/or the courts we are aware some have been told police reports provided 'do not have enough detail' regarding the damage sustained, or that evidence of charges (vs conviction) does not establish the victim-survivor has limited liability.

The effectiveness of the protection limiting a survivor-victim's liability for damage is undermined if Tribunal Members do not understand its operation and purpose. We feel some Tribunal Members may also require further guidance when considering applications for matters relating to domestic violence provisions within the RTA, particularly section 54A of the RTA. It is also essential that Members are aware of the importance of trauma

informed practice, including an understanding of safety, privacy and how best to take account of the trauma experience of applicants when considering matters of this nature.

### **Recommendation 10 & 11: Role of the Tribunal**

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*NSW Civil and Administrative Tribunal (NCAT) Tribunal Members undergo mandatory training about domestic and family violence and abuse, including the nature and dynamics of domestic and family abuse and all sections of the RTA relating to domestic and family violence and abuse, particularly section 54A of the RTA.*

*NCAT consider Member specialisation within the Tribunal in relation to matters relating to DVTN, database listings where the tenant was in circumstances of domestic violence at the end of the tenancy, and/or claims on bond and/or general claims for tenant damage where the tenant is an exempted tenant under section 54A of the RTA. Specialisation may assist the Tribunal implement trauma-informed judicial/Tribunal practices within the hearing process when appropriate.*

## **4.9 Protection against blacklisting for victim-survivors**

We have seen multiple instances where the tenant has issued a DV notice of termination and the landlord or their agent has nonetheless listed them on a tenant database such as TICA. While a tenant is able to apply to have this listing removed, the process can be very traumatic for the survivor and they may have faced trouble securing housing before becoming aware of the listing. This again points to an ongoing lack of awareness on the part of landlords and their agents and the need for further training (see Recommendation 2).

### **Blacklisting of renters in circumstances of DV**

“[The victim-survivor is] now on TICA but throughout the process the real estate did not once attempt to contact. Ridiculous. [They have] now lost everything and been placed on TICA. [Tenant] was also driven out [of their tenancy] due to the rent going from \$340 a week and increased to \$440 illegally.” Q22R8

“Tenant had been given a 90 day Termination and the real estate did not take into consideration that the tenant was needing to flee domestic violence and made accusations that they were going to place the tenant on TICA.” Q13R2

“In working with the real estate industry for the past 15 years, not all real estates do the right thing by the victim tenants and use their power to further aggravate their situation by blacklisting.” Q22R1

The blacklisting of victim-survivors presents a particular problem where the tenant has used different termination grounds to end their tenancy. Currently the restriction on database listing only applies if a DVTN as defined was given. This protection is too narrow and does not provide assistance to victims-survivors who may not have known to use the DV provisions at the point at which they left their tenancy.

We recommend an expansion of coverage of the current restriction to provide better protection to all victim-survivors. This could be achieved by changes to either section 213A or to section 217. At 213A this would involve making clear that a tenant who ended their tenancy under Division 3A of Part 5 (existing restriction) or who would have the right to end the tenancy in this way (expanded restriction)

213A Further restriction on listing - domestic violence

A landlord ... must not list... if -

(a) the ... tenant ... agreement that was terminated, or

(b) the person's co-tenancy was terminated, under Division 3A of Part 5 **or the person was the tenant in circumstances of domestic violence or an exempted co-tenant who has the right of early termination under Division 3A of Part 5 giving the termination notice under that Division.**

Alternatively the scope of section 217 could be broadened to add circumstances of domestic violence as a specific ground for listing removal, for example:

217 Disputes about listings

2A Grounds for order - domestic violence

The Tribunal may make an order under this section if it is satisfied that the applicant has been the victim of domestic violence while a tenant of the residential premises for which a listing has been made.

Consideration could also be given to an increase to the penalty attached to s213A and increased commitment to compliance and enforcement in relation to breaches of this section.

#### **Recommendation 12: Expansion of protection against blacklisting for all tenants who ended their tenancy in circumstances of domestic violence**

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*The restriction on tenancy database listing be extended to include all tenants who are victim-survivors of domestic violence and ended their tenancies in circumstances of domestic violence.*

## **4.10 Securing a new home**

We have heard from victim-survivors who are concerned that they will experience or have experienced discrimination as a result of their domestic violence circumstances and/or having served a DVTN. This is particularly a concern for renters in regional NSW where informal 'blacklisting' and sharing of information between agencies can be a concern.

### **Victim-survivors experience & concerns about discrimination at application**

While my client was not listed on a database, I feel we have come up against an informal blacklist. My client was recently verbally told by a real estate agent that she would never be approved for a property by that agency. I have no proof but I am inclined to believe that the agency is giving negative references. I'm not sure how we can combat this." Q22R6

"Some real estates are less inclined to rent to women if they are aware there has been any domestic violence. Start Safely can now be a disincentive." Q22R13

"It would be good for there to be a statement on the letter [declaration form] that it should not affect or influence decisions on any future tenancies as this is usually a big concern." Q22R11

There are currently few protections in place to regulate against discrimination when applying for a new rental property. There are some protections in place under the NSW Anti-Discrimination Act 1977 and federal anti-discrimination laws, but these would not currently provide protection against discrimination on the basis of being a victim-survivor of domestic violence.

### **Recommendation 13: Protection against discrimination**

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*Being a victim-survivor of domestic violence be included as a protected attribute in the Anti-Discrimination Act 1977.*

## **4.11 Privacy and confidentiality**

The information provided to real estate agents to establish that victim-survivors are in circumstances of domestic violence is especially personal and sensitive information. However, the existing privacy obligations of real estate agents with respect to the handling and collection of tenant data are piecemeal and limited.

Section 105C(3) of the *Residential Tenancies Act* states that a person must not use or disclose any evidentiary document attached to a DVTN unless permitted or compelled by law to disclose the document or information. Section 105C(4) of the Act requires secure storage and disposal of such documentation. Consideration could be given to increasing the penalty attached to section 105C(3) to facilitate better compliance, and to ensure that greater weight is given to the devastating impact that could result if a potential data breach were to occur in these circumstances.

Additionally, many real estate agencies are not covered by the *Privacy Act 1988* (Cth) (those with an annual turnover of less than \$3 million). Agencies which are covered by the statutory privacy principles often adopt a broad interpretation of the permission to ask tenants for information which is 'reasonably necessary'. What is 'reasonably necessary' in the context of the domestic violence provisions is often extremely sensitive information, and victim-survivors are left with no choice but to disclose this information in order to access any protections.

Improving privacy and compliance requirements within the *Residential Tenancies Act* is necessary to ensure that victim survivors feel more secure to disclose their information and therefore to access the relevant protections.

The Tenants' Union of NSW is also aware that some real estate agents have started to seek tenant consent for publication of photography at the signing of a lease. Especially in the current context of a very tight private rental market, many tenants will feel pressure to consent at the point of signing a lease. Circumstances can change over the course of a tenancy. A tenant who provided consent at the time of signing a tenancy agreement, may later find themselves in a DV situation and may not remember or be aware they provided consent for publication of photos of inside their property when they first signed their agreement. The safety of a victim-survivor of domestic violence can be compromised if photos or videos are published that identify where they are living.

#### **Recommendation 14: Privacy obligations with respect to tenants' personal information**

*Increasing penalty attached to section 105C(3) to facilitate improved compliance with protection of the sensitive and personal information of victim-survivors*

#### **Recommendation 15 - 17: Consent for publication of photos or videos**

*The law require landlords and their agents obtain a tenant's consent before taking photographs of their home when accessing the residential premises **for any reason.***

*Tenants be provided copies on request of any photographs or video recordings taken in which the tenants' possessions are visible.*

*Consent for publication of any specific photograph or visual recording in which the tenants' possessions are visible be obtained within a reasonable timeframe prior to publication, and each time the landlord or their agent would like to publish the photographs or video recordings. The RTA should also continue to ensure that a tenant is able to withhold consent to photographs or video recordings if it is reasonable to do so, i.e. we do not recommend any limiting at 55A(2)*