



29 January 2016

Statutory Review of the Residential Tenancies Act
Fair Trading Policy
PO Box 972
Parramatta NSW 2124

By email: policy@finance.nsw.gov.au

Dear Fair Trading Policy Team,

Statutory Review of the Residential Tenancies Act

1. Women's Legal Services NSW (WLS NSW) thanks the NSW Fair Trading for the opportunity to comment on the statutory review of the *Residential Tenancies Act 2010* (NSW) (the Act).
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. We welcomed the additional protections and options available to victims of domestic violence introduced through the 2010 amendments to the Act. However, based on the experience of our clients we are of the view that these provisions are not working as well as intended and must be strengthened. We are deeply concerned that inadequate tenancy legislation means that women and their children who experience domestic violence are exposed to unacceptable risks to their safety and in some circumstances are unable to escape the violence.
4. The purpose of this submission is to raise some concerns around the current Act for women, especially those experiencing domestic violence, and make some recommendations for improvement. We submit that this review of the Act should prioritise the needs of victims of domestic violence.

Use of language

5. Domestic and/or family violence, which often includes sexual assault, occurs when one person tries to coerce or control another person in a range of 'domestic relationships' as outlined in section 5 *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Family violence is the preferred term to encompass the complex interaction of kinship structures and extended family relationships in Aboriginal and Torres Strait Islander communities. The definition of 'family violence' in the *Family Law Act 1975 (Cth)* also includes coercive and controlling behaviour.
6. When we use the term "domestic violence" in this submission it is intended to also include family violence.
7. In the large majority of cases, as acknowledged in section 9(3)(b) of the *Crimes (Domestic and Personal Violence) Act*, domestic violence is gendered, that is, it is perpetrated by men against women. However, women can be perpetrators of violence in both heterosexual and same sex relationships.
8. We note that some people who experience violence prefer the term "victim" and others prefer the term "survivor". In this submission we use the term "victim" which is intended to be inclusive of both victims and survivors.

Recommendations

9. In summary, we recommend:
 - 9.1 Increasing the portion of the interest on rental bonds being paid to tenants and used to fund the Tenants' Advice and Advocacy Services;
 - 9.2 Adding a definition of "domestic violence offence" to the Act which has the same meaning as it has in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);
 - 9.3 Adding to the Act an additional ground to terminate a tenancy or residential tenancy agreement without compensating the landlord due to domestic violence, by serving a notice of termination and evidence of domestic violence, which could take effect upon service ("domestic violence termination notice");
 - 9.4 Defining "evidence of domestic violence" within the Act as an apprehended violence order (AVO), an injunction made under section 114 of the *Family Law Act 1975* (Cth) or a standard form statutory declaration from a prescribed list of people who can make a professional assessment as to whether the victim has experienced a domestic violence offence;
 - 9.5 Including within the Act an option to challenge a domestic violence termination notice solely on the grounds that it does not comply with the evidentiary requirements of the notice. Such an application must be made within 14 days after the notice is given;
 - 9.6 If the additional ground to end a tenancy or residential tenancy agreement due to domestic violence is adopted, repealing section 100(1)(d);

- 9.7 In the alternative but less preferred if the additional ground to end a tenancy or residential tenancy agreement due to domestic violence is not adopted, allowing tenants with a final AVO with an exclusion order to give a notice of termination, which could have effect upon service;
- 9.8 Amending subsection 102(2) of the Act to remove the word “special” so to allow the NSW Civil and Administrative Tribunal (NCAT) to make an order ending a co-tenant’s tenancy if “it is appropriate to do so in the circumstances”, not “the special circumstances, of the case”;
- 9.9 Amending section 102 of the Act to state that victims of domestic violence can use this provision;
- 9.10 Amending section 102 of the Act prohibiting NCAT from ordering that victims of domestic violence pay the landlord compensation;
- 9.11 Amending section 71 by including within the list of reasonable excuses to change locks, “where it is necessary to protect the safety of a tenant”.
- 9.12 Amending section 54 of the Act to exclude victims of domestic violence from being held liable for the actions of perpetrators;
- 9.13 Empowering NCAT to decide individual liability for damage to a residential premises where there is evidence of domestic violence;
- 9.14 Improving the safety of victims of domestic violence using NCAT by reviewing and implementing safety mechanisms and procedures;
- 9.15 Ongoing training for NCAT members and other staff about the nature and dynamics of domestic violence;
- 9.16 Amending section 213 of the Act prohibiting landlords and their agents from listing personal information about a person on a residential tenancy database if they have knowledge that the person experienced domestic violence;
- 9.17 Amending section 213 of the Act prohibiting residential tenancy database operators from listing personal information on a residential tenancy database if they have or receive evidence that the person experienced domestic violence.

Domestic Violence and Homelessness

10. There were an estimated 28,190 homeless people in NSW on the night of the Census of Population and Housing in 2011, which was 26.8% of the total population of homeless people in Australia at that time.¹ Aboriginal and Torres Strait Islander Australians are

¹ Australian Bureau of Statistics, ‘Census of Population and Housing: estimating homelessness, 2011’, November 2012, table 3.1, p.16; Australian Bureau of Statistics, ‘Census of Population and Housing: estimating homelessness, 2006’, September 2012, table 1.1, p.47. The ABS defines a person as being homeless where they do not have suitable accommodation alternatives and their current living arrangement: is in a dwelling that is inadequate; has no tenure, or if their initial tenure is short and not extendable; or does not allow them to have control of, and access to space for social relations (Australian Bureau of Statistics, ‘Information paper: a statistical definition of homelessness’, 4 September 2012, p.11).

over-represented in rates of homelessness in NSW at 7.8%.²

11. Violence against women is one of the most widespread human rights abuses in Australia. A study conducted in Victoria found that domestic violence puts more women aged 15-44 years at risk of ill health and premature death than any other risk factor.³ Violence against women also comes at an enormous economic cost. Research released by the Australian Government shows that each year violence against women costs the nation \$13.6 billion.⁴ This figure is expected to rise to \$15.6 billion by 2021.⁵
12. In 2014-15, 48,262 people used homelessness services, with 33.4% of the clients citing domestic and family violence or sexual abuse as the reason for seeking assistance from homelessness services.⁶
13. The Australian Government has acknowledged the link between domestic violence and homelessness in *The Road Home: A National approach to Reducing Homelessness*.⁷ The *National Plan to Reduce Violence against Women and their Children 2010 – 2022* (National Plan) recognises that escaping violence is the most common reason provided by people who seek help from specialist homeless services.⁸ The National Plan has been endorsed by the Council of Australian Governments (COAG).
14. It is also our experience that many women who are victims of domestic violence remain in a violent home and/or relationship, as they simply have nowhere else to go.
15. We submit that the inadequacy of housing options for victims of domestic violence stems from systemic failures across emergency, temporary and long term housing options across public, social and private housing systems.
16. We submit that the failure to adequately address these issues can have devastating consequences. Not only is the safety of women and children at risk but lack of safe housing may also result in a child(ren) being removed from the care of their parents.
17. It is therefore important that at the same time as strengthening protections within the Act, including to make it easier for a victim of violence to end their tenancy without penalty as we outline below, there must also be safe and affordable alternative housing options for such victims of violence who are primarily women and children.

² Curtin Economics Centre, 'Falling Through the Cracks: poverty and disadvantage in Australia' Focus on the States Report Series, No.1 (October 2014) p 52-53.

³ VicHealth and Department of Human Services, *The Health Costs of Violence. Measuring the Burden of Disease Caused by Intimate Partner Violence – A Summary of Findings*, 2004 at 10 http://www.health.vic.gov.au/vwhp/downloads/vichealth_violence%20-%20summary.pdf

⁴ KPMG, *The Cost of Violence against Women and their Children. Safety Taskforce*, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, 2009 a https://www.dss.gov.au/sites/default/files/documents/05_2012/vawc_economic_report.pdf

⁵ Ibid.

⁶ Australian Institute of Health and Welfare, 'Specialist homelessness services, NSW supplementary tables, 2014-15', table NSW <http://www.aihw.gov.au/homelessness/specialist-homelessness-services-2014-15/supplementary-tables/>.

⁷ Homelessness Taskforce, Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home: A National approach to Reducing Homelessness*, 2008 https://www.dss.gov.au/sites/default/files/documents/05_2012/the_road_home.pdf.

⁸ Council of Australian Governments, *National Plan to Reduce Violence against Women and their Children 2010 – 2022*, 2012, https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf

Australian human rights obligations

Right to adequate housing

18. The right to adequate housing is found in Articles 11 and 2 of the *International Covenant on Economic, Social and Cultural Rights*, ratified by Australia on 10 December 1975.
19. Pursuant to Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, State parties “recognize the right of everyone to an adequate standard of living for himself/herself and his/her family, including adequate food, clothing and housing and to the continuous improvement of living conditions.”⁹
20. The core elements of this right are outlined in General Comment No.4 of the United Nations Committee on Economic, Social and Cultural Rights and include: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.¹⁰
21. We submit that the right to adequate housing is more than a right to shelter and specifically includes a right to be secure, safe and free from violence in your home. General Comment No.4 states:

*In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense, which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity.*¹¹

22. We also note, as outlined in General Comment No.4:

*While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that a State party take whatever steps are necessary for that purpose.*¹²

23. And further, the obligation is “to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum available resources.”¹³

Obligation to eliminate violence against women

24. Australia's human rights obligations to eliminate violence against women are outlined in the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) ratified by Australia on 28 July 1983 and CEDAW Committee General Recommendation No 12 (General Comment No 12) and CEDAW Committee General Recommendation No 19 (General Comment No 19).

⁹ Article 11(1) *International Covenant on Economic, Social and Cultural Rights* (ICESCR), ratified by Australia on 10 December 1975.

¹⁰ CESCR Committee General Comment No.4: *The right to adequate housing*, UN Doc E/1992/23 (1991) at para 8

¹¹ CESCR Committee General Comment No.4 at para 7

¹² CESCR Committee General Comment No.4 at para 12

¹³ CESCR Committee General Comment No.4 at para 14

25. *General Comment No 19* makes clear that gender-based violence is a form of discrimination within Article 1 of CEDAW¹⁴ and Article 2 of CEDAW obliges state parties to legislate to prohibit all discrimination against women. Such violence is a violation of the rights to life, to equality, to liberty and security of the person, to the highest standard attainable of physical and mental health, to just and favourable conditions of work and not to be subjected to torture and other cruel, inhuman, or degrading treatment or punishment.¹⁵
26. Under international human rights, States are required to act with due diligence to protect, promote and fulfil their human rights obligations.¹⁶
27. Additionally, CEDAW Concluding Observations on Australia in 2010 recommended that Australia develop strategies to prevent homelessness resulting from domestic/family violence.¹⁷

Discussion question 12: Should a portion of the interest on rental bonds continue to be paid to tenants, or should this portion also be used to fund services for tenants?

28. We submit that the current proportion of interest on rental bonds paid to tenants (0.01%) and used to fund services for tenants such as the Tenants' Advice and Advocacy Services (at around 8%) is meager.
29. We recommend increasing both the portion of the interest on rental bonds being paid to tenants and used to fund the Tenants' Advice and Advocacy Services.

Recommendation 1:

Increasing both the portion of the interest on rental bonds being paid to tenants and used to fund the Tenants' Advice and Advocacy Services.

¹⁴ CEDAW Committee, *General Recommendation No.19: Violence against Women*, UN Doc a/47/38 (1992), para 7.

¹⁵ CEDAW Committee General Comment No 19, para 7. See also: *International Covenant on Civil and Political Rights* (ICCPR) ratified by Australia on 13 August 1980, Articles 2, 3,7 and 26; ICESCR Articles 3 and 10.

¹⁶ Human Rights Committee, *General Comment No.31*, CCPR/C/74/CRP.4/Rev.6, para 8; Committee on the Rights of the Child, *General Comment No.5*, CRC/GC/2003/5, 27 November 2003, para 1; *Committee on Economic, Social and Cultural Rights, General Comment No.14*, E/c.12/2000/4 9200), para 33.

¹⁷ Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women –Australia*, 30 July 2010, CEDAW/C/AUL/CO/7 at paragraph 29 at: <http://www2.ohchr.org/english/bodies/cedaw/cedaws46.htm>

Discussion question 32: Are current termination notice periods appropriate? And Discussion question 35: Should there be any additional grounds on which a tenant can terminate a residential tenancy agreement without compensation?

New options available to victims wanting to end their tenancy

30. Victims of domestic violence living in rental accommodation often need to leave their property very quickly in order to keep themselves and their children safe. The options available to them now are:

30.1 abandoning the property;

30.2 if they are near the end of their fixed term residential tenancy agreement they can give their landlord a 14 day notice of termination (s 96);

30.3 if they are in a periodic agreement they can give their landlord and any other co-tenants a 21 day notice of termination (section 97);

30.4 if they have a final AVO with an exclusion order, they can give a 14 day notice of termination, without need to compensate the landlord (s 100); or

30.5 they can apply to NCAT for an order ending their tenancy or the tenancy of the other co-tenancy due to the special circumstances of their case however may still be liable to compensate their landlord (s 102).

31. We submit that the current termination notice periods and grounds on which a tenant who experiences domestic violence can end their tenancy are inadequate for reasons outlined below.

32. If a victim who is a co-tenant simply abandons the property this will not end their liability under their residential tenancy agreement. They can still be held liable for all of the rent while their violent partner remains living in the property.

Case Study One

Corrine and her partner Martin* were co-tenants on a fixed term residential tenancy agreement for six months. One month into the residential tenancy agreement Corrine fled to another state with her children due to concerns for her safety after a violent incident at home. Martin remained living in the property and Corrine believed that he would continue to pay the rent.*

Two months later Corrine received a phone call from the real estate agent informing her that the rent had not been paid and she owed them \$2,000.

Corrine didn't have the money to pay the debt as she needed all of her money to support herself and her children.

**Not their real names.*

33. Waiting until the end of a fixed term residential tenancy agreement to give a notice of termination is rarely a viable option to victims of domestic violence. While victims in periodic agreements can leave immediately after giving a 21-day notice of termination, we are concerned that they remain jointly and severely liable for any rental arrears or damage done to the property up until the end of the notice period.
34. In our experience, the option to end your residential tenancy agreement under s 100 of the Act is not often available to victims of domestic violence for the following reasons.
35. Firstly, many victims do not feel safe to apply for an AVO for their protection, often fearing that the violence will escalate if they do.
36. Secondly, if a victim of domestic violence wants to leave the property it is not appropriate for the court to make an AVO that includes an exclusion order if the victim does not want to continue to live in the property.
37. Thirdly, if a victim of domestic violence wants to remain in the property an exclusion order will not be made without considering the accommodation options for the alleged perpetrator.
38. Finally, it can take up to a year for a final AVO to be made, especially where there are charges against the perpetrator of violence, during which time the victim may have abandoned the property and incurred significant liabilities under their residential tenancy agreement.
39. Significant debts make it financially very difficult for victims to re-establish themselves in a new home and can lead to a blacklisting on a tenant database. It also makes it difficult to obtain positive renting references. These can be substantial obstacles to finding alternative housing and a cause of homelessness amongst domestic violence victims. As we believe that the current grounds on which a victim of domestic violence can terminate their tenancy are inadequate and in many cases unhelpful, we submit that Division 3 of Part 5 of the Act should be amended to include an additional ground for termination of a residential tenancy agreement on the grounds of domestic violence.
40. We note that the *Residential Tenancies Act 1995* (SA) (the SA Act) was recently amended giving the South Australian Civil and Administrative Tribunal (SACAT) the power to terminate a residential tenancy based on domestic abuse, where there is an intervention order in place against another tenant or a tenant has committed domestic abuse against another tenant (s 89A). Domestic abuse has the same meaning in the *Intervention Orders (Prevention of Abuse) Act 2009* (SA).
41. We believe that the addition of section 89A to the SA Act provides a clear option to victims of domestic violence wanting to leave their tenancy. It also has significant symbolic value, acknowledging domestic violence is a significant reason why women need to end their tenancies.
42. However section 89A of the SA Act still requires victims of violence to apply to the SACAT for orders ending their tenancies, which could take time and could be difficult for women to do, particularly as they are likely to be involved in a number of other court proceedings at that time, for example AVO and family law proceedings.

43. Therefore we submit that Division 3 of Part 5 of the Act should be amended to allow victims of domestic violence to end their liability under their residential tenancy agreement immediately without penalty by serving a notice of termination on their landlord and any other co-tenants.
44. We submit that domestic violence should be defined within the Act to have the same meaning as it does in the *Crimes (Domestic and Personal Violence) Act 2004* (NSW), namely that it is a “domestic violence offence”. Domestic violence encompasses a wider range of controlling behaviours than the definition within the AVO Act. However, for the sake of clarity and consistency, we submit that this definition is sufficient.
45. To limit any misuse of this proposed provision we submit that the notice of termination should include a copy of an AVO (provisional, interim or final), an injunction made under section 114 of the *Family Law Act 1975* (Cth), or a statutory declaration from a professional with sufficient experience to form an opinion as to whether a person has been a victim of a domestic violence offence.
46. Being able to rely on a statutory declaration from a relevant professional would allow victims too fearful to seek out an AVO to leave their tenancy without needing to seek a Tribunal order as well as assuring landlords that the reason for ending their tenancy was justified in the circumstances.
47. We propose including a standard form statutory declaration as a Schedule to the Act to assist victims and professionals to meet the evidentiary requirements. We would be very happy to participate in further discussions with NSW Fair Trading about what should be included in such a statutory declaration.
48. We note that the Department of Immigration and Citizenship can make findings as to whether an applicant for permanent residency has experienced family violence based on evidence, including statutory declarations from a list of professionals.¹⁸ We submit that a victim of domestic violence should be entitled to rely on a statutory declaration from any of those professionals if they want to end their tenancy.
49. We have limited the evidence in this provision to statutory declarations (which would include prescribed information as per the Schedule referred to above) and not also include reports as a means of limiting evidence to that which is necessary but least intrusive. This is important given the evidence will be provided to the alleged perpetrator as well as the landlord. This evidence should not be able to be shared beyond these specific proceedings.
50. We submit that landlords should have the option of challenging the notice of termination issued on the grounds of domestic violence by lodging an application in NCAT. They must do this within 14 days after the notice is given. However, we submit that NCAT must be required to make an order terminating the tenancy of a co-tenant or residential tenancy agreement if the tenant meets the evidentiary requirements so as to provide a level of certainty to the victim of domestic violence when they serve the notice of termination.
51. We note that section 109 of the Act allows a tenant or landlord to give a termination notice when the property becomes uninhabitable, which ends the residential tenancy

¹⁸ Migration Regulations 1994 - Specification of Evidentiary Requirements - IMMI 12/116

agreement on the date it is issued. We believe that experiencing domestic violence has the effect of frustrating the residential tenancy agreement because it is no longer safe for the tenant to remain living in the property. Therefore it is warranted that victims of domestic violence should have the option of relying on a notice of termination that has immediate effect.

52. If section 104A is adopted section 100(1)(d) becomes redundant because victims could use their AVO to give a notice of termination that would take immediate effect.

53. However if section 104A is not adopted, in the alternative and less preferred, we submit that tenants with a final AVO with an exclusion order should be permitted to give a notice of termination that could take immediate effect.

Recommendation 2:

Insert into section 3(1) of the Act:

“domestic violence offence” has the same meaning as it has in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)

“domestic violence termination notice” – see section 104A

Recommendation 3:

Insert section 104A Termination due to domestic violence

(1) A tenant or co-tenant may give a termination notice if they have experienced a domestic violence offence (domestic violence termination notice)

(2) A domestic violence termination notice must include evidence of domestic violence.

(3) Evidence of domestic violence means:

(a) apprehended violence order; or

(b) court injunction under section 114(1)(a) or section 114(1)(b) of the Family Law Act 1975 (Cth); or

(c) a statutory declaration from a competent person which:

(i) identifies the person alleging they have been a victim of a domestic violence offence; and

(ii) identifies the alleged perpetrator of the domestic violence offence; and

(iii) states they have formed the opinion that the victim experienced a domestic violence offence; and

(iv) identifies the evidence they used to form their opinion.

Note: The standard form statutory declaration is set out in Schedule 3.

(4) a competent person means:

- (a) doctor;
 - (b) registered psychologist;
 - (c) registered nurse;
 - (d) social worker (who is member of the Australian Association of Social Workers or is eligible to become a member);
 - (e) family consultant appointed under the Family Law Act 1975 (Cth);
 - (f) family relationship counsellor who works at a Family Relationship Centre listed on the Australian Government Family Relationships website;
 - (g) child protection worker;
 - (h) domestic violence service worker.
- (5) A domestic violence termination notice may end the residential tenancy agreement on the date the notice is given.
- (6) The domestic violence termination notice may specify a termination date that is before the end of the fixed term of the residential tenancy agreement if it is a fixed term agreement.
- (7) A landlord or tenant may apply to the Tribunal for an order in relation to a dispute about a domestic violence termination notice and if doing so must apply within 14 days of the notice being given.
- (8) The Tribunal must, on application by a landlord or tenant, make an order terminating the tenancy of a co-tenant or an order terminating the residential tenancy agreement to take effect on the date specified in the notice if it is satisfied a domestic violence termination notice was given in accordance with this section and that this section applies to the residential premises.

Recommendation 4:

If section 104A is inserted:

Repeal section 100(1)(d) of the Act “that a co-tenant or occupant or former co-tenant or occupant is prohibited by a final apprehended violence order from having access to the residential premises”.

In the alternative but less preferred, if section 104A is not inserted:

Amend section 100(2) by adding “Except as provided by subsection (2A),” so reads “*Except as provided by subsection (2A)*, the termination notice must specify a termination date that is not earlier than 14 days after the day on which the notice is given.”

Insert section 100(2A)

A termination notice on the grounds that a co-tenant or occupant or former co-tenant or

occupant is prohibited by a final apprehended violence order from having access to the residential premises may end the residential tenancy agreement on the date the notice is given.

Strengthening current options for victims: section 102 and locks

54. We submit that section 102 of the Act could be strengthened by reducing the threshold for obtaining an order by giving NCAT the discretion to make orders if it is appropriate in “the circumstances of the case”, not “the *special* circumstances of the case”.
55. Section 102 could be further strengthened by explicitly including reference to tenants who experience domestic violence so making clear in the legislation that victims of domestic violence who are co-tenants with the perpetrator could use this section to stay safely in the property or leave and end their liability under their residential tenancy agreement.
56. We are concerned that the ability of NCAT to order the victim of domestic violence to compensate the landlord under s 102 can serve to punish the victim by enforcing what is, in effect, a monetary penalty and is a considerable disincentive to leave. We submit that victims of domestic violence should not be held liable to compensate the landlord under this section.
57. We submit that section 71 could be strengthened by stating that it is a “reasonable excuse” to change the locks if it is “necessary to protect a tenant from violence”.
58. In circumstances of domestic violence we support retaining section 72 which requires a tenant (or landlord) who changes locks to provide the landlord and any other tenants with the new keys no later than 7 days after the locks are changed. We believe this intervening period gives victims of domestic violence time to take the necessary steps to end their own tenancy or the tenancy of a violent co-tenant, should they wish to do so.

Recommendation 5:

Amend section 102(2) of the Act:

The Tribunal may make an order under this section if it is of the opinion that it is appropriate to do so in the special circumstances of the case
by removing “special”.

Recommendation 6:

Insert section 102(2A):

The Tribunal may make an order under this section if a tenant has experienced domestic violence.

Recommendation 7:

Insert section 102(4A):

The Tribunal must not order a co-tenant under a residential tenancy agreement that is

terminated under this section before the end of the fixed term or a fixed term agreement to pay an amount to the landlord where there is evidence of domestic violence.

Recommendation 8:

Amend section 71(2) to add “(e) *if necessary to protect the tenant from violence*” so reads:

Without limiting what is a reasonable excuse, it is a reasonable excuse that a lock or other security device was altered, removed or added:

- (a) in an emergency, or
- (b) in accordance with an order of the Tribunal, or
- (c) after the tenancy of a co-tenant was terminated, or
- (d) after a tenant or occupant of residential premises was prohibited from having access to the residential premises by an apprehended violence order, or
- (e) *if necessary to protect the tenant from violence.*

Liability for damage as a result of domestic violence

59. It is very common for our clients to report that violent family members have caused damage to their homes. Damage might include holes in walls and broken doors and windows. If a victim of domestic violence is a co-tenant on a residential tenancy agreement with a violent partner, they can be held liable for all of the damage done to the property despite the fact that they had no control over that person's actions.

Case Study Two

Donna and Max* had been in a relationship for 5 years and were renting together. Max had been violent towards Donna on many occasions. He would throw things at Donna and had punched multiple holes in the walls. On one occasion he threw a chair through their front window. Donna reported the violence to the police and Max was charged with a number of offences including property damage. The courts also granted an AVO for Donna's protection. Max moved out of the property and Donna was hopeful that she could remain safely living in the property.*

At the next property inspection the real estate agent informed Donna that they would be terminating her tenancy due to the significant damage caused to the property. The real estate agent also said that they would be asking her to pay for all the damage to the property, which was extensive and far exceeded the amount Donna and Max had paid for the bond.

Despite the fact that the damage was not her fault, Donna was liable to compensate the landlord and could not prevent the termination of her tenancy.

** Not their real names.*

60. Again, significant debts can make it very difficult for victims to re-establish themselves in a new home and can lead to a blacklisting on a tenant database. It also makes it difficult to obtain positive renting references. These can be substantial obstacles to finding alternative housing and a cause of homelessness amongst domestic violence victims.
61. Subsection 89A(11) of the SA Act gives the SACAT the power to determine which of the co-tenants should be held liable for any damage to the residential premises. We submit that the Act should be amended to give NCAT the same powers.

Recommendation 9:

Insert section 54(1A)

This section does not apply where there is evidence of domestic violence. (Note: see section 104A(9)).

Recommendation 10:

Insert section 104A(9)

If the tenancy of a co-tenant or the residential tenancy agreement is terminated under this section or section 102 the Tribunal may, on application by a landlord or tenant, find that one or more, but not all, of the co-tenants under the residential tenancy agreement are responsible for damage to the residential premises and may order that the responsible co-tenant or co-tenants are liable (to the exclusion of other co-tenants) for compensating the landlord.

Discussion question 39: Do the current information, advice and dispute resolution services operate effectively?

62. Given that NCAT has to deal with matters where domestic violence is an issue, we submit that it is essential that there are steps taken to ensure the safety of victims of domestic violence when participating in the process and to ensure that the domestic violence issues are dealt with appropriately.
63. It is important to recognise that victims of domestic violence may have particular vulnerabilities when navigating NCAT proceedings. Apart from concerns regarding their physical safety when participating in the process and the need for safe rooms, victims may face challenges when participating in conciliations, giving evidence and being cross-examined by violent partners.
64. Improvements could include: the option of shuttle conciliation where the victim and alleged perpetrator are not present in the same room; lawyer-assisted conciliation as a means of addressing the power imbalance between the victim and alleged perpetrator; prevention from being directly cross-examined by an alleged perpetrator of violence or having to directly cross-examine an alleged perpetrator; and the option of having applications determined “on the papers”.
65. It is essential that safety mechanisms be put in place at NCAT to ensure that victims of domestic violence can adequately participate in NCAT proceedings and make use of the provisions in the Act designed for their protection.

66. Consideration should also be given to the need for staff training in relation to domestic violence so staff better understand the nature and dynamics of domestic violence. This should include NCAT members and other NCAT staff.

Recommendation 11:

Improve the safety of victims of domestic violence using the NSW Civil and Administrative Tribunal by reviewing and implementing safety mechanisms and procedures.

Recommendation 12:

Ongoing training for NSW Civil and Administrative Tribunal members and other staff about the nature and dynamics of domestic violence.

Discussion question 41: Do you have any suggestions for improving the current provisions relating to residential tenancy databases?

67. As outlined above, there are a number of circumstances wherein victims of violence might be blacklisted on a tenant database as a consequence of domestic violence, whether it be due to early termination of their residential tenancy agreement, rental arrears or damage to property.
68. WLS NSW welcomed the 2010 amendments to the Act that now provide for an application to be made to NCAT for a person's name to be removed from a database where it is "unjust in the circumstances".¹⁹
69. We believe, however, that these provisions need to be strengthened to provide greater protection for victims of domestic violence. We believe that landlords, their agents and database operators should be prohibited from blacklisting a tenant where there is evidence of domestic violence. This is consistent with s 89A(4)(d) of the SA Act.
70. We further submit that victims should not need to apply for an order from NCAT in order for their personal information to be removed. Database operators should be required to remove a person from the database if that person provides them with evidence that they were a victim of domestic violence during that tenancy that led to the listing.

Recommendation 13:

Insert section 213(1A):

A landlord or agent of a landlord must not list personal information about a person in a residential tenancy database if they have knowledge that person experienced a domestic violence offence.

Recommendation 14:

Insert section 213(4):

¹⁹ *Residential Tenancies Act 2010* (NSW), section 217(2)(b).

A database operator must not list personal information about a person in a residential tenancy database if they have or receive evidence of domestic violence perpetrated against the person.

We would warmly welcome the opportunity to participate in further discussions about the strengthening of protections of victims of domestic violence.

If you would like to discuss any aspect of this submission, please contact Gabrielle Craig or Kellie McDonald, Senior Solicitors or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor