



**Redfern
Legal
Centre**

Real Estate Housing Policy Team

NSW Government

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By Online Submission

2 December 2022

To the Appropriate Officer

Review of domestic violence rental laws

Please find attached our policy submission in response to the 'Review of domestic violence rental laws.'

We would welcome the opportunity to meet with you to further discuss our submission.

Yours faithfully,

Redfern Legal Centre

Alexis Goodstone
Interim Chief Executive Officer

SUBMISSION:

Statutory review of the domestic violence provisions in the
Residential Tenancies Act – October 2022

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1. Introduction: Redfern Legal Centre

Redfern Legal Centre is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area. RLC has a particular focus on human rights and social justice. Our specialist areas of work are tenancy, credit and debt, financial abuse, employment and police powers and government accountability. RLC also has a generalist practice, primarily offered through our Health Justice Partnership and First Nations solicitor. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free legal advice, conduct casework, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's work in tenancy

RLC has a long history of providing advice, assistance, and advocacy to the local community, with a key focus on the provision of information and services to tenants experiencing vulnerability and a strong emphasis on the prevention of homelessness. Since RLC was founded in 1977, tenancy has been one of our core areas of advice. Since 1995, RLC has been funded by NSW Fair Trading to run the Inner Sydney Tenants' Advice and Advocacy Service ('ISTAAS'). ISTAAS assists tenants living in the City of Sydney, Randwick, Inner West and Bayside local government areas through the provision of advice, advocacy and representation.

Since the introduction of the domestic violence provisions in 2019, RLC has received a significant number of requests for advice from tenants and co-tenants who have experienced domestic violence and have concerns about their tenancy. Our submission is informed by the experiences of our clients and the stories heard by our advocates in providing that advice.

This submission highlights RLC's concerns about the effectiveness of some of the domestic violence provisions in the *Residential Tenancies Act 2010* (NSW) ('the RT Act') in safeguarding the rights of tenants who are seeking to end their tenancies, ensure their premises are secure, obtain their bonds back or avoid liability for damage caused as a result of domestic violence.

3. RLC's views in summary

RLC welcomes the introduction of specific legislative provisions to protect the rights of tenants and non-perpetrator co-tenants who have experienced domestic violence. Overall, RLC believes the provisions to be a positive addition to the RT Act and has seen tenants and co-tenants benefit from them, particularly when trying to leave a tenancy early without penalty.

There are, however, a number of prominent issues that have arisen in practice when advising tenants and non-perpetrator co-tenants about their rights under these provisions that require attention. These issues include:

- The definition of 'domestic violence offence', 'circumstances of domestic violence' and a lack of general definition of 'domestic violence' in NSW,
- The requirement for a victim/survivor of domestic violence to physically serve a copy of a domestic violence termination notice on the perpetrator in order to comply with s 223 of the RT Act,
- The difficulty in accessing protection from liability for damage caused by domestic violence,
- The difficulty for victims of domestic violence to access their interest in a bond when terminating their co-tenancy in circumstances of domestic violence, and
- The barriers to tenants in securing their properties without the consent of the landlord, in circumstances of domestic violence.

These submissions will not address every provision enacted in 2019 or all discussion questions listed in the Issues Paper, but rather will focus on the above issues and recommendations to strengthen the protections or make it easier for tenants and non-perpetrator co-tenants to access the protections in practice.

4. RLC's recommendations

RLC recommendations that:

- i. A definition of "domestic violence" be introduced which references a non-restrictive list of behaviours and is not linked to specific criminal offences contained in different Crimes Acts.
- ii. The requirement for a victim of domestic violence to serve a notice of termination on remaining co-tenants be removed and the landlord instead be required to provide notice to the remaining co-tenants that the victim's interest in the tenancy has ceased.
- iii. The test under s 54(1A) be amended to apply where damage has occurred 'in circumstances of domestic violence' as opposed to 'during the commission of a domestic violence offence'.
- iv. Section 174 of the RT Act be amended to remove the obligation on tenants who have terminated their co-tenancies because of circumstances of domestic violence to request their bond back from the perpetrator;
- v. Section 174 of the RT Act be amended to enable a vacating tenant in circumstances of domestic violence to complete a "bond refund form for persons experiencing family or domestic violence" and provide it directly to the landlord;
- vi. Section 174 of the RT Act be amended to provide that any dispute about the amount of payout of the bond should be between the vacating tenant and the landlord;
- vii. Section 175 of the RT Act be amended to include a provision that a NSW Civil and Administrative Tribunal order regarding the repayment of a rental bond must not have the effect of deducting an amount from the tenant's bond for damage caused due to a domestic violence incident;
- viii. Section 71(2) of the RT Act be amended to specify that being in circumstances of domestic violence is a 'reasonable excuse' for tenants to change or alter/add locks or other security devices when they are in circumstances of domestic violence; and
- ix. In order to demonstrate that a tenant is in circumstances of domestic violence for the purposes of section 71(2), a tenant should be able to rely on the same evidentiary items as set out in section 105B(2) regarding the right to early termination.

5. Responses to specific issues

i. Ending a tenancy because of domestic violence – Provided evidence

Q 1. Do the current 'circumstances of domestic violence' listed in the Act adequately capture situations of domestic violence that would require someone to end a tenancy? If not, why and what other circumstances may be appropriate to list?

In order to have a right of early termination of a Residential Tenancy Agreement, it is necessary for a tenant or co-tenant to show that they were in 'circumstances of domestic violence' pursuant to s 105B of the RT Act.

'Circumstances of domestic violence' is defined at s 105B(2) of the RT Act as being where a person:

- (a) Has been the victim of a domestic violence offence during the tenancy, and the perpetrator has been found guilty of that offence, or,

- (b) Is the protected person under an in-force DVO, or
- (c) Is the protected person under an injunction made under s 68B or 114 of the *Family Law Act 1975* (Cth), or,
- (d) Has been declared by a competent person to be a victim of domestic violence perpetrated by the relevant domestic violence offender during the current residential tenancy agreement.

Redfern Legal Centre welcomes the addition of the declaration by a competent person as a means for tenants to show they have been in circumstances of Domestic Violence. The declaration does not require legal proceedings be initiated against the perpetrator to obtain and in most circumstances is easily accessible by visiting a doctor or other support person with whom they are already engaged. In our experience, the declaration by a competent person has been an easily accessible method for victims of domestic violence to obtain the evidence necessary to access the protections under s 105 B and C of the RT Act.

It is clear in practice however that tenants, landlords, legal professionals, competent persons and members of the NSW Civil and Administrative Tribunal ('the Tribunal') would benefit from a clear definition of 'domestic violence' to provide guidance to parties in these matters. Currently there is no general definition of "domestic violence" either in the RT Act or the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). The only definition related to domestic violence for the purposes of the RT Act is "domestic violence offence" which is defined in s 3 of the RT Act as having the same meaning as it has in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

The meaning of "domestic violence offence" is found at s 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which states:

- (1) In this Act, domestic violence offence means an offence committed by a person against another person with whom the person who commits the offence has (or has had) a domestic relationship, being –
 - (a) A personal violence offence, or
 - (b) An offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or
 - (c) An offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both)

A 'personal violence offence' is defined at s 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). The definition is a list of sections of various Crimes Acts detailing a range of general criminal offences. The ultimate application would be that if any one of these general criminal offences are committed within the context of a current or former domestic relationship, then the person would be able to demonstrate that they are in 'circumstances of domestic violence' sufficient for the purposes of s 105B(2) of the RT Act.

Whilst it's not clear that the RT Act requires a competent person to find that a 'domestic violence offence' has been committed in order to determine that the tenant is a victim of domestic violence for the purposes of creating the declaration, the lack of general definition of domestic violence provides no guidance to parties in these matters as to the kinds of behaviour for which a declaration could be made.

*Case Study: Daisy**

Daisy lived in a share house with three of her friends. They were all co-tenants on the lease. After a period of living together, one of Daisy's co-tenants started to become controlling and threatening towards her. They would control who Daisy was able to bring into the house, would not let her close the bedroom door and began sending harassing messages to Daisy repeatedly. Daisy did not feel safe in the property anymore and wanted to terminate her co-tenancy and move out however they were still in the fixed term. Daisy was surprised to learn that her situation may have constituted domestic violence, even though she and her co-tenant had never had an intimate relationship and there had been not been any overt physical violence perpetrated against her.

*not her real name

A review of residential tenancy laws in other jurisdictions that have provisions allowing the early termination of tenancies and co-tenancies on the basis of domestic violence provide examples of more generalised definitions of domestic violence. These are based on behaviour experienced, as opposed to the commission of criminal offences, within certain kinds of relationships. Both Queensland and Western Australia contain definitions of domestic violence premised on behaviour and action directed towards a victim in defined domestic and family relationships.

Redfern Legal Centre believes that a generalised list of behaviour that defines "domestic violence" would be a beneficial addition to the RT Act and would provide greater clarity and guidance to competent persons, parties and practitioners in this space. It would also allow tenants and co-tenants to access the protections of the provisions in circumstances that are not currently considered 'domestic violence' under the legal definitions we have, such as financial abuse. The introduction of a general definition of domestic violence would better facilitate the aims of the provisions which is to provide greater protection to victims of domestic violence and easily accessible avenues to terminate their tenancies or interests in co-tenancies without penalty.

The lack of general definition of 'domestic violence' also has implications for the vicarious liability of tenants and co-tenants where damage is done to the property in circumstances of domestic violence. Currently, the protection from liability for damage that arises through domestic violence must be tied to damage that occurred during the 'commission of a domestic violence offence' pursuant to s 54 (1A) of the RT Act. The difficulties faced by tenants, and co-tenants in relation to this issue will be considered in further detail below but we have found that the requirement to show that the damage occurred during the commission of a domestic violence offence has resulted in tenants being found liable for damage even where they are victims of domestic violence and the damage has been caused by the perpetrator. It is worth noting here that required solutions to those issues would be incredibly difficult to implement without a more generalised definition of 'domestic violence' being inserted into the RT Act or *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Redfern Legal Centre recommends the introduction of a general definition of "domestic violence" to be used for the purposes of s 105B and s105C and to replace the requirement of "during the commission of a domestic violence offence" in s 54(1A). The *Domestic and Family Violence Protection Act 2012* (QLD) and *Restraining Orders Act 1997* (WA) provide helpful examples to develop this definition. The definition relied upon for the purposes of the RT Act should include a generalised and non-restrictive list of behaviours which will constitute "circumstances of domestic violence" including physical, sexual, emotional, psychological and financial abuse.

Recommendation

1. A definition of “domestic violence” should be introduced which references a non-restrictive list of behaviours and is not linked to specific criminal offences contained in different Crimes Acts.

ii. Giving a domestic violence termination notice

Q 8. Are you aware of any issues or barriers relating to the use of domestic violence termination notices? If so, what are they?

Q 10. Are you aware of tenants experiencing any difficulty with giving a domestic violence termination notice to a landlord/agent or a co-tenant? If yes, how might this be addressed?

Q 11. Are you able to provide additional context through case studies or examples?

Redfern Legal Centre is concerned about the requirement for a victim of domestic violence to serve the perpetrator with legal notice of termination. The RT Act outlines the requirements for valid legal service at s233 and requires that a notice be served on them physically (either in person or by post) or, in circumstances where the co-tenant has nominated an email address for the legal service of documents, by email. Electronic service is not an automatically accepted form of legal service under the RT Act and generally requires the consent of the person being served. We are concerned that in circumstances where a co-tenant perpetrator has not provided their consent/withholds their consent to being served electronically, a victim will need to serve the notice on them personally or post the notice and allow seven days for service.

We have spoken to tenants who need to leave their property immediately because of the risk posed to them by perpetrators of domestic violence who are co-tenants. In almost every case, they have expressed hesitation in serving the notice of termination on the perpetrator due to the risk of retaliation. In these circumstances the best advice we are able to provide is to have someone else attend the property on their behalf and either hand it to the perpetrator or someone else living at that address, or put it in their mailbox. The physical service of a termination notice on a co-tenant perpetrator presents an unnecessary barrier for victims of domestic violence who need to end a tenancy in NSW. Additionally, in some circumstances where there is an Apprehended Violence Order (AVO)/Apprehended Domestic Violence Order (ADVO) in place, this order prevents the victim from communicating with the perpetrator and raises additional concerns for the service of a termination notice. Oftentimes, this means that a victim will need to involve others to ensure that they do not frustrate an AVO/ADVO.

*Case Study: Josie**

Josie was a young professional living in an apartment with her partner. Both Josie and her partner were on the lease. After her partner started to become violent and controlling towards her, Josie decided she had to leave. She left the property without telling her partner as she was concerned about his reaction, given the nature of the violence he had perpetrated against her. She obtained a declaration from her doctor and provided a copy of this and a termination notice to her landlord. Josie was mortified to find out that she would likely need to return to the property to put a copy of the termination notice addressed to her partner in the mailbox for the termination to be legally valid. Josie had to involve her father in the service of the notice to her ex-partner out of fears for her safety when returning to the property.

*Not her real name.

In both Western Australia and Queensland, provisions dealing with termination of tenancies on the grounds of domestic violence require a termination notice with attached documentation to be sent to the landlord only. Those jurisdictions then place the obligation on the landlord to notify the remaining co-tenants of the change in interest in the tenancy. Queensland's provision is relevantly extracted below:

381E Effect of notice ending residency interest if more than 1 resident

- (1) This section applies if—
- (a) a resident (the **vacating resident**) gives the provider a notice ending residency interest; and
 - (b) the vacating resident is not the sole resident for the rooming accommodation agreement.
- ...
- (3) After the vacating resident's interest in the rooming accommodation agreement ends, the provider must give each remaining resident for the agreement a written notice (a **continuing interest notice**) stating—
- (a) the vacating resident's interest in the agreement has ended; and
 - (b) the agreement continues for all of the remaining residents on the same terms; and
 - (c) if the remaining residents are required to top up the rental bond under [section 381F](#)—
 - (i) the remaining residents are required to top up the rental bond; and
 - (ii) the amount the remaining residents must pay to top up the rental bond; and
 - (iii) the day by which the top up must be made.
- (4) The day stated in the continuing interest notice under subsection (3)(c)(iii) must not be earlier than 1 month after the notice is given to all of the remaining residents.
- (5) The provider must give all of the remaining residents the continuing interest notice—
- (a) no later than 14 days after the vacating resident's interest ends; but
 - (b) not earlier than 7 days after the vacating resident's interest ends.

Redfern Legal Centre considers that requiring a landlord or real estate agent to notify the remaining co-tenants of the change in tenancy interest is preferable to the requirement that a victim serve a

notice physically on the perpetrator of domestic violence. This will reduce barriers to its use by victims of domestic violence in NSW as well as enhance the safety of victims fleeing domestic violence.

Recommendation

2. The requirement for a victim of domestic violence to serve a notice of termination on remaining co-tenants be removed and the landlord instead be required to provide notice to the remaining co-tenants that the victim's interest in the tenancy has ceased

iii. Limits on liability for damage to a rental property

Q 19. Are the exemptions from liability for property damage occurring during a domestic violence offence clear and operating effectively? If not, how could they be improved?

Q 20. Are you aware of tenants that have experienced claims for property damage contrary to the exemptions, or any difficulty relying on the exemptions? If they did, what were the claims or difficulties?

Redfern Legal Centre endorses limits on the liability of tenants relating to damage caused by domestic violence. The protection provided under s 54(1A) is an important one as it excludes tenants who are the victims of a domestic violence offence from being vicariously liable for the actions of others even if they were lawfully on the premises. Redfern Legal Centre does not believe that these protections go far enough however, and has concerns about the barriers to protection that tenants face due to the requirement in the RT Act of 'the commission of a domestic violence offence.'

The requirement that the damage be caused 'during the commission of a domestic violence offence' requires evidence that an offence outlined in one of a number of Crimes Acts referenced in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) be produced in the event of dispute. As discussed in the section titled *Ending a tenancy early because of domestic violence – provided evidence*, the definition of 'domestic violence offence' is legally complex and onerous and would require that the Tribunal decide on whether a criminal offence has been committed in the absence of any general definition of domestic violence in NSW. Whilst not uncommon for civil courts and Tribunals to make determinations of fact that could indicate that a criminal offence has occurred, it is not common for Tribunals to make a finding that a criminal offence did in fact occur. The current definition of "domestic violence offence" in the RT Act and the *Crimes (Domestic and Personal Violence) Act* requires a Tribunal to be satisfied that a criminal offence occurred and that the damage was caused during the commission of that criminal offence, in order to give rise to the protections under s 54(1A) of the RT Act.

Ultimately, this provision requires a tenant to make reports to police about the damage and collate evidence with date and time stamps to show when the damage occurred and what damage took place during that particular event, and then establish to the Tribunal that the event constituted an offence. Not only is this legally complex and onerous, it also presents practical barriers for a tenant who is the victim of domestic violence and requires that they either a) do not flee the property or b) if they do flee, return very shortly afterwards to collect evidence of the damage and when it

occurred. This does not reflect the reality for many victims of domestic violence. We have seen in practice that without specific evidence of what damage occurred and when, the Tribunal is reluctant to find that a tenant is not liable or vicariously liable for damage to the property.

Case Study: Daniel*

Daniel was the sole tenant of a one-bedroom property. One day his ex-partner appeared on his door step demanding that Daniel let him in for a “few days” so he could find his feet after being evicted from his own property. Afraid of his ex-partner, Daniel allowed him to stay at his premises. Daniel’s ex-partner did not leave after the few days agreed upon and became increasingly coercive. Daniel frequently had threats of violence made against him. After a number of months, Daniel finally asked his ex-partner to leave the property. Daniel’s ex-partner physically assaulted him and threatened him with a weapon and Daniel fled the property. Daniel’s ex-partner then proceeded to cause significant damage to the premises and Daniel required the assistance of the police to remove his ex-partner a number of weeks later. Daniel’s landlord made a claim in the Tribunal seeking \$15,000 (the jurisdictional limit) to cover the cost of damage to the unit. Daniel had evidence of contacting the police but was not aware of the extent of the damage until he returned to the premises weeks later. Whilst the Tribunal did accept that Daniel was the victim of domestic violence, and did reduce the amount that he had to pay to the landlord, it required very specific evidence of the items that were damaged during the incident and was reluctant to extend the protection from liability after Daniel had fled the property. Daniel was ultimately required to pay the landlord thousands of dollars for damage caused by the perpetrator due to the lack of evidence he was able to obtain because he fled the property.

*Not his real name.

Stories like Daniel’s highlight the barriers faced by tenants who are the victims of domestic violence. Often victims have other financial pressures and emotional stressors as a direct result of the violence perpetrated against them, and the lack of protection against liability for things like damage places them in situations where they must either choose not to flee the property and thereby place themselves at further risk of harm or, flee but be stuck with large bills for damage caused by perpetrators of violence. The requirement that the damage must be caused during the commission of a domestic violence offence, as opposed to a more generalized “circumstances of domestic violence” test means that there will be many tenants who are excluded from protection, particularly where damage is caused to the property after a tenant has fled.

Anecdotally, from the work of our advice service, we know that landlords are very reluctant to accept that a tenant may not be liable or responsible for damage done to the property and we very often see claims being made against tenants’ bonds for damage even where this damage has been caused by domestic violence. There is currently no deterrent for landlords not to pursue matters in the Tribunal, particularly in relation to bond, even where they have been informed that the tenant was a victim of domestic violence, and provided with evidence. The barriers to tenants in relation to evidence gathering and proving that the specific damage occurred during a domestic violence offence coupled with the low cost of the Tribunal means that victims are not able to rely on s 54(1A) of the RT Act often enough.

Landlords are running a commercial enterprise in the leasing of their properties. When they do this, they encounter business risk including property damage that is not the fault of either party and

should bear the costs of this damage. The majority of landlords have landlord insurance to cover and they are better placed to cover the costs of damage caused through the commission of domestic violence than victims. Ultimately, where there is evidence (such as a declaration from a competent person) that the tenant has been a victim of domestic violence and evidence of damage caused in circumstances of domestic violence, this should be enough to protect tenants from incurring the costs of that damage.

Redfern Legal Centre recommends that the test under s 54(1A) be changed from “during the commission of a domestic violence offence” to “where damage is caused in circumstances of domestic violence”. This would lower the bar and allow tenants to be protected in circumstances where they may not be able to show the commission of a criminal offence has occurred or where the damage occurred in circumstances where the tenant was required to flee the property. This change should be made alongside a change to the definition of ‘domestic violence’ under the RT Act to include a more generalised list of behaviours that will be considered domestic violence for the purposes of the RT Act including physical, sexual, psychological, emotional and financial abuse.

Recommendation

3. The test under s 54(1A) be amended to apply where damage has occurred ‘in circumstances of domestic violence’ as opposed to ‘during the commission of a domestic violence offence’.

iv. Repayment of rental bonds and domestic violence

Q 22. What issues are you aware of that tenants experienced regarding the repayment of the rental bond when a tenant has given a domestic violence termination notice and a co-tenant has continued renting a property?

Q 23. Are these provisions on repayment of the rental bond working effectively? If not, what are the current barriers and how could they be improved?

The process for obtaining repayment of the rental bond as prescribed by the RT Act is problematic for tenants who have terminated their tenancies due to being in circumstances of domestic violence where there is more than one person listed on the lease.

The relevant provisions of the RT Act are as follows:

166 Matters that may be subject of rental bond claim

- (1) A landlord is entitled to claim from the rental bond for the residential tenancy agreement any of the following—
 - (a) the reasonable cost of repairs to, or the restoration of, the residential premises or goods leased with the premises, as a result of damage (other than fair wear and tear) caused by the tenant, an occupant or an invitee of the tenant,
 - (b) any rent or other charges owing and payable under the residential tenancy agreement or this Act,
 - (c) the reasonable cost of cleaning any part of the premises not left reasonably clean by the tenant, having regard to the condition of the premises at the commencement of the tenancy,

- (d) the reasonable cost of replacing locks or other security devices altered, removed or added by the tenant without the consent of the landlord,
 - (e) any other amounts prescribed by the regulations.
- (2) This section does not limit the matters for which the landlord may claim from the rental bond for a residential tenancy agreement.

174 Repayment of bond to former co-tenant

- (1) This section applies if the tenancy of a co-tenant is terminated and the residential tenancy agreement continues in force in relation to one or more other co-tenants.
- (2) The remaining co-tenant or co-tenants must, within 14 days of a request by a former co-tenant, pay to the former co-tenant an amount equal to the rental bond (if any) paid by the former co-tenant for the residential tenancy agreement.
- (3) The remaining co-tenant or co-tenants may deduct from that amount any amount owed to them by the former co-tenant for rent or other reasonable costs associated with the residential premises.
- (4) If a final apprehended violence order is in force prohibiting a former co-tenant from having access to the residential premises, the remaining tenant or tenants are not required to pay the amount referred to in subsection (2) within the period required by that subsection.
- (5) A former co-tenant who is paid an amount in accordance with this section is not entitled to payment of any other amount of rental bond for the residential tenancy agreement.
- (6) This section does not apply if the liabilities of the former co-tenant under the residential tenancy agreement exceed the amount of rental bond paid by the former co-tenant.

175 Powers of Tribunal

- (1) The Tribunal may, on application by a landlord or tenant or any other person (including a former co-tenant) who has an interest in the payment of a rental bond, make an order as to the payment of the amount of the rental bond.
- (2) The Tribunal may make an order whether or not the amount of a rental bond has been paid by the Secretary.
- (3) An application for an order must be made within the period prescribed by the regulations.

We are concerned that the provisions outlined above could have a detrimental impact on tenants who are also victim-survivors of domestic violence who have terminated their co-tenancies due to domestic violence.

Contact with perpetrators of domestic violence offence

The effect of the above provisions as the legislation currently prescribes, is that when a tenant has terminated their co-tenancy but their co-tenant(s) continue to rent the property, they must first make a written request to their former co-tenant(s) asking to repay them their portion of the bond. If the former co-tenant does not repay the bond within 14 days of the request, then the tenant must make an application to the Tribunal to seek an order for repayment of their interest in the rental bond. The other party to this Tribunal application will be the former co-tenant(s).

This process is particularly problematic where the tenant's former co-tenant is also the perpetrator of domestic violence. RLC has advised a significant number of tenants in this situation who have

expressed their reluctance to go through the process of obtaining repayment of their bond due to the danger they face by having to have direct contact with the perpetrator of the domestic violence.

We are very concerned about the wider-reaching implications these provisions have for victim survivors of domestic violence who have terminated their co-tenancies. For instance, we see many vacating tenants who choose not to pursue the repayment of their bond. This could have financial implications for them, for example, by not having the funds to secure another tenancy elsewhere. In addition to these implications, the current provisions do not have regard to the trauma that domestic violence has on victim-survivors. In requiring tenants who are also victim-survivors to have continued contact with the perpetrator, the provisions risk the re-traumatisation of victim-survivors.

Case Study: Maria*

Maria came to RLC for advice about how to get her bond back after she had terminated her tenancy due to domestic violence. Her ex-partner and perpetrator of the domestic violence remained living in the premises. Her ex-partner had been incredibly violent towards herself and her daughter, and even after fleeing the premises and with an AVO out against her ex-partner, she was still very scared and felt unsafe. Maria and her daughter had suffered significant trauma due to being in a domestic violence situation and were residing in a women's refuge while looking for another place to rent. When Maria found out that she would need to request the bond back directly from her ex-partner as the remaining co-tenant in the premises, she became incredibly distressed. Maria ultimately decided not to attempt to recover her bond as she did not want to go through the trauma and danger of having to be in direct contact with her ex-partner.

*Not her real name

When identifying the issues with the domestic violence provisions under the RT Act it is useful to compare these provisions with the legislation governing residential tenancies in other Australian jurisdictions. Queensland's *Residential Tenancies and Rooming Accommodation Act 2008* (QLD) prescribes that in a situation where a tenant has successfully terminated their co-tenancy on the grounds of domestic and family violence, the tenant can obtain their portion of the bond back without involving the perpetrator of the domestic violence.

According to a [fact sheet](#) published by the Queensland Government, Queensland's legislation requires that the vacating tenant complete a form titled "Bond refund for persons experiencing domestic and family violence" which relates to their portion of the bond. Any remaining tenants will not be notified of the bond claim, and any dispute about the amount to be paid out to the vacating tenant will be between the vacating tenant and the landlord; at no point does the vacating tenant's former co-tenant, or perpetrator of the domestic violence, have to be involved. The remaining co-tenants will be required to 'top-up' the bond, where there is a shortfall of the amount required under the residential tenancy agreement.

Payout of bond where damage caused during commission of a domestic violence offence

The current bond provisions in the RT Act do not specifically address damage caused as a result of domestic violence as a consideration for the Tribunal when determining the payout of a rental bond.

Section 166 of the RT Act (extracted above) sets out the circumstances in which a landlord is entitled to claim an amount from the rental bond. These include:

- the reasonable cost of repairs to, or the restoration of, the residential premises or goods leased with the premises as a result of damage (other than fair wear and tear) caused by the tenant, an occupant or an invitee of the tenant,
- any rent or other charges owing and payable under the residential tenancy agreement or the RT Act,
- the reasonable cost of cleaning any part of the premises not left reasonably clean by the tenant,
- the reasonable cost of replacing locks and other security devices altered, removed or added by the tenant without the consent of the landlord, and
- any other amounts as prescribed by the legislation.

Section 175 of the RT Act then operates to allow the NCAT to consider the above factors and make a decision regarding the payout of the bond between the parties.

While section 54(1A) of the RT Act exempts a tenant from vicarious liability for damage caused during the provision of a domestic violence offence, we are concerned that the bond provisions do not specifically state that the Tribunal must consider any circumstances of domestic violence when determining the payout of the bond. The onus is currently on the vacating tenant to raise this as a defence of the bond claim. We are concerned that the result of this would be that there is a disproportionate payout of the bond to the vacating tenant in a situation where the other party is the domestic violence perpetrator.

Case Study: Julia*

Julia contacted our service for advice about the repayment of her rental bond. She had made an application to the Tribunal under section 175 of the RT Act after the landlord had made a claim over a portion of her bond. The amount that the landlord was claiming was due to damage caused to the premises (a hole in the wall in the living room, red wine stain on the carpet in the bedroom and a broken hinge on one of the doors in the hallway). Julia told us that this damage was caused during a series of violent outbursts by her ex-partner. She did not call the police after every incident as she was scared about how her ex-partner would react. Julia was worried that the Tribunal would not take these factors into account and was seeking advice about whether the amounts being claimed by the landlord could be deducted from her bond.

*Not her real name.

In Queensland, domestic violence is listed as a specific consideration when determining the repayment of the rental bond.

The Residential Tenancies and Rooming Accommodation Act 2008 (QLD) relevantly states:

136D Tribunal order about payment of a rental bond

(1) This section applies if, under section 136B, an interested person applies to the tribunal for an order about the payment of a rental bond.

(2) The tribunal may make any order about payment of the rental bond the tribunal considers appropriate having regard to –

(a) for a residential tenancy agreement –

(i) the efforts made by the tenant to comply with the tenant’s obligation under s 188(4)

(ii) the lessor and tenant’s compliance with this Act for the agreement; and

(iii) the evidence supporting any claim on all or part of the rental bond; or

(b)

(3) However, the tribunal’s order must not have the effect of penalising a tenant or resident for any damage, caused by an act of domestic violence committed against the tenant or resident to –

(a) for a residential tenancy agreement – the premises or inclusions; or

(b) ...

Queensland’s legislation makes it a requirement that the Queensland Civil and Administrative Tribunal must consider any damage caused during the commission of a domestic violence incident when determining the payout of the rental bond. While this does pose an evidentiary burden on the vacating tenant to demonstrate that the damage was caused during the commission of a domestic violence incident, goes further than NSW’s current provisions by ensuring that the bond is repaid appropriately.

Redfern Legal Centre is concerned that the current provisions in the RT Act regarding repayment of the rental bond are not working effectively in the case of former co-tenants who have terminated their tenancies due to being in circumstances of domestic violence.

Our recommendations for how these barriers could be overcome are as follows:

Recommendations

4. Section 174 of the RT Act be amended to remove the obligation on tenants who have terminated their co-tenancies because of circumstances of domestic violence to request their bond back from the perpetrator.
5. Section 174 of the RT Act be amended to enable a vacating tenant in circumstances of domestic violence to complete a “bond refund form for persons experiencing family or domestic violence” and provide it directly to the landlord.
6. Section 174 of the RT Act be amended to provide that any dispute about the amount of payout of the bond should be between the vacating tenant and the landlord.
7. Section 175 of the RT Act be amended to include a provision that a NSW Civil and Administrative Tribunal order regarding the repayment of a rental bond must not have the effect of deducting an amount from the tenant’s bond for damage caused due to a domestic violence incident.

v. Security of premises – changing locks in circumstances of domestic violence

Q 26. Should any other circumstances be listed as a reasonable cause for altering, removing or adding a lock or other security device for the residential premises? If yes, what are they?

Section 71(1) of the RT Act prescribes that a landlord or a tenant in NSW may alter, remove, or add, or cause or permit the alteration, removal or addition of a lock or other security device for the residential premises only with consent of the other party, or with a reasonable excuse.

Relevantly, s71(2) of the RT Act sets out what constitutes a ‘reasonable excuse’ as follows:

(2) 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 premises by an apprehended violence order.

We are concerned that the RT Act does not currently specify that being in circumstances of domestic violence is considered a ‘reasonable excuse’ for changing the locks to the premises, unless a co-tenant or occupant is prohibited from accessing the premises by an ADVO. It is very common for victim-survivors of domestic violence to not want to report the domestic violence to police, and therefore there are a significant number of situations where a person could be in circumstances of domestic violence despite there not being an official AVO/ADVO in place.

Being in circumstances of domestic violence can result in victim-survivor feeling anxious, fearful and unsafe if they continue to live in the residential premises, even if the perpetrator no longer resides there. Therefore, the RT Act should contain a provision which specifically permits the tenant to alter/change or add any lock or other security device when they are in circumstances of domestic violence and at risk while continuing to reside in the premises.

Case study: Christina*

Our client, Christina, was a tenant in a private rental who was the victim of family violence. Her partner refused to be a tenant on the lease, and all of the bills were placed in her name only. She worked with a domestic violence caseworker to come up with a safety plan, the intention of which was for her to remain in the home as she was the only tenant named on the lease. The domestic violence caseworker asked if changing the locks was something that she might be able to do, to reduce the risk of him re-entering the property with the copy of the keys that he held. Christina called her real estate agent, who told her she’d need to get her landlord’s permission. Christina’s landlord did not respond for over two weeks, and then told her that changing the locks was unnecessary and he would not permit the works. Christina then had to work with her caseworker to completely change the safety plan and obtain assistance in finding alternative accommodation.

*Not her real name.

Residential tenancies legislation in Western Australia has specifically considered this issue. The *Residential Tenancies Act 1987* (WA) relevantly states:

Section 45 – Securing premises

(1) ...

(2) It is a term of every residential tenancy agreement –

(a) that a tenant may alter or add any lock or other means of securing the residential premises –

(i) ...

(ii) in any event, if it is necessary to prevent the commission of family violence that the tenant suspects, on reasonable grounds, is likely to be committed against the tenant or a dependant of the tenant; and

(b) that the tenant must give to the lessor a copy of the key to any lock or other means of securing the residential premises altered or added under paragraph (a) as soon as practicable, and in any event within 7 days, after the lock or other means of securing the residential premises has been altered or added.

As set out above, Western Australia’s legislation prescribes that where a tenant is in circumstances of domestic violence and changing the locks is necessary to prevent the commission of a family violence offence, that the tenant suspects on reasonable grounds will be committed against themselves or their dependents, they can change the locks to the premises without the landlord’s prior permission. After doing so, they must provide the landlord with a copy of the new keys within seven days.

Similarly, Queensland’s *Residential Tenancies and Rooming Accommodation Act 2008* (NSW) also contemplates a situation where a tenant can change the locks of the premises where they are in circumstances of domestic violence. Relevantly, the Act states:

Section 211 – Changing locks

(1) ...

(2) However, the tenant may also change a lock at the premises if the tenant –

(a) believes the change is necessary to protect the tenant or another occupant of the premises from domestic violence; and

(b) engages a locksmith or other qualified tradesperson to change the lock.

It has been our experience that in comparison to these provisions from other Australian jurisdictions, the current provisions in the RT Act are not sufficient as they do not specify that being in circumstances of domestic violence are a “reasonable excuse” to change or alter/add locks or other security devices without the consent of the landlord. As a result, many tenants are put in a situation where they are not safe in their premises, as the perpetrator of domestic violence against them is still able to access the property.

Recommendations

8. Section 71(2) of the RT Act be amended to specify that being in circumstances of domestic violence is a 'reasonable excuse' for tenants to change or alter/add locks or other security devices when they are in circumstances of domestic violence.
9. In order to demonstrate that a tenant is in circumstances of domestic violence for the purposes of section 71(2), a tenant should be able to rely on the same evidentiary items as set out in section 105B(2) regarding the right to early termination.

6. Conclusion

Since the commencement of the specific legislative domestic violence provisions in the RT Act in 2019, RLC has advised a significant number of tenants and non-perpetrator co-tenants who have experienced domestic violence. While the provisions overall are a positive addition to the RT Act, we are concerned that some of the provisions do not go far enough to protect the rights of co-tenants and non-perpetrator co-tenants experiencing domestic violence. The issues, case studies and recommendations set out in the above submissions highlight the main issues identified by the tenants we have advised who are engaging with the domestic violence provisions in the RT Act. Enacting the recommendations set out in these submissions will strengthen the protections for tenants and non-perpetrator co-tenants accessing the domestic violence provisions, and enable them to take appropriate action to ensure the safety of themselves and their family.