THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC:JvdPvk091222

9 December 2022

Residential Tenancies – Domestic Violence Provisions Statutory Review
Policy & Strategy, Better Regulation Division
Department of Customer Service
4 Parramatta Square
12 Darcy Street
PARRAMATTA NSW 2150

By email: dvreview@customerservice.nsw.gov.au

Dear Madam/Sir,

Statutory review of the domestic violence provisions in the *Residential Tenancies Act 2010* (NSW)

Thank you for the opportunity to contribute to the statutory review of the domestic violence (**DV**) provisions in the *Residential Tenancies Act 2010* (NSW) (**the Act**). The Law Society's Indigenous Issues Committee has contributed to this submission. Please see below our responses to select questions in the Issues Paper below.

Question 3: Is the current definition of competent person appropriate? If not, how could it be improved?
In the experience of our members, the expansion of the 'competent person' definition has been beneficial for victim-survivors to access the DV provisions. However, concerns remain in respect of whether all victim-survivors who need to access the DV termination provisions are able to. We suggest that the definition of 'competent person' could be expanded to include tenant advocates and solicitors. Clients could be made aware of the DV termination provisions by those workers if those workers were included as competent persons under the Act, and be immediately assisted to access those provisions if appropriate. Another possible category of 'competent persons' are certain support workers in specialist support services who, for example, provide support to people experiencing homelessness, and disability advocate/support workers.

Easier access to a 'competent person' and the DV termination process could be facilitated where there is an existing relationship with a support worker.

There are disproportionately high rates of violence against Indigenous women, and it is important to provide adequate pathways for Indigenous victim-survivors to access the protections within the DV provisions. Therefore, we support the suggestion in the Issues Paper that workers from Indigenous corporations registered by the Office of the Registrar of Indigenous Corporations (**ORIC**) be included as 'competent persons.' Organisations within this category could include women's and family centres. We note, however, that many grassroots Indigenous community-controlled organisations that would be well-placed to assist in this regard are not registered with ORIC. We suggest that a targeted consultation of Indigenous

individuals and organisations be carried out to ensure that the definition of 'competent persons' includes the appropriate people to ensure that Indigenous victim-survivors have effective access to the DV provisions.

For the DV provisions to be accessible and effective, tenants, landlords and their agents must be aware of them, and it is crucial that amendments which act to improve the protections, such as the expansion of the competent persons list, are also known and understood. The Tenant Information Statement and Landlord Information Statement, published by NSW Fair Trading, set out the rights and obligations of tenants and landlords respectively, and generally must be provided to the relevant parties prior to the signing of a tenancy agreement. Accordingly, we suggest that these information statements are updated to include further information on the DV provisions, including references to the expanded competent persons list.

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

We understand that it tends to be more difficult for victim-survivors to make use of the DV termination provisions in circumstances where the victim and perpetrator are co-tenants and the victim wishes to stay in the premises and exclude the perpetrator.

This is particularly a problem in regional areas of NSW where vacancy rates are low, and the affordability crisis is significant. Currently, s 79 of the Act operates to end a perpetrator's co-tenancy where a final apprehended violence order (**AVO**) is obtained against the perpetrator. However, s 79 is not often used as it takes time to obtain final AVOs. Furthermore, many victim-survivors of DV may not have involved the police or courts for a variety of reasons. We suggest that expediting the process of terminating a perpetrator's co-tenancy could assist victim-survivors to stay in their home. One option is to introduce a legislative mechanism allowing victim-survivors to terminate a perpetrator's co-tenancy in 'circumstances of domestic violence' within the meaning of s 105B(2) of the Act, including by applying to the NSW Civil and Administrative Tribunal (**NCAT**). This would be separate to the existing provision under s 102, which allows termination of a co-tenant's tenancy by the Tribunal in the 'special circumstances' of the case. Our members advise that s 102 is often not an appropriate mechanism to end a perpetrator's co-tenancy in circumstances of DV, due to the evidentiary threshold of 'special circumstances', and a requirement for the co-tenant(s) and landlord to be parties to the NCAT proceedings.

Question 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?

The requirement for victim-survivors to serve a DV termination notice on a perpetrator co-tenant can be a traumatic experience and a risk to the safety of the victim-survivor. We suggest that this requirement be amended to require only that the victim-survivor serve the DV termination notice to a landlord/agent. To remove the requirement that victim-survivors engage with perpetrators in this way, we suggest that a landlord or real estate agent could instead be required to inform any remaining co-tenants when their co-tenant's tenancy has ended in circumstances of domestic violence. We suggest that there may also be a role for state-funded and managed DV programs in this regard.

Question 12: Are the provisions prohibiting information about tenants who have given a domestic violence termination notice in a tenancy database adequate?

Our members have reported examples of real estate agents and landlords listing tenants on the Tenancy Information Centre Australia database, where tenants have issued a DV

termination notice. This highlights a lack of awareness of protections on the part of the landlord and real estate agents.

We note again that for the DV provisions to be accessible and effective they must be known and understood by tenants, landlords and their agents. Therefore, it is also suggested that training be mandated and made available all for landlords and their agents with respect to domestic and family violence, and the DV provisions of the Act. An increase to the penalty attached to s 213A could also be considered as a way to improve compliance and enforcement.

The process of trying to have an invalid database listing removed can also be traumatic for victim-survivors. Our members advise that the listing of a tenant on a tenant database, or 'blacklisting', can be a significant barrier for victim-survivors to secure new housing, and therefore a barrier to escaping their DV circumstances. Such a listing can also result in homelessness and, in some cases, the removal of children where there is no prospect of suitable alternative housing. Also, as noted previously, many victim-survivors may not have involved the police or courts or reported the DV due to a variety of factors, resulting in no DV termination notice being served. Therefore, we suggest that the protection against database listing under s 213A should be expanded beyond people who have issued a DV termination notice to include victim-survivors in 'circumstances of domestic violence' more broadly.

Question 13: Are there any other restrictions or changes required to protect the confidentiality of tenants or co-tenants termination of their tenancy using a domestic violence termination notice?

Section 105C(3) of the Act provides that a person must not use or disclose evidence annexed to a DV termination notice (e.g. a certificate of conviction, DVO, family law injunction or competent person declaration), unless the person is permitted or compelled by law to disclose the document or information. However, the giving of a DV termination notice involves the provision of extremely sensitive and personal information by victim-survivors. Currently, there are limited external protections to ensure the confidentiality of such information. Individual landlords and some smaller agents with an annual turnover of less than $3 million are not covered by the Australian Privacy Principles, and those who are covered can collect information that is 'reasonably necessary' for their functions or activities, which can be interpreted broadly. Therefore, we suggest consideration of an increase to the penalty attached to s 105C(3) to improve compliance and enforcement.

We note that a privacy breach in circumstances of domestic violence could have particularly serious consequences for the safety of victim-survivors and their families. Accordingly, we suggest that a prescribed term regarding an obligation to keep information annexed to a DV termination notice confidential, could be added to the standard form tenancy agreement at Schedule 1 of the *Residential Tenancies Regulation 2019* (NSW).

Question 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?

Our members advise that it is not uncommon for landlords to seek compensation from victim-survivor tenants even where evidence has been provided of damage being committed during a DV offence. This could be due to a lack of awareness of these provisions.

As noted above, awareness of and training on the DV provisions for landlords and their agents is crucial to the effective operation of these provisions, and training on domestic and family violence and the domestic violence provisions of the Act should be mandatory for landlords and real estate agents.

Our members have also observed a lack of consistency in respect of what evidence is considered acceptable in determining the issue of liability for property damage.

For example, our members are aware of matters in which the NCAT did not accept police event numbers or even police incident reports as evidence to establish the victim-survivor has limited liability.

One suggestion in respect of addressing the evidence requirements is to consider setting out a non-exhaustive list in the Act about what is required to substantiate damage incurred as a result of a DV offence.

Another option, outside of the legislation, might be to provide for a specialist NCAT member who is effectively trained in domestic and family violence and abuse to hear those matters.

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

Our members advise that, for a number of reasons, it can be challenging for victim-survivors to obtain a refund of their bond from perpetrator co-tenants where a bond was paid in part or in full at the start of a tenancy. Consideration could be given to a legislative mechanism which would allow the victim survivor's bond to be severable after the giving of a DV termination notice which severs their co-tenancy.

Our members advise that, in practice, it is not appropriate for victim-survivors to have to recover their portion of the bond from a perpetrator co-tenant, due to a variety of factors. The prospect of communicating with perpetrator co-tenants to access the bond is especially difficult for victim survivors who have safety concerns, or who are experiencing financial abuse - which is often a subset of domestic violence. Given the remedial nature of these provisions, we suggest that further legislative amendment to allow for the bond to be severed in these circumstances is warranted.

Question 24: What could be the consequences, both positive and negative, if landlords and agents are required to obtain consent each time they wish to publish photos or video recordings of the interior of residential premises in which the tenant's possessions are visible?

As noted in the Issues Paper, some real estate agents seek consent for publication of photos or video recordings only at the start of a lease, preventing victim-survivors from being able to reasonably refuse consent to publish photos or video of their premises when it becomes necessary to protect their safety at a later point. We suggest that provision should be made to require that consent is required every time publication of such visual records is intended.

Thank you again for the opportunity to contribute. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

Joanne van der Plaat
President