

Chapter 11: Domestic violence and housing

It's well known that domestic violence is a leading cause of women's homelessness. Therefore, it's important that you seek instructions from your client about their housing situation. This chapter will focus on options available to clients who are renting and experiencing domestic violence.

WATCH THIS SPACE

There are potential changes coming to tenancy laws, including the provisions that relate to tenancy and victims of violence so please ensure that you are up to date with any changes that may have been introduced following the writing of this chapter.

Legislation

The *Residential Tenancies Act 2010* (NSW) (RTA) sets out the rights and responsibilities of tenants and landlords in NSW (including social housing providers).

NCAT

The NSW Civil and Administrative Tribunal Commercial and Consumer Division (NCAT) resolves disputes between tenants, landlords and co-tenants. It is informal, low cost and user friendly. However it strongly advocates for resolution through conciliation and does not have safe rooms or other procedures to protect victims of domestic violence. Solicitors will need to seek leave under section 45 of the *Civil and Administrative Tribunal Act 2013* (NSW) to represent their clients in NCAT.

Residential tenancy agreements

Section 13 of the RTA states that a residential tenancy agreement is an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence. It may be express or implied and may be oral or in writing, or partly oral and partly in writing.

Types of tenants

Section 3 of the RTA defines a tenant as a person who has the right to occupy a residential premises under a residential tenancy agreement, including sub-tenants.

A co-tenant is a tenant who is one of two or more tenants listed on a residential tenancy agreement, who are jointly and severally liable for the rent and any damage to the property.

A sole tenant is a person who is the only person listed on a residential tenancy agreement.

A sub-tenant is a person who has a written residential tenancy agreement with a tenant who is listed as a tenant on a residential tenancy agreement with a landlord.

A person who resides in a rental property but is not named on a residential tenancy agreement is an occupant.

Types of residential tenancy agreements

A fixed term residential tenancy agreement is for a particular period of time, for example six months.

A periodic residential tenancy agreement is not for a particular period of time. If a tenant continues to live in a rental property beyond the time period specified in a fixed term agreement and does not enter into a new fixed term agreement, they will be on a periodic agreement.

Taking instructions:

You should get the following instructions from your client:

1. What type of tenant are they; co-tenant, sole tenant or occupant?
2. What type of residential tenancy agreement do they have, for example fixed term, periodic, or no residential tenancy agreement? You should ask to look at a copy of their residential tenancy agreement to confirm what type of residential tenancy agreement they have. Consider whether you need an authority from your client to speak to their real estate agent or social housing provider.
3. Do they want to stay in the property or go?
4. If they want to stay, can they afford to rent the property on their own?

5. Do they have an apprehended violence order (AVO)? If so, is it interim or final? What are the conditions on the AVO?
6. Are there any debts associated with the tenancy, for example, rent arrears or damage to the property?
7. Is the property sufficiently secure? Do locks need to be changed?
8. Are they likely to owe their landlord more than their rental bond?
9. Has NCAT terminated their tenancy?
10. Who paid the bond?

Options for tenants and occupants wanting to stay

Co-tenants in a fixed term residential tenancy agreement

If your client is a co-tenant with the defendant in AVO proceedings, if there is a final AVO that prohibits the defendant from having access to the rental property, your client can continue to live safely in the property. The AVO will end the defendant's tenancy, which means your client will be solely liable for the rent.

An interim AVO prohibiting the defendant co-tenant from having access to the rental property will mean that your client can continue to live safely in the property while the interim AVO is in place. An interim AVO won't end the defendant's tenancy.

If your client does not have a final AVO excluding the defendant co-tenant from accessing the property, your client could apply under section 102 of the RTA for an order from NCAT ending the other co-tenant's tenancy due to the special circumstances of their case. Your client could argue that the domestic violence warrants NCAT making an order ending the co-tenant's tenancy. NCAT has been known to list these applications urgently if requested to do so in writing. Your client could use a statutory declaration, police records, letters from support services and/or an interim AVO to support their application. Your client would benefit from having an advocate represent them as the other co-tenant may be permitted to cross-examine them.

Co-tenants in a periodic residential tenancy agreement

Your client has the same options available to them as co-tenants in fixed term residential tenancy agreement wanting to stay. Please see above for these options.

Sole tenants in a fixed term or periodic residential tenancy agreement

If your client wants to stay living in the property they do not need to do anything. However you may want to refer them to their local Staying Home Leaving Violence (SHLV) service if they would like to upgrade the security of their home. See '**Locks and Security**' below for more information about SHLV.

Occupants

If your client doesn't have a residential tenancy agreement they do not have any legal right to stay in the property. However, if they have a final AVO that prevents a tenant from accessing the property, they can apply to NCAT under section 79 for an order that they be recognised as a tenant.

Options for tenants and occupants wanting to leave

Co-tenants in a fixed term residential tenancy agreement

It is not recommended that your client just vacate their rental property because they will remain liable for the rent and any damage caused by the remaining co-tenant(s) who stay living in the property. If they can't pay any outstanding debts owing they could be listed on a 'bad tenants' database, which can make it very difficult for them to rent another property. This is why it's very important to advise your client about their other options if they want to leave the property.

Your client can end their residential tenancy agreement without having to compensate their landlord if both the landlord and other co-tenant(s) agree to end it. If they are able to reach an agreement they should put their agreement in writing and everyone should sign it. The agreement should state that they do not owe their landlord any money.

If your client has a final AVO prohibiting the defendant co-tenant from accessing the rental property, your client can give their landlord a 14-day written termination notice and a copy of their AVO.

You can refer your client to www.tenants.org.au for sample termination notices. They will not owe their landlord any money for ending their tenancy early.

If your client does not have a final AVO prohibiting the defendant co-tenant from accessing the rental property they could apply under section 102 for an order from NCAT to end their tenancy due to the special circumstances of their case. Your client could argue that the domestic violence warrants NCAT making an order ending their tenancy. NCAT has been known to list these applications urgently if requested to do so in writing. Your client could use a statutory declaration, police records and/or an interim AVO to support their application. Your client would benefit from having an advocate represent them as the other co-tenant may be permitted to cross-examine them. NCAT has the power to order your client to compensate the landlord for ending the tenancy early, however this is still a much better option than abandoning the rental property.

Co-tenants in a periodic residential tenancy agreement

Your client can just leave the rental property, however they will remain liable for the rent and any damage caused by the remaining co-tenant(s) who stay living in the property. If they can't pay any outstanding debts owing they could be listed on a 'bad tenants' database, which can make it very difficult for them to rent another property. This is why it's very important to advise your client about their other options if they want to leave the property.

Your client can end their residential tenancy agreement without having to compensate their landlord if both the landlord and other co-tenant(s) agree to end it. If they are able to reach an agreement they should put their agreement in writing and everyone should sign it. The agreement should state that they do not owe their landlord any money.

If they can't reach an agreement, your client can give their landlord and all the other co-tenants a 21-day written termination notice and leave the property. You can refer your client to www.tenants.org.au for sample termination notices. They will be jointly and severally responsible for the rent until the end of the 21-day period.

Sole tenants in a fixed term residential tenancy agreement

Your client has the same options available to them as co-tenants in a fixed term RTA wanting to leave. Please see above for these options.

Additionally, if your client is near the end of their fixed term residential tenancy agreement they can give their landlord a 14-day written termination notice. You can refer your client to www.tenants.org.au for sample termination notices.

Sole tenants in a periodic residential tenancy agreement

Your client has the same options available to them as co-tenants in a periodic residential tenancy agreement wanting to leave. Please see above for these options.

Occupants

Your client can just leave, however, if they have any other type of agreement with the homeowner or the people they are living with, they should give a written termination notice in accordance with that agreement.

Locks and security

Landlords are responsible for ensuring that their rental properties are reasonably secure (s 70). However, if your client would like to upgrade the security of their rental property beyond what would normally be reasonably secure, they will need to pay for it, unless they are eligible for support through a Staying Home Leaving Violence (SHLV) Service.

Practitioner tip

SHLV is a specialised domestic and family violence program aimed at promoting victims' housing stability and preventing homelessness and the program can pay to upgrade the security of victims' homes. A list of SHLV services is available at www.community.nsw.gov.au/parents-carers-and-families/domestic-and-family-violence/staying-home-leaving-violence and see also **Chapter 14**, page 101 for further information.

Your client will need to seek their landlord's permission if they want to add or remove a lock or security device unless they have a 'reasonable excuse', which section 71(2) defines as:

- a) *in an emergency;*
- b) *in accordance with an NCAT order;*
- c) *after the tenancy of a co-tenant is terminated; or*

d) after a tenant or occupant is prohibited from having access to the property by an AVO.

Sections 73 and 72 require tenants to give a copy of the key or other opening device to the landlord and any other tenants within seven days, unless NCAT authorises a copy not be given or a person is prohibited from having access to the property by an AVO.

See also 'Victims Support: Financial assistance for information on financial assistance to cover security upgrades to a property' on page 91.

Tenant databases

Many victims of violence who flee rental properties may be listed on tenant databases without knowing it. Landlords and agents are unlikely to rent your client a property if they are listed on a tenant database.

Tenant databases contain personal information about people who have lived in rental properties, which landlords and agents can access to determine whether to enter into a residential tenancy agreement with a person.

Section 212 states that your client can be listed on a tenant database if they were named as a tenant on a residential tenancy agreement and their tenancy was terminated because they breached their residential tenancy agreement and because of that breach they owed their landlord an amount more than their rental bond, or if NCAT made a termination order.

Section 213 states that a landlord or agent must not list personal information about your client in a tenant database unless:

- ▶ they have given your client a copy of the personal information or taken other reasonable steps to disclose the personal information to them;
- ▶ they have given them at least 14 days to review the personal information and make submissions objecting to its entry into the database or about its accuracy, completeness and clarity; and
- ▶ they have considered any submissions made.

However, this section does not apply if the landlord or agent cannot locate the person after making reasonable inquiries.

Section 211 requires landlords and agents to notify former tenants that they have been listed on a

tenant database. However, if your client did not provide their previous landlord or agent their new address they may not know if they are listed on a tenant database.

Section 216 allows your client to find out whether a former landlord or agent has listed them on a database by making a written request. The information must be provided to them for free within 14 days of making the request. Your client can also request this information from a database operator, however they may need to pay a fee, which should not be excessive.

Your client can seek an order from NCAT under section 217 prohibiting them from being listed on a tenant database or removing or amending their personal information on the tenant database if:

- ▶ the tenant database includes personal information about them that is inaccurate, incomplete, ambiguous or out of date, or that has been listed on the database for longer than three years; or
- ▶ it is unjust in the circumstances, having regard to the following:
 - the reason for the listing;
 - the tenant's involvement in any acts or omissions giving rise to the listing;
 - any adverse consequences suffered, or likely to be suffered, by the tenant because of the listing;
 - any other relevant matter.

Rental bonds

If your client stays living in a rental property and their perpetrator was a co-tenant and moves out, your client will be obliged under section 174 to repay them any money they paid towards the bond within 14 days of receiving written request from the perpetrator, unless the perpetrator is prohibited from accessing the property by a final AVO.

If your client moves out of the property and the remaining co-tenant does not repay the money your client paid towards the bond within 14 days of making a written request, your client can apply to NCAT to resolve the matter. Section 175(3) of the RTA and regulation 22(8) of the *Residential Tenancies Regulation 2010* (NSW) requires tenants to apply within six months of the bond being paid out, which would occur after the remaining tenants move out.