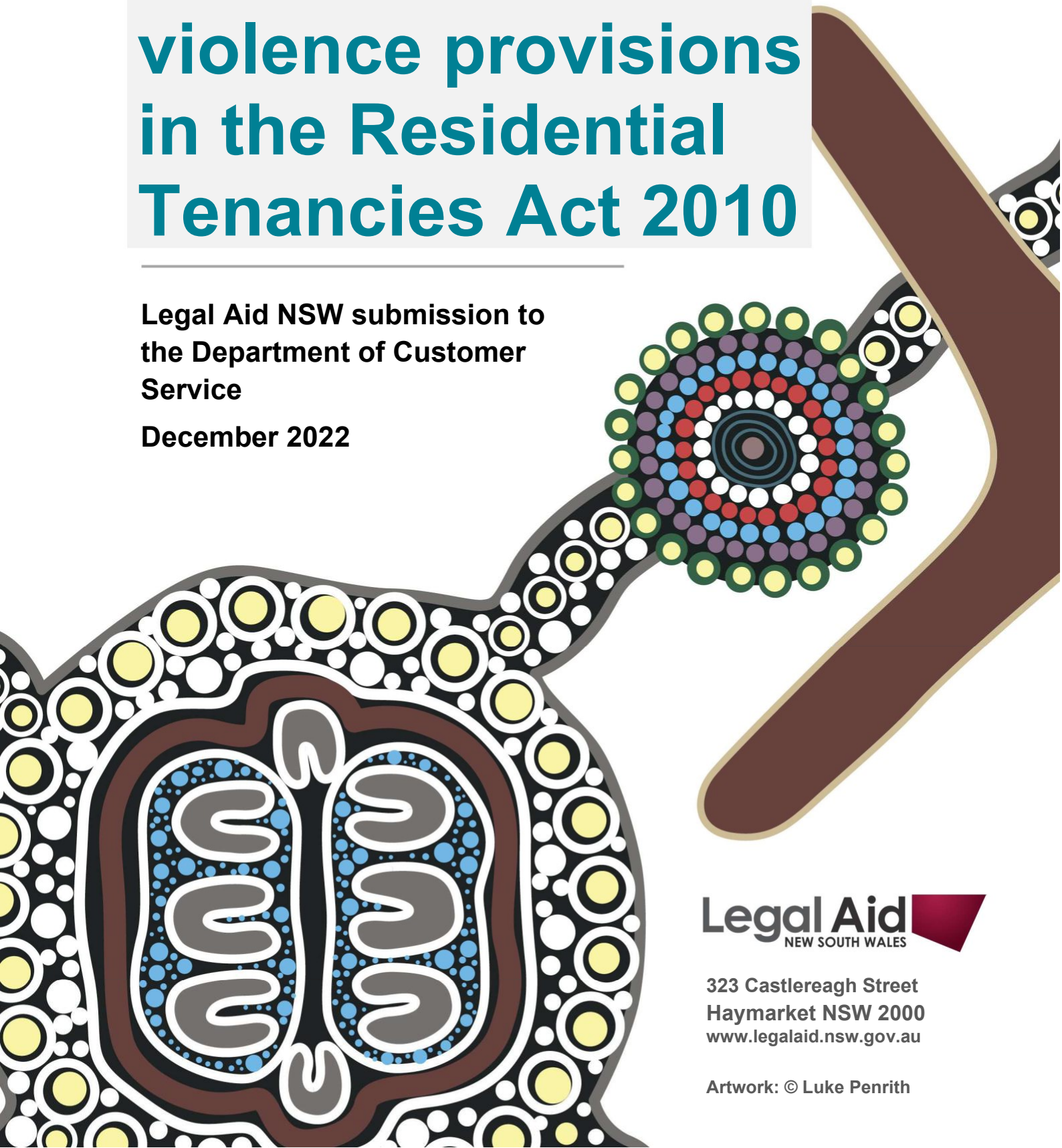


# Statutory review of the domestic violence provisions in the Residential Tenancies Act 2010

Legal Aid NSW submission to  
the Department of Customer  
Service

December 2022



**Legal Aid**  
NEW SOUTH WALES

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## Acknowledgement

**We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise their continuing connection to land, water and community.**

**We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.**

**Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.**

# 1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact:

[Redacted contact information]

## 2. Executive Summary

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Customer Service in response to the statutory review of the domestic violence provisions in the Residential Tenancies Act 2010 (the Act). Our submission is informed by the services we provide.

Our Civil Law Division is the largest publicly funded civil law practice in Australia and the work of our civil lawyers and allied professionals is wide-ranging. In the 2020-2021 financial year, the Civil Law Division provided 55,869 civil law services to clients across New South Wales including both at Legal Aid NSW offices and at our many outreach locations. The Civil Law Division provides specialist legal services including through our Housing and Homelessness specialist team. Housing law solicitors advise tenants on their housing rights and obligations and litigate matters to prevent homelessness. Within the housing team there are specialist solicitors who assist clients experiencing family and domestic violence with their housing matters. In the 2020/21 financial year Legal Aid NSW provided 4333 housing advice and assistance services.<sup>1</sup>

Legal Aid NSW's Family Law Division is the largest family law practice in Australia. It provides legal information, advice and minor assistance, extended legal assistance, early resolution assistance, duty services, dispute resolution and case representation in family law matters. In the 2020-2021 financial year our Family Law Division provided 65,016 family law services to clients across New South Wales. The Domestic Violence Unit (DVU) is a specialist unit within the Family Law Division. DVU is a trauma-informed multidisciplinary service made up of lawyers, paralegals, social workers and financial counsellors who work together to assist

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<sup>1</sup> In the 2021/22 financial year Legal Aid NSW has so far provided 4803 housing advice and assistance services.

clients escaping domestic and family violence to address their legal and non-legal needs. The services provide casework litigation, social work assistance and financial counselling. In the 2021-2022 financial year Legal Aid NSW's Domestic Violence Unit provided 1,838 advice services, 1,659 minor assistance services, 10 extended legal assistance services and 36 grants of aid to clients seeking support for domestic violence related issues.

Legal Aid NSW also administers NSW Government funding for Women's Domestic Violence Court Advocacy Services (WDVCASs) across the state through our Women's Domestic Violence Court Advocacy Program (WDVCAP) Unit. In the 2021-2022 financial year WDVCAS provided 55,341 court advocacy services to women experiencing domestic violence.

Legal Aid NSW considers the domestic violence provisions within the Act as largely empowering. In our view they enhance the safety, choice and agency of victims<sup>2</sup> of domestic violence (victims) who would ordinarily face significant, short and long term, structural and economic barriers to leaving violence if the provisions did not exist. In our experience, supporting clients fleeing domestic and family violence has been made easier by the introduction of these provisions. We have also received positive feedback from our clients regarding the process, benefits, agency, choice and enhanced safety that the provisions provide.

Legal Aid NSW considers the current domestic violence provisions to be largely working as intended. However, we are concerned about the lack of knowledge and training around their existence, and their consequent underutilisation. In addition,

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<sup>2</sup> Victim is used in this submission to denote a person who is the victim or complainant or alleged victim of domestic and family violence or sexual violence. Some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission, the term 'victim' is intended to be inclusive of both victims and survivors. This submission acknowledges every person's experience is unique and individual to their circumstances.



we submit that reform in the following areas would further enhance the protections offered by these provisions, and the overall operation of the regime:

1. Broadening the definition of ‘competent person’.
2. Introducing a positive duty on landlords to inform tenants of the domestic violence provisions in the Act.
3. Removing the requirement on a tenant serving a domestic violence termination notice to serve that notice on a co-tenant when that co-tenant is the domestic violence perpetrator.
4. Introducing a mechanism to enable tenants who have terminated a tenancy pursuant to Part 5 Division 3A of the Act to claim their share of the rental bond directly from Fair Trading.

## Recommendations

### Recommendation 1

A comprehensive public awareness campaign should be rolled out to educate the real estate industry, potential “competent persons” and the wider community, about the domestic violence provisions under the Act.

### Recommendation 2

A notice about Part 5 Division 3A of the Act should be included in a separate section of the “Tenant’s Information Statement”, and under the “Checklist” section of the Statement.

Information about Part 5 Division 3A of the Act (including the requirement of the termination notice under section 105C) should be included in the Standard Tenancy Agreement in a more prominent and informative way than is currently provided for in the “Note” on page 14 of the existing Standard Tenancy Agreement.

### Recommendation 3

The current definition of ‘circumstances of domestic violence’ in section 105B of the Act is appropriate and should not be changed.

### Recommendation 4

The type of evidence required to be annexed to a domestic violence notice is adequate and need not be changed.

### Recommendation 5

The definition of a “competent person” should be expanded to include the following persons:

Disability advocate/support workers.

Community access workers.  
Homelessness or housing workers.  
Tenancy workers or tenant advocates/solicitors.  
Workers from Aboriginal corporations registered by the Office of the Registrar of Indigenous Organisations.  
Financial counsellors registered with Financial Counsellors Association of NSW (FCAN).  
General counsellors registered with the Australian Counselling Association (ACA) and/or Australian Register of Counsellors and Psychotherapists (ACAP).

### **Recommendation 6**

The current penalties under section 105H of the Act are appropriate and should not be changed.

### **Recommendation 7**

The Declaration by Competent Person form should be updated to provide competent people with more information about what is and is not required of them, including that their declaration is not reviewable by the Tribunal and that they will not be required to give evidence in any subsequent Tribunal proceedings.

### **Recommendation 8**

Training, including via short pre-recorded online courses, should be made publicly available to educate “competent persons” about their obligations.

### **Recommendation 9**

Part 5 Division 3A of Act should be amended to impose a positive obligation on landlords and real estate agents to inform tenants of their right to terminate a tenancy in circumstances where the landlord or the agent becomes aware of domestic violence.

The “Landlord’s Information Statement” should also be amended to include information about this obligation under the heading “What you must tell your tenant before signing a tenancy agreement”.

### **Recommendation 10**

The current requirement for victims to serve a domestic violence termination notice on co-tenants should be removed in circumstances where the co-tenant is also the relevant perpetrator of domestic violence.

### **Recommendation 11**

Mandatory training should be introduced for landlords and real estate agents regarding the prohibition on publishing information about tenants who have given a domestic violence termination notice in a tenancy database.

### **Recommendation 12**

The current penalties under section 213A of the Act should not be changed.

### **Recommendation 13**

The prohibition against reviewing the contents of competent persons’ declarations should remain.

### **Recommendation 14**

In circumstance where a tenancy has been terminated pursuant to section 79 of the Act, the requirement for the victim/remaining occupant to seek an order from the Tribunal to be recognised as a tenant under the Residential Tenancy Agreement should remain.

### **Recommendation 15**

Victims of domestic violence who have terminated a tenancy pursuant to Part 5 Division 3A of the Act should be permitted to claim their share of the rental bond directly from Fair Trading. To achieve this, section 174 of the Act should be amended as follows:

(7) If a tenancy was terminated pursuant to Part 5 Division 3A and the remaining co-tenant does not comply with section 174(2) of this Act, the tenant who served the domestic violence termination notice may, notwithstanding section 163(3), make a claim directly to the Secretary, in the approved form, for the payment of their share of the rental bond.

### **Recommendation 16**

Section 55A(1) should be amended to require landlords and real estate agents 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.

### **Recommendation 17**

Section 55A(3) of the Act should remain unchanged.

### **Recommendation 18**

The list of reasonable excuses to alter, remove or add a lock or security device pursuant to section 71(2) should be expanded to include the following:

- o (e) if the tenant is, or has been in circumstances of domestic violence, in accordance with section 105B(2)..

### **Recommendation 19**

Training should be offered to landlords and real estate agents to help them better understand the intersection of the Residential Tenancies Regulation 2019 and the Surveillance Devices Act 2007

## 3. Ending a tenancy because of domestic violence

### 3.1 Awareness of the domestic violence provisions in the Act- agents, landlords, potential competent people and the general public

In our casework experience, when the domestic violence provisions of the Act are used, they largely operate well. However Legal Aid NSW considers there is a strong need for increased education of landlords, real estate agents (agents), potential “competent people” and the general public with regard to the provisions. This is particularly important given that our solicitors report a mixed experience with agents and landlords acting in accordance with the spirit of the legislation, even when they are aware of its existence.

#### Recommendation 1

A comprehensive public awareness campaign should be rolled out to educate the real estate industry, potential “competent persons” and the wider community, about the domestic violence provisions under the Act.

### 3.2 Awareness of the domestic violence provisions in the Act- tenants

The domestic violence provisions are designed to reduce the need for victims to initiate legal proceedings and therefore require legal assistance. Accordingly, it is difficult for us to ascertain the extent to which the provisions are relied upon by victims. Of those who do seek legal assistance, many are unaware of the provisions, and do not use them to their benefit. It therefore appears that there is, at least to some extent, a lack of awareness of these provisions, which should be addressed as a matter of priority.

## Recommendation 2

A notice about Part 5 Division 3A of the Act should be included in a separate section of the “Tenant’s Information Statement”, and under the “Checklist” section of that Statement.

Information about Part 5 Division 3A of the Act (including the requirement of the termination notice under section 105C) should be included in the Standard Tenancy Agreement in a more prominent and informative way than is currently provided for in the “Note” on page 14 of the existing Standard Tenancy Agreement.

### 3.3 Question 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?

The Act states that a person is in “circumstances of domestic violence” if the person:

- a) has been the victim of a domestic violence offence during the tenancy and the domestic violence offender has been found guilty of that offence, or
- b) is protected by an in-force provisional, interim or final domestic violence order, or
- c) is protected against family violence by an in-force family law injunction (under section 68B or 114 of the Family Law Act 1975), 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 currency of the residential tenancy agreement.<sup>3</sup>

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<sup>3</sup> Residential Tenancies Act 2010 (NSW) s 105B(2).

Legal Aid NSW considers the above definition appropriate.

### Recommendation 3

The current definition of 'circumstances of domestic violence' in section 105B of the Act is appropriate and should not be changed.

#### 3.4 Question 2: Are the types of evidence required adequate? If not, why? Are there other types of evidence that should be included?

The Act requires one of the following types of evidence to be annexed to a domestic violence termination notice:

- a. a copy of the certificate of conviction in proceedings against the relevant domestic violence offender for the domestic violence offence, or
- b. a copy of the relevant domestic violence order made against the relevant domestic violence offender, or
- c. a copy of the relevant injunction granted under section 68B or 114 of the Family Law Act 1975 (Cth) in favour of the tenant or co-tenant in proceedings against the relevant domestic violence offender, or
- d. a declaration made by a competent person in the prescribed form.<sup>4</sup>

Legal Aid NSW considers the current evidence required to be annexed to the domestic violence termination notice to be adequate and does not recommend it be broadened or limited.

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<sup>4</sup> Residential Tenancies Act 2010 (NSW) s 105C(2).

## Recommendation 4

The type of evidence required to be annexed to a domestic violence notice is adequate and need not be changed.

### 3.5 Question 3: Is the current definition of competent person appropriate? If not, how could it be improved?

Legal Aid NSW supports broadening the definition of a “competent person”. We recommend the definition be amended to include the following categories of people:

Disability advocate / support workers. Community access workers.

Homelessness or housing workers.

Tenancy workers or tenant advocates/solicitors

Workers from Aboriginal corporations registered by the Office of the Registrar of Indigenous Organisations.

Financial counsellors registered with Financial Counsellors Association of NSW (FCAN).

General counsellors registered with the Australian Counselling Association (ACA) and/or Australian Register of Counsellors and Psychotherapists (ACAP).

People experiencing domestic and family violence may not have reported the matter to Police or be engaged with a specialist domestic violence service. Expanding the list of competent people to include those listed above will allow for better uptake of the provisions and ensure they are working as intended for all people experiencing domestic violence. We note that in our experience the provision is operating as intended and has not been misused for unintended purposes as was suggested by some critics.

## Recommendation 5

The definition of a “competent person” should be expanded to include the following persons:

- o Disability advocate / support workers.
- o Community access workers.
- o Homelessness or housing workers.
- o Tenancy workers or tenant advocates/solicitors.
- o Workers from Aboriginal corporations registered by the Office of the Registrar of Indigenous Organisations.
- o Financial counsellors registered with Financial Counsellors Association of NSW (FCAN).
- o General counsellors registered with the Australian Counselling Association (ACA) and/or Australian Register of Counsellors and Psychotherapists (ACAP).

### 3.6 Question 6: Are the current provisions and penalties regarding false or misleading information appropriate? If no, what changes should be made?

Legal Aid NSW considers the current penalties under section 105H of the Act (including an \$11,000 fine or 2 years imprisonment (or both)) to be both appropriate and sufficient. Two years imprisonment is a significant deterrent to providing false information.

We also note that if the penalties for providing false or misleading information were to be increased, it could act as a further deterrent for potential competent people to provide such declarations. Legal Aid NSW is aware of potential competent people refusing to provide declarations when asked due to a fear they will become involved in legal proceedings and be required to attend court and give evidence. Although these concerns are largely due to a misunderstanding of the process and what is required of them (which is discussed below) Legal Aid NSW considers that increasing the penalties for providing false or misleading information will further deter these people from assisting victims.



## Recommendation 6

The current penalties under section 105H of the Act are appropriate and should not be changed.

### 3.7 Question 7: Could the provisions and guidance about providing evidence be improved, and if yes, how?

Legal Aid NSW considers that the information contained in Schedule 3 of the Residential Tenancies Regulation 2019 sufficiently sets out what is required when making a competent person declaration. However, this information is not easily accessible to the general public, contained in a schedule of a Regulation. Unless a person making use of the provisions is familiar with how to locate and read legislation, it may be difficult for them to find and understand them. In our view there is a need for information and education targeted towards those who fit the definition of a competent person and that information should be available in a format that is easily accessible to them.

As discussed above at 3.6, Legal Aid NSW is aware of potential competent people refusing to provide declarations when asked due to fear they will become involved in legal proceedings and be required to attend court and give evidence. This demonstrates a misunderstanding of the provisions. Legal Aid NSW recommends the proforma Declaration by Competent Person form be updated to provide information to potential competent people about what is and is not required of them, including that the form is not reviewable by the Tribunal and that they will not be required to give evidence in any subsequent Tribunal proceedings. We further suggest that training, including via short pre-recorded online courses, be rolled out to various classes of competent people so that they are better aware of their obligations when approached to provide a declaration.

## Recommendation 7

**The Declaration by Competent Person form should be updated to provide competent people with more information about what is and is not required of them, including that their declaration is not reviewable by the Tribunal and that they will not be required to give evidence in any subsequent Tribunal proceedings.**

## Recommendation 8

**Training, including via short pre-recorded online courses, should be made publicly available to educate “competent persons” about their obligations.**

## 4. Giving a domestic violence termination notice

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

Legal Aid NSW clients have reported incidents where the agent was aware of the existence of domestic violence in the home before the client fled but did not assist the client by referring them to the provisions under Part 5 Division 3A of the Act. This suggests that either some agents and landlords are not aware of the provisions, or, if they are aware, they do not consider themselves obliged to inform the tenants. Agents who are approached by victims of domestic violence seeking information and/or assistance on ending their tenancy are in an ideal position to assist them and advise them of their options. We therefore suggest that a separate provision should be introduced under Part 5 Division 3A of the Act imposing a positive duty on landlords and their agents to inform tenants of their right to terminate a tenancy in circumstances where the landlord becomes aware of domestic violence. The provision should include a requirement that the landlord advise the tenant of what steps they need to take to be covered by the domestic violence provisions of the Act. Breaches of the provision should carry a civil penalty in line with other provisions under the Act. To ensure that landlords and agents are aware of their obligations, information about this positive duty should be included in the Landlord's Information Statement under the heading "What you must tell your tenant before signing a tenancy agreement".

The below case study highlights the issue and the need for a positive duty to be placed on landlords and their agents:

### Case study: Priya's story

Priya and Sharath have been in a domestic relationship for two years and share a rental property. Sharath has regularly committed acts of domestic violence against Priya. Police have recently become involved and an Apprehended Domestic Violence Order (ADVO) has been made protecting Priya from Sharath. Priya makes the decision to leave the rental home she shares with Sharath. Priya approaches Legal Aid NSW and receives legal advice about serving a domestic violence termination notice.

After receiving legal advice Priya fills in the template domestic violence termination notice. She serves a copy of the notice and the ADVO on both Sharath and the agent. Unfortunately, when serving the notice on the agent via email Priya unknowingly selects the wrong file and serves a blank termination notice template on the agent instead of the completed form. After serving the notice and the ADVO Priya believes her tenancy has been terminated. She moves out and obtains housing elsewhere.

After being served with the domestic violence termination notice Sharath remains living at the property alone for a number of months without paying rent.

Months later the agent contacts Priya and advises her she owes them a considerable sum in unpaid rent. These rent arrears were incurred by Sharath after Priya had served her termination notice and moved out. The agent tells Priya that her tenancy at the property is still current and that it was never terminated. Priya investigates this and discovers she had incorrectly sent the agent a blank domestic violence termination notice template instead of the completed form.

The agent did not contact Priya in the months after she served the notice to advise her that she had sent them a blank version of the document. This is despite the document being titled 'Domestic Violence Termination Notice' and being accompanied by the ADVO.

Due to the tenancy not being terminated Priya is now liable for Sharath's unpaid rent.

### Recommendation 9

Part 5 Division 3A of Act should be amended to impose a positive obligation on landlords and real estate agents to inform tenants of their right to terminate a tenancy in circumstances where the landlord or the agent becomes aware of domestic violence.

The “Landlord’s Information Statement” should also be amended to include information about this obligation under the heading “What you must tell your tenant before signing a tenancy agreement”.

**4.2 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?**

Legal Aid NSW is aware that many victims of domestic violence have difficulty serving the domestic violence termination notice on a co-tenant who is the perpetrator of violence against them. For reasons outlined below, we consider this requirement inappropriate.

Section 223 of the Act sets out how service must occur. It requires:

- (i) delivering it to the person personally, or
- (ii) delivering it personally to a person apparently of or above the age of 16 years at the person’s residential or business address, or
- (iii) delivering it in an envelope addressed to the person and leaving it in a mailbox at the person’s residential or business address, or
- (iv) sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or
- (v) sending it to an email address specified by the person for the service of documents of that kind, or
- (vi) any other method authorised by the regulations for the service of documents of that kind.<sup>5</sup>

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<sup>5</sup> Residential Tenancies Act 2010 (NSW) s 223.

Requiring a victim of domestic violence to serve a domestic violence termination notice on the relevant domestic violence offender has the potential to place the victim in danger by requiring further contact. Many victims are terrified of their perpetrator and fear that the service of the domestic violence termination notice on that person will escalate the situation or encourage further contact by them.

Further, if the perpetrator is in custody or there is an ADVO with a condition preventing contact, victims often face further barriers in ensuring service has occurred. The below case study demonstrates this issue. It also demonstrates the need for further education as the victim's liability could have been limited earlier if the domestic violence service knew how to assist with a domestic violence termination notice.

**Case study: Frankie's story** Frankie is a young woman with 2 children. Up until recently she was sharing a house with her partner, Terry. Terry is now in custody as a result of being sentenced for domestic violence offences against Frankie.

Frankie is assisted by a domestic violence service to flee the rental property she shared with Terry and move to temporary accommodation with her children.

The domestic violence service contacted Frankie's agent to notify them of the domestic violence and that Frankie has left the property. No domestic violence termination notice is served at this stage and the domestic violence service did not advise Frankie about this option.

The agent advises Frankie that she has to pay a fee to break the lease and that the bond and additional compensation will be claimed.

Frankie attends Legal Aid NSW and receives advice about serving a domestic violence termination notice on the agent and Terry.

Frankie does not know in which correctional centre Terry is being held or how to obtain that information. She is therefore unable to serve the notice on Terry and terminate the tenancy.

Legal Aid NSW submits that the current requirement for victims to serve a domestic violence termination notice on co-tenants should be removed in

circumstances where the co-tenant is the perpetrator of domestic violence. Instead, in those circumstances, the tenant should only be required to serve the termination notice on the landlord or agent. The landlord or agent can then serve the notice on the co-tenant to advise them of the termination. To give effect to this recommendation, section 223 of the Act should be amended as follows:

- (4) A tenant who has served a domestic violence termination notice on a landlord is not required to serve that notice on any co-tenant if that same co-tenant is listed in the notice as the relevant domestic violence offender.

### Recommendation 10

The current requirement for victims to serve a domestic violence termination notice on co-tenants should be removed in circumstances where the co-tenant is also the relevant offender of domestic violence.

#### 4.3 Question 12 & 13:

- i. Are the provisions prohibiting information about tenants who have given a domestic violence termination notice in a tenancy database adequate? If not, how could they be improved?
- ii. Are any other restrictions or changes required to protect the confidentiality of tenants or co-tenants terminating their tenancy using a domestic violence termination notice?

Legal Aid NSW considers the prohibition on listing information about tenants who have ended a tenancy by way of a domestic violence termination notice on tenant database as adequate. We do not consider they require any changes or additional restrictions. However, we support increased education of landlords and agents about these provisions, noting that we are aware of circumstances where landlords and agents did not comply with the prohibition. In our view, landlords and agents should be required to undergo mandatory training about section 213A requirements, the potential harm that can befall victims of domestic violence if this

information is shared, and that a breach of the provision is an offence carrying a maximum penalty of 20 penalty units (currently a \$2,200 fine).<sup>6</sup> The training could form part of broader training on rights and obligations under Part 5 Division 3A of the Act.

Legal Aid NSW considers the current penalties under section 213A of the Act to be both appropriate and sufficient in the circumstances.

### Recommendation 11

Mandatory training should be introduced for landlords and real estate agents regarding the prohibition on publishing information about tenants who have given a domestic violence termination notice in a tenancy database.

### Recommendation 12

The current penalties under section 213A of the Act should not be changed.

#### 4.4 Question 14: Is the prohibition against contents of competent person declarations being reviewable in Tribunal proceedings clear and working well? If not, how?

Legal Aid NSW considers the prohibition against reviewing the contents of competent persons declarations in Tribunal proceedings to be clear and working as intended. We support this prohibition and recommend that it remain.

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<sup>6</sup> Residential Tenancies Act 2010 (NSW) s 213A.



## Recommendation 13

The prohibition against reviewing the contents of competent persons' declarations should remain.

### 4.5 Question 15: Have you ever experienced a dispute related to a competent person declaration or a domestic violence termination? If so, what happened?

The below case study outlines a dispute with an agent over a domestic violence termination notice. It demonstrates the need for further education to ensure that the provisions are understood by landlords and agents. Most tenants would expect that agents are well versed in tenancy legislation and without legal advice and assistance most tenants would be unlikely to question a similar response from an agent.

**Case study: Erin's story** Erin is a Legal Aid NSW client. There is a current ADVO protecting Erin from her ex-partner, Andrew. Andrew is currently in custody due to domestic violence offences against Erin.

Erin flees the rental property she previously shared with Andrew and moves into another property. Erin is the sole tenant of the new property. After Erin has been residing at the new property for three months Andrew is released from gaol. He finds out where Erin is living and begins stalking her. Erin no longer feels safe in her new home and makes the decision to leave this property for her safety.

Erin is able to secure a new property. She receives legal advice from Legal Aid NSW. The solicitor assists her by drafting a domestic violence termination notice, with a copy of the ADVO attached. Erin seeks to end her previous tenancy immediately both due to her safety and so that she is not liable for rent on multiple properties.

Erin serves the domestic violence termination notice on the agent however they refuse to accept it and tell Erin that she is unable to terminate using the domestic violence provisions of the Act because Andrew did not live at the property in question and was not a co-tenant.

The Legal Aid NSW solicitor contacts the agent to explain the provisions of the legislation, however the agent continues to refuse to accept that the notice is valid. After considerable advocacy and written correspondence from the solicitor

**explaining the provisions and the correct interpretation of the definitions in the Act, the agent finally acknowledges they misunderstood the legislation. The agent accepts the termination notice and Erin is not required to commence Tribunal proceeding to ensure the end of her tenancy.**

## 5. Impacts on co-tenants and occupants

### 5.1 Question 17: Are the current processes enabling an occupant to become a tenant after a tenant is prohibited from accessing the premises by an apprehended violence order working well? If no, how can they be improved?

If a final ADVO prohibits a tenant or co-tenant from having access to the residential premises their tenancy is automatically terminated.<sup>7</sup> If this occurs, the remaining occupant can either ask the landlord or agent to have the agreement put in their name, or if the landlord refuses, they can apply to the Tribunal for an order recognising them as a sole tenant under the residential tenancy agreement.<sup>8</sup> We understand that some stakeholders have suggested that victims may be reluctant to go through the Tribunal process because of fear that the tenant/domestic violence offender will be a party to those proceedings. However, we note that it is unlikely the tenant would be a party to these proceedings given their tenancy would be automatically terminated by the ADVO prior to proceedings commencing.

Once the tenancy has been automatically terminated due to the making of a final ADVO it is open to the victim/occupant to approach the landlord and request their name be added to the lease. Although we acknowledge that it can be difficult to go through the Tribunal process, Legal Aid NSW supports this requirement remaining unchanged, particularly given it is generally only when the landlord does not agree to the remaining occupant becoming a tenant that the Tribunal is required to intervene. Keeping this requirement would also protect the rights of any other remaining co-tenants and would allow them to be heard in Tribunal proceedings.

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<sup>7</sup> Residential Tenancies Act 2010 (NSW) s 79(1).

<sup>8</sup> Residential Tenancies Act 2010 (NSW) s 79(2).

## Recommendation 14

**In circumstances where a tenancy has been terminated pursuant to section 79 of the Act, the requirement for the victim/ remaining occupant to seek an order from the Tribunal to be recognised as a tenant under the Residential Tenancy Agreement should remain.**

## **6. Limits on the liability for damage to rental property**

### **6.1 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?**

Despite these provisions, liability for property damaged caused during domestic violence incidents is an ongoing issue for Legal Aid NSW clients. In our experience victims are often unable to satisfy the Tribunal to the civil standard of proof that the damage was caused by the domestic violence offender ‘in the commission of a domestic violence offence’. There is often a lack of documentary evidence and providing oral evidence to try to support their case exposes a victim to cross examination and re-traumatisation. We acknowledge this is a difficult issue and we are unable to provide a specific recommendation on how to address it.

## 7. Repayment of rental bond

### 7.1 Question 22 and 23:

- i. What issues are you aware of that tenants have 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?
- ii. Are the provisions on repayment of the rental bond working effectively? If not, what are the current barriers and how could they be improved?

Legal Aid NSW considers there is a gap in the current provisions for bond refunds. Currently if a victim flees the premises and the domestic violence perpetrator, who is also a co-tenant on the lease, refuses to pay to the victim their share of the bond in accordance with section 174 of the Act, the victim is essentially forced to make an application to the Tribunal to recover their share of the bond.<sup>9</sup> For various reasons, many victims are not willing or able to pursue this option, and will effectively be forced to absorb the financial loss. In our experience, victims who have ended their tenancy are regularly losing their share of the bond to avoid further contact with the domestic violence perpetrator through legal proceedings. This negatively impacts their financial situation and their ability to obtain safe and secure housing following the termination of their tenancy.

Whilst some victims may be eligible for certain types of bond loans or financial compensation which they may choose to use towards a rental bond, these processes can take a long time and will not be available to all victims who find themselves in this situation. We therefore recommend a mechanism to enable victims of domestic violence who have terminated a tenancy pursuant to Part 5

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<sup>9</sup> Residential Tenancies Act 2010 (NSW) s 175.

**Division 3A to claim their share of the rental bond directly from Fair Trading to enable them to get their share of the bond without having to engage with the person who used violence against them.**

### **Recommendation 15**

**Victims of domestic violence who have terminated a tenancy pursuant to Part 5 Division 3A of the Act should be permitted to claim their share of the rental bond directly from Fair Trading. To achieve this, section 174 of the Act should be amended as follows:**

- **(7) If a tenancy was terminated pursuant to Part 5 Division 3A and the remaining co-tenant does not comply with section 174(2) of this Act, the tenant who served the domestic violence termination notice may, notwithstanding section 163(3), make a claim directly to the Secretary, in the approved form, for the payment of their share of the rental bond.**

## 8. Security of domestic violence victims in a rental property

8.1 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?

Legal Aid NSW supports an amendment to section 55A(1) of the Act requiring landlords and agents to obtain a tenant's written consent each time they wish to publish photos or video recordings of the interior of the property if the tenant's possessions are visible. In practice, many tenants are asked for written consent at the beginning of their tenancy and that same consent is used by landlords and agents throughout the tenancy to publish photos and video recordings online. This is problematic as a person may not be the victim of domestic violence at the beginning of the tenancy however those circumstances may change throughout the tenancy. A requirement for landlords to obtain consent each time they wish to publish photos or video recordings of the interior of the premises will allow tenants to appropriately respond to the request for consent to publish photos and video recordings based on their circumstances at the time of the request, rather than at the beginning of the tenancy.

### Recommendation 16

Section 55A(1) of the Act should be amended to require landlords and real estate agents 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.



**8.2 Question 25: Should the Act provide that it is not unreasonable for a tenant to withhold consent to publish photos or video recordings of the interior of residential premises in which the tenant's possessions are visible in any other specific circumstances? If your answer is yes, what are the circumstances? If your answer is no, why not?**

Legal Aid NSW considers the wording of section 55A(3) of the Act, which allows a tenant to withhold consent if the tenant is in circumstances of domestic violence (within the meaning of section 105B of the Act), to be appropriate.

### Recommendation 17

**Section 55A(3) of the Act should remain unchanged.**

**8.3 Question 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?**

Section 71(2) of the Act currently states that it is a reasonable excuse if a lock or other security advice was altered, removed or added:

- (a) in an emergency
- (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.

Legal Aid NSW recommends the addition of the following to the list of reasonable excuses:

- (e) if the tenant is in circumstances of domestic violence.

## Recommendation 18

The list of reasonable excuses to alter, remove or add a lock or security device pursuant to section 71(2) should be expanded to include the following:

- o (e) if the tenant is, or has been in circumstances of domestic violence, in accordance with section 105B(2).

Additionally, we have observed that requests by victims of domestic violence in rented premises to install wireless security cameras outside their homes or apartments are regularly refused by landlords. The reasons for refusal given by landlords are often around privacy issues. Security cameras can be a helpful security upgrade that allows victims of domestic violence to stay in their homes. The Residential Tenancies Regulation 2019 number 22 (1) allows a wireless removable outdoor security camera to be added, subject to landlord approval and to the Surveillance Devices Act 2007. We recommend training for landlords and agents aimed at assisting them to better understand the intersection of the Residential Tenancies Regulation 2019 and the Surveillance Devices Act 2007 to ensure that victims of domestic violence can install wireless cameras in appropriate circumstances. This could be done as part of broader training on t Part 5 Division 3A provisions.

## Recommendation 19

Training should be offered to landlords and real estate agents to help them better understand the intersection of the Residential Tenancies Regulation 2019 and the Surveillance Devices Act 2007.

## 9. Role of the Tribunal

### 9.1 Question 28 & 29: Could a matter have been prevented from going to the Tribunal? If so, how? Could the provisions be improved to address this?

For reasons discussed at part 6 of this submission, Legal Aid NSW recommends that a mechanism be introduced to enable victims of domestic violence who have terminated a tenancy pursuant to Part 5 Division 3A to claim their share of the rental bond directly from Fair Trading, rather than having to go to the Tribunal (see recommendation 15).

We acknowledge that allowing a tenant who is in circumstances of domestic violence to claim their share of the bond directly from Fair Trading will not always eliminate the need for the Tribunal to become involved, and that they may still have to go to Tribunal if there is a dispute. However, if the tenant was able to claim their share of the bond directly through Fair Trading, rather than from the co-tenant, the legal proceedings would not directly involve the co-tenant/domestic violence perpetrator reducing the need for further interaction between the victim and their perpetrator.



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