

Domestic Violence and Tenancy (Advanced)



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Gabrielle Craig on 2 September 2014. This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- Excluding a perpetrator of violence from the home;
- Changing the locks;
- Ending a Residential Tenancy Agreement (RTA) early
- Blacklisting

Domestic violence and homelessness

- Freedom from violence and safe and adequate housing are basic human rights!
- Domestic violence is the leading cause of homelessness in Australia (Homelessness Australia, 2011)
- Homelessness or risk of homelessness can:
 - Place women at risk of losing their kids due to FaCS involvement;
 - Place women at significant disadvantage in family law proceedings;
 - Place women at risk of losing employment; and/or
 - Have significant psychological effects on women and their children

Sometimes there are good reasons why a victim of violence may wish to remain in her home and at other times it will be important that she be able to leave quickly.

Residential Tenancies Act or AVO?

- The interaction between the *Crimes (Domestic and Personal Violence) Act 2007* and the *Residential Tenancies Act 2010* is complex
- Both have provisions that can be used to increase protection for victims of violence in their homes. Often clients will need to use both pieces of legislation

Apprehended Domestic Violence Orders (AVOs)

- The most effective way to exclude a perpetrator of violence from the home is usually to get an AVO with an exclusion order
- An exclusion order is an additional term on the AVO, which may restrict the defendant from:
 - Going within X metres of the premises; or
 - Entering the premises; or
 - Residing at the premises (ie, living there permanently)
- An application for can be made by the NSW Police or privately at the Local Court
- Clients can talk to workers from the Women's Domestic Violence Assistance Service (WDVCAS) or the Police Domestic Violence Liaison Officer (DVLO) for assistance in getting an AVO and for help working out the orders they will need
- When considering whether to make an exclusion order the court looks at:
 - The **effects and consequences** on the safety and protection of the protected person and any children living at the premises **if an order prohibiting or restricting access is not made;**
 - Any **hardship** that may be caused **by making or not making the order**, particularly to the protected person and any children;
 - The **accommodation needs of all relevant parties**, in particular the protected person and any children; and
 - Any other relevant matter
- It can be difficult for a victim to get an exclusion order if they do not intend on staying living at the premises (for example, because they can not afford the rent alone)



Advantages of an AVO with an exclusion order

- Exclusion orders can be included in Provisional and Interim Orders. This means they can be obtained quickly
- They can also be obtained by someone who isn't on the Residential Tenancy Agreement (RTA) and can be obtained by a co-tenant, sole tenant or occupant
- A breach on an AVO is a criminal offence

Will the perpetrator's name come off the lease when an AVO is made?

- If a **final** AVO is made then the defendant's tenancy will automatically terminate. Keep in mind that this will mean that **the victim will now be liable for all of the rent on their own**
- If there is an Interim or Provisional AVO this will not affect the tenancy

What if there's no exclusion order?

- Seek legal advice!
- See if the AVO can be varied to include the exclusion order

What to do when there is no AVO in place

- Sometimes clients won't want an AVO or they haven't been able to obtain one, or simply didn't know what orders to ask for. Client's might be scared about the AVO process or have had previous difficulty dealing with the police
- If there is no AVO in place there are two main options:
 - A perpetrator can also be removed with consent of all parties involved.
 - If the perpetrator is a co-tenant then **an application can be made to the NSW Civil and Administrative Tribunal (NCAT)** to remove them from the RTA
- NCAT will make the decision based on the special circumstances of the case

Can my client change the locks?

- While AVOs can be very effective in providing protection for a victim who wants to remain living in her home, she also might want to change her locks and/or upgrade her security to increase her protection in the home
- Usually a tenant will need the landlords permission to change the locks
- However they can change the locks without permission if they have a "**reasonable excuse**"
- It is an offence to change the locks without permission if they do not have a reasonable excuse

What is a reasonable excuse?

- The legislation doesn't provide an absolute list but it includes:
 - In an emergency;
 - In accordance with an order of the Tribunal;
 - After the tenancy of a co-tenant was terminated; or
 - After a tenant or occupant of a residential premises was prohibited from having access to the residential premises by an AVO

Is domestic violence a reasonable excuse?

- The legislation doesn't provide explicit protection however it is arguable that for a lot of clients experiencing violence this should be considered a "reasonable excuse"
- It is important to note that in these circumstances you only need an "AVO" **not a final order**

The catch

- If there is no AVO with an exclusion order and a tenant changes the locks, the legislation requires that a copy of the key **must** be given to the landlord and **any other co-tenant within 7 days**



- This applies even if there was a ‘reasonable excuse’ (eg, if there was domestic violence)
- This will not apply if there is an AVO with an exclusion order. If there is an AVO, but no exclusion order, your client may want to apply to have the AVO amended
- Alternatively, if there is domestic violence involved, your client can **apply to NCAT** for permission to change the locks and permission not to provide the other co-tenant (the perpetrator of violence) with a key

Leaving Early

The options available if someone wants to leave and end their tenancy early will depend on:

- The type of RTA they have;
- The type of tenant that they are;
- Whether or not they have an AVO with an exclusion order

The consequences of ending a lease early

- Breaking a lease agreement early can have serious consequences for a tenant. These can include:
 - Significant debts; and/or
 - Blacklisting on a tenant database

Co-tenants

- Co-tenants are jointly and severally liable under the RTA
- This means that both tenants can be wholly liable for all of the rent and any damage done to the property
- It also means that it often isn’t easy for one party to end the agreement early
- If your client is a co-tenant and simply leaves the property, she will not end her liability under the RTA. This means, if the perpetrator remains in the property and doesn’t pay rent your client will still:
 - Accrue liabilities and be asked to pay for ALL of the rent owed
 - Be liable for any damage to the property **even after she leaves**
 - Get blacklisted

The following myths are not true. If you hear your client saying them, refer them for urgent legal advice!

Common Myth: “I left so it’s not my problem any more”

Common Myth: “It’s ok the real estate agent took me off the lease”

What if my client has a final AVO with an exclusion order?

- Under the *Residential Tenancies Act 2010* if a client has a **final AVO with an exclusion order**, she can give both her landlord and the other co-tenant (the violent perpetrator) **14 day written notice** and leave without having to pay any penalties
- However, note this only applies if the AVO is **final**
- This provision is often not very helpful as it may take some time for an AVO to become final and your client may need to leave immediately to ensure her safety. Some AVOs can take >6months to become final (for example, where there are charges being heard at the same time)

What if my client doesn’t have a final AVO with an exclusion order?

1. NCAT

- Your client can apply to NCAT to end the tenancy and her liability under the RTA
- To apply to NCAT, your client will need to argue that the order is appropriate given the ‘**special circumstances**’ of the case
- Whether your client can terminate her lease early will depend on the individual facts of the case and the discretion of the Tribunal member
- Your client will need evidence to support her case, especially if there is no AVO in place. Other evidence your client can put forward to support her case includes:
 - Doctors records;



- Hospital records;
- Counseling notes;
- DV support workers;
- FaCS records; &/or
- Statutory declarations from friends & family

2. Consent of all parties

- Another way to end a client's liability as a co-tenant under the RTA is to get the consent of both the other co-tenant and the landlord
- This can often be difficult as both co-tenants and landlords are often reluctant to agree
- However, it may be worth trying as it can be a quick way to resolve the issues. However, it is **very** important that any agreement is put **in writing & signed by ALL relevant parties**

Periodic Agreements

- If your client is in a periodic agreement (where there is no fixed term) with the other co-tenant, then your client can simply give a 21-day no grounds notice to both the other co-tenant and her landlord

Blacklisting

- While it's best to avoid getting blacklisted on a bad tenant database there are things that someone can do if this has happened so it is important to get help!
- If your client is blacklisted, she can make an application to have her name removed if the listing was **unjust in the circumstances**
- There is no guarantee that the listing will be removed
- If your client has been blacklisted, they should contact their local tenants rights and advocacy service

Referrals

NCAT

To contact NCAT visit www.ncat.nsw.gov.au or call 1300 006228 (1300 00NCAT)

Tenants Rights and Advocacy Service

For tenancy legal advice or help and support with NCAT applications, contact your local tenants rights and advocacy service. Find your local service by entering your postcode at www.tenants.org.au

Staying Home Leaving Violence (SHLV)

SHLC can help women and children escaping domestic violence to remain safely in their homes. They may also be able to help victims get assistance to change their locks and upgrade their security

Bega – 02 6492 6239

Blacktown/Mt Druitt – 02 9677 1962

Campbelltown – 1800 077 760

Dubbo – 02 6883 1560

Eastern Sydney – 02 9526 4701 / 0439 414 673

Fairfield – 02 9601 7777

Kempsey – 02 6563 1588

Lake Macquarie – 02 4943 9255

Liverpool – 02 9601 7777

Maitland – 02 4934 2585

Moree – 02 6752 4536

Newcastle – 02 4926 3577

Penrith – 02 4721 2499

Redfern – 02 9699 9036

Shoalhaven – 02 4421 7400

Walgett – 02 6828 1611

Warnervale – 4356 2600

Wollongong – 02 4255 5333

Victims Services

In some circumstances victims may be eligible to have immediate expenses reimbursed by Victims Services (eg, the cost of temporary accommodation). It is worth referring a client to Victims Services (1800 633 063) www.victimsservices.lawlink.nsw.gov.au or a Community Legal Centre