

Domestic Violence Protections for the Tenancy Sector

Information Paper



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Introduction

Message from the Minister for Business Services and Consumers



Hon Gail Gago MLC

Domestic violence continues to have a profound impact on the South Australian community. It is found across all cultures, ages and socio-economic groups, but the majority of those who experience domestic violence are women. However, it is not possible to measure the true extent of the problem as most incidents of domestic violence go unreported.

Australian women are most likely to experience physical and sexual violence in their home, at the hand of a male current or ex-partner. For 62% of women who had experienced physical assault by a male perpetrator, the most recent incident was in their home.

The Weatherill Government has made a strong commitment to addressing domestic violence in our community. Last year, the Premier reaffirmed domestic violence prevention as a priority for this Government with the release of the 'Taking A Stand – Responding to Domestic Violence' paper. Since then, the Government has embarked on a series of initiatives to address domestic violence in our community. To build on these initiatives, the Government is pursuing changes to strengthen the level of protection afforded to victims of domestic violence in the tenancy sector.

The proposed changes will recognise domestic violence in our tenancy legislation, and provide further protections for victims in the tenancy sector, including rooming house residents, to either continue in the tenancy without the perpetrator, leave the tenancy and no longer be liable for the premises, or terminate the tenancy altogether. The South Australian Civil and Administrative Tribunal (SACAT) will be empowered to determine that one or more, but not all co-tenants, are liable for compensation to the landlord and order that the bond be paid to the landlord and any co-tenants not liable for compensation as it thinks fit, but not so as to unduly disadvantage the landlord.

The existing restraining order provision will be broadened so that a tenant may apply where there is risk of a co-tenant (or a person permitted on the premises by a co-tenant) causing serious damage to property, personal injury or committing an act of domestic abuse against the tenant. A tenant's information will also be prohibited from being listed on a Residential Tenancy Database, often referred to as a 'tenant blacklist', where the tenant did not cause or reasonably cause a breach of the tenancy or the nature of any breach resulted from an act of abuse or domestic abuse against the tenant.

These proposed changes send a clear message that this Government will not tolerate the use of violence to control or intimidate another person, particularly in a domestic setting. Consequences of violence should not have a further negative impact on victims. These changes aim to ensure that victims are supported and can remain in their homes when it is safe to do so.



Hon Gail Gago MLC

Overview

At present, the *Residential Tenancies Act 1995* (the Act) does not provide sufficient protection to victims of domestic violence in the tenancy sector. A tenant or landlord may apply to SACAT to terminate a residential tenancy based on hardship, and SACAT may consider any special circumstances that may result in undue hardship to the tenant or landlord. However, SACAT's powers are limited in cases where the tenant is a co-tenant with the person being violent towards them.

Co-tenants are jointly and severally liable, it flows from this that SACAT cannot terminate a residential tenancy, unless the other tenant joins the application, indicates no opposition to it, or SACAT is satisfied that the other tenant has abandoned the premises. This means that where a tenant has established that there are grounds which would ordinarily have met the test required to terminate a tenancy based on hardship, because the person is a co-tenant, SACAT is unable to terminate the tenancy unless one of these situations apply.

SACAT is also unable to make an order that one tenant in a co-tenancy is liable for compensation to the landlord (to the exclusion of other co-tenants). In situations of domestic violence this generally results in the victim being required to pay for damage caused to the property by the perpetrator, either out of the bond or as compensation, or both. This may also lead to a victim of domestic violence being listed on a Residential Tenancy Database, often referred to as 'tenant blacklist', as a result of damage caused to the property by the perpetrator from a situation of domestic violence.

On application by a landlord where there is risk that a tenant (or person permitted on the premises by a tenant) may cause serious damage to property or personal injury, SACAT may make an order restraining the tenant or other persons on the premises from engaging in certain conduct. However, at present it is not explicit that a tenant may apply for a restraining order against a co-tenant or person permitted on the premises by a co-tenant.

The *Intervention Order (Protection of Abuse) Act 2009* (the IO Act) contains measures to help victims of abuse safely stay in their home. It allows an intervention order to prohibit the perpetrator from being anywhere near the family home, even though the perpetrator may own or rent it. The aim is to encourage victims of abuse and their children to stay in the family home if they want to and prevent their lives being unnecessarily disrupted. It also offers a means of longer-term security to protected persons who wish to stay in the home.

The IO Act allows the Court, when making an intervention order that excludes a defendant from rented premises in which the defendant lives with the protected person, to make another order by which the defendant's interest in the tenancy agreement is assigned to the protected person or to some other person or persons other than the defendant. This measure takes into account the needs of the landlord and prevents the order being made if incompatible with the legal obligations of the landlord. These orders do not terminate the tenancy agreement but allow it to continue in terms that are consistent with the assignment of a tenant's rights in a residential tenancy agreement under the Act.

Proposed Changes

Recognising domestic violence

These proposed changes aim to support victims of domestic violence in the tenancy sector to leave a hostile environment or remove the perpetrator from the environment, without incurring further unfair expenses caused by the perpetrator, and to minimise any further dealings with the person in relation to the tenancy in the future.

Domestic violence is not limited to physical and sexual assault, it is violent, threatening or other behaviour that controls a member of the person's family or causes the family member to be fearful. It is not always between partners, it can be perpetrated by grandchildren, cousins, brothers, sisters, uncles, aunts, mums or dads. Domestic violence can include a wide range of behaviour between family members.

It is proposed to adopt existing definitions under the IO Act, including, abuse, act of abuse, and domestic abuse in the Residential Tenancies Act. Domestic associate is a new term, however it reflects the relationships outlined in the IO Act for the purposes of domestic abuse, which includes a broad range of intimate, family and informal care relationships. It is also proposed to define co-tenant for clarification purposes.

Termination based on domestic abuse

Under these proposed changes, a tenant may apply to SACAT to terminate a residential tenancy based on domestic abuse in the following circumstances:

- where there is a Court issued intervention order in force against a person residing at the premises for the protection of the applicant or a domestic associate of the applicant residing at the premises. The inclusion of domestic associates aims to extend these protections to children or other domestic associates that are not named on the tenancy agreement. An intervention order may relate to domestic or non-domestic abuse. This aims to afford a level of protection to victims of non-domestic abuse. Requiring a Court issued intervention order provides a level of protection to the landlord against applicants fabricating evidence of non-domestic (or domestic) abuse in order to terminate a residential tenancy agreement; or
- where a person who resides at the premises has committed domestic abuse against the applicant. Without limiting the evidence that may satisfy SACAT that domestic abuse has occurred, it may include a South Australia Police report or report from a domestic violence service provider.

Orders SACAT may make

Under the proposed changes, on application to terminate a residential tenancy based on domestic abuse, SACAT may make an order terminating the residential tenancy and:

- requiring a new tenancy agreement be entered into on the same terms and conditions for the remainder of the tenancy between the landlord, applicant and /or any co-tenants, subject to any objections by the landlord or any co-tenants. SACAT must not make an order effectively creating a new tenancy agreement if the hardship likely to be suffered by the objector, is greater than the hardship likely to be suffered by the applicant (or domestic associate of the applicant), if the order was not made. This aims to support the victim to remain in the premises and remove the perpetrator from the residential tenancy; or
- requiring a new tenancy agreement be entered into on the same terms and conditions for the remainder of the tenancy between the landlord, perpetrator and any co-tenants, if the landlord has not indicated that it would be unreasonable to do so. This aims to support the victim to leave the residential tenancy and no longer be liable for any damage caused to the premises.

However, SACAT must not make an order requiring a new tenancy agreement, unless satisfied that any co-tenant under the new agreement could reasonably be expected to comply with obligations under the agreement. This aims to ensure that any co-tenants remaining at the premises under a new agreement are not caused hardship.

Rooming Houses

It is proposed to extend these protections to rooming house residents and empower SACAT to terminate the rooming house agreement of either the applicant or the perpetrator. This takes into consideration the nature of rooming houses and the likelihood of the applicant having a separate agreement to the perpetrator at the same premises.

Bond and compensation

It is further proposed that SACAT may find that one or more, but not all, co-tenants are responsible for compensation to the landlord, either in relation to the early termination of a tenancy or for damage to the premises or ancillary property.

It is proposed to empower SACAT to make an order that the responsible co-tenant/s are liable (to the exclusion of other co-tenants) for a payment of compensation to the landlord. SACAT may direct the bond be paid in such proportions as it thinks fit, to the landlord and any co-tenant who is not liable for making a payment of compensation, but not so as to unduly disadvantage the landlord. In making such a direction, SACAT should consider which co-tenants were liable for a payment of compensation to the landlord, which co-tenants contributed to the bond and in what proportions, and the existing principles of the Act, including the intended purpose of the bond.

These amendments aim to provide a balance between the victim's interest in the bond, if any, and the landlord's right to compensation out of the bond. However, compensation exceeding the bond will be an order against the responsible co-tenants only.

Lodgement of new bond

Where SACAT makes an order requiring a new tenancy be entered into, the tenant (or co-tenants) to the new agreement may be required to lodge a new bond, at the request of the landlord. It is proposed SACAT will consider the payment of any bond when making the order and may make a self-executing order terminating the new tenancy agreement if the new bond is not lodged by the date specified in the order.

Housing SA may offer assistance with providing a guarantee (or portion) to the applicant to lodge a new bond. Where a victim of abuse does not have an existing bond guarantee and does not meet the eligibility requirements, Housing SA may still be in a position to offer assistance in the form of a bond guarantee.

Residential Tenancy Database

It is proposed that where the applicant (tenant) did not cause or reasonably cause a breach of the residential tenancy, or the nature of any breach of the residential tenancy resulted from an act of abuse or domestic abuse against the tenant, SACAT may order that the landlord, landlord's agent or a database operator must not list the applicant's personal information in a Residential Tenancy Database.

Restraining Orders

It is proposed to empower SACAT to accept an application from a tenant for a restraining order, where there is risk of a co-tenant or a person permitted on the premises by a co-tenant causing serious damage to property, personal injury or if the co-tenant is a current or former domestic associate of the tenant, committing an act of domestic abuse.

Summary

The residential tenancy sector plays a vital role in providing flexible and affordable housing to the community and with the residential sector growing and domestic violence still prevalent in homes and households, it's imperative that the Act provides adequate protections for those renting that are subjected to domestic abuse.

These changes aim to support victims of domestic violence in the tenancy sector to leave a hostile environment or remove the perpetrator from the environment, without incurring further unfair expenses caused by the perpetrator, and to minimise any further dealings with the person in relation to the tenancy in the future.

It is proposed that SACAT may terminate a residential tenancy, allowing for appropriate bond and compensation claims to be considered, and order a new tenancy agreement be entered into (on the same terms and conditions for the remainder of the tenancy) between the landlord and applicant or perpetrator (and /or any co-tenants).

Under these proposed amendments, SACAT will also be empowered to consider whether there is a relevant pending application under the IO Act, accept an application from a tenant for a restraining order and prohibit a tenant from being listed on a Residential Tenancies Database in certain circumstances relating to domestic abuse.

These proposed amendments strengthen the Government's commitment to women's safety in South Australia, which is reinforced through *A Right to Safety* the next phase of the Women's Safety Strategy 2011-2022. A key part of our Government's agenda is supporting women to remain in their homes when it is safe to do so rather than a response that results in the woman and any children she may have being displaced from their familiar surroundings, social supports, school and employment.

This Government is committed to ensuring victims are respected and supported and not suffering hardships associated with relocating. This can often mean leaving employment which leads to financial hardship, and leaving community connections and support, impacting their children's education and isolating them further.

Frequently Asked Questions

What is abuse?

Abuse may take many forms, including:

- physical or sexual (ie. unwanted sexual contact, hitting or pushing);
- emotional or psychological (ie. belittling, making comments to make a person feel bad about themselves);
- economic (ie. limiting a person's access to money or unreasonably making them account for every cent);
- threats of injury or death to an individual, their child or another person or something of importance to the individual, such as a pet;
- stalking, including constant unwanted monitoring of a person's activities;
- causing damage to a person's property; or
- threats by the perpetrator of self-harm or suicide as a means of tormenting or intimidating a person.

What is domestic abuse?

Domestic abuse is where a person commits an act of abuse against their partner, family member or other domestic associate.

If the act of abuse is not committed against a domestic associate, it is considered non-domestic abuse.

Who is a domestic associate?

A domestic associate includes a broad range of intimate, family and informal care relationships. This includes where two people are or were formerly:

- married, domestic partners or in an intimate personal relationship;
- one is the child, stepchild, grandchild, or under the guardianship, of the other;
- brother, sister or otherwise related by blood, marriage, domestic partnership or adoption;
- related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group; or
- one is the carer of the other.

Will these proposed changes apply to non-domestic abuse?

A tenant that is a victim of non-domestic abuse (ie. between two people that are not in an intimate, family or informal care relationship) will be able to apply to the South Australian Civil and Administrative Tribunal (SACAT) if an intervention order is in force against a person residing at the premises.

The intervention order must be for the protection of the tenant or their domestic associate (ie. child) who normally or regularly resides at the premises.

How will these proposed changes help victims of abuse?

A tenant that is a victim of domestic abuse will be able to apply to SACAT to terminate the tenancy agreement and:

- require a new tenancy agreement be entered into on the same terms and conditions for the remainder of the tenancy between the landlord, victim and /or any co-tenants, subject to any objections by the landlord or any co-tenants. This aims to support the victim to remain in the premises and remove the perpetrator from the residential tenancy; or
- require a new tenancy agreement be entered into on the same terms and conditions for the remainder of the tenancy between the landlord, perpetrator and any co-tenants, if the landlord has not indicated that it would be inappropriate to do so. This aims to support the victim to leave the residential tenancy and no longer be liable for any damage caused to the premises.

A tenant may also apply if a domestic associate of theirs (residing at the premises) is a victim of domestic abuse or the intervention order is for their protection.

SACAT will consider any relevant bond or compensation claims upon termination of a tenancy, regardless of whether a new tenancy is made with the landlord. This aims to minimise any further dealings between the victim and perpetrator in relation to the tenancy agreement in the future.

Can the landlord claim compensation for the early termination of a tenancy?

Yes, if the tenancy is terminated due to abuse.

SACAT will be able to order any co-tenants to pay compensation to the landlord for any loss or inconvenience resulting, or likely to result, from the termination of the tenancy or any additional order made under these proposed changes.

Where the perpetrator is not a co-tenant, similar to the termination of a tenancy based on hardship, SACAT may still order a tenant or co-tenant to pay compensation to the landlord for any loss or inconvenience due to the termination of the tenancy. In these circumstances, an intervention order may be considered as the perpetrator is not named on the agreement.

Can the landlord claim compensation for damage to the property?

Yes. The landlord can claim compensation for damage to the premises or ancillary property. If another co-tenant is responsible for the damage, SACAT may order that only the co-tenants responsible for the damage are liable to pay compensation to the landlord.

If the persons responsible for the damage are not a co-tenant or resident, but were on the premises with the consent of a co-tenant, the co-tenant remains vicariously responsible for the damage. In these circumstances, an intervention order may be considered as the perpetrator is not named on the agreement.

How will the bond be refunded?

If another co-tenant is liable for making a payment of compensation (for damages to the premises or the early termination of a tenancy), SACAT may give a direction that the bond be paid in certain proportions to the landlord and any co-tenant who is not liable for making a payment, but not so as to unduly disadvantage the landlord.

SACAT should consider which co-tenants were liable for a payment of compensation to the landlord, which co-tenants contributed to the bond and in what proportions, and the existing principles of the Act, including the intended purpose of the bond.

This aims to provide a balance between the victim's interest in the bond (where they are not liable for making a payment of compensation) and the landlord's right to compensation out of the bond. However, compensation exceeding the bond will be an order against the responsible co-tenants only.

What happens when the tenancy is terminated and a new tenancy agreement is required?

SACAT will be able to order that a new tenancy agreement be made between the landlord and victim or perpetrator (and /or any co-tenants).

The new tenancy agreement will be for the remainder of the tenancy and on the same terms and conditions as the terminated tenancy, subject to any changes determined by SACAT. This aims to provide flexibility should certain terms or conditions under the terminated tenancy no longer apply.

SACAT will also consider any bond or compensation claims and make an order in relation to the payment of the bond and compensation, if any, in the same order that terminates the tenancy and requires a new tenancy be made.

A new tenancy agreement will need to be made between the relevant parties as outlined in the SACAT order and a new bond paid for the remainder of the tenancy, if any, at the request of the landlord. SACAT will consider the payment of a new bond and may make a self-executing order terminating the new tenancy agreement if the new bond is not lodged by the date specified in the order.

Can the landlord or a co-tenant object to the termination of a tenancy agreement or a new agreement being required?

Yes. The landlord and any co-tenant have the right to object.

SACAT must not make an order terminating a tenancy or requiring a new tenancy agreement be made if the hardship likely to be suffered by the objector, will be greater than the hardship likely to be suffered by the victim.

If the landlord indicates that it would be unreasonable to do so, SACAT must not make an order requiring a tenancy agreement between the landlord and perpetrator.

Can a tenant apply for a restraining order?

Yes. A victim may apply for a restraining order if there is risk of a co-tenant or a person permitted on the premises by a co-tenant causing serious damage to property, personal injury, or if the co-tenant is or was formerly a domestic associate, committing an act of domestic abuse.

The victim should first seek advice on applying for an intervention order, which provides further protections in relation to preventing domestic and non-domestic abuse.

Can a tenant that has been subjected to domestic abuse be listed on a Residential Tenancy Database?

SACAT may order that a landlord, landlord's agent or a database operator must not list a tenant on a residential tenancy database, where:

- the tenant did not cause or reasonably cause a breach of the residential tenancy; or
- the nature of any breach of the residential tenancy resulted from an act of abuse or domestic abuse against the tenant.

How will these changes apply to rooming houses?

The changes will apply to rooming houses in the same way they apply to a residential tenancy. However, SACAT will be able to terminate the rooming house agreement of either the victim (at their request) or the perpetrator.

This takes into consideration the nature of rooming houses and the likelihood of the victim having a separate agreement to the perpetrator at the same premises.

How do these changes relate to intervention or tenancy orders?

The *Intervention Orders (Protection of Abuse) Act 2009* provides for intervention orders and also tenancy orders in cases of domestic and non-domestic abuse. A person that has been subjected to abuse or who is fearful of being subjected to abuse is strongly encouraged to contact their local police station or a domestic violence service provider in the first instance.

An intervention order may prohibit the perpetrator from being anywhere near the family home, even though the perpetrator may be a tenant.

An intervention order assists with removing the perpetrator from the premises. These proposed changes will provide an additional avenue for a victim to either continue in the tenancy without the perpetrator, leave the tenancy and no longer be liable for the premises, or terminate the tenancy altogether.

Disclaimer

This information paper has been prepared to provide an overview of proposed legislative changes. Whilst every effort has been made to ensure the accuracy of the information contained in this paper, no responsibility is taken for reliance on any aspect of it and it should not be used as a substitute for legal or other professional advice. Any action taken in anticipation of the outcomes of this paper is solely at the risk of persons taking such action.