

Attention: Review Secretariat

Real Estate and Housing Policy Team
NSW Government

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

Response to the Review of domestic violence rental laws

Dear Review Secretariat,

Australia's National Research Organisation for Women's Safety (ANROWS) thanks you for the opportunity to make a submission in response to the Review of domestic violence rental laws.

ANROWS is an independent, not-for-profit company established as an initiative under Australia's first *National Plan to Reduce Violence against Women and their Children 2010–2022*. Our primary function is to provide an accessible evidence base for developments in policy and practice design for prevention and response to violence against women, nationally. Every aspect of our work is motivated by the right of women and children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and children, and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians. ANROWS will continue to deliver and develop this function under the new *National Plan to End Violence against Women and Children 2022–2032*.

Primary funding for ANROWS is jointly provided by the Commonwealth and all state and territory governments of Australia. ANROWS is also, from time to time, directly commissioned to undertake work for an individual jurisdiction, and successfully tenders for research and evaluation work. ANROWS is registered as a harm prevention charity and deductible gift recipient, governed by the Australian Charities and Not-for-profit Commission (ACNC).

This submission is focused on the housing and financial stress experienced by victims and survivors of domestic and family violence (DFV) and the potential for new tenancy laws to provide meaningful supports and options for victims and survivors. It draws on ANROWS research and other peer-reviewed evidence. We would be pleased to assist the Real Estate and Housing Policy Team further, as required.

Yours sincerely



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Chief Executive Officer

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Overall feedback

ANROWS supports the use of tenancy laws to strengthen protections for tenants who are victims and survivors of domestic and family violence (DFV) in New South Wales. These tenancy laws strengthen protections for victims and survivors of DFV by enabling them to terminate their tenancy immediately and without penalty. ANROWS commends the focus on provision for victims and survivors to demonstrate circumstances of domestic violence through a declaration by a competent person and therefore without reliance on evidence provided by police or the justice system.¹ This is consistent with the evidence base, which shows that many victims and survivors will not engage with police or the justice system. ANROWS supports the limits on liability and provisions for rental bonds that, if implemented correctly, could help to reduce financial stress for victims and survivors. The tenancy laws represent an important element of developing and implementing a system-wide response to DFV and can complement broader responses to the housing needs of victims and survivors. ANROWS's support of these tenancy laws comes with the proviso that they are implemented with workforce development and capability building to ensure that they don't unintentionally increase the vulnerability of victims and survivors and are underpinned by evaluation to ensure that they function as intended.

A note on terminology

While the *Residential Tenancies Act 2010* (NSW) uses the terms “domestic violence” and “family violence”, ANROWS uses the term “domestic and family violence” (DFV) in this submission to capture violence against women and children perpetrated in a broader family context or by non-cohabiting partners or ex-partners as well as violence perpetrated in a domestic setting. When referring to specific elements of the *Residential Tenancies Act 2010* (NSW) this submission will use the same terminology as the Act.

Victims' and survivors' housing needs

Responding to: Overall design and use of the domestic violence provisions in the Residential Tenancies Act 2010 (NSW) across all discussion questions

ANROWS is pleased that the tenancy laws reflect the importance of safe and secure housing for victims and survivors of DFV. Housing is critical to ensuring that victims and survivors can separate from perpetrators, as victims and survivors who struggle to maintain independent accommodation are more likely to return to a perpetrator (Breckenridge et al., 2016). DFV is the primary reason that women and children leave their homes in Australia, with those who have experienced DFV comprising 42 per cent of all Specialist Housing Service clients in 2020-21 (AIHW, 2022). The need for housing is reinforced by findings from a study by Kaspiew et al. (2017, p. 153), in which 27 out of 47 mothers who had separated from an ex-partner due to DFV identified that they had experienced housing stress post-separation. Victims and survivors who experience housing stress and vulnerability can also experience financial stress (please see the “Limits on liability for damage to rental property and repayment of rental bond” section for further discussion of financial stress) and may experience

¹ Please see the *Residential Tenancies Act 2010* (NSW) for the definition of a “competent person”.

child protection and custody issues when perceived as unable to maintain a residence (Cortis & Bullen, 2016; Cripps & Habibis, 2019).

Housing vulnerability can be partially driven by the lack of safe housing options in a constrained rental market. A report published by the Australian Housing and Urban Research Institute highlighted that the supply of affordable rentals in the private market can vary widely across different locations and that this can constrain victims' and survivors' housing options (Flanagan et al., 2019). Victims and survivors may also face discrimination from landlords where they have a poor tenancy record due to damage caused by a perpetrator of DFV or where they have received government-funded housing subsidies (Flanagan et al., 2019).

This experience of housing insecurity post-separation can be exacerbated for women from diverse groups, including First Nations women (Bevis et al., 2020; Blagg et al., 2018; Langton et al., 2020a), women living in regional and remote communities (Wendt et al., 2017), migrant and refugee women (Vaughan et al., 2016), and women leaving prison (Bevis et al., 2020; Day et al., 2018). For example, First Nations women can face shortages of crisis, transitional and long-term housing, particularly in rural and remote areas, that put them at risk of homelessness or returning to an unsafe home (Cripps & Habibis, 2019). These systemic housing shortages can also place First Nations women at risk of having their children removed by Child Protection when they are unable to access long-term stable housing within the required timeframe, typically 12 months (Cripps & Habibis, 2019).

Housing vulnerability can also be experienced by women who remain in their homes after separation from a perpetrator of DFV (Cortis & Bullen, 2016). These victims and survivors may face difficulty affording rent or mortgage payments on a single income, involvement in lengthy and costly court matters, continued harassment by the perpetrator, and a lack of family support (Breckenridge et al., 2016). This evidence demonstrates the need for housing supports for victims and survivors both when they remain in the home or when they find safe and secure alternative accommodation.

ANROWS notes that there is a dearth of high-quality evaluation evidence exploring the effectiveness of similar tenancy laws. However, a number of international reviews suggest that housing interventions, policies and programs can have protective effects on future victimisation and experiences of violence (Baker et al., 2010; Bassuk et al., 2014; Klein et al., 2021).

Workforce development and capacity building

Responding to: Overall design and use of the domestic violence provisions in the Residential Tenancies Act 2010 (NSW) across all discussion questions

ANROWS emphasises the need for workforce development and capacity building to ensure that the tenancy laws are implemented as intended to protect the safety of victims and survivors. All those involved in implementing these laws, including competent persons, must be supported to understand the complexities of DFV to recognise circumstances of domestic violence, accurately identify the person most in need of protection and instances of systems abuse, and understand the risks to victims and survivors prior to and during separation from a perpetrator.

The workforce involved in implementing domestic violence provisions in the *Residential Tenancies Act 2010* (NSW) must be supported to have a nuanced understanding of DFV and coercive control.

For an explanation of coercive control, please see ANROWS's *Policy brief: Defining and responding to coercive control* (2021). It is particularly important that competent persons understand coercive control and DFV to avoid misidentification of the person most in need of protection. In the context of a relationship characterised by DFV, the "person most in need of protection" is the individual who is the primary victim and survivor of DFV in the relationship and who may require protection from the other individual (see Nancarrow et al., 2020). There is evidence that frontline workers do not always recognise the person most in need of protection. For example, ANROWS research identified that police responses to DFV can focus on responding to a single incident of DFV and risk missing the overarching pattern of coercive control and/or misidentifying the victim or survivor as the perpetrator of DFV, particularly when they have engaged in self-defence (ANROWS, 2021; Nancarrow et al., 2020). The concept of coercive control is useful because it helps to articulate the ongoing, repetitive and cumulative nature of DFV. In the context of tenancy laws, it is critical that the person most in need of protection is accurately identified to ensure that they receive appropriate supports and to help prevent ongoing systems abuse by perpetrators. Misidentification of the person most in need of protection can precipitate or exacerbate the consequences of housing vulnerability and insecurity outlined above in the "Victims' and survivors' housing needs" section.

ANROWS cautions that, like other systems, tenancy laws may be open to systems abuse by perpetrators. Systems abuse is defined as the "abuse or manipulation of legal systems and processes by perpetrators to exert power and control over the victim/survivor" (Douglas & Chapple, 2019 as cited in Nancarrow et al., 2020, p. 8). Systems abuse can be perpetrated using any systems and processes, including the legal system, to intimidate victims and survivors or to deplete their financial and emotional resources (Douglas & Chapple, 2019; Kaspiew et al., 2017; Kaspiew et al., 2022; Miller & Smolter, 2011; Nancarrow et al., 2020; Reeves, 2019; Wangmann et al., 2020). These tenancy laws present another system through which a perpetrator could perpetrate systems abuse and protections must therefore be put in place to mitigate this risk. Developing workforce understanding of coercive control, DFV and the potential for misidentification of the person most in need of protection is a key protection mechanism to prevent systems abuse by perpetrators.

The provisions in the *Residential Tenancies Act 2010* (NSW) aimed at protecting victims and survivors of DFV are likely to be employed during periods where victims and survivors are separating from an abusive partner. Those involved in applying the provisions will therefore need training and guidance on the risks around separation. The controlling and/or abusive behaviours of perpetrators can escalate in intensity or frequency immediately preceding, or after, separation (Cox, 2016). This can include lethal behaviours, with a study of intimate partner violence homicides (IPVHs) in New South Wales between 2008 and 2016 noting actual or impending separation as a characteristic in 47 per cent of IPVHs (NSW Domestic Violence Death Review Team, 2020, p. 154). It is therefore important to be aware of how processes under the new tenancy laws may involve contact between the victim and survivor and the perpetrator, the associated risk, and how this risk can be managed and mitigated. Read more about how risk can be managed in the *National Risk Assessment Principles for domestic and family violence* (Toivonen & Backhouse, 2018).

Based on the evidence outlined above, ANROWS recommends that the workforce is supported to understand:

- the *Residential Tenancies Act 2010* (NSW) and its application to their work
- how coercive control may present, including the tactics and strategies used by perpetrators to manipulate and image-manage
- how to recognise trauma responses
- how to support individuals to access specialist services and support
- the dynamics of financial control.

ANROWS notes that while this list covers a range of key competencies, it should not be considered exhaustive.

Implementation considerations

Responding to: Overall design and use of the domestic violence provisions in the Residential Tenancies Act 2010 (NSW) across all discussion questions

While these tenancy laws have the intention to protect the safety of victims and survivors of DFV, the outcomes and potential unintended consequences of their implementation must be thought through and monitored and reviewed in practice. Research on other legal provisions that are designed to support victims and survivors demonstrates that they are not always meaningfully applied in practice, or are capable of creating unintended consequences. For example, ANROWS's *Domestic violence, social security, and the couple rule* report explored the experiences of women who appealed Centrelink decisions about whether they should be considered a single person or a member of a couple for the purposes of receiving social security support (Sleep, 2019). This "couple rule" can be problematic for women experiencing domestic violence, as women may make multiple attempts to leave a perpetrator and not be able to provide a single/accurate separation date (Sleep, 2019). While the *Social Security Act 1991* (Cth) allowed for consideration of "special circumstances", including DFV, this was rarely applied in practice. Counterintuitively, police and health records that documented DFV were instead applied as evidence that a victim and survivor was currently in a "couple" with the perpetrator (Sleep, 2019). The complexities of DFV and the difficulties experienced by victims and survivors trying to leave relationships were not well understood (Sleep, 2019). This placed victims and survivors at risk of ineligibility for further payments, debt for overpayments, or criminal prosecution for fraud (Sleep, 2019). This case study highlights that, even where provisions are available, the frequency and appropriateness of their application relies upon the understanding and competency of the workforce.

ANROWS suggests that further clarification of a number of definitions and the scope of the tenancy laws would be beneficial. It would be useful to outline the context in which DFV can occur, the types and patterns of behaviours that constitute DFV, and the types of relationships between perpetrators and victims and survivors that are covered by the tenancy laws. The inclusion of this context in the *Residential Tenancies Act 2010* (NSW) itself would support victims and survivors and their advocates to immediately identify their eligibility to access protections under these rental laws. ANROWS further recommends clarification of the relationship between the terms "domestic violence" and "family violence", which are currently used interchangeably in the *Residential Tenancies Act 2010* (NSW).

ANROWS recommends that the implementation of these tenancy laws be underpinned by robust evaluation. Evaluation should be ongoing and supported by structural mechanisms to review

effectiveness on a regular basis. This should include consultation with victims and survivors, and frontline DFV service organisations, to identify the impact and effectiveness of these laws in practice. ANROWS would be pleased to speak further with the Real Estate and Housing Policy Team to discuss the role we could play in supporting evaluation.

Circumstances and evidence of domestic violence

Responding to:

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?*
2. *Are the types of evidence required adequate? If not, why? Are there other types of evidence that should be included?*

ANROWS supports the inclusion of a declaration by a competent person to broaden the permitted forms of evidence of domestic violence. Evidence from the Australian Bureau of Statistics’ 2016 *Personal Safety Survey* highlighted that 82.1 per cent of women who experienced violence from a current partner never contacted police (ABS, 2017). DFV is also under-reported in groups who have experienced historical barriers to reporting or injustice through police and legal system responses (see for example Langton et al., 2020a; Salter et al., 2020). For victims and survivors who do report to police and/or proceed to court, navigating the legal system can be a complex, costly, traumatic and lengthy process (for discussion of complexity, see Nancarrow et al., 2020; Wangmann et al., 2020; for cost, see Wangmann et al., 2020; for trauma, see Salter et al., 2020; for length, see Kaspiew et al., 2022), with circumstances of coercive control not consistently identified under current police and legal practices (Nancarrow et al., 2020). As such, police and legal evidence may not always be available in a timely manner. The inclusion of a declaration by a competent person as evidence provides options for victims and survivors who have not reported to police, or who are engaged with the legal system but are experiencing delays with the legal process.

ANROWS notes the expansion of the types of domestic violence orders (DVOs, protection orders often known as apprehended domestic violence orders in NSW) classified as evidence of circumstances of domestic violence to include in-force provisional and interim DVOs. ANROWS cautions that while this expansion has the potential to support victims and survivors who have not yet received final DVOs, safeguards must be put in place to mitigate the risk of unintended consequences. Unintended consequences of this expansion could include perpetrators of DFV applying for DVOs against victims and survivors as a means of systems abuse, or police issuing a DVO that lists the victim and survivor as the primary aggressor due to misidentification of the person most in need of protection (Nancarrow et al., 2020).

Competent persons

Responding to:

3. *Is the current definition of competent person appropriate? If not, how could it be improved?*
4. *What issues (if any) are there with the provision of declarations by competent persons?*

5. *Are you aware of any issues with other definitions in section 105A of the Act? If so, what are they?*

ANROWS supports the current definition of competent persons included in the tenancy laws. Victims and survivors of DFV access a wide range of services for support, and there is an opportunity for these providers to give evidence as competent persons. A recent ANROWS report by Hegarty et al. (2022) identified the types of services that are most commonly accessed by victims and survivors when help-seeking. This study indicated that the most commonly accessed formal support was health services (51.4 per cent), followed by specialist services (40.1 per cent) and justice services (35.6 per cent) (Hegarty et al., 2022, p. 59. *This report is currently under embargo and this sentence must be redacted if published before 8 December 2022*). Victims and survivors also accessed housing and financial services (15.1 per cent) and other community services (11.3 per cent) for support, although less commonly (Hegarty et al., 2022, p. 59. *This report is currently under embargo and this sentence must be redacted if published before 8 December 2022*). These findings highlight that the current definition of competent persons captures the formal support services accessed by the majority of victims and survivors.

Barriers to help-seeking and disclosure that exist for different groups of women must be considered when defining competent persons. For example, some First Nations women identified fears around child removal as barriers to accessing services or reporting DFV to police (Langton et al., 2020b; Our Watch, 2018). Bevis et al. (2020) identified that communication disconnect can also function as a barrier for First Nations women, with many women speaking an Aboriginal language as their first language while communication from police, legal services and service providers occurs in English. Vaughan et al. (2016) highlighted that challenges with communication and access to information are also an issue for many migrant and refugee women attempting to access support for DFV. It is important that those defined as competent persons can provide tailored and accessible support to all victims and survivors who are seeking meaningful support to end tenancies.

While the inclusion of a declaration by a competent person as evidence is a positive step for victims and survivors, it also creates opportunities for perpetrators to perpetrate systems abuse. Perpetrators could restrict a victim's and survivor's access to competent persons, give false or misleading statements, or present themselves as the victim to end a tenancy as a tactic of abuse. This is particularly a risk where there is a lack of understanding of DFV among competent persons or in circumstances where there is a misidentification of the person most in need of protection. Protections must be in place to ensure that perpetrators are not able to access a false or misleading declaration by a competent person. ANROWS outlines suggested protections in the "Provisions for providing evidence" section below.

Provisions for providing evidence

Responding to:

6. *Are the current provisions and penalties regarding false or misleading information appropriate? If no, what changes should be made?*
7. *Could the provisions and guidance about providing evidence be improved, and if yes, how?*

ANROWS agrees that provisions and penalties must be in place to prevent false or misleading information being provided, particularly by perpetrators of DFV. These provisions and penalties must be enforced by a workforce that has thorough understanding of DFV to support accurate identification of the person most in need of protection. This will help to ensure that perpetrators are less likely to be able to perpetrate systems abuse through false or misleading disclosures, and to protect genuine victims and survivors from being accused of providing false or misleading disclosures. ANROWS recommends that these provisions and penalties should be reviewed as part of the evaluation of the tenancy laws to ensure that they are being applied as intended. Please see the above sections on “Workforce development and capacity building” and “Implementation considerations” for further discussion of workforce development and evaluation.

Limits on liability for damage to rental property and repayment of rental bond

Responding to:

- 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?*
- 22. 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?*
- 23. Are these provisions on repayment of the rental bond working effectively? If not, what are the current barriers and how could they be improved?*

ANROWS is supportive of the limits on liability for property damage and provisions on repayment of the rental bond as these provisions could help to reduce the financial burden on victims and survivors. Financial stress is the emotional distress and anxiety experienced by victims and survivors in relation to their financial status (Morgan & Boxall, 2022), and can be created by financial abuse, where a perpetrator attempts to prevent or control a victim’s and survivor’s ability to acquire, use or maintain resources (Cortis & Bullen, 2016). Kaspiew et al. (2017) highlighted that financial abuse can escalate post-separation as perpetrators attempt to maintain abuse and control. Financial stress is a significant barrier to victims and survivors leaving a relationship and is a catalyst for returning to a relationship, with victims and survivors facing potential housing instability and/or homelessness post-separation (ANROWS, 2019; Breckenridge et al., 2016; Kaspiew et al., 2017). Results from the 2016 *Personal Safety Survey* (ABS, 2017) highlighted that one in five women returned to violent partners as a result of having no financial support or alternative housing options after separation. Including provisions that are intended to reduce the financial costs of ending a tenancy for victims and survivors of DFV is a positive recognition and response to the financial stress experienced by these women.

ANROWS again cautions that these provisions need to be supported by protections to identify and avoid systems abuse by perpetrators. Perpetrators may attempt to entrap victims and survivors in ongoing contact through disputing limits on liability for damage and arrangements for the repayment of the rental bond. Victims and survivors may experience claims for property damage where the exemptions should apply but are not enforced and may face challenges recovering their share of the

bond without involving the perpetrator or taking their case to a tribunal. Protections must be put in place to reduce opportunities for perpetrators to perpetrate systems abuse and to ensure that the workforce is able to identify and respond to systems abuse where it does occur.

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