

Submission by Kimberley Community Legal Services Inc. to Department of Mines, Industry Regulation and Safety in regard to the statutory review of family domestic violence provisions in residential tenancies and residential parks legislation

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We acknowledge that we work on Aboriginal land, traditionally the home of the Yawuru people of the West Kimberley and Miriwoong people of the East Kimberley. We pay respect to all elders past and present.

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Introduction to the Kimberley region and the work of KCLS

1. The Kimberley region is host to a culturally and linguistically diverse population of almost 40,000 people, dispersed over a large and (at times) challenging geographical area.¹ Approximately 40 per cent of the population of the Kimberley is made up of Aboriginal and Torres Strait Islander people.² Within this population, there are more than 30 different language groups, and over 150 different Aboriginal Communities.³
2. Unfortunately, incidence and reporting of family and domestic violence ('FDV') is rising in the Kimberley. Criminal offences relating to family violence, including breaches of restraining orders, have steadily risen in Kununurra and many other communities across the region over at least the last seven years.⁴ This has increased the associated legal issues that victims and survivors of FDV ('victim-survivors') may face.
3. Kimberley Community Legal Services (KCLS) is an independent, not-for-profit Community Legal Centre (CLC) that provides holistic care services to people who are experiencing or are at risk of financial disadvantage, family violence or homelessness across the Kimberley. Our services include social work, legal advice, financial counselling, and community education. We have two permanent offices located in Broome and Kununurra, and we conduct outreach to Balgo, Billiluna, Derby, Dampier Peninsula, Fitzroy Crossing, the Gibb River Road, Halls Creek, Kalumburu, Mt Barnett, Mulan, Warmun, and Wyndham.⁵
4. KCLS is the only CLC in the Kimberley that offers free tenancy advice for renters,⁶ placing us in a unique position to comment on the operation of the reforms introduced into the *Residential Tenancies Act 1987* (WA) ('RTA') and *Residential Parks (Long-Stay Tenants) Act 2006* (WA) in 2019

¹ Kimberley Development Commission, 'Our Place – Our Community' *REMPLAN* (Web page, 2021)

<<https://app.remplan.com.au/kimberleyregion/community/population/language-spoken?state=1BGDTz!JNwyTmZRpfkjya0Ho9P1lImCvtKQ2lgALADhGkPknU7tKuxtZLZ>>.

² Ibid

³ Ibid

⁴ Government of Western Australia, 'Crime in Western Australia' *Western Australia Police Force* (Web page, 28 Oct 2022) <https://www.police.wa.gov.au/Crime/CrimeStatistics#>.

⁵ Legal Aid WA, 'Finding Help and Legal Information' *Blurred Borders* (Web Page) <<https://blurredborders.legalaid.wa.gov.au/finding-help-and-legal-information>>.

⁶ Grace Dudley, *Stuck in the Heat: Lived Experiences of Public Housing Tenants in the Kimberley* (Report, 2022), 4.

(‘the reforms’). This submission has been informed by consultation with KCLS staff across all practice areas.

KCLS Experiences with assisting clients to use the FDV provisions

5. This submission provides responses to select matters outlined in the consultation paper. As a CLC that provides free legal advice to people who experience or are at risk of financial disadvantage, FDV or homelessness in the Kimberley,⁷ our involvement with the 2019 reforms is exclusively through advocacy for tenants (most of whom live in public housing) who have cause to rely on the reforms for the protection of themselves and their family members. For this reason, our submission is limited to comments on the following matters outlined in the consultation paper:
 - Matter 5: Terminating tenancy without penalty
 - Matter 6: Liability for Debts Caused by the Perpetrator.
 - Matter 7: Being recognised as a tenant
6. We have identified additional issues within the Kimberley region that prevent the reforms from providing the intended benefits to victim-survivors in circumstances in which the reforms would otherwise work. Therefore, to provide the necessary background to the matters contained within the consultation paper, our submission opens with a discussion of these additional issues.

Challenges in the Kimberley

7. The issues discussed below are compounding factors that can increase the complexity of tenancy issues faced by victim-survivors within the Kimberley region.

Unavailability of alternative housing

8. The reforms include a mechanism enabling victim-survivors of FDV to terminate their interest in a tenancy agreement early without financial penalty, under some conditions.⁸ This allows victim-survivors to escape their living situation and move to a different property. However, the operation of these reforms is built on a premise that alternative rental properties are readily available. In

⁷ Kimberley Community Legal Services Inc, ‘Our Journey’ *Kimberley Community Legal Services* (Web page, 2022) <<https://www.kcls.org.au/who-we-are>>.

⁸ *Residential Tenancies Act 1987* (WA) (‘RTA’) s71AB.

the three years since the introduction of the reforms, KCLS has been unable to utilise these provisions to assist any clients.

9. Currently, a key barrier that prevents victim-survivors from relying on these provisions in the Kimberley is that residents cannot find alternative accommodation if they were to terminate the lease. This is the case for both private tenants and social housing tenants.
10. In the private rental market, the East Kimberley region (of which Kununurra is the main hub) has only a 0.39% tenancy vacancy rate at the time of writing.⁹ This is despite the fact that in Kununurra, almost 65% of private dwellings are rented.¹⁰ The current private rental crisis is making it difficult for all tenants to find accommodation, even when tenants have exemplar rental and employment history.¹¹
11. In the Kimberley, almost half of renters are in social housing.¹² Even if the private rental market was more relaxed, many vulnerable members of the Kimberley would be unable to move to a private rental based on their financial circumstances and rental or employment history. The waitlist for public housing in the East Kimberley is 158 weeks on the general list, or 55 weeks on the priority list. The waitlist for public housing in West Kimberley is 121 weeks or 55 weeks on the priority list.¹³ This makes movement between public housing rental properties extremely difficult.
12. If alternative housing were available, the reforms would provide a valuable protection to victim-survivors. However, currently, both private and public tenants are precluded from accessing this assistance in the Kimberley. Even in a more relaxed economic environment, this aspect of the reforms would realistically only be available to tenants with the means and ability to find

Recommendation 1: The WA Government address the current rental crisis, particularly for victim-survivors at risk of (or experiencing) overcrowding and homelessness, by committing to increasing social housing stock in the Kimberley.

⁹ Real Estate Investar Australia, 'Investment Property Wyndham-East Kimberley, WA' *real estate investor | invest better* (Web page, 2022)

<<https://www.realestateinvestar.com.au/Property/western+australia/wyndham-east+kimberley>>.

¹⁰ Australian Bureau of Statistics, 'Kununurra' *Australian Bureau of Statistics* (Web page, 2021)

<<https://www.abs.gov.au/census/find-census-data/quickstats/2021/UCL515020>>.

¹¹ Hannah Barry, 'Broome's rental crisis leads to bidding wars and forced evictions as tensions boil over' *ABC NEWS* (Web page, 23 Mar 2021) <<https://www.abc.net.au/news/2021-03-23/broome-rental-crisis-leads-to-tensions-bidding-wars/100023930>>.

¹² Dudley (n 6) 8.

¹³ Western Australia, *Parliamentary debates*, Legislative Council, 18 May 2022, [467] (Hon Sue Ellery).

alternative private rentals. In the absence of adequate social housing, social housing tenants will remain unable to rely on these protections.

Language barriers and low legal literacy

13. The geographical isolation of Kimberley residents, combined with the cultural and linguistic diversity of the Kimberley region, makes it difficult to ensure that all residents have access to relevant tenancy information and adequate support in navigating tenancy systems.¹⁴ It also means that legal and financial literacy can vary highly within members of the population. It is difficult to measure the scale and effect of these challenges, except to say that it can complicate almost every facet a victim-survivor's interaction with Australian legal and regulatory systems.¹⁵ This is particularly so in matters relating to tenancy.
14. However, navigating this diversity is not just the responsibility of victim-survivors. Service providers within the Kimberley must be familiar with both the operation of the reforms and the unique challenges faced by Kimberley residents in order to provide the administrative assistance necessary to allow a victim-survivor to access the protections available within the reforms.¹⁶
15. The below case study provides an example of how low legal literacy and inefficient administration can compound a client's legal issue and frustrate the client's attempt to rely on the reforms.

Case 1

Andrea was co-living with her partner (the perpetrator) and her small child. The perpetrator's name was on the lease. After an FVRO was served on the perpetrator for the protection of Andrea and her young child, Andrea wanted to stay where she was and remove the perpetrator from the lease. However, Andrea was not sure if she was listed as a co-tenant on the lease. She thought she remembered signing a document when she moved into the property with the perpetrator, but she did not have a copy of it and was not readily able to access it. When we attended the Housing Office with Andrea to ask for a copy of the lease, we were told that

¹⁴ Law Council of Australia, *The Justice Project | Rural Regional and Remote (RRR) Australians* (Final report, August 2018) 23.

¹⁵ Law Council of Australia, *The Justice Project | Aboriginal and Torres Strait Islander People* (Final report, August 2018) 26-36.

¹⁶ Law Council of Australia (n 14) 23.

Andrea's housing officer was unavailable and to come back later. We followed up via e-mails and phone calls with the Andrea's housing officer, but never received a response.

Approximately two weeks later, the perpetrator filed an objection against the FVRO and it was cancelled. At this point, Andrea found out that she was a co-tenant on the lease. Andrea did not wish for the FVRO to be cancelled, but tensions between herself and the perpetrator had eased. In light of this, Andrea decided not to pursue further legal protection against the perpetrator and she remained at the property.

16. As demonstrated by Andrea's ultimate decision not to pursue legal protection, the administrative delays and poor communication of property managers or housing officers can have significant impacts on the operation of the reforms. Similar issues to those faced by Andrea cause substantial delays in navigating the tenancy system in circumstances in which victim-survivors should benefit from the protections offered by the reforms.

Recommendation 2: DMIRS develop culturally appropriate and in-language (where possible) information about FDV tenancy provisions for Aboriginal community members, and ensure these resources are available and accessible to those in remote and isolated regions.

Recommendation 3: DMIRS provide free training for FDV lawyers and other service providers in the use of the FDV reforms, to upskill these professionals in assessing client needs relating to the reforms.

Recommendation 4: DMIRS provide training to private landlords, property managers and Housing Authority officers to ensure they are equipped and trained to treat victim-survivors' requests with urgency.

Response to matters for review in consultation paper

Matter 5: Terminating a tenancy without penalty

17. The reforms provide victim-survivors a valuable mechanism through which victim-survivors can terminate a tenancy without financial detriment in circumstances of FDV.¹⁷ As observed in the consultation paper, victim survivors 'can only access the protections offered under the legislation

¹⁷ RTA (n 8) s71AB.

if they have ended with interest in a tenancy agreement by issuing a family violence termination notice during the term of the tenancy'.¹⁸

18. The operation of the reforms currently does not account for recognised patterns of victim-survivor behaviour. There may be a number of factors that mean that victim-survivors do not feel physically or emotionally safe to name or report FDV until out of the violent situation or an issue arises (for example, when moving out of property).¹⁹ Fear of retribution, shame, and embarrassment are well-documented examples of factors that can delay or prevent reporting or labelling FDV as it occurs.²⁰ The reforms will not provide an adequate level of protection to victim-survivors until they recognise and account for the needs of victim-survivor's themselves.

Case Study

19. The following case study addresses consultation question 7, in which a tenant subject to family violence was unaware of the need to issue a notice of termination to the landlord/property manager during the tenancy to avoid being liable for debts and damage to the property:

Case 2

Dorothy was listed as a tenant on a lease with the Housing Authority. When Dorothy vacated the property to move to a different property, the final inspection report uncovered extensive property damage. Dorothy now has an estimated tenant liability debt in excess of \$30,000. Dorothy says that a lot of the damage is attributable to family violence. However, the perpetrator was never listed on the lease. Dorothy only raised the matter once she had vacated the property and the final inspection report had been carried out, and there are no corresponding police reports. Dorothy risks being held liable for these damages.

The perpetrator is currently imprisoned, but KCLS and the Department of Housing are concerned that upon his release, he will do the same thing to the new property Dorothy has

¹⁸ Government of Western Australia Department of Mines, Industry Regulation and Safety, *Statutory review of family domestic violence provisions in residential tenancies and residential parks legislation* (Consultation Paper, Nov 2022) 15.

¹⁹ Monica Campo and Sarah Tayton, *Domestic and family violence in regional, rural and remote communities* (Practitioner resource, 2015) 1; See also Haley Clark, 'What is the justice system willing to offer?' (2010) 85 *Family Matters* 28, 28.

²⁰ Monica Campo and Sarah Tayton, *Domestic and family violence in regional, rural and remote communities* (Practitioner resource, 2015) 1.

been moved to. At the new property, Dorothy has been placed on a fixed term lease. This means that if damage occurs again, her tenancy will likely be terminated, and she and her children would be facing homelessness.

20. Dorothy was unaware of the consequence the termination would have on her tenant liability. Had she been aware of it, it may have influenced her decision to end the lease and report the FDV offending.

Proposed solutions and recommendations

21. At page 15 of the consultation paper, DMIRS propose the following solutions to these shortfalls:

- Legislative amendment to allow victim-survivors to apply for relief from tenant liability debts both during and after the tenancy. This would be the case whether or not the perpetrator is on the tenancy agreement, provided that there is evidence of the family violence;
- Legislative amendment to ‘impose a positive obligation on property managers/landlords to inform tenants who have been impacted by family violence of their rights’.

22. KCLS supports these amendments. Whilst late reporting of domestic violence would potentially remain a hurdle in the collection of ‘evidence’ of FDV, these legislative amendments would assist many victim-survivors in accessing the protections within the reforms.

Recommendation 5: That these legislative amendments are implemented as a matter of priority.

Recommendation 6: Provide information regarding the protections available to victim-survivors early, and at the time of key events. For example, information sheets could be provided with new leases, when serving FVROs, or making police reports.

Matter 6: Liability for debts caused by the perpetrator

23. The reforms also provide a mechanism through which victim-survivor tenants can apply to assign liability to the perpetrator for damage caused to a rental property that is attributable to FDV.²¹

²¹ RTA (n 8) s17B.

However, as was identified in the consultation paper, the legislation is currently limited, as a tenant may only apply to assign liability for damage to a perpetrator where that perpetrator is a) listed on the lease, or b) is unlawfully at the premises.²² Our staff identified these two limitations as among the biggest barriers to the success of the reforms in the Kimberley.

24. A combination of socio-economic factors in the Kimberley mean that it is common for either the victim-survivor or a perpetrator to not be listed on the lease when a victim-survivor seeks assistance. Within the Kimberley region, it is common for large or extended family groups to live at (or between) overcrowded houses.²³ This overcrowding and the associated tenancy complications are predominantly a bi-product of the low rental vacancy and lack of adequate housing in the region, resulting in many people's inability to move or find alternative accommodation.²⁴ However, in the case of First Nations people, it is also a product of a lack of culturally appropriate housing that recognises and caters for different family and community structures.²⁵

Case study

25. The following case study addresses question 9 in the consultation paper, detailing an instance where a victim of family violence has paid for damage caused by the perpetrator who was at the property without permission:

Case 3

Carla is listed as tenant on a lease with the Housing Authority. Carla's daughter's partner has caused damage to the property attributable to family violence. However, the perpetrator is

²² RTA (n 8 s17B; Government of Western Australia Department of Mines, Industry Regulation and Safety (n 18) 17.

²³ See, eg, 'The Looma Aboriginal Community in the Kimberley Is Warning Overcrowding and Mental Health Problems Will Get Worse If a Funding Stalemate over Remote Housing Isn't Resolved.' *ABC News WA* (ABC1 Perth, 2018); Jessica Hayes, 'Rising COVID-19 cases and overcrowded housing putting remote Aboriginal communities at risk' *ABC NEWS* (Web page, 27 March 2022) <<https://www.abc.net.au/news/2022-03-27/remote-communities-wa-covid-19-cases-rise-overcrowding-isolation/100942312>>; Dudley (n 6) 14.

²⁴ Dudley (n 6) 14.

²⁵ Australian Housing and Urban Research Institute, 'Creating culturally sensitive housing for remote Indigenous communities' (Online Brief, 2 Aug 2018) <<https://www.ahuri.edu.au/research/brief/creating-culturally-sensitive-housing-remote-indigenous-communities>>; see also Gini Lee and David Morris, *Best practice models for effective consultation: towards improving built environment outcomes for remote Indigenous communities* (AHURI Final Report No 76, Apr 2005).

not listed on the lease, and visits the property at the invitation of Carla's daughter, not Carla. For this reason, Carla faces liability for this damage.

26. Carla's story is common throughout the Kimberley. The recognition of FDV by perpetrators not on the lease would greatly assist financially disadvantaged victim-survivors across the Kimberley in accessing these protections within the reforms.

Proposed solutions and recommendations

27. At page 17 of the consultation paper, DMIRS propose the following solutions:

- Legislative amendment to allow victim-survivors to assign liability for property damage to a perpetrator where the perpetrator is not listed on this lease and is lawfully at the premises; and
- Legislative amendment to 'make it clearer' that victim-survivors may assign liability to a perpetrator where the perpetrator is not on the lease and is unlawfully at the premises.

28. KCLS supports these amendments as practical, simple solutions to the challenges faced by victim-survivors.

Recommendation 7: that these legislative amendments be implemented as a matter of priority.

Matter 7: Being recognised as a tenant

29. The reforms provide a mechanism through which victim-survivors who were listed as co-tenants alongside a perpetrator on a tenancy agreement could remove this co-tenant perpetrator from the lease.²⁶ However, under the reform provisions, this order may only be made by a court. This option is frequently viewed as unattractive to victim-survivors, as the adversarial nature of court experiences can be traumatic and stressful, particularly at a time when a victim-survivor is attempting to escape conflict.²⁷

²⁶ RTA (n 8) s71AE.

²⁷See, eg, Heather Douglas, 'Domestic and Family Violence, Mental Health and Well-Being, and Legal Engagement' (2017) 25(3) *Psychiatry, Psychology and Law* 341. Most literature regarding the mental health and wellbeing of victim-survivors is written in relation to in criminal law proceedings, however it is generally applicable to civil law court processes as well.

30. On top of this, as mentioned above it is common for victims-survivors to not be named on a tenancy agreement in which the co-habiting perpetrator is listed as the tenant. Currently, the only way in which a householder may be recognised as a tenant is through applying through a separate (additional) court process provided for under section 59C of the RTA.²⁸ This means that, if a victim-survivor is not listed on a tenancy agreement (as is often the case) and wishes to remain at the property but remove the perpetrator from the lease, the victim-survivor must apply to the court through two separate processes. This process is prohibitively onerous (and time-intensive) for victim-survivors who are already in precarious physical and financial circumstances.

Case studies

31. The following case study addresses consultation question 11, detailing an example of a situation 'where a tenant subject to family violence has been unable to remain at the property due to not being listed as a tenant on the tenancy agreement':

Case 4

Bernice was co-living with her partner (the perpetrator). The perpetrator's name was on the lease. Bernice's name was not on the lease. The perpetrator was arrested and placed in gaol. At this time, Bernice and her children faced homelessness as the perpetrator's tenancy agreement was to be cancelled. Fortunately, Bernice was able to find a living arrangement with extended family. Bernice decided that this option was easier and less stressful than pursuing the tenancy through the section 59C court process.

32. Bernice was fortunate in being able to avoid homelessness. However, difficulties such as Bernice's are unfortunately a dominant trend in tenancy patterns amongst victim-survivors in the Kimberley.

Proposed solutions and recommendations

33. At page 18 of the consultation paper, DMIRS propose to create a simpler and more accessible mechanism for victim-survivors who are householders but are not named on a tenancy agreement to be recognised as a tenant.

²⁸ RTA (n 8) s59C.

34. Whilst KCLS broadly supports this proposal, more detail and consultation is required to design an appropriate mechanism that will make this process less onerous for victim-survivors whilst also balancing the interests of other parties.

Recommendation 8: Consult with FDV lawyers and service providers in the design of a mechanism that would allow victim-survivors to be recognised on a tenancy agreement with an emphasis on accessibility to victim-survivors.

Conclusion

35. The reforms provide important protections to victim-survivors of FDV in relation to a range of tenancy matters. However, as is recognised by DMIRS, there are several limitations to the reforms which reduce the usability of the provisions for victim-survivors, particularly when considered alongside the multiple other stressors that victim-survivors face when attempting to escape FDV.
36. Several of these limitations can be addressed with relative ease. Expanding victim-survivors' ability to apply for relief from tenant liability debts both before and after the termination of a tenancy is one comparatively simple legislative amendment that would have a significant affect on the usability of the protections. Allowing victim-survivors to assign liability for property damage to perpetrators not listed on the lease is another such solution.
37. Other limitations are a result of larger, systemic socio-economic challenges within the Kimberley. These issues are not so simply resolved but can and should nevertheless be lessened by efforts on the part of DMIRS and other service providers. For example, the effects of culture and language barriers can be mitigated by creating and disseminating accessible, appropriate resources to at-risk communities. Ensuring that all professionals who play a role in the provision of tenancy services are appropriately trained would also increase the ability of victim-survivors to receive timely and appropriate assistance.
38. This statutory review process represents an opportunity for Western Australia to consolidate its commitment to afford victim-survivors strong protections equivalent or better than those in other jurisdictions. If implemented the proposed changes will deliver a more accessible and safe process for affected community members in the Kimberley region.