

Residential Tenancies Practice Note #09-01

Family Violence & Tenancy

Background

In 2008 the Family Violence Protection Act 2008 (FVPA) came into full operation in Victoria. The Act introduces a number of major changes to Victoria's system for the prevention and protection against family violence.

Key elements of the FVPA include:

- The introduction of Family Violence Safety Notices which are temporary notices issued by the police until the matter can be dealt with by the court.
- An improved system of Family Violence Intervention Orders
- Expansion of the definition of 'family violence' which now includes:
 - Psychological and emotional abuse, and
 - Economic abuse
- Provisions strengthening the capacity of courts to make orders excluding perpetrators of family violence from a protected person's home.

Terminology: In this practice note a Family Violence Safety Notice is referred to as a 'notice' and a Family Violence Intervention Order is referred to as an 'order' unless the full term is required for clarity. All other types of notices and orders (eg. VCAT orders) are designated specifically.

What is the issue?

The FVPA amended the Residential Tenancies Act (RT Act) to enable some tenancy matters to be dealt with by VCAT where a notice or order has been issued. The amendments also create a number of new rights and obligations for tenants, landlords and estate agents.

The FVPA also amended the Victorian Civil & Administrative Tribunal Act (VCAT Act) to refine VCAT's procedures in family violence matters.

This practice note sets out the options available for tenants and residents of rented premises where there is a family violence safety notice or family violence intervention order in place.

What should you do?



There are options both for a person who is protected by a notice or order, that is the protected person, and a tenant who is excluded from a home by a notice or order, that is the excluded tenant. What options are available will depend on whether there is a notice or order in place and also whether or not an order is final.

1. Locks

Where a protected person decides to stay in their home they may need to change the locks to reduce the risk of an excluded tenant gaining access to the premises. Section 70A of the RT Act now provides that where there is a notice or interim or final order in place the protected person is allowed to change the locks to any external door or window of rented premises. The protected person can only do this if they are a tenant or otherwise reside at

the rented premises and if there is an 'exclusion condition' in the notice or order which excludes a person who is also a tenant of the same rented premises.

If there is not an exclusion condition in the notice or order then this provision does not apply. It is therefore important to check that the order or notice contains an exclusion condition.

The protected person is not required to give a copy of the key to the excluded tenant whilst the notice or order is on foot. A copy of the key must however be provided to the landlord or landlord's agent but they are prohibited from providing a copy to the excluded tenant. A copy of the key must also be provided to all other tenants excepting the excluded tenant.

A copy or certified extract of the notice or order must also be provided to the landlord or landlord's agent.

If a victim of family violence requires financial assistance to pay for the cost of changing the locks they may be able to apply to the Victims of Crime Assistance Tribunal for an interim order allowing for the payment of up to \$1000 where financial assistance is urgently needed on the same day. A copy of the family violence application or a police statement should be attached to the VOCAT application. For further information refer to the Department of Justice publication Financial Assistance for Victims of Crime or call the Victims of Crime Helpline 1800 819 817.

2. Application for new tenancy agreement (replacing an existing agreement)

If a protected person decides to stay in their home they may need to protect their interests by having the excluded tenant removed from a tenancy agreement. A protected person may also need to have a tenancy agreement transferred into their name and have existing liabilities determined. They may also seek to have other tenants included on the tenancy agreement.

Section 233A of the RT Act now enables a person to apply to VCAT for an order terminating an existing tenancy agreement and requiring the landlord to enter into a new tenancy agreement with a specified person. This option is only available if there is a final order in place in addition the application can only be made by a protected person and only if the order contains a condition excluding a tenant from the rented premises.

A protected person may avail themselves of this procedure if they are a tenant of the rented premises or if they are simply living in the premises for example as a licensee of the excluded tenant.

Section 233B of the RT Act provides that for VCAT to make an order terminating an existing tenancy agreement and requiring the landlord to enter into a new tenancy agreement the protected person must be able to demonstrate the following:

- the protected person and other people (if any) could reasonably be expected to comply with the duties of a tenant
- the protected person or their children would be likely to suffer severe hardship if they were compelled to leave the premises
- the hardship would be greater than any hardship that the landlord would suffer if VCAT made the order
- the order sought is reasonable, given the length of the exclusion under the final family violence intervention order and the length of the existing tenancy agreement
- the order sought is reasonable, given the interests of any other tenants (other than the excluded tenant) under the existing tenancy agreement and whether they support the application

Section 233C of the RT Act provides that if the application is determined in favour of the protected person VCAT may also then determine the parties' liabilities under the existing tenancy agreement. This includes liabilities in relation to the bond, rent, damage to the premises and outstanding utility charges.

The new agreement is to be for the same rent paid with the same frequency and unless the tribunal determines otherwise on the same terms and conditions as the existing agreement.

Under these provisions there is no entitlement to compensation for early termination of the agreement.

In preparing for the hearing a protected person should obtain evidence that demonstrates that the prospective tenant(s) can afford the rent and which demonstrates the severe hardship which would follow from eviction.

Evidence establishing that a person can afford the rent could include: payslips; an income statement from Centrelink; bank statements; employer references or a letter from a financial counselor.

Evidence in relation to severe hardship could include a letter from support workers, medical practitioners and evidence concerning the lack of alternative accommodation or problems associated with moving for example where changing schools would have an adverse impact on children.

Evidence should also be prepared in relation to the apportionment of liability. This may require copies of utility bills, rent receipts and bank statements. If there is an issue concerning damage to the premises caused by the excluded tenant photographs will assist.

Where there is a dispute concerning liability for damage to the premises the hearing may be adjourned to allow an inspection of the premises (s 233C(3) RT Act).

The entry provisions have been amended to enable entry for the purpose of proceedings arising from an application under s 233A. The excluded tenant is entitled to have a representative attend the inspection and is required to provide the name and contact details of the representative to the landlord or landlord's agent (s 86(1)(g) & (4) RT Act). Those details must be provided to the protected tenant in the notice of entry (s 88(c)(ii) RT Act).

3. Reduction of Fixed Term

A protected person may decide to leave their home so that they can protect their own safety or the safety of their children. Alternatively for a tenant who is subject to an exclusion condition they will be prohibited from returning to their home. In these situations the protected person and the excluded tenant respectively may need to protect their interests by applying to VCAT for an order reducing the term of a fixed term tenancy under s 234 of the RT Act.

A person is entitled to make an application under s 234 irrespective of whether a family violence intervention order is in place or not.

The applicant must establish that:

- there has been an unforeseen change in their circumstances
- the applicant would suffer severe hardship if the tenancy agreement continues

- the hardship would be greater than any hardship suffered by the other party to the agreement if the term of the agreement is reduced.

Section 234(2A) now provides that if a final or interim family violence intervention order has been made then VCAT may be satisfied that there has been an unforeseen change in circumstances that may cause a tenant applicant severe hardship if:

- the tenant is subject to a condition in a family violence intervention order excluding them from the rented premises; or
- the tenant is a protected person under a family violence intervention order who is seeking to reduce the term of the tenancy agreement to protect their own safety or the safety of their children.

NOTE: this applies whether or not the order contains an exclusion condition.

Section 234(3) provides that if the applicant succeeds then VCAT can order that compensation be paid to the other party.

4. Special Procedures

The amendments introduce some special procedural rules in relation to family violence matters.

Section 233D of the RT Act provides that for applications under s 233A an excluded tenant can only cross examine a protected person with the leave of the tribunal and then only subject to limitations (see s 233D(3)).

More generally s 73A of the VCAT Act now provides that in a proceeding under the RT Act where any of the parties are the protected person and respondent to a family violence intervention order, the respondent may only personally cross examine the protected person with the leave of the tribunal.

In either case it may be appropriate to adjourn a hearing to enable legal representation to be arranged rather than to grant leave for an excluded tenant to personally cross examine a protected person.

VCAT has introduced specific application forms for protected persons and excluded tenants applying under these provisions. There are now specific detailed requirements in relation to the service of documents in these matters (see s 506(3)).

Section 62A of Schedule 1 to the VCAT Act now provides that a protected person or an excluded tenant can have a support person at a VCAT hearing. Support person includes a legal practitioner, a social worker, a friend or family member or any other person chosen by the party. Protected persons can also access a family violence support worker available through VCAT.

The tribunal can also make necessary arrangements for the hearing including screens, closed circuit television and a hearing room that the general public can not access.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific matter you should contact the Tenants Union on (03) 9411 1444.

Tenants Union Legal Team