

5 February 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Residential Tenancies Amendment Bill

Purpose

1. We have considered whether the Residential Tenancies Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 20933/12.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 25 (minimum standards). Our analysis is set out below.

The Bill

4. The Bill aims to modernise the Residential Tenancies Act 1986 ('the principal Act') while appropriately balancing the rights and obligations of tenants and landlords.
5. The purposes of the Bill are to increase security of tenure for tenants who are meeting their obligations, promote good-faith relationships in the renting environment, enhance the regulatory powers and tools available to the chief executive of the Ministry of Housing and Urban Development ('the regulator'); and better support tenants to assert their legal rights.
6. One significant amendment is that the Bill removes the ability for landlords to end a periodic tenancy for any reason or without providing a reason. Instead, the Bill specifies grounds upon which landlords can end a tenancy, including frequent anti-social behaviour or late rental payments, and imposes notice requirements.
7. The Bill also makes the following changes:
 - a. clarifying the rules around minor changes that a tenant may make to the premise;
 - b. providing for fixed-term tenancies to become periodic upon expiry;
 - c. prohibiting the solicitation of rental bids by landlords;
 - d. limiting rent increases to once every 12 months;
 - e. improving a tenant's ability to assign their tenancy;

- f. providing for suppression orders to be granted in the Tenancy Tribunal ('the Tribunal');
 - g. allowing for identifying details to be anonymised in situations where a party has been wholly or substantially successful in taking a case to the Tribunal; and
 - h. requiring landlords to provide for the installation of ultra-fast broadband, subject to specific triggers and exemptions.
8. The Bill also establishes the new financial penalties for non-compliance with the scheme by:
- a. introducing an infringement offence regime applicable to many new and existing offences (sch 1B);
 - b. expanding the category of unlawful acts for which exemplary damages can be awarded (sch 1A); and
 - c. introducing pecuniary penalties for landlords with six or more tenancies who intentionally commit certain unlawful acts (cl 55).

Consistency of the Bill with the Bill of Rights Act

Section 14 – Right of Freedom of Expression

9. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
10. Various provisions in the Bill *prima facie* limit the freedom of expression by:
- a. requiring landlords to respond to requests from tenants, the regulator or network operators within a certain timeframe and/or in a certain way;
 - b. prohibiting landlords from soliciting rental bids or advertising or offering tenancies without stating a rental amount in the advertisement or offer; and
 - c. providing that landlords and tenants who fail to comply with many new and existing notification and information obligations commit an infringement offence and/or an unlawful act.
11. A provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective.²

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

12. We consider that the limitations on s 14 of the Bill of Rights Act serve and are rationally connected to the important objectives of promoting good faith and reasonable communication between landlords and tenants and ensuring compliance with the Act.
13. The information landlords are required to supply is limited to what is necessary to enable tenants to assert their legal rights and the regulator to monitor to compliance with the scheme, and the timeframe and manner restrictions are reasonable. The newly applicable penalties are set at proportionate levels and the scheme enables the regulator to choose the most appropriate penalty type for non-compliance. Further, the prohibition on the solicitation of rental bids appears to be necessary in order to effectively regulate the practice, which further exacerbates landlords' market power over tenants.
14. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 25 – Minimum standards of criminal procedure

Infringement offences

15. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to the law.
16. A number of clauses in the Bill provide that a landlord's failure to comply with their existing and proposed obligations under the Act amounts to an infringement offence under a new infringement offence regime to be inserted by clause 66. The infringement offences in the Bill are listed in proposed new Schedule 1B, which also sets out the applicable penalties. Clause 70 will also enable regulations to be made that specify additional offences, either in the Act or in regulations made under it, as infringement offences.
17. These offences are strict liability offences that raise a *prima facie* issue of inconsistency with s 25(c) because the accused is required to prove a defence or disprove a presumption in order to avoid liability. In the case of strict liability offences, a defendant who is unable to prove a defence, or disprove a presumption, could be convicted even if reasonable doubt exists as to their guilt.
18. We consider that the proposed strict liability infringement offence regime serves the important purposes of regulating tenancy relationships, encouraging compliance with the Act, and efficiently penalising non-compliance. In considering whether the provisions are proportionate to their objectives we note that:
 - a. infringement offences do not result in a criminal conviction;
 - b. the infringement offences are applicable only to landlords, who have chosen to participate in a regulated activity and can reasonably be expected to adhere to the applicable standards of conduct;
 - c. for the specified offences in this Bill, the defendant (the landlord) is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - d. the applicable penalties, namely an infringement fee of \$1,000 or a fine of not more than \$3,000, are relatively low. For each infringement offence, a lower level

of penalty is applicable to landlords with five or fewer tenancies, upon whom the financial impact of a fine or fee may be greater.

19. For these reasons, we consider that the infringement offences in the Bill appear to be justified.

Pecuniary penalties

20. Clause 55 of the Bill introduces new ss 109B to 109E in the principal Act. These sections provide the Tribunal with the discretion to make a pecuniary penalty order if it is satisfied that a landlord with six or more tenancies has intentionally committed an unlawful act under one of the following provisions of the principal Act:
- a. sections 45(1A) or 66I(4) (landlord's responsibilities in relation to cleanliness, maintenance, smoke alarms, healthy homes standards, and building health and safety requirements);
 - b. sections 45(1AB) or 66I(5) (landlord's responsibilities in relation to contaminated premises);
 - c. section 54(3) (retaliatory notice of termination);
 - d. section 60AA (acting to terminate a tenancy without grounds); and
 - e. section 137(2) (contracting to contravene or evade the provisions of the Act).
21. Under proposed new s 109C, the maximum amount of pecuniary penalty is \$50,000. Since this penalty significantly exceeds the fines that can be imposed for conduct that is characterised as criminal under the Act, we have considered whether it could offend s 25 of the Bill of Rights Act to address the relevant conduct in a way that may avoid its criminal procedure safeguards.³
22. In considering whether the pecuniary penalty provisions are justified under s 5 of the Bill of Rights Act we note that pecuniary penalty orders:
- a. aim to deter non-compliance with key obligations of the scheme, including to provide rental premises in a condition that is not detrimental to the health and safety of tenants;
 - b. can only be made in respect of intentional conduct and are likely to be reserved for more serious offending; and
 - c. can only be made in respect of landlords with six or more tenancies, whose actions have the potential to affect a wider proportion of the rental market and who are likely to receive substantial rental income.
23. On this basis, we are satisfied that the civil pecuniary penalty provisions are not in breach of s 25 of the Bill of Rights Act.

³ In this respect we note the New Zealand Law Commission's 2014 observation that it is not yet clear whether the criminal procedural safeguards in the Bill of Rights Act, which apply to "offences", also apply to pecuniary penalties: NZLC R133: *Pecuniary Penalties*, para 6.5.

Conclusion

24. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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