



Briefing

Reform of the Residential Tenancies Act 1986 – Further minor policy issues for drafting			
Date:	17 January 2020	Security level:	In Confidence
Priority:	High	Report number:	BRF19/20010532

Action sought		
	Action sought	Deadline
Hon Kris Faafoi Associate Minister of Housing (Public Housing)	Agree to the minor policy issues set out in this briefing for inclusion in the Bill amending the Residential Tenancies Act 1986.	By 22 January 2020 to allow Parliamentary Counsel Office to finalise a draft Bill for circulation to your Ministerial colleagues on 27 January 2020

Contact for discussion			
Name	Position	Telephone	1 st contact
Claire Leadbetter	Manager, Tenures and Housing Quality	04 832 2431	s 9(2)(a) ✓
Susan O'Neill	Senior Policy Advisor	04 832 2571	

Other agencies consulted
Ministry of Business, Innovation and Employment (Housing and Tenancy Services), Ministry of Justice (Offences and Penalties, Human Rights, Courts and Tribunals), the Principal Tenancy Adjudicator and the Office of the Privacy Commissioner

Minister's office to complete

- Noted
- Seen
- Approved
- Needs change
- Not seen by Minister
- Overtaken by events
- Declined
- Referred to (specify)

Comments
 I'm not sure if a system exists but certainly does the L/Lords must retain be uploaded for ease of access to a database? or see if good practice relies on them being forthcoming with their paperwork?

Date returned to MHUD:

22/01/20

Note: Minister has a discussion point for Mondays officials

Melting. Cheesha



Briefing

Reform of the Residential Tenancies Act 1986 – Minor policy issues for drafting

For: Hon Kris Faafoi, Associate Minister of Housing (Public Housing)
 Date: 17 January 2020 Security level: In Confidence
 Priority: High Report number: BRF19/20010532

Purpose

1. This briefing seeks your agreement to various minor policy issues to be included in the amendments to the Residential Tenancies Act 1986 (RTA), which you are aiming to introduce by the week commencing 17 February 2020.

Executive Summary

2. Cabinet agreed to amend the RTA to improve fairness in the RTA through improved security of tenure and strengthened enforcement [SWC-19-MIN-0142]. Cabinet also agreed to amendments around minor fittings, installing fibre broadband in rental properties, setting and increasing rent, and access to justice [SWC-19-MIN-0146].
3. We have been working with Parliamentary Counsel Office (PCO) on drafting the Bill. Through the drafting process, a number of minor policy issues have arisen. Cabinet has authorised you as the Associate Minister of Housing (Public Housing) to make minor policy decisions. You have previously approved various policy decisions in this process [BRF19/20110498 refers]. Cabinet has also authorised you as the Associate Minister of Housing (Public Housing) to decide on the additional documents that landlords will be required to retain and produce to the Regulator on request [SWC-19-MIN-0142].
4. Cabinet has agreed to clarify the Tenancy Tribunal's general power to suppress identifying details from decisions if this is in the interests of the parties and the public interest. We propose the Tenancy Tribunal can redact sensitive information broader than just names and identifying details (for example sensitive evidence about mental health or domestic violence, or commercially sensitive information). This is part of the general clarification of suppression powers. In addition, one possible interpretation of the current section 95 is that it already provides for this (although, this part of section 95 is generally seen as difficult to interpret).
5. Cabinet agreed that landlords be required to retain an expanded range of documents, including rent and bond records, and other documents required to demonstrate compliance with their general responsibilities and obligations under the RTA. We propose a range of new documents that will assist the Regulator in determining where there has been a breach, and in some cases, whether a breach was intentional or inadvertent. The documents include matters relating to the tenancy, such as rent records, and matters relating to the premises, such as records of building work.
6. In our earlier advice to you, we identified that some of the proposed infringement offences are not suitable as infringement offences [BRF19/20110498 refers]. We have identified an additional proposed infringement offence that should not be an infringement offence. We propose that the breach of the obligation on a landlord to not invite or encourage bids for rent should not be an infringement offence. This behaviour requires an assessment of the landlord's state of mind, which is not appropriate for an infringement offence.

is there an effort in a practical way of doing this for landlords

OK

Jun 25
2013

- 7. In our previous advice [BRF19/20110498], we recommended that s112(1) of the RTA be amended to increase the maximum penalty for the offence of contempt of proceedings at the Tenancy Tribunal from \$2,000 to \$3,600. Further discussion with the Offences and Penalties team from the Ministry of Justice has revealed that such an increase may not be needed or desirable. We propose keeping the maximum penalty at the current level of \$2,000.
- 8. Cabinet agreed to establish a new infringement regime to allow the Regulator to issue infringement notices for strict liability offences [SWC-19-MIN-0142]. We recommend introducing regulation-making powers to specify offences in the RTA and offences in regulations under the RTA that are infringement offences, as well as the fine or fee to be imposed. We propose a maximum fine of \$750 and a maximum fee of \$500. This maintains relativity with the current power in the RTA to make criminal offences by regulation, with a maximum penalty of \$1,000.

Recommended actions

9. It is recommended that you:

- a) **Note** that Cabinet has agreed to reform the Residential Tenancies Act 1986 and a Bill to implement the reform is currently being drafted.
- b) **Note** that Cabinet authorised you to make minor policy decisions on issues arising during the drafting process [SWC-19-MIN-0142].
- c) **Note** that Cabinet has agreed to clarify the Tenancy Tribunal's power to suppress identifying details from decisions.
- d) **Agree** to clarify that the Tenancy Tribunal can also suppress other information it sees fit if this is in the interests of the parties and the public interest, for example sensitive evidence and commercially sensitive information.
- e) **Note** that the Residential Tenancies Act 1986 requires landlords to retain certain documents, and produce them on request to the Regulator.
- f) **Note** that Cabinet agreed that landlords be required to retain an expanded range of documents, including rent and bond records, and other documents required to demonstrate compliance with their general responsibilities and obligations under the Residential Tenancies Act 1986, and that Cabinet delegated decision-making power for determining those documents to the Associate Minister of Housing (Public Housing).
- g) **Agree** that landlords be required to retain and produce to the Regulator on request the following documents:
 - i. Rent records and bond records retained under section 30 of the Residential Tenancies Act 1986;
 - ii. Advertisements offering the premises for rent prior to the tenancy;
 - iii. Any notices or letters, emails, or other forms of correspondence between a landlord or a person acting on their behalf and a prospective tenant for a tenancy;
 - iv. Records of any building work and electrical work carried out at the premises. This supplements the current requirement in section 123A(1)(c) to retain records of any maintenance or repair work carried out at the premises;
 - v. Reports or assessments by a professional of work required, or carried out, at the premises which relates to any part of the landlord's compliance with section 45 or section 661 of the Residential Tenancies Act 1986, which set out the general

Noted

Noted

Noted

Agree / Disagree

Noted

Discuss.

Noted

obligations of landlords (including boarding house landlords) under Agree / Disagree the Act.

h) **Agree** that building work be defined in accordance with the definition set out in the Building Act 2004. Agree / Disagree

i) **Note** that we will include a definition of electrical work, with reference to relevant legislation. Noted

j) **Agree** that the obligation in the Residential Tenancies Act 1986 on a landlord to not invite or encourage bids for rent is not to be subject to an infringement offence. Agree / Disagree

k) **Note** that you have previously agreed to increase the maximum penalty for the offence of contempt of proceedings at the Tenancy Tribunal from \$2,000 to \$3,600. Noted

l) **Note** that further discussions with the Ministry of Justice have indicated that it is not appropriate or proportionate to increase the maximum penalty for the offence of contempt of proceedings. Noted

m) **Agree** to rescind the previous decision to increase the maximum penalty for the offence of contempt of proceedings under the Residential Tenancies Act 1986. Agree / Disagree

n) **Agree** to new proposals to empower the making of regulations in relation to the proposed infringement regime as follows:

- i. Specify offences in the Residential Tenancies Act 1986 that are infringement offences, and the maximum penalties under the infringement regime.
- ii. Specify offences in regulations under the Residential Tenancies Act 1986 that are infringement offences, and the maximum penalties under the infringement regime.

Agree / Disagree

o) **Agree** to specifying in the Residential Tenancies Act 1986 the following proposed maximum penalties for infringement offences established by regulation:

- i. The fine and fee for infringement offences in the Act prescribed by regulation to not exceed \$750 and \$500 respectively.
- ii. The fine and fee for infringement offences prescribed by regulation (offence not already in the Act) to not exceed \$750 and \$500 respectively.

Agree / Disagree



Claire Leadbetter
Manager, Tenures and Housing Quality

17/1/20



Hon Kris Faafoi
Associate Minister of Housing (Public Housing)

20/1/20

Cabinet has agreed to amendments to the Residential Tenancies Act 1986

10. On 30 September 2019, Cabinet agreed to amend the RTA to improve security of tenure and to strengthen enforcement [SWC-19-MIN-0142]. On 18 October 2019, Cabinet agreed to further amendments around minor fittings, installing fibre broadband in rental properties, setting and increasing rent, and access to justice [SWC-19-MIN-0146].
11. We have been working with PCO on drafting the Bill. You have instructed that the Bill have its First Reading in the first sitting block of 2020. We are aiming to have the Bill approved by the Cabinet Legislation Committee (LEG) on 11 February 2020.
12. Through the drafting process, a number of minor policy issues have arisen. Cabinet has authorised you as the Associate Minister of Housing (Public Housing) to make minor policy decisions on issues arising in the drafting process [SWC-19-MIN-0142]. You have previously approved various policy decisions in this process [BRF19/20110498 refers].

Policy proposals

We have identified various minor policy issues for your decision

13. Through our continuing discussions with PCO and other agencies, we have identified various minor policy issues for your decision. These decisions are:
 - a. Optimising privacy and access to justice – suppression of details in Tenancy Tribunal proceedings and decision
 - b. Agreeing to the additional documents that landlords must retain and produce to the Regulator on request
 - c. Removing a breach of the obligation on a landlord to not invite or encourage bids for rent as an infringement offence
 - d. Rescinding your previous decision to increase fine for the offence of contempt of proceedings
 - e. Setting maximum penalties for infringement offences that are prescribed by regulation.

14.

s 9(2)(g)(i)

s 9(2)(h)

s 9(2)(g)(i)

Optimising privacy and access to justice

15. Cabinet has agreed to clarify the Tenancy Tribunal's general power to suppress identifying details from decisions if this is in the interests of the parties and the public interest [SWC-19-MIN-0146]. The current section 95 of the Act can be interpreted as allowing for anonymisation but Tenancy Adjudicators and the public are unclear about how and when this can apply.
16. In the course of drafting the Bill, we have identified a change to optimise the proposals. We propose designing the new section that will give effect to this proposal in a way that ensures the Tenancy Tribunal can, after having due regard to the interests of the parties and the public interest, redact sensitive information broader than just names and identifying details (for example sensitive evidence about mental health or domestic violence, or commercially sensitive information). This is part of the general clarification of suppression powers, as one possible interpretation of the current section 95 is that it already provides for

this. This also ensures that the Tenancy Tribunal's suppression powers align with the powers of comparable Tribunals.¹

17. Cabinet has also agreed to introduce a new default position that identifying details will be removed from Tenancy Tribunal decisions in the following circumstances:
 - a. where a party has wholly or substantially successfully enforced their rights or wholly or substantially defended a case; and
 - b. that party makes an application or request for identifying details to be removed; and
 - c. the Tribunal does not consider that any specific attributes of the case or the conduct on the party seeking anonymisation mean there would be public interest in the identifying details being published.
18. The Ministry of Justice feedback during the agency consultation phase on the Bill was that the default position applying to both landlords and tenants does not allow the Tribunal enough discretion to make decisions on a case-by-case basis and could result in unfair outcomes. The Ministry of Justice feedback included a recommendation that this should be narrowed to only apply to tenants. This would mean that the new default position that parties can get suppression if they are successful would not be available to landlords, but the general powers to suppress if this is in the interests of the parties and the public interest would.
19. The proposal is available to both parties in order to achieve fairness and balance in the tenancy relationship. The problem definition of publishing of names leading to adverse consequences and creating a disincentive to parties enforcing their rights primarily applies to tenants currently. However, this could be due to current market conditions and should market conditions change, landlords may face similar issues. In order to future proof legislation, the policy is designed to account for changes in market conditions.

Approving the documents that landlords must retain and produce to the Regulator

Background to the issue

20. Section 123A of the RTA currently provides that a landlord must retain certain documents during, and for 12 months after the termination of the tenancy, and produce the documents to the Regulator (currently the Ministry of Business, Innovation and Employment) on demand. This provision reflects that landlords are running a business and they need to keep records and behave accordingly.
21. Cabinet:
 - a. agreed to broaden the general functions and powers of the Chief Executive of the department acting as Regulator under the Act to include monitoring and assessing compliance of landlords with the RTA.
 - b. agreed that landlords be required to retain an expanded range of documents, including rent and bond records, and other documents required to demonstrate compliance with their general responsibilities and obligations under the RTA.
 - c. authorised you as the Associate Minister of Housing (Public Housing) to decide on the specific documents that will be required [SWC-19-MIN-0142 refers].
22. The Healthy Homes Guarantee Act 2017 gave the Regulator the function to monitor and assess compliance of landlords with the healthy home standards. But the Regulator did not have that function in relation to compliance with the RTA generally. The Bill includes a new

¹ For example, the Immigration and Protection Tribunal, Employment Relations Authority and Canterbury Earthquakes Insurance Tribunal.

function of monitoring and assessing compliance of landlords with the RTA. The types of documents that must be retained and produced under section 123A should reflect that new broader function.

23. Section 123A was included in the RTA in 2016, and the Tenancy Compliance and Investigation Team (TCIT) was established by the Regulator at the same time. Since its establishment, TCIT has learnt about the types of documentation that will assist in identifying whether a breach has occurred, the circumstances that lead to that breach, and the most appropriate course of compliance action to take.

24. s 9(2)(f)(iv)

25. The additional documents that it is proposed landlords be required to retain and provide to the Regulator upon request are set out in Table 1 below. Landlords will not be required to create new documents, but will be required to provide these where they have access to them.

26. s 9(2)(f)(iv)

We propose the following additional documents be retained

Documents		Discussion
1.	Rent records and bond records retained under section 30	Section 30 provides that landlords must keep rent and bond records for 7 years, but does not provide that the Regulator may request those records. If they are included in s123A, the Regulator will be able to request the documents during a tenancy and up to 12 months following the end of the tenancy.
2.	Advertisements offering the premises for rent prior to the tenancy	To determine if the landlord complied with the requirement in the Bill to advertise a tenancy with a price.
3.	Any notices or letters, emails, or other forms of correspondence between a landlord (or a person acting on their behalf) and a prospective tenant for a tenancy	To determine if the landlord invited or encouraged the tenant to bid for rent (a breach of the Bill). There is an existing definition of prospective tenant in the Act. It is not as wide as every person who looks at a premises. A prospective tenant is "a person to whom any other person has offered to grant a tenancy, or with whom any other person has entered into negotiations for the granting of a tenancy to that person". Using this definition limits the breadth of the requirement, reducing the compliance burden for landlords.

	Documents	Discussion
4.	<p>Amend the current requirement to retain "records of any maintenance or repair work carried out at the premises by or for the landlord during the tenancy (or copies)" to "records of any maintenance or repair work, building work or electrical work carried out at the premises by or for the landlord during the tenancy (or copies)".</p> <p>Define "building work" as defined in the Building Act 2004.² See definition below.</p> <p>Define "electrical work" with reference to relevant legislation.</p>	<p>Maintenance and repair work may not cover the broad range of work undertaken at a premises, for example, new construction or alterations.</p> <p>The landlord has a responsibility under the Act to comply with all requirements in respect of buildings, health and safety under any enactment as far as they apply to the premises (s45(1)(c)). By requesting these types of documents, the Regulator will be able to determine if the landlord is meeting that obligation in s45.</p>
5.	<p>Reports or assessments by a professional of work required, or carried out, at the premises which relates to any part of the landlord's compliance with section 45 or section 66I of the RTA.</p>	<p>This complements the requirement to retain records of repair, maintenance or building work. These documents may provide evidence of a tenant's complaint. They will also indicate if the landlord was advised of issues with the premises, that the landlord chose not to address. This indicates the intention of the landlord in breaching the Act, and will assist the regulator in deciding enforcement action.</p> <p>The work is limited to that required to comply with s45 and s66I, for example:</p> <ul style="list-style-type: none"> • providing and maintaining the premises in a reasonable state of repair – s45(1)(b)/s66I(1)(b) • complying with requirements in respect of smoke alarms – s45(1)(ba)/s66I(1)(ba)

² Building work—

(a) means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and
(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the [building code](#); and

(b) includes sitework; and

(c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and

(d) in [Part 4](#), and the definition in this section of supervise, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of [Part 4](#)

	Documents	Discussion
		<ul style="list-style-type: none"> • complying with legal requirements regarding buildings, health and safety – s45(1)(c)/s66I(1)(c).

Removing an infringement offence

27. Cabinet agreed to establish a new infringement regime to allow the Regulator to issue infringement notices for lower-level breaches [SWC-19-MIN-0142]. Infringement offences fall under the criminal jurisdiction, but no conviction is entered. The Regulator can issue an infringement notice without applying to the Tenancy Tribunal. The penalty is paid to the Crown. The proposed infringement offences were included in the appendix to the Cabinet paper *Improving Fairness in the Act* [SWC-19-SUB-0142 refers].
28. According to the Legislation Design and Advisory Committee's Legislation Guidelines, infringement offences are appropriate where the conduct involves straightforward issues of facts than can be easily identified by an enforcement officer. Infringement offences are generally not appropriate for mens rea offences (i.e. offences that require a mental element, such as intent or recklessness), cases that involve complex factual situations, or conduct that may warrant more serious consequences.
29. In our advice to you on 13 December 2019, we identified that some of the proposed infringement offences are not suitable as infringement offences [BRF19/20110498 refers]. At that time, we were still discussing whether a further breach should be an infringement offence.
30. We propose that the breach of the obligation on a landlord to not invite or encourage bids for rent is not an infringement offence. In order to decide if there is a breach, there must be a value judgement on whether the behaviour amounts to "inviting or encouraging". While in some cases this will be clear-cut, in others it will be less certain. Given there is a judgement required, we consider this behaviour is not appropriate as an infringement offence. It will still be an unlawful act, and subject to exemplary damages.

Rescinding previous decision to increase fine for an offence

31. In the previous briefing *Minor policy issues for drafting* [BRF19/20110498], we recommended that s112(1) of the RTA be amended to increase the maximum penalty for the offence of contempt of proceedings at the Tenancy Tribunal from \$2,000 to \$3,600.
32. Further discussion with the Offences and Penalties team from the Ministry of Justice has revealed that such an increase may not be needed or desirable. It would be inconsistent with penalties in other comparable legislation and regimes. The current penalty for contempt (\$2,000) under the RTA is sufficient in reflecting the seriousness of the conduct and remains up to date.
33. We recommend that you rescind this previous decision to increase the maximum penalty for the offence of contempt under the RTA.

Setting maximum penalties for infringement offences prescribed by regulation

34. Cabinet agreed to establish a new infringement regime to allow the Regulator to issue infringement notices for strict liability offences [SWC-19-MIN-0142].
35. Providing for powers to establish new infringement offences by regulation is a standard feature of infringement regimes. We recommend introducing regulation-making powers to specify offences in the RTA and offences in regulations under the RTA that are infringement offences, as well as the fine or fee to be imposed. The ability to specify new infringement offences helps to 'future-proof' the RTA and is consistent with the current provision in the RTA to be able to create criminal offences by regulation.

36. If fees³ and maximum fines⁴ are to be set by regulations, the empowering provision should specify the upper limit for the fees and maximum fines. The RTA currently provides that criminal offences created by regulation will be subject to a maximum fine of \$1,000. It is appropriate to retain relativity with this, and have a maximum infringement fine that is less than the offence fine, and to have a maximum infringement fee that is less than the maximum infringement fine.
37. For infringement offences prescribed by regulation both where there is an existing offence in the Act, and when there is not, we propose:
 - a. a maximum fine of \$750
 - b. a maximum fee of \$500.

Consultation

38. This briefing has been prepared in consultation with the Ministry of Business, Innovation and Employment, and following discussions with Parliamentary Counsel Office. We have also consulted on specific issues with the Ministry of Justice (Offences and Penalties, Human Rights, Courts and Tribunals), the Principal Tenancy Adjudicator and the Office of the Privacy Commissioner.

Next steps

39. If you agree to the proposed amendments in the briefing, we will issue drafting instructions to PCO to implement the amendments in the Bill.
40. You will receive a draft Cabinet Legislation Committee paper and draft of the Bill in time for consultation with your colleagues, to commence on 27 January 2020.

³ Amount of the infringement fee charged by the Regulator under an infringement notice.

⁴ Maximum amount the District Court can impose, on application by the Regulator in relation to an infringement offence.