



Human Rights Commission  
Te Kāhui Tika Tangata

# Submission on Residential Tenancies Amendment Bill (No. 2)

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**Submission of the Human Rights Commission on the Residential Tenancies  
Amendment Bill (No. 2)**

## Introduction

1. The Human Rights Commission ('the Commission') welcomes the opportunity to provide the Local Government and Environment Committee ('the Committee') with a submission on the Residential Tenancies Amendment Bill (No. 2) ("the Bill")
2. The Commission has focused its submission on the following aspects of the Bill:
  - Proposed amendments that would make tenants liable for all or part of any damage caused to rental premises as a result of carelessness or negligence.
  - The provision of additional powers and rights to landlords in respect of rental premises contaminated by methamphetamine.
3. The Commission has a number of reservations about the Bill. In summary:
  - a. The amendments introducing tenant liability for careless damage may drive further rent increases. The Commission considers that the enactment of the Bill in its current form will result in imbalanced legislation which places a higher duty of care burden on tenants as compared to landlords. This could be rectified by amending the Bill to incorporate the provisions of the Healthy Homes Guarantee Bill (No 2) and taking other steps to introduce a more reciprocal legislative framework governing private rental premises.
  - b. The Commission also considers that aspects of Part 2 of the Bill, regarding methamphetamine contamination, could be regarded as inconsistent with fundamental international human rights standards. We recommend that Part 2 is not enacted in its current form. Additional safeguards are required to protect the rights of tenants and to ensure that termination processes are not inappropriately invoked.

## Tenant liability for careless damage

4. Clause 7 of the Bill introduces new sections 49A-49E, which set out the framework for a tenant's liability for careless damage.
5. It should be noted that tenants are currently responsible for damage to their landlord's property caused by carelessness. The Residential Tenancies Act ("the Act") provides

that tenants have a responsibility to not intentionally or carelessly damage, or permit any other person to damage, the rental premises.<sup>1</sup> The Act also provides that tenants are responsible for careless damage caused by another person in circumstances where the tenant has given that person permission to be in the rental premises.<sup>2</sup>

6. The Act does not expressly provide that tenant responsibility for careless damage translates into financial liability to rectify any damage caused. A 2016 decision of the Court of Appeal<sup>3</sup>, referred to in the Explanatory Note, has confirmed that this is the case.
7. It is notable that the Bill retains the statutory presumption that tenants are not liable for any costs or indemnity to the landlords for damage of the rental property<sup>4</sup>. In addition, the Bill does not require tenants to provide landlords with a full indemnity for careless damage, instead limiting liability to a maximum of 4 week's rent or the landlord's insurance excess, whichever is the lesser. It does, however, require that tenants are liable for full payment of any damage:
  - caused intentionally, or
  - caused by any action or omission by themselves, or another person whom the tenant has given permission to be in the rental premises, that constitutes an imprisonable offence (a very broad range of offences)
  - required to cover any insurance money that would have been recoverable by the landlord, but for the nature of the tenant's act or omission that led to the damage.
8. The Bill also introduces an obligation upon landlords to provide tenants with a statement of their insurance cover (or lack thereof) upon request.<sup>5</sup> However, provision of this statement is not automatic. It is up to tenants to make such a request.

#### *Human rights and policy considerations*

9. The policy rationale of clause 7 of the Bill is twofold. It is designed to ensure that landlords are not burdened with covering all damage arising from a tenant's carelessness, and secondly it seeks to incentivise tenants to take due care of the rental premises. The Regulatory Impact Statement (RIS) to the Bill states that "*the balance of liabilities has now tipped too far in favour of tenants, who are now largely immune from*

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<sup>1</sup> Residential Tenancies Act, Section 40(2)(a)

<sup>2</sup> Residential Tenancies Act, Section 41(2)

<sup>3</sup> *Holler v Osaki* [2016] NZCA 130

<sup>4</sup> Clause 7, new s 49A

<sup>5</sup> Clause 6, new s 45(2B)

*the cost of damage they cause. There is a balance to be struck between encouraging tenants to take a high degree of care and not exposing them to excessive risk and cost”.*<sup>6</sup>

10. However, the RIS goes on to note that these reforms may lead to increased rents for tenants due to landlords passing on the costs of increased insurance premiums.<sup>7</sup>

11. This may lead to further affordability pressures in a rental market currently skewed against tenants, most acutely in larger cities. Tenant households already face significant affordability barriers. The 2014 Household Economic Survey reported that 44% of tenant households spend more than 25% of their income on housing and 22% spend more than 40% of household income on housing.<sup>8</sup>

12. Affordability is a key component of the right to adequate housing under Article 11 of the International Covenant on Economic Social and Cultural Rights (ICESCR). The UN Committee on Economic Social and Cultural Rights<sup>9</sup> has described this as follows:

*Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels.*<sup>10</sup>

13. The RIS does not explore the impact of the Bill on housing affordability in the private rental market. Nor does the RIS attempt to quantify the actual opportunity cost of the current state of the law upon landlords. In the absence of available departmental analysis, the Commission encourages the Committee to carefully consider these factors.

14. In addition, the Commission encourages the Committee to consider whether this Bill will result in a balanced set of rights, responsibilities and duties between tenants and landlords. For example, in its current form the Act does not impose obligations or duties

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<sup>6</sup> <http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-tenant-liability-damage-residential-tenancy-properties.pdf> at para 5, page 4

<sup>7</sup> <http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-tenant-liability-damage-residential-tenancy-properties.pdf> at para 5, para 7, age 4

<sup>8</sup> Perry, Bryan. *Household Incomes in New Zealand; Trends in Indicators of Inequality and Hardship*. Wellington (NZ): Ministry of Social Development, 2014

<sup>9</sup> Note other international instruments such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities also contain provisions relevant to the right to housing.

<sup>10</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23, para 8(c) available at: <http://www.refworld.org/docid/47a7079a1.html> [accessed 21 August 2017]

of care upon landlords to ensure that the residence is insulated, to take measures to reduce or eliminate damp or mould, or provide tenants with a heating source. Instead, it merely obliges landlords to “provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises.”<sup>11</sup>

15. The Commission considers that the Bill places financial liabilities upon tenants that are not adequately reciprocated, and its enactment would result in imbalanced legislation. In order to balance the legislative rights and responsibilities that exist between landlords and tenants, the Commission considers that other steps should be taken to ensure a more balanced statutory framework for governing the private rental market.
16. For example, at a minimum, the amendments to the Act proposed in the Healthy Homes Guarantee Bill (No 2) should be passed simultaneously with the passage of this Bill.
17. As the Committee will be aware, the Healthy Homes Guarantee Bill (No 2) introduces legal duties upon landlords<sup>12</sup> to meet heating, insulation, drainage and ventilation standards prescribed by the Ministry of Business, Innovation and Employment<sup>13</sup>. The adverse impact that the poor quality of much of New Zealand’s private rental stock has on health outcomes (particularly for children) has been extensively documented.
18. The right to adequate housing under ICESCR requires that housing is sufficient to protect inhabitants from cold, damp, heat, rain, wind or other threats to health and disease.<sup>14</sup> The Act currently does not provide any such requirement and accordingly falls below the human rights standards that New Zealand is committed to under ICESCR.
19. Furthermore, as business owners, landlords ought to ensure that the impact of their business does not compromise or infringe the human rights of others. The Commission draws the Committee’s attention to the UN Guiding Principles on Business and Human Rights<sup>15</sup> (UNGPs) as being of relevance to housing policy and legislation in this respect. Under the UNGPs, governments and private businesses have complementary obligations to respect and uphold human rights. For governments, this includes the enactment and enforcement of laws which require businesses to respect human rights<sup>16</sup>.

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<sup>11</sup> Residential Tenancies Act 1986 s 45(b)

<sup>12</sup> Healthy Homes Guarantee Bill (No 2), clause 5

<sup>13</sup> Ibid, clause 6

<sup>14</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23 at para 8(d)- the “Habitability” requirement

<sup>15</sup> UN Guiding Principles on Business and Human Rights

[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>16</sup> Ibid, Pillar 1, Principle 3(a)

For businesses, including small scale rental property operators, this includes ensuring that activities do not cause or contribute to adverse human rights consequences<sup>17</sup>.

**20. The Commission therefore recommends that the Committee:**

- a. Consider the impact of tenant liability for careless damage on affordability in the private rental market.**
- b. Amend the Bill to incorporate the amendments to the Residential Tenancies Act that are set out in the Healthy Homes Guarantee Bill (No 2) and take other steps to enact a more reciprocal private rental legislative framework.**

Methamphetamine contamination in residential premises

21. The other key aspect of the Bill is its introduction of provisions, under Part 2, that address methamphetamine use or manufacture in residential tenanted premises.

22. Part 2 of the Bill provides for one protective measure in favour of tenants, namely a specific responsibility upon landlords to not let a residence to a tenant in the event that the residence is yet to be decontaminated following a positive test for methamphetamine contamination<sup>18</sup>. It also provides for notice requirements which landlords must comply with when entering the premises for the purpose of undertaking such a test.<sup>19</sup>

23. In the event of a positive test for methamphetamine contamination, Part 2 of the Bill provides that<sup>20</sup>:

- where the tenant is not responsible, the landlord must abate their rent;
- the landlord may give a notice of termination with a minimum notice period of 7 days
- the tenant may give notice of termination with a minimum notice period of 2 days.

24. These provisions also apply to boarding facilities, with landlords able to terminate individual boarding tenancies, where any part of a room is found to be contaminated or where decontamination is required. Landlords may also terminate any or all of the

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<sup>17</sup> Ibid, Pillar 2, Principle 13(a)

<sup>18</sup> Clause 26

<sup>19</sup> Clause 27

<sup>20</sup> Clause 30, new s 59B

boarding tenancies within one boarding facility where any part of that facility is found to be contaminated<sup>21</sup>.

25. Part 2 of the Bill goes on to provide for regulations to be developed that, among other things, establish a maximum acceptable level of methamphetamine in a residence and set out testing requirements and procedures<sup>22</sup>. The commencement of Part 2 will be subject to these regulations being passed, as they will establish the “prescribed maximum acceptable level” required for a residential property to meet the legal definition of “methamphetamine contaminated” under the Bill.

26. The RIS provides that a new Standard for methamphetamine contamination is being developed (NZS 8510) and implies that this will indicate the “prescribed maximum acceptable level” for the purposes of the Bill (although this is not provided for in the Bill itself).

27. However, the Commission understands that there is currently no scientific consensus regarding what constitutes a safe level of methamphetamine contamination in a residential environment. We would therefore recommend that consultation with relevant sector stakeholders is undertaken prior to the regulations being issued.

#### *Human rights and policy considerations*

28. The Bill provides landlords with the power to unilaterally terminate a tenancy irrespective of whether the tenant was at fault, or contributed to the methamphetamine contamination. The landlord is not required to have regard to the tenant’s personal circumstances in doing so.

29. This aspect of the Bill appears to be inconsistent with the relevant ICESCR standards, which provides that:

*“...all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction.”<sup>23</sup>*

30. The Bill does not contain any due process requirements for termination on the grounds of methamphetamine contamination. Furthermore, the 7-day notice period provides

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<sup>21</sup> Clause 35

<sup>22</sup> Clause 37, new section 1

<sup>23</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23 at para 8(a)- the “security of tenure” requirement

tenants with very little time to seek a review of the decision or find alternative accommodation. The Bill therefore may lead to outcomes that are both potentially unjust and that subject tenants – irrespective of the existence of fault or contribution – to considerable hardship, possibly homelessness in some cases.

31. The Bill has given rise to considerable concern, both in terms of the potential injustices that may occur and its incoherency with Government drug treatment policy. The New Zealand Drug Foundation notes that the Bill contradicts the Government's National Drug Policy 2015-2020 and its Housing First policy, both of which recognise that secure housing is an important factor in limiting drug-related harm.<sup>24</sup>
32. The Bill also risks tenants being evicted for the actions of others over which they may have little or no control, including family members and abusive partners<sup>25</sup>.
33. It is notable that neither the RIS<sup>26</sup> nor the Ministry of Justice's Bill of Rights (BORA) advice on the Bill<sup>27</sup> consider in any substantive detail the human rights implications arising from termination of notice and eviction. The RIS points to the existing right of appeal under the Act in respect of a termination notice<sup>28</sup>. However, the very short notice period proposed is likely to fetter the ability of many tenants, particularly those in vulnerable circumstances, to utilise this avenue or seek legal advice and advocacy in doing so.
34. For the avoidance of doubt, the Commission is not advocating that tenants should be required to, or have the ability to, remain in methamphetamine contaminated homes. The Commission's concern is that those affected by the presence of methamphetamine in their homes, through no fault of their own, should not be subject to cost or disproportionate inconvenience through having to find, and fund, new accommodation at very short notice. Further, the Commission is concerned that the expedited notice provisions might provide an opportunity for landlords to circumvent usual rental termination requirements unless there are adequate procedural safeguards in place to ensure that the procedure is not utilised inappropriately and that affected tenants can quickly access review processes if required.

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<sup>24</sup> New Zealand Drug Foundation, Submission on the Residential Tenancies Amendment Bill No 2, p 2

<sup>25</sup> Ibid - See the examples set out on pages 2 and 5

<sup>26</sup> <http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-protection-tenants-landlords-effects-meth-contamination.pdf>

<sup>27</sup> <https://www.justice.govt.nz/assets/Documents/Publications/bora-residential-tenancies-amendment-bill-2.pdf>

<sup>28</sup> <http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-protection-tenants-landlords-effects-meth-contamination.pdf> at p 12 - see s 77(2)(f), Residential Tenancies Act 1986

**35. In summary, the Commission is very concerned about the human rights implications of this part of the Bill and recommends that it is not passed in its current form.**

**36. Further, the Commission recommends that the Committee:**

**a. Review the grounds of termination with a view to ensuring that:**

**(i) Tenants without fault or contribution are not subject to a termination of tenancy without their consent and provision of appropriate compensation.**

**(ii) The personal circumstances of tenants must be taken into account prior to any decision being made; including vulnerability indicators such as dependent children or victims of family violence.**

**b. Review the notice period for termination and ensure that affected tenants are provided with an adequate opportunity to appeal the decision and arrange advice and advocacy in doing so.**

**c. Amend clause 37 to provide that the issue of regulations under s 137C are subject to prior consultation with relevant sector stakeholders.**