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29 October 2018

Residential Tenancies Act Reform
Housing and Urban Branch
Building Resources Markets
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140

By email: RTAreform@mbie.govt.nz

Re: Reform of the Residential Tenancies Act 1986

1. Introduction

1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment's discussion document *Reform of the Residential Tenancies Act 1986* (discussion document).

1.2 The proposals outlined in the discussion document are intended to modernise the legislation, to improve the security and stability of tenure for residential tenants while protecting landlords' interests, and to improve the quality of rental properties, including boarding houses. A targeted review of the Residential Tenancies Act (RTA) is being undertaken and the discussion document sets out some proposed changes to "areas of the RTA that directly affect renters".[1] Feedback is sought principally from tenants and landlords, and the Law Society has therefore confined its feedback to specific relevant questions.

2. General comments

2.1 As the discussion document notes, "there have been a lot of small changes to the RTA over the past 30 years, but it's been a while since broader questions about the law were asked … [and] we need to make sure the law is modern and fit for purpose".[2]

2.2 It is therefore disappointing that some significant aspects of tenancy law – such as the composition, jurisdiction and procedure of the Tenancy Tribunal (Tribunal) – have been excluded from the current review. No information has been provided about the likely timeframe for the remaining aspects to be considered. Continuing the pattern of piecemeal reform is undesirable.

2.3 It would be timely to include a review of the Tribunal's composition, jurisdiction and procedure at this point, since the potential outcome of the changes under discussion is that there will be an increase in disputes brought to the Tribunal. There need to be adequate

1 *Reform of the Residential Tenancies Act 1986* (discussion document), at [10].
2 Note 1, at [8].

systems and processes for (the often unrepresented) litigants bringing disputes to the Tribunal.

3. Chapter 2: Modernising tenancy laws so tenants feel more at home

Q 2.1.1: If no-cause terminations are removed and a tenant displays anti-social behaviour (to the point where the landlord wants to end the tenancy) should the landlord be required to issue a notice to the tenant to improve their behaviour, before they can apply to the Tenancy Tribunal to end the tenancy? Please explain your answer.

3.1 The proposal is that the tenant should be informed of the cause or reason for the termination of the tenancy. There should be a procedure for the landlord to follow, to advise the tenant of the behaviour that is complained of. An obligation for a notice to be served, requiring an improvement to behaviour within a set period, may encourage resolution between the parties before the matter is referred to the Tribunal.

3.2 As the discussion document notes, landlords may be reluctant to use the current process in the Act for giving tenants written notice to remedy, because of fears about retaliatory behaviour.[3] It should also be noted that another likely factor influencing landlords' preference for using the current 'no cause' termination is the potential delay in having matters heard in the Tribunal. This is a factor that needs further consideration, as discussed above at [2.2] – [2.3].

Q 2.1.2: Do you think the examples listed [at paragraph 37 of the discussion document] cover the kinds of behaviour that would interfere with the reasonable peace, comfort, or privacy of any other tenants or neighbours? If not, what other examples would you include and why?

3.3 It is not clear from sections 40(2)(c) and 41(1) of the RTA what types of behaviour interfere with reasonable rights of peace, privacy and comfort of neighbours. It may assist landlords, tenants and the Tribunal to have examples of such behaviour provided.

3.4 The list of behaviours should be drafted to be illustrative rather than exhaustive, to ensure that other types of behaviour are not inadvertently excluded.

3.5 In addition to the examples suggested in the discussion document,[4] consideration could be given to including landlord concerns about retaliatory behaviour and/or antisocial behaviour directed against landlords and their families.

Q 2.1.3: What kinds of evidence could a landlord produce to prove a tenant was behaving in an anti-social way if affected people such as neighbours, did not want to speak out? (Examples could include photographs, letter, affidavit, audio recording, video recording).

4.6. Each dispute will involve different circumstances and the Tribunal should have the ability to consider a range of different types of evidence. However, it will be important not to encourage collection of evidence by methods that breach other laws (such as those relating to privacy and covert filming).

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3 At [33] and [34].

4 At [38].

Q 2.1.4: Landlords are currently required to give tenants 42 days' notice if they have sold the property with a requirement for vacant possession, want to move in, or need it for an employee or family member. What do you think the impact would be if this notice period was extended from 42 to 90 days?

4.7. The current 42-day notice period is well understood and routinely accommodated in agreements for sale and purchase, when determining the settlement date of the property where vacant possession is required. An extension from 42 to 90 days' notice would require settlement dates to be at least 90 days after the date of the agreement, to enable vacant possession to be given. This would create a delay in current settlement processes where settlement commonly occurs within one month to six weeks of unconditional date.

4.8. Another question is whether the move from 42 to 90 days' notice might have a domino effect, with social and economic impacts that have not yet been fully considered. For example, an owner may sell a tenanted property but will be buying a property that is not tenanted where the timeframes for approving a conditional clause in a purchase contract will be well short of 90 days. This could disadvantage vendors who have tenanted properties when putting them up for sale.

4.9. Most agreements for sale and purchase contain provisions for penalty interest for late settlement and the penalties would apply in the event vacant possession is not provided where a tenant remains in the property. The penalty rates usually exceed 12% calculated daily and a purchaser may also claim their own costs and damages. The cost to a vendor may be significant if vacant possession cannot be provided.

4.10. If the notice period is extended, the Law Society considers steps should be taken to educate stakeholders in the conveyancing industry, including lawyers, real estate agents, conveyancing professionals and investor associations, so that agreements for sale and purchase contain appropriate settlement dates.

Q 2.1.5: When a rental property is sold, should the new owner only be able to require vacant possession if they want to use the property for a purpose that can't reasonably be accommodated with the existing tenants in place? E.g. to live in the property themselves, for a family member to live in, to renovate or to convert to a commercial property. Please explain your answer.

4.11. Any exceptions to an applied rule must be carefully drafted to avoid uncertainty and potential disputes.

Q 2.1.6: Should a landlord be able to end a tenancy so they can advertise the property for sale with vacant possession? What impact do you think this would have on tenants?

4.12. If this proposal is implemented there should be clear timeframes within which a landlord must list the property for sale and a definition of "advertising for sale" as a trigger for a tenancy termination.

Q 2.1.7: Do you think that landlords should give tenants evidence about why they are terminating a tenancy? If yes, what sort of evidence should that be?

4.13. If there is a specified list of events that may be used by a landlord to terminate a tenancy, it would assist the parties to have examples of the types of evidence that could be used to support the landlord's position. As noted above, the list should be illustrative rather than exhaustive.

Q 2.1.8: Do you think that a false reason to terminate a tenancy should be considered an unlawful act and subject to penalties, such as those described in Section 5 (Enforcing Tenancy Laws)? If you answered yes, what kind of penalty do you think would be appropriate?

4.14. Enforcement and penalty provisions help to ensure compliance; without them, there may be little or no incentive to comply with the law. However, there is an issue about what is meant by a "false" reason when terminating a tenancy. A reason may be given in good faith but later found not to meet a standard that may be uncertain and a matter of subjective judgment. The legislative drafting will need to be certain and clear.

Q 2.1.12: What impact do you think removing 90 day 'no cause' terminations and only allowing terminations for the reasons in the table [at p15] would have?

4.15. The factors listed in the p15 table are described generally and some do not provide sufficient clarity. For example, it is not clear whether tenants would have the right to terminate a tenancy without giving the required notice, such as if the premises are unsafe.

4.16. These factors need to be considered further, to ensure all the possible exceptions are captured and are clearly defined to avoid potential disputes.

Q 2.1.17: Do you think tenants should have the right to renew, extend or modify their fixed-term tenancy (option 1), if their landlord has not raised any concerns with their behaviour or if specific termination provisions do not apply at the time the tenancy was due to be renewed? What effect do you think this would have on the relationship between landlords and tenants?

4.17. The Law Society understands that an "auto-renew" approach (where there is no tenant default) is used routinely in commercial leases and their renewal provisions are in favour of tenants. This approach (in that context) is widely understood and accepted and does provide some certainty for tenants at the time of renewal. This approach may also be useful in a residential tenancy context.

Q 2.1.19: What else could the Government do to make sure landlords feel comfortable offering periodic agreements, if they can only terminate for the reasons proposed?

4.18. If landlords may only terminate for the proposed reasons, it is essential the list of reasons permitting termination are clearly defined in the legislation and a wide range of family and financial circumstances are considered when determining the reasons. In addition, it would be helpful for landlords and tenants to be given guidance on what type of evidence should be provided by the landlord to support their position (see also the comments on question 2.1.7).

4.19. As the circumstances of each tenancy are different, and parties will have their own subjective interpretation of the legislation, there may be an increase in disputes referred to the Tribunal (as noted at [2.3] above). If so, the Tribunal will need to be adequately resourced to deal with the increased workload and thought should be given to creating expanded fast track or early resolution services to minimise any backlog.

Q 2.2.2: Do you think tenants should have more responsibilities for the property that they rent? Please explain your answer. Are there other things a tenant should or should not be able to do? Please explain your answer.

4.20. Both landlords' and tenants' responsibilities for looking after residential property are not articulated well (or at all regarding tenants' responsibility) in the existing legislation. The paucity of provisions in legislation governing the standard of care expected of tenants should be addressed. Better education is also required for both landlords and tenants, regarding their responsibilities for looking after residential property. Having greater transparency about both parties' responsibilities to take care of rental property should encourage better landlord/tenant relations.

4.21. If it is proposed that tenants should be responsible for maintenance of the property, care should be taken in drafting the obligations of the tenant and the standard to which the work must be completed. It would be difficult to draft a definitive list of acceptable works, as properties differ, and a general list may not consider specific aspects of the property (such as historic listing or building covenants registered on the title).

Q 2.2.3: Do you think a tenant's responsibilities to keep a property 'reasonably clean and tidy' make it clear what sort of behaviour a landlord can expect? If not, how could this be made clearer to a tenant?

4.22. The term "reasonably clean and tidy" may be open to a range of interpretations. To reduce the potential for disagreement, it would be helpful to provide guidelines about the accepted levels of tidiness and cleanliness, and examples (e.g. a prohibition on having derelict vehicles on the property, etc). The guidance should be illustrative rather than exhaustive, so that there is flexibility to reflect the individual nature of each property and tenancy relationship.

4.23. It is also noted that the standard form Residential Tenancy Form contains a premises condition report. The standard form could easily be modified to encourage the parties to use still and video images to confirm the condition. (A requirement to lodge a copy of the condition report, including any images, with the lodging of the Bond form and funds could be considered as a mechanism to encourage proper use of the Residential Tenancy Agreement and condition report.) The standard form could also be modified or expanded to include ongoing condition requirements or standards for the parties to negotiate and agree upon before entering into the tenancy.

4.24. It is further noted that the landlord's ability to require cleaning by the tenant during or at the end of the tenancy, for example a requirement to commercially clean carpets at termination, is commonly misunderstood and improperly incorporated into residential tenancy agreements. The Law Society suggests that any guidance should include a list of

acceptable and unacceptable requirements and these should also be incorporated in the standard form.

Q 2.2.8: Are there other things a landlord should be responsible for? If yes, please specify. Are there other things that a landlord should or should not be able to do? If yes, please specify.

4.25. It would be helpful for all obligations of the landlord, whether current or proposed, to be carefully defined. As each property is different, it may be difficult to produce an exact list of obligations but general categories with guidance/examples would be of assistance. A practical suggestion is to produce a succinct table of landlord and tenant obligations arising out of the amended RTA and to have that table attached to all residential tenancy agreements in future. (Such table could be formulated by regulation with any new requirements being updated into such a table.)

Q 2.2.9: Do you think the current obligations make it clear what tenants can expect from landlords in terms of maintenance? If you answered no, how could this be made clearer?

4.26. As discussed above (at [4.20], [4.25]), landlord obligations in relation to maintenance are commonly not well understood by tenants and landlords, and it would be helpful to have guidelines and examples set out in the legislation and to have a table of obligations (updated via regulations) attached to residential tenancy agreements in future.

4.27. However, many tenants and landlords do not read the legislation or investigate the extent of landlord obligations through other sources, and we suggest that the standard Residential Tenancy Agreement should be used as the primary educational tool and information resource for landlords and tenants. The standard Residential Tenancy Agreement includes a premises condition report for the parties to agree on and acknowledge the condition at the commencement of the tenancy. This report could be expanded to outline and agree on any ongoing maintenance to preserve the property throughout the tenancy.

Q 2.2.10: What other changes to landlords' responsibilities might be needed to modernise the law so it can appropriately respond to changing trends in the housing and rental markets?

4.28. As set out in previous responses, any obligation to be imposed on landlords must be carefully drafted to ensure that landlords clearly understand their responsibilities and to reduce the potential for disputes.

Q 2.2.12: How do you think landlords and tenants should share the responsibility for maintaining heating equipment, ventilation methods, and any other improvements installed under the Healthy Homes standards?

4.29. If tenants and landlords are to each have some responsibility for maintenance of various improvements, their respective obligations, the standard to which they must be performed, the timeframes and the penalties for non-compliance will need to be drafted so that both parties fully comprehend their obligations. Each party's obligations may also need to refer to any specific requirements relating to preserving manufacturers' warranties.

4.30. It must also be acknowledged that there may be various types of improvements at the property and each type may have its own specific maintenance requirements.

Q 2.2.13: If a landlord makes improvements to a property to make it warmer or drier, should tenants be obligated to use those improvements? Please explain your answer.

4.31. It would be appropriate to distinguish between types of improvement depending on their use and potential benefit, when determining whether tenants should have any obligation to use an improvement. For example, extraction of fumes or moisture may be necessary to preserve the condition of the property, while heating may be considered more a matter of the tenant's personal choice or decision reflecting individual financial circumstances.

Q 2.3.3: Should a tenant be under an obligation to reverse any modifications they make in rental properties, unless the landlord agrees to take on the modification? Please explain your answer.

4.32. If this proposal is accepted and tenants are obliged to reverse minor modifications not accepted by landlords, the process to be followed should be carefully drafted to ensure the parties understand their obligations at the time of making the modifications and at termination. The process should include guidance as to timeframes, standards of workmanship and penalties for non-compliance. (In addition, if this proposed reform proceeds, it will need to be made clear that it does not extend to structural modifications; similar to the commercial lease regime, tenants will not be able to carry out structural repairs or structural additions/alterations without the landlord's approval.)

4.33. It may be helpful in this context to consider the provisions relating to commercial leases. 'Tenant Works' (with a landlord consent process) and 'Make Good' provisions are commonplace in commercial leases. These provisions set out a procedure to be followed on termination, timeframes for completion, and the landlord's ability to remove and pass these costs on if the tenant fails to make good. It is further noted that the 'Make Good' provisions in the commercial lease context are widely accepted but can be a common source of dispute when determining if the works are in fact tenant's works and the standard to which the obligation to make good must be performed.

4.34. As discussed earlier, the standard Residential Tenancy Agreement contains a condition report which should be completed at the commencement of the tenancy. This report could be used to ascertain the condition at commencement and at termination to determine the scope of tenant modifications.

Q 2.3.4 Do you think that if the landlord doesn't wish to take on a modification at the end of a tenancy and the tenant doesn't reverse it, that this should be an unlawful act with a potential financial penalty? Please explain your answer.

4.35. As already discussed, it is important that any regime has enforcement and penalty provisions to ensure compliance. As noted in Q 2.3.3 above, in the commercial context there is an accepted procedure for make good following the tenant failing to remove and restore. The issues commonly encountered in the commercial lease context should be reflected upon when considering penalties.

Q 2.3.5: What are reasonable grounds to object to a tenant's request to make minor modifications to a rental property?

4.36. Any grounds to object must be carefully and concisely drafted to ensure certainty for landlords and tenants and to reduce the likelihood of disputes.

4.37. As noted in the comments on question 2.2.2, there may be aspects of the particular property that restrict or prevent even minor modifications. To avoid disputes or prevent requests for modification that cannot be considered due to the specific nature of the property, it is suggested that a procedure be followed at the commencement of the tenancy, to disclose (and perhaps agree) any modifications that may be acceptable and those that are prohibited or cannot be agreed to.

4.38. The standard Residential Tenancy Agreement and the condition report could be used to record such matters.

Q 2.3.7: Depending on the type of modification, should a landlord be able to require the tenant to use a suitability qualified trade person? If so, what modifications should, or should not, be subject to this requirement?

4.40. If this proposal is accepted, the concept of "suitability qualified trade person" must be clear enough to provide certainty for the landlord and tenant. One approach would be for the type of work required to be assessed against the accepted qualification requirements within each trade and requirements set out in other legislation such as the Building Act, with the schedule of exempt work being a good example to create a list or provide guidance on when the services of a qualified tradesperson must be used.

Q 2.3.8: What are sorts of modifications that could be included on a list of alterations tenants have a right to make without seeking their landlord's permission?

4.41. As noted above at [4.32], tenants should not be able to carry out structural repairs or structural additions/alterations without the landlord's approval (the same restriction applies to commercial leases).

Q 2.3.9: Do you think that the advantages, disadvantages and impacts of each option have been correctly identified?

4.42. It appears that many landlords and tenants are not familiar with the Act and that there are common misconceptions about the obligations of landlords and tenants (see earlier discussion at [4.25] – [4.26]). The standard Residential Tenancy Agreement is often the only document the parties read or use to regulate their relationship. With that in mind the agreement could be used to educate the parties regarding their respective obligations and also as a medium to agree on the condition, maintenance and modifications for the particular property.

Q 2.4.6: Would it be more effective if tenants instead gave reasons why they should be able to keep pets in rental properties?

4.43. If tenants are asked to establish why they should keep pets, there should be a clear procedure for how this information should be presented to the landlord and a process for

the landlord to grant or decline consent. It would be helpful to have guidance as to the circumstances where pets would not be acceptable.

Q 2.4.7: Do some premises have specific attributes that mean they are inappropriate for some types of pet? If so, what?

4.44. As noted in the discussion document,[5] some properties have specific attributes that mean they are not appropriate for pets. There may also be restrictions on the title to or use of the property, for example covenants, cross-lease leases or body corporate rules that prevent pets being homed at a property.

5. Chapter 3: Setting and Increasing Rent

Q 3.1.3 If you think something should be done about rental bidding, do you have a preference between option one or option two, or another option? Please explain.

5.40. The Law Society does not express a preference on this issue, but acknowledges that many people object to the concept of rental bidding in the current rental market and that it is appropriate to have a debate about the options. Any option that is accepted must be drafted so the process is certain and understood by landlords, tenants and property managers.

Q 3.2.2: Do you think the RTA should include guidance on what constitutes 'substantially exceeding market rent'? If you answered yes, what do you think constitutes 'substantially exceeding market rent'?

5.1. Since the objective of the RTA review is to give tenants and landlords certainty, the term "substantially exceeding market rent" should either be defined in the Act or guidance should be provided. A rent that "substantially exceeds market rent" will need to be objectively defined, in relation to current market rents for similar properties in the relevant local area.

Q 3.3.3: Should landlords be required to disclose how they will calculate future rent increases when a new tenancy is entered in to? Please explain.

5.2. In the context of commercial leases, the tenant and landlord commonly agree at the beginning of the tenancy how the future rental increases will be calculated. This provides certainty for both parties as to timing and method. There are also mechanisms in most commercial leases, particularly those documented on standard form leases, to follow if the calculation of proposed changes to rent is objected to and how the rent should be dealt with pending final determination.

5.3. While a direct application of these provisions may not be appropriate for residential tenancies, the approach could give some guidance for disclosure requirements and potential dispute process for residential tenancies.

[5] At [120] – [121].

6. Chapter 4: Boarding Houses

Q 4.1.1 Do you think tenants' and landlords' current responsibilities for boarding houses are fit for purpose? Please explain.

6.1. There appears to be little understanding by tenants and landlords about responsibilities relating to boarding houses, and confusion as to whether rules that apply to residential tenancies apply to boarding situations.

Q 4.1.4: Do you think a self-certification regime would lift the quality of boarding houses, and/or mean standards could be effectively enforced? Please explain.

6.1. If a self-certification scheme was to be introduced, the aspects of self-certification would need to be carefully drafted to ensure it is understood what is covered and the standard required for each aspect.

Q 4.1.5: Do you think self-certification should focus on: the physical property, the operator, and/or both? Please explain.

6.2. Self-certification could focus on both the physical property and the operator. Physical aspects of the property may include certifications as to heating, ventilation, fire egress etc. The operator could be asked to certify in respect of their own circumstances or performance over the previous year, for example by certifying that they have not received any adverse decisions in respect of their operations from a tribunal or regulatory body.

Q 4.1.8: Do you think a Warrant of Fitness would lift the quality of boarding houses and/or mean standards can be effectively enforced? Please explain.

6.3. A warrant of fitness for buildings in the commercial context is the building owner's annual statement (usually produced by external professionals) confirming that the specified systems in their compliance schedule have been maintained and checked for the previous twelve months. As the certificate is lodged with council, it is a public record and therefore is a useful tool to encourage, monitor and enforce compliance.

6.4. Warrants of fitness for boarding houses could be used in a similar way.

Q4.1.12: Is the definition of a boarding house understandable and does it capture all the premises you think should be treated differently because of the shared nature of the accommodation?

6.5. We note the definition of boarding house is not well understood. It also fails to capture the emergence of short-term and shared-space renting.

6.6. There is also confusion associated with the common understanding of the term "boarder" (being a person that rents a room in a shared space) as opposed to a "boarding house", where the definition requires actual occupation and intended occupation by at least six tenants at a time.

7. Chapter 5: Enforcing Tenancy Law – Ensuring the right penalties are enforced by the right authorities under the RTA

Q 5.1.6: Do you think it is appropriate for MBIE to carry out audits of a landlord or property manager?

7.1. The Law Society has no view on whether this is warranted in the context of residential tenancies but notes that an audit power would not be out of kilter with powers of other comparable agencies. The labour inspectorate, for example, has a range of investigative and enforcement powers under the Employment Relations Act 2000.

Q 5.1.7: Do you think it is appropriate for MBIE to be able to take a single case in respect of multiple breaches of the RTA?

7.2. There is merit in enabling MBIE to bring a case for pecuniary penalties in respect of multiple breaches by the same person/entity. This should apply to claims for pecuniary penalties only. Consolidation should remain the procedure where a claim is made by a landlord/tenant or by MBIE on behalf of a tenant.

7.3. It should also be possible for a defendant to apply for the claims to be severed if it is in the interests of justice. This would be consistent with the criminal law.[6] Severance may be appropriate where evidence in relation to one penalty claim would not be admissible as propensity evidence in relation to another.

Q 5.1.9: Do you consider it appropriate for MBIE to enter into enforceable undertakings with landlords?

7.4. Yes. This is consistent with other comparable regulatory regimes such as the Employment Relations Act 2000 and the Health and Safety at Work Act 2015.

Q 5.1.10: Do you think it is appropriate for MBIE to issue improvement notices? If so, in what situations?

7.5. Yes. This is consistent with other comparable regulatory regimes (as noted at question 5.1.9). Improvement notices would be appropriate where a person is failing or has failed to comply with any of their obligations under the Act. Examples may include use of premises for an unlawful purpose or a landlord failing to comply with maintenance obligations or the obligation to install smoke alarms (section 45). It should be possible for the recipient to object to the notice (see section 223E of the Employment Relations Act 2000).

[6] There is provision in section 138 of the Criminal Procedure Act 2011 for the prosecutor to propose that two or more charges be heard together, but the court may override the prosecutor's proposal either of its own motion or on the application of a defendant where it considers that doing so is "in the interests of justice".

Q 5.1.12: Do you agree MBIE should have the ability to issue infringement notices in circumstances where a breach of the RTA is straightforward to prove? and Q 5.1.14: What situations do you consider would be appropriate to issue an infringement notice in?

7.6. An infringement notice is criminal rather than civil and only appropriate where a person has committed an infringement offence. This is consistent with other comparable regulatory regimes (see question 5.1.9).

7.7. Based on the information currently available, the Law Society is not satisfied there is a need to create additional infringement offences under the Act. It is appropriate for the existing unlawful acts to continue to be dealt with as civil matters (other than where they constitute a separate existing offence).

Q 5.1.17: Do you think changing the name of exemplary damages to 'penalty' would better clarify the purpose of the regime?

Q 5.1.18: Do you think MBIE should have the ability to apply to the Tenancy Tribunal to award a penalty where unlawful acts have been committed? If yes what do you consider would be the appropriate maximum penalty MBIE should be able to apply for?

7.8. The Law Society considers that using the term 'exemplary damages' to describe both the amounts paid to the wronged party[7] and amounts paid to the Crown[8] is confusing.

7.9. It suggests that exemplary damages (which are claimed by a landlord/tenant, or by MBIE on behalf of a landlord/tenant) should be separated from the pecuniary penalty regime (where MBIE brings a claim as the organisation responsible for the general administration of the Act, and the penalty is paid to the Crown). As the discussion document notes, enabling MBIE to apply to the Tribunal for a penalty (instead of exemplary damages) where unlawful acts have been committed would "better incentivise landlords and property managers to proactively comply with their obligations under the Act".[9]

7.10. By way of comparison, under the Commerce Act 1986 the court can award exemplary damages (or other damages) on the application of a person who has suffered loss. Damages may be awarded even if a penalty has been awarded. However, the amount of exemplary damages should take into account any pecuniary penalty.

7.11. However, the Law Society recommends that the inclusion of exemplary damages in the residential tenancy context be subject to further review, for the following reasons:

- allowing for exemplary damages needs to be justified, and it is unclear if justification exists in relation to residential tenancies (given that these types of damages are not normally available in contractual claims);
- while the possibility of exemplary damages may make it more economically viable for tenants to bring claims against landlords, tenants recovering exemplary damages are (by definition) receiving a windfall; and

7 The landlord or tenant, pursuant to section 109(5) RTA.

8 Pursuant to section 109(6) RTA.

9 At [260].

- a penalty regime may be able to achieve the policy objective of holding landlords to account.

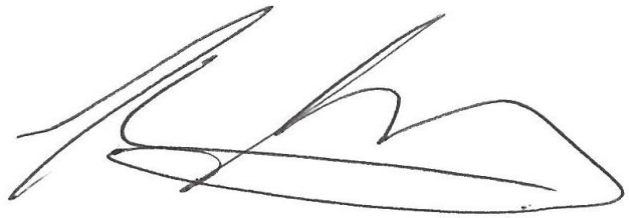
Q5.1.19: Do you think a landlord, tenant or MBIE should be able to take a case and seek exemplary damages after 12 months from when the act was committed?

7.12. No. While this is a shorter time frame than in some other enactments dealing with civil liability, there is an interest in claims relating to tenancies being dealt with promptly.

8. Conclusion

8.1. These comments have been prepared by the Law Society's Property Law Reform Panel and Civil Litigation and Tribunals Committee, and we hope MBIE finds the feedback helpful. If you have any questions or would like to discuss the comments, please contact the Law Society's Law Reform Manager, Vicky Stanbridge (Vicky.stanbridge@lawsociety.org.nz / (04) 463 2912) in the first instance.

Yours faithfully,



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