

2 May 2024

Hon Judith Collins KC, Attorney-General

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

### **Purpose**

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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 26068/5.4). 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 section 14 (freedom of expression) and section 25(c) (the right to be presumed innocent until proven guilty). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Residential Tenancies Act 1986 (the principal Act) to:
  - a. provide a landlord with the ability to terminate a periodic tenancy without cause by providing 90 days' written notice to the tenant;
  - b. reduce the notice period that a landlord may provide to the tenant to terminate a periodic tenancy on specified grounds to 42 days;
  - c. reduce the notice period that a tenant may provide to the landlord to terminate a periodic tenancy from 28 days to 21 days;
  - d. provide a tenant with the ability to apply in writing to the landlord for consent to keep a pet at the premises and to require a landlord to respond to the tenant's application (with the grounds for refusal if the request is refused, or to set out any reasonable conditions attached to the consent if the request is consented to);
  - e. provide the landlord with an ability to require a pet bond to be paid by the tenant where the landlord has consented to a pet being kept on the premises; and
  - f. create an infringement offence where a landlord requires the tenant to pay a pet bond for an amount that exceeds two months' rent, or in circumstances other than those permitted by the Bill.

5. The Bill also amends the principal Act to:
  - a. provide a landlord with the ability to prohibit a tenant from smoking at parts of the premises, except for outdoors or in any storage or parking outbuildings;
  - b. enable a tenant to give notice of their withdrawal from a tenancy where the tenant or their dependent has been a victim of family violence while residing at the premises;
  - c. provide that tenancy bonds (including pet bonds) may be lodged by the landlord online;
  - d. allow the Tenancy Tribunal (the Tribunal) to make some decisions on the papers; and
  - e. make consequential amendments to the Residential Tenancies (Termination for Physical Assault by Tenant and Withdrawal Following Family Violence) Regulations 2022.
6. The Bill also makes other consequential amendments to the principal Act, including to the jurisdiction of the Tribunal to consider disputes relating to these matters.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 14 - Freedom of expression**

7. 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.<sup>1</sup>
8. The Bill proposes to amend the principal Act to require a landlord to respond to a tenant in writing and include certain information, where the tenant makes a written request to the landlord for consent to keep a pet on the premises.<sup>2</sup> This prima facie engages section 14 of the Bill of Rights Act.
9. A provision which limits a protected right or freedom may be consistent with the Bill of Rights Act if the limitation is reasonable and justifiable in a free and democratic society under section 5 of that Act. The section 5 inquiry may be approached as follows:
  - a. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. If so, then:
    - i. Is the limit rationally connected with the objective?
    - ii. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?

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

<sup>2</sup> See clause 16 (new section 42E).

iii. Is the limit in due proportion to the importance of the objective?<sup>3</sup>

10. We consider that any limit on the freedom of expression contained within the Bill is justified under section 5 of the Bill of Rights Act because:
- a. the requirement for the landlord to respond in writing to the tenant's request for consent to keep a pet on the premises and to include certain information is rationally connected to the Bill's objective of providing a process for a tenant to apply to a landlord for consent to keep a pet at the premises;
  - b. the requirement in new section 42E limits section 14 no more than reasonably necessary. It requires that landlords provide the information, in their capacity as landlord, about their decision on the tenant's application and any reasonable conditions attaching to that decision (if the landlord consents to the pet being kept). It would be reasonable in a tenancy situation to expect that a landlord communicate information to the tenant that is relevant to the conditions of the tenancy, where a tenant has sought the landlord's consent;<sup>4</sup> and
  - c. the information that a landlord would be required to include in their response would be factual in nature and contains limited expressive value. We therefore consider the limit to be proportionate to the importance of the objective.

### **Section 25(c) - Right to be presumed innocent until proven guilty**

11. Section 25(c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires the Crown to prove an accused person's guilt beyond reasonable doubt.
12. The Bill proposes to create a new infringement offence where a landlord requires the tenant to pay a pet bond for an amount that is greater than two weeks' rent, or in circumstances other than those permitted by the Bill.<sup>5</sup>
13. Although infringement offences such as the one the Bill proposes to create do not result in a criminal conviction,<sup>6</sup> the Court of Appeal in *Henderson v Director of Land Transport New Zealand* held that the rights in sections 24 and 25 of the Bill of Rights Act apply to minor offences dealt with under the infringement notice regime.<sup>7</sup>
14. Strict liability offences such as this prima facie limit section 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by finding that certain facts occurred (which could be the physical elements of the offence and/or the existence of particular circumstances) without proof of any mental element. The accused is required

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<sup>3</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

<sup>4</sup> See, for example, section 42A of the principal Act, which similarly requires a landlord to respond to the tenant in writing following a request from the tenant for consent for a fixture, renovation, alteration or addition to the premises.

<sup>5</sup> See clause 8 (new section 18AA(6)). The Bill also re-enacts the existing infringement offence where a landlord requires payment of a general bond (a bond other than a pet bond) of more than four weeks' rent (see clause 7, replaced section 18). We consider the re-enacted offence to be a justified limit on s 25(c) of the Bill of Rights Act, for reasons similar to those outlined in paragraph 16 below.

<sup>6</sup> Section 375(1)(a) of the Criminal Procedure Act 2011.

<sup>7</sup> [2006] NZAR 629 (CA).

to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability.

15. Strict liability offences may nevertheless be justifiable limits on rights under section 5 of the Bill of Rights Act. They have found to be more likely to be justifiable where:
  - a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;
  - b. the defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
  - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
16. We consider that any limits that the proposed infringement offence might place on the right to be presumed innocent are justified because:
  - a. the infringement offence serves the important objective of promoting a landlord's compliance with the Bill;
  - b. we consider the maximum fine and infringement fee for breaching the infringement offence are reasonable, are likely to be commensurate with a landlord's ability to pay, and are necessary to ensure a landlord's compliance with the Bill. The total maximum fine which the Tribunal may impose in relation to a breach of the new infringement offence is \$3,000.00;<sup>8</sup>
  - c. common law defences of absence of fault will still be available to the defendant. The defendant will be best placed to demonstrate that they had reasonable excuse or that there was a total absence of fault; and
  - d. the context for the infringement offence is within a regulated environment designed to protect the rights of tenants of residential properties. The offence applies to landlords acting within this regulated environment.

## Conclusion

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17. 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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<sup>8</sup> See clause 38 (Schedule 1B amended).