NEW ZEALAND PROPERTY INVESTORS FEDERATION

SUBMISSION TO

Social Services Select Committee

on the

RESIDENTIAL TENANCIES BILL

Presented by :

NEW ZEALAND PROPERTY INVESTORS FEDERATION

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BACKGROUND

The organisation presenting these submissions is comprised of representatives from twelve Landlord and Property Investor Associations throughout New Zealand: namely, -

Wellington	Southland
Palmerston North	Otago
New Plymouth	South Canterbury
Rotorua	Canterbury
Gisborne	Marlborough
Hawkes Bay	Nelson

These submissions are made in the knowledge that the Minister of Housing has on several occasions, both publicly and in correspondence to us, made reference to the need for greater Private Sector involvement in Rental Housing, the necessity of giving encouragement to that type of investment.

Principally, we comment Section by Section, on those matters we have identified which will have the opposite effect to those laudible aims expressed above.

REFERENCES:

Our reference numbers exactly follow those of the Bill. For instance, 13/26 should be read as page 13, line 26, and may be followed by reference to Sec 12, subsec (1) (a)

TYPICAL PROFILE PRIVATE RESIDENTIAL LANDLORD

The typical Residential Landlord who will be affected and bound by this bill, will be a person who has owned and maintained his own home for some years, usually having commenced, as do most New Zealanders, by struggling to save the deposit and find the finance for his own first home, after having been a tenant

himself previously. Thus having a true appreciation of both Tenant and Landlord aspirations and needs. Having been highly motivated our typical landlord, has through diligence, persistance and shear hardwork, not only made the evolution from Tenant to Homeowner, but further there are a small proportion of Homeowners who become very highly motivated, "workalcholics" whom having become converts to "the property owning democracy" find an instinctive desire, as their circumstances improve, to acquire (usually with some instinct to provide for their old age) a second residential property which may be a holiday retreat, or perceived to be a residentially based investment and it is this perception, to which the majority of Federation Membership subscribe. A lot of Landlords indeed, only ever go as far as their "second property" however, it is not unusual to find that a proportion continue on this path and it is fair to say that whilst our membership comprises Landlords owning from 1 to 40 residential properties, the average will be 3 - 5 investment residential properties, it is of course indicative of the very nature of Landlords problems (we believe Government is aware of what these are) that as soon as a Residential Landlord becomes the proud owner of 6-9 such properties, he usually sells the lot and being loyal to the property owning ideal, invests the proceeds into Commercial/Industrial property where the returns are higher, the tenants more stable, the administration greatly reduced.

Therefore in sumary our "TYPICAL RESIDENTIAL LANDLORD" is the one most affected by this Bill

* Owns 3 - 5 Residential properties.
* Supervises the day to day administration either personally or through close contact with a Licenced Real Estate Office.
* Does most of the repairs,maintenance and upgrading himself.
* Likes to know personally and get on well with his tenant.
* Appreciates and understands (having been one himself) "Tenants" requirements.
* Is an achiever who works hard towards towards his goal.
* Is fiercly independant and resentful of petty restrictions that work to his and the tenants detriment.
* Is always trying to run a "tight ship", working often long and irregular hours himself, outside his main employment, to improve and maintain his accommodation for his tenants. Only to find, that through no fault of his own, that his commitment to provide sorely needed residential rental accommodation, is thwarted and frustrated by Agencies and events entirely beyond his control when he knows full well that, he is providing on average, better accommodation, at lesser administrative cost, than any other, local, or central government agency.

In closing, this "**typical profile**" we exhort you to consider as a "**classic example**" our **Prime Minister** who has on nationwide, written, oral and visual media stressed his acquisition for retirement purposes, of one residential unit where we understand him to say that he makes $36 p.a. clear. We submit that he is our "**prototype achiever par excellence**" and we commend his accumen in having invested in residential property, **OUTSIDE THE TERMS OF THIS BILL AS PROPOSED.**

1. THE REQUIREMENT FOR RESIDENTIAL TENANCY LEGISLATION

The provision of housing caters for a basic human need. It goes beyond the physical provision of shelter, extending into the satisfaction of emotional and sociological needs, such as privacy, social status, and security.

The provision of private sector rental accomodation is also a commercial operation. There is no fundamental conflict between the social and commercial factors involved, since the marketplace provides a medium thrcugh which the needs and desires of tenants can be satisfied.

Difficulties may arise in two areas:

(a) in cases where there may be inherent inequities between tenant and landlord

(b) when the marketplace is put out of balance.

There may be an understandable perception that the tenant is automatically at a disadvantage when dealing with a landlord. However, such inequities as may exist are more likely to result from an imbalance in supply and demand, than from any inherent relationship between the parties. Unsatisfied demand for private sector rental housing will place market power in the hands of landlords.

Saturated demand will place market power in the hands of tenants.

The Federation accepts that there are limited circumstances in which either landlords or tenants may have measures at their disposal which allow the imposition of their will on the other party in a way which is socially undesirable. To this extent, regulation of the market is required.

Where the problem relates to the economic balance of supply and demand, excessive regulation can only prove counter-productive. If there is a shortage of private sector rental housing,

this demonstrates that the market does not perceive its provision as an attractive investment. The compliance costs of a tightly regulated environment will reduce the attractiveness of this form of investment still further.

In considering the requirement for residential tenancy legislation the Federation concludes:

(a) the move to consolidate such legislation into a single Act is to be applauded

(b) where apparent inequities are the result of the economic climate, the only redress is to achieve a balance in supply and demand

(c) excessive, or tightly prescriptive, legislation carries high compliance costs which will prove counter-productive

(d) the best protection for both landlord and tenant is an economic environment in which building costs, property prices, interest rates and inflation are kept in balance

Regulations which are out of step with the real world of supply and demand are likely to prove unenforceable, or enforceable only at unacceptable economic cost.

Regulations which are overly prescriptive in their approach are open to abuse, through their capture by segments of the marketplace.

The Federation notes that the Fourth Labour Government has, to date, shown a remarkable appreciation of these truths, as reflected in the current directions of economic policy. It is the Federation's belief, therefore, that a similar approach will be adopted in respect of the Residential Tenancies Bill in its final form.

2. THE FEDERATION'S STANCE

(a) The Bill obscures the objectives of tenancy legislation by the institution of excessively cumbersome procedures.

(b) Some provisions are harsh. The Federation proposes some amelioration.

(c) There should be greater reliance on the marketplace as the primary means of resolving conflict, but within a clear legislative framework.

(d) Intervention by the bureacracy or judiciary is warranted only where the marketplace fails to provide resolution.

(e) Where intervention is required, it should be administerably simple, and above all swift and equitable in its execution

(f) The federation is fundamentally opposed to the creation of a new bureacracy, with its attendant costs, to administer this legislation.

(g) The Federation believes existing mechanisms are available and adequate to the task of overseeing the effective implementation of the legislation.

(g) Considerable emphasis must be palced on minimising compliance costs, since any additional cost burden will eventually fall most heavily on the end user, that is, the tenant.

3. ENFORCEABILITY AND COMPLIANCE COSTS

In the final analysis, any attempt at regulation will be enforceable only to the extent that it is reasonable, and reflects marketplace realities.

However, the enforceability of this legislation (and therefore the equity of its application) can be enhanced by ensuring the administering agencies become involved only in respect of points of genuine conflict, and at a stage where the parties have demonstrated an inability to reach agreement. The Bill as it is currently framed, involves the mandatory use of judicial or quasi-judicial procedures in situations where resolution could be expected by negotiation in the first instance between the parties, within the clear framework of a legislative base.

The approach adopted by the Bill is at best costly. At worst, it may prove unworkable. The Federation expects to see, at the very least, significant delays in the processing of applications, due to the unneccessary stress which will be placed on the administering agencies.

A major thrust of these submissions is towards reducing the administrative burden, and therfore costs, implicit in the Bill as drafted.

4. EQUITY

A rationale for introducing regulation may be to correct perceived inequities.

To the extent that inequities result from economic factors, they can be adjusted in the long term only by adjusting the economic environment.

To the extent they result from market failures, some regulation is desirable.

The landlord/tenant relationship is essentially a commercial one. The nature of the service being traded, however, introduces sociological and deep emotional issues. In particular, the fundamental human need for security is at stake.

The Federation accepts that effective tenancy legislation must address issues such as security of tenure.

In doing so, there is a danger which must be guarded against. The emotional strength of an issue such as this can readily overshadow the fundamental questions of the rights and freedoms of both parties, and the commerical realties of particular situations.

It is vital, therefore, that the judicial framework within which the legislation is enforced should be without bias, and capable of producing objective judgement in the context of highly charged emotional issues.

As currently drafted, this Bill tends to write bias into the way in which judicial decisions may be made, in relation to some particular circumstances.

5. DIVERSITY

A marketplace which adequately satisfies the variety of demand which exists, can be expected to exhibit considerable diversity. The prescriptive nature of the Bill tends to limit the diversity which should be available in terms of variety of tenancy agreements. An extreme, but valid, interpretation of the Bill is that it in fact prescribes the only legally binding form of tenancy agreement possible.

SECTION 11 provides, in Subsection (1), for the variation of the provisions of the Act, only in such situations as the judicial authortiy is satisfied is in the interest of the parties.

Subsection (2) provides further, for the voluntary waiving of rights by the landlord.
Subsection (3) prevents the voluntary waiving of rights by the tenant.

In the event that a tenant wished to contract out of some of the provisions of the Act, it would not be an unreasonable assumption that, for his/her particualr circumstances, he/she saw a substantial benefit in so doing. The Federation believes this is a fundamental right, which should be preserved for the tenant. This is particularly important for the tenant who may accept greater obligations than required by the Act, in return for such clear advantages as a lower rental.

The possiblilty of abuse of this right by a landlord who may enjoy, for any reason, a position of advantage over the tenant, can be guarded against by preserving for the tenant a right of review by the judicial authority.

RECOMMENDATION

5.1 That SECTION 11, Subsection (3) be replaced with the following:

> "Subject to clauses (3)(a) and (3)(b), Subsection 1 of this section shall not prevent a tenant from waiving voluntarily any of the rights conferred upon tenants by this Act, or from voluntarily incurring more or more extensive obligations than those that are imposed on tenants by this Act, provided that -
> (a) such waiver shall be voluntary and in writing, and
> (b) it shall be subject to review by the [judicial authority] on application by either party, in which case, the [judicial authority] may rule that it is of no effect, unless satisfied in terms of Subsection (1) (b) of this Section.

It should be noted that Subsection (1) of this Section does conceive of the possibility that a variation from the specified provisions of the legislation can be in the interests of either (or both) parties. Subsection (3) appears to be designed to prevent such an eventuality from occuring.

6. COMMERCIAL RISK

Since the provision of private sector rental accomodation is a commercial operation, it follows that commercial risks are involved.

The introduction of a regulatory environment has an almost inevitable effect on the risk factor.

It is a fact of commercial life that the return required from an investment will reflect the level of risk involved (beta factor).

If the Bill has the effect of unnecessarily increasing the commercial risk, the inevitable consequence will be an increase in the rental required to achieve a satisfactory return to the investor. If other factors in the economic or regulatory environment prevent those higher rentals from being realised, the result will be de-investment, and a reduction in the private sector rental stock.

Property investors have demonstrated a willingness to accept the level of commercial risk currently inherent in the market. Any change by way of regulatory intervention will necessarily result in a re-appraisal of that willingness, in the light of the new thresholds which will be established.

When entering into a tenancy agreement, a landlord must make an appraisal of the commercial risks involved, in particular:

- the creditworthiness of the prospective tenant
- the likelihood of damage to the property
- the likelihood of compensation in the event of damage or abuse of the property by the tenant.

SECTION 16 addresses one problem faced by the landlord, in establishing the general bona fides of the tenant, by requiring the tenant to provide basic personal information.

It unfortunately fails to address the problem of gaining confirmation as to the veracity of information provided.

RECOMMENDATION

That SECTION 16, subsection (1) be amended to include a requirement for the tenant to provide, on request in addition to full name, address and occupation,

- immediate past residential address (i.e. not the address of the premises about to be rented)
- day time contact address and telephone
- next of kin
- the name of one referee.

The provision of false information should be an unlawful act, subject to a term of imprisonment not exceeding three months, or fine not exceeding $500.

Not only will this information assist in establishing the bona fides of the tenant, but is also requisite should the landlord have to contact the tenant in the event of an emergency.

SECTION 18 The increase in the level of bond payable, together with the provision for ongoing adjustments in line with rental movements (essentially inflation adjustment) will help to reduce the risks in relation to accidental or malicious damage to the property. However, this clause must be read in conjuction with the provisions for receipt of rent in advance, and the lead times involved in resolving the issue of abandonment. As currently framed, the Bill could result in the major portion, if not the total, bond being absorbed by arrears of rent, before the question of property damage is addressed.

This problem is taken up later in these submissions.

The Bill fails to adequately specify the situations in which the bond monies should be payable to the landlord or tenant on the termination of a tenancy. Property damage is an obvious

case, reasonably well covered elsewhere in the Bill, where the bond may be payable to the landlord. Equally, the costs of cleaning a property should be deductible from the bond, where the tenant has left the property in an untidy condition.

The bond provisions should also provide flexibility to cover the substantially different circumstances possible in different tenancies.

For example, the provisions of this Act will be applicable to the private home-owner whose property is let during an extended period of absence. In such situations, protection against damage is vital to the peace of mind of the home-owner, extending beyond commercial considerations.

Similarly, the risk of damage is greater in respect of the letting of fully furnished luxury accomodation, than perhaps low-cost unfurnished student accomodation.

RECOMMENDATION

That a 'prescribed rental' of $120 per week be set, below which the provisions of SECTION 18 are applicable, and above which, the question of the appropriate bond is a matter for negotiation between the parties to the tenancy agreement.

SECTION 12

RECOMENDATION

Add Subsection (4):

"Nothing in this section shall be construed as preventing a landlord from discriminating against any person on soley commercial grounds."

7. RENTAL

In keeping with present Government policy, regulation of rentals must be considered as unacceptable as the regulation of any other prices.

The effectiveness of market forces in controlling rental prices has been evidenced in the modest increases subsequent upon the lifting of the rent freeze, despite significant cost increases suffered by property investors.

There may be instances where the manipulation of rental prices by landlords could disadvantage tenants, owing to the particular circumstances of the landlord/tenant relationship. In such cases, mediation or review by a judicial authority may be justified, provided that the criteria for review are the operation of market forces. The Bill, in intent, follows this approach.

The Federation has no argument, therefore, with the general approach. Unfortunately, in its implementation, the Bill requires regulatory intervention in cases where there is clearly no requirement.

SECTION 24 provides for a maximum of two rent increases per annum, at no less than 180 day intervals. There is no acceptable rationale for this requirement. If there were, the Federation would argue for a similar imposition on mortgage interest.

RECOMMENDATION

7.1 Delete Subsection (1) of Section 24.

SECTION 25 provides for the determination by the judicial authority of a market rent, but only where that authority has made a subjective judgement as to whether the rental complained about exceeds the market rent by a substantial amount.

The level of the existing rental is irrelevant to the making of an order on what constitutes a fair market rental. Inclusion of this instruction to the judicial authority is an example of the tendency towards bias noted in pargraph 4 above.

RECOMMENDATION

7.2 Delete, in SECTION 25, Subsection (1), the words "on being satisfied that the rent payable or to become payable for the tenancy exceeds the market rent by a substantial amount."

SECTION 28 provides an example of the requisite involvement of the judicial authority in situations where there can be a reasonable expectation of resolution between the parties concerned, without the need for intervention.

If the improvements in question have been undertaken "with the consent of the tenant," there is likely to be agreement on the consequent adjustment of the rental. It is only if the improvements have been undertaken unilaterally by the landlord that there may be a requirement for mediation or arbitration.

RECOMMENDATION

7.3 That SECTION 28 be amended by deleting lines 9-11, and substituting the following:

"The rent may be increased by such an amount as to take reasonable account of the value of such improvements, subject to the operation of SECTION 25.'

There is adequate protection for the tenant in the case of unilateral improvements, afforded by SECTION 25. If this were felt to be insufficient, a further subsection could be introduced after Subsection (1).

RECOMMENDATION

7.4 If felt to be necessary, insert the following subsection after Subsection (1) of SECTION 28:

> "Where such improvements are effected without the consent of the tenant, or in the event of dispute as to the adjustment in rental, the [judicial authority] may make an order as to the level of rent to be charged, on application by either party, and in accordance with Section 25."

SECTION 32 prevents the landlord from imposing pecuniary penalties on tenants. In view of the potential for abuse, and the avenue of recourse through the courts, the Federation does not argue with this in princple.

However, Subsection (2) of SECTION 32 goes beyond the prohibition of penalty, to a prohibition on incentives.

It is a fact that some tenants are, from the landlord's point of view, better than others. It should be acceptable for the landlord to provide pricing signals which may modify the tenant's behaviour towards a particular model.

As noted above, there are acceptable arguments against pecuniary penalties being imposed unilaterally by the landlord. These arguments do not apply to the offering of genuine reductions or rebates.

It may be argued that the unrebated rental, in such circumstances can constitute a penalty, and there is no guarantee that the reduction is genuine. Such a line of argument is invalid in the context of this legislation, in that the tenant has the opportunity to seek an order, under SECTION 25 as to the market rental of the property. The landlord is effectively prevented, therefore, from charging a premium above the market rental.

RECOMMENDATION

7.5 Delete Subsection (2) of SECTION 32, as an unwarranted intervention in market mechanisms, and redundant in terms of other provisions in the Act.

8.RESPONSIBILITIES

The Bill makes a sound attempt at listing, in an evenhanded manner, the responsibilites of each party to a tenancy agreement.

The Federation's comments in this regard are more in the nature of fine tuning, that any substantial objection. There are aspects which could benefit from inclusion, or clarification. These are listed below, largely without comment.

SECTION 37 The Federation notes the potential difficulty of ensuring vacant possession in the event of difficulties in the termination of the previous tenancy. This underlines the necessity to attend to difficulties forseen in later Sections of the Bill, dealt with below. In the event of vacant possessio being precluded by the culpable actions of a previous tenant, the Federation is of the opinion that any liability should lie with the previous tenant, rather than the landlord.

SECTION 38

RECOMMENDATION

8.1 Delete the words "or permit," since otherwise the landlord may be deemed responsible for events beyond his control. Add to Subsection (2), "no liability is to attach to the landlord where after using his best endeavours he is unable to control the behaviour complained of."

SECTION 40

RECOMMENDATIONS

8.2 Subsection (1)(c): delete "reasonably" both times it occurs.

8.3 Add: "(1)(f) Leave the premises clean and tidy

(1)(g) Abide by any other terms of the tenancy agreement provided they are not contrary to the provisions of this or any other Act.

(1)(h) At all times provide for the satisfactory ventilation of the premises to guard against dampness and mildew."

8.4 Subsection (2)(c): Modify to read "...privacy of the landlord, landlord's tenants...."

SECTION 45

RECOMMENDATION

8.5 Subsection (1)(a): Delete reference to word "reasonable"(1)(a) (Cf SECTION 40 above)

8.6 Subsection (2): Add after "or other services to the premises," the words "except as may be necessary soley for the purposes of repairs and maintenance, or where the safety of the tenant or the premises is at risk."

SECTION 47

While the desirability of affording the tenant the maximum opportunity to find alternative accomodation is accepted, the assumption that the sale of a property will necessarily result in the displacement of the tenant is invalid. It would not be desirable to unnecessarily unsettle the tenant where the sale of the property is on a fully let basis.

RECOMMENDATION

8.7 Delete SECTION 47 in its entirety

SECTION 48

8.8 Subsections (1)(a) and (b) : amend 7 o'clock in the evening to read 8 o'clock in the evening. Change 48 hours to 24 hours.

Alter "not more than once in any period of four weeks" to read "not more than three times in any period of twelve weeks".

8.9 Subsection (6): Delete.

9. TERMINATIONS

The question of termination of tenancy, (or alternatively security of tenure) must be central to any tenancy legislation. It is important that this aspect of the legislation is both equitable and workable. It is perhaps the most necessary area of protection required from the tenant's point of view; at the same time the ability to terminate an unsatisfactory tenancy, or to withdraw from tenancy agreement because of changed circumstances should not be compromised.

Termination by Notice

The period of notice given must be adequate to allow the other party in the agreement to make alternative arrangements. While there may be a facile attraction towards lenghty periods of notice, there also comes a point where the degree of urgency is masked, with the result that only a small portion of the time allowed is in fact used for the purpose of making alternative arrangements. The alternative scenario is that arrangements are effected in the early part of the notice period, and the remainder becomes redundant.

There are circumstances, such as the disposition of the property, which will not afford a lengthy period of notice. The Federation believes on balance, that it is better to aim for uniformity, and to avoid lengthy periods of notice.

RECOMENDATION

9.1 That SECTION 51 be replaced with the following:

"Subject to Section 52 of this Act, the minimum period of notice to be given by either party to a tenancy agreement is 30 days, provided that a shorter period may be agreed upon between the parties in the event that satisfactory alternative arrangements have been completed by the party on whom notice has been served."

SECTION 53 provides protection for the tenant against possible abuse of termination provisions by the landlord. As currently drafted, however, the gaining of an order under SECTION 53 could provide the tenant with protection against termination ad infinitum.

RECOMMENDATION

9.2 SECTION 53 be amended by adding:

"(3) An order made under this Section shall have effect for a period of 180 days. Nothing in this Section shall be taken as preventing the issue of a further notice by the landlord on the ground of a change in circumstance such as the sale or disposition of the premises, or on the ground of a breach of the tenancy agreement by the tenant following the date of the order.

Termination on Breach of Agreement or Act

The Bill recognises there are certain limited circumstances in which a summary termination of the tenancy agreement is necessary. These are clearly spelled out in SECTION 54.

The Federation believes that, given such clarity in the legislation, in the majority of cases, it would not be necessary to involve the judicial authority to the extent of making an order.

In particular, the requirement for speedy resolution of such issues may be compromised by the procedures involved, particularly if the resources of the judicial authority were to become strained.

RECOMMENDATION

9.3 That SECTION 54 be amended by rewording Subsection (1) to allow the landlord to terminate the tenancy on seven day's notice if any of the provisions of clauses (1) (a)-(c) are met, provided that the notice is in writing, and a copy is delivered to the District Registrar.

The tenant would then be given a period of seven days in which to contest the notice if he/she so wished. Only in the latter circumstance would the judicial authority be required to make an order. There should also be a requirement on the judicial authority to make an order within seven days of receiving an application by the tenant.

The provisions of Subsection (2) should be maintained.

9.4 Subsection (1)(b): delete "substantial", add at end of clause, "other than fair wear and tear."

9.5 Add a new Subsection:
"(1)(d) Nothing in Subsection (1) of this Section shall be taken as preventing action being taken under the Crimes Act 1961 or the Summary Offences Act 1981, in respect of any offence committed against those Acts, and the penalties for such offences will be as provided for in the relevant Act.

SECTION 55

RECOMMENDATION

9.4 Similar flexibility should be introduced into SECTION 55, to allow termination by agreement between the landlord and tenant, without involving the judicial procedure, except to the extent of providing written notification.

9.5 The provisions of SECTION 55 should be maintained for use in the event of failure to reach agreement, subject to a similar time constraint as above.

9.6 Delete Subclause (c).

Destruction of Premises

In the event of the destruction, or partial destruction of the premises, the only person capable of deciding whether or not the premises should be re-instated is the legal proprietor of the property.

RECOMENDATION

9.7 Replace Subclause (4)(b) of SECTION 57 with:
"Either party may terminate the tenancy."

Termination for Arrears

The termination of the tenancy for arrears of rental, or the related issue of abandonment by the tenant, is crucial to the commercial vaibility of the investemnt for the landlord and affects also the Federation's attitude to the questions of the appropriate bond, and appropriate amount of rent receivable in advance.

It is vital to allow rapid terminations in the event of arrears, in order to mitigate the loss which will inevitably be suffered by the landlord.

It is important to remember the bond serves two purposes - to provide limited security against non-payment of rent, and also to provide for a limited guarantee of compensation in the event of damage caused by the tenant. It is possible for the majority of the bond to be absorbed in arrears of rent. There is an unfortunate correlation between those tenants who fall behind in rent and those who tend to cause the greatest amount of damage to the premises.

It should also be remembered that the general practice of requiring rent in advance means that those tenants who fall into arrears by fourteen days have missed two rent payments.

RECOMENDATION

9.8 That SECTION 54, subsection (1) (a) be amended to read "7 days" rather than "21 days".

(It should be noted that under the Federation's proposal, the tenant would have an effective period of notice of a further 10 days.)

SECTION 59

RECOMMENDATION

9.9 That a definition of the term "Abandonment of Premises" be inserted in SECTION 2, to read:

"A tenant is deemed to have abandoned premises if he has vacated the premises for a period of not less than seven days, and has removed (or caused to be removed) the substantial part of his/her personal effects and chattels, and is in arrears with rent."

Given a clear definition such as the above, the obtaining of an order should not be necessary, provided that written notice is served on the tenant at his/her last known address.

Only if the notice is contested, should it be necessary for an order to be obtained.

10. TENANCY MEDIATORS

The concept of tenancy mediators is both interesting and potentially useful in resolving tenant/landlord disputes.

A close study of the Bill, however, reveals that the role of the tenancy mediator has not been adequately thought through.

As noted earlier in these submissions, in virtually all cases where there is a potential for conflict between the tenant and landlord, there is a primary requirement to seek an order from the judicial authority.

In terms of SECTION 74 (6), the tenancy mediator is precluded from exercising any duties, functions, or powers in respect of any dispute which is before the judicial authority, unless under the direction of that authority.

However, SECTION 85 requires the Tenancy Officer to refer any applications to the Judicial Authority direct to a Tenancy Mediator, unless under the direction of the authority.

There appears to be a substantial contradiction.

The Federation believes the commonsense approach to the resolution of conflict between landlord and tenant is as follows:

(1) the landlord and tenant should be afforded the opportunity to resolve the conflict to their mutual satisfaction, as can be expected in the majority of cases, given a clear legislative framework in which their respective rights and obligations are spelled out.

(2) Where agreement cannot be reached, the disputants should be afforded the opportunity of mediation.

(3) Only on exhaustion of the above options should judicial proceedings be required.

RECOMMENDATIONS

10.1 SECTIONS 74, 85 and 86 should be reworked to ensure consistency, and to allow for the three tiered approach to the settlement of conflicts suggested above.

10.2 SECTION 74 should provide for the tenancy mediators to be available on the application of either or both parties, on payment of a fee charged on an hourly basis.

10.3 SECTION 74 should be amended to provide simply for the appointment of tenancy mediators, without reference to whether or not they are officers of the Housing Corporation. The Federation can with some reluctance accept the role of the Housing Corporation in servicing the tenancy mediator service. It cannot accept the Housing Corporation, being itself a major landlord, as providing the mediation service.

11. JUDICIAL AUTHORITY

The Federation is fundamentaly opposed to the creation of a new judicial authority, with strong links to a Government Department which is also a major marketplace competitor, as the prime means of execution of this legislation.

RECOMMENDATION

11.1 That all reference to the Tenancy Tribunal in this Bill, be struck out and replaced with reference to the Small Claims Tribunal.

11.2 That where necessary, the jurisdiction of the Small Claims Tribunal be extended to cover the provisions of this Bill.

12. JURISDICTION OF JUDICIAL AUTHORITY

The explanatory note refers to the concepts embodied in SECTION 104 as a "somewhat novel concept." It is not only novel, but a significant threat to basic civil liberties to allow a judicial authority whose prime function is mediation and arbitration, to indulge in the execution of penal provisions. If this is to be a function of the judicial authority responsible for the execution of this legislation, then a higher standard of evidence is required than that set out in SECTION 93, and the direction in SECTION 83 (2) to disregard the finer points of law is totally incongruous.

The imposition of penalties, whether by way of exemplary damages or otherwise is the proper province of the District Court or High Court, and the legislation should be so framed as to reflect that fact.

RECOMMENDATION

12.1 That the powers of the judicial authority responsible for executing this legislation should be no greater than those of the Small Claims Tribunal, and should not include the power to set exemplary damages. SECTIONS 93 and 75 (2)([illegible]) be deleted accordingly.

12.2 That SECTION [illegible] (2) be amended by inserting at the end, "[illegible]."

12.3 That SECTION [illegible] [illegible] Work Orders) be amended by [illegible] the words "[illegible] under the [illegible] Act [illegible], or [illegible] Improvement [illegible] 194[illegible]."

12.4 SECTION 104 to be deleted in its entirety as constitutionally unsound and a threat to civil liberties.

13. APPEAL

In view of the standard of evidence proposed for the judicial authority responsible for initiating proceedings, the importance of adequate appeal mechanisms cannot be over-emphasised. The Federation is concerned that the exclusion from appeal to the District Court in respect of orders where the amount in dispute would be less than $1,000 may result, in some circumstances in a severe penalty to one or other disputant.

RECOMMENDATION

13.1 That SECTION 112 (2)(b) be amended to take account of the possibiltiy of a series of work orders relative to the same disputant parties, with their genesis in the same set of circumstances, with a cumulative value of more than $1,000.

14. FUNCTIONS OF DIRECTOR-GENERAL

The Federation considers it objectionable that the Director General of a Department which must be seen as competing in the marketplace for the provision of rental housing services, and through powers of delegation, any officer of that Department, should be given wide-ranging powers of investigation and regulation in that marketplace.

RECOMMENDATION

14.1 SECTIONS 118 and 119 should be deleted in their entirety.

15. RESIDENTIAL TENANCIES FUND

The Federation does not consider it to be in the interests of efficiency that the administration and execution of this legislation should be funded by what amounts in effect to a levy on tenants, by way of the depositing of bond monies with the administering authority.

The Federation accepts that bond monies received from tenants are effectively held in trust for the tenant, and against the contingency of specified occurences.

RECOMMENDATION

15.1 That landlords be required to place bond monies in a properly constituted trust account.

15.2 That any interest earned on bond monies held be held in trust for the tenant, on the same terms and conditions as the bond itself.

Should the decision be taken to press ahead with the establishment of the Housing Corporation fund, it is recommended

15.3 That the substantial pool of money so removed from the private rental housing sector be made available by way of mortgage finance for the provision of more private sector rental accomodation, and that interest monies so earned be held in trust for the tenant on the same terms and conditions as the bond money.

The Federation is aware of the line of argument which suggests that up until now it has been the landlord, not the tenant who has benefitted from the holding of bond monies. The quantum of benefit so received, however, will have served to reduce the level of rental income required to effect an adequate return. Removal of that quantum of benefit will result in an adjustment of the rental return. It is the tenant, who in the final analysis will suffer the costs of this funding scheme.

It is therefore appropriate that interest monies obtained from the holding of bonds should be returned to the tenant.

15.4 Delete in their entirety, SECTIONS 122-128 inclusive and SECTION 140.

16. POWERS OF MODIFICATION

The Bill contains some frightening provisions for modification outside the scrutiny of the public arena.

RECOMMENDATIONS

16.1 That SECTION 130 be deleted. There are numerous other provisions which allow discretion in the application of the Act.

16.2 That Practice Directions as issued under SECTION 110 be clearly subject to the provisions of the Official Information Act 1982, available to the public on request. Further, that they should be subject to judicial review to ensure consistency with this or any other Act or Regulations.

16.3 That Rules of Procedure, under SECTION 111, and regulations issued under SECTIONS 136 or 137 should be the subject of adequate consultation with the public and affected parties, prior to their implementation.

7/1 - change to (Section 2)

"...occupy the premises (with full and private use)... in consideration for rent."

Comment : Australian experience indicates that there have been problems in interpretation of similar existing wording in the Australian Acts.

7/27 - delete (Section 2)

We submit that (d) and (e) should be deleted.

Comment : Without deletion we believe that a situation of de facto assignment of tenancy could arise in conflict with s.44

8/6 - delete (Section 2)

(a) Delete the words "Saturday or"

8/14 - delete (Section 2)

(e) change to "the 25th and 26th December and the "1st and 2nd of January".

Comment : The Federation believes that for tenancy purposes the existing definition is too restrictive and impracticable.

10/20 - addition (Section 6)

After the word "food" add "or other services"

10/21 - addition (Section 6)

After the word "food" add "or other services"

Comment : The Federation believes that this better elaborates the intent.

10/29 - delete (Section 6, ss(3))

Delete entirely

Erosion of rights - different service

Comment : The Federation believes that this clause is entirely unnecessary

17/23 - alteration (Section 19, ss(1)(a)(iv))

The following words: "The name of the payer (if known to the persons who receives the payment) should be altered to: "The name of the payer (shall be correctly stated to the person who receives the payment).

17/23 - addition (Section 19, ss 1)(a)(iv)

It should also be an offence for the payer to fail to disclose his/her proper name.

17/24 - alteration (Section 19, ss(1)(b))

"...shall within" delete "10 working days" and insert "on or before 20th of the month following payment made..."

new clause (Section 19, ss new clause) after (b)

"The landlord shall be entitled to demand that any payment by way of bond may not be made otherwise than in cash, or by a cheque drawn on any recognised trust account, or by a certified bank cheque."

Comment : 10 working days is not necessarily enough time to allow a tenants cheque to be cleared and the payment sent on by way of the landlords cheque, especially in rural areas: it is worth noting there is some residential letting in these areas. To bring this section into line with the Corporation's demands under section 21, this new subsection should be added - further letting agencies require (because of the volume of their business) to "batch" such payments which would conform to existing commercial practice.

19/41 - alteration (Section 22 (10))

After the word "Tenancy" insert "after 30 days has elapsed."

Comment : The Federation believes a finite date is warranted.

new clause (Section 22 ss new clause) after (10)

"That the Bond Division be open on weekdays from 7.30 am to 6.00 pm and Saturdays from 10.00 am to 2.00 pm for purpose of servicing claims against bond, and issuing of receipts."

Comment : Tenant should be able to have access to the Division without loss of employment time.

19/24 - alteration (Section 22(6))

After the word "application" insert "In the event that any dispute is resolved in the landlord's favour the tenant shall be responsible for the rental and cost of repairs until the premises are available for re-letting."

Comment : In these circumstances it is inequitable for the landlord to be responsible for any loss.

20/4 - alteration (Section 23, ss(1)(b))

Should be amended by the addition of the following words before the word "before" - "Not more than 7 days"

Comment : This will mitigate losses that could otherwise occur.

20/21 - alteration (Section 24, ss(2))

Change the words "sixty days" to "30 days".

Comment : The Federation has throughout this submission recorded the standardisation of such times to 21 days for both parties

- new clause (Section 24, ssnew clause) after (5)

"In the event of notice to increase being less than the required time for such notice the tenant may recover the excess rent to the proper time of notice."

20/39 - alteration (Section 25 (1))

Delete the words "a substantial amount" and replace with "25%".

Comment : The Federation believes "substantial" required definition.

21/19 - addition (Section 25 (3))

After the word "relevant" insert "including risk and/or utilisation"

21/31 - new clause (Section 25 ss new clause) after (5)

"From the commencement of a new tenancy the tenant shall not apply to the Tribunal for a rent assessment until 180 days has elapsed"

Comment : The Federation has cases where a tenant replying to an advertisement and entering into a tenancy has the next day applied to the Tribunal for a rent determination, this is obviously a vexatious and unwarranted tactic.

21/4 - alteration (Section 25, (2))

Change the words "3 months" to "30 days"

Comment : see comment under 20/21 - alteration (Section 24(2

22/~~21~~5 - alteration (Section 26 (1)(b))

delete line 5 - replace with "as is provided for in the Tenancy Agreement".

~~21~~ 22/42 - new clause (Section 27, ss new clause) after (3)

"That no tenant shall recover rent in excess of market rent as determined by Tribunal for the period of 180 days form the commencement of the tenancy."

Comment : It is inequitable to allow a tenancy which could be for a long term to provide for an open ended refund where the tenant could conceivably deliberately engineer such situation

25/18 - delete (Section 34

Delete entire section 34.

Comment : If no reports on the existing condition of the tenancy are available as at 1/4/36 it is impracticable to place bonds in the hands of the Bonds Division.

26/1 - alteration (Section 35, (2))

change the words "12 months" to "181 days"

Comment : This makes a 12 month mockery of the promise to abolish protected tenancies.

26/10 - addition (Section 35, (4))

Addition after the word "Act" insert "except that this subsection shall be of no effect after 1st October 1986"

Comment : It would be inconsistent to limit an order of the Tribunal on market rent, to 6 months, but allow an order of the then abolished Rent Appeal Board, made perhaps as late as 31st March 1986, to remain in force any longer than a similar order made by the new Tribunal on say, 1st April 1986.

27/10 - alteration (Section 39 (1,)

(2nd time occcring) at 29/14.

Alter after the word "landlord" and insert the new words "except as the parties may otherwise agree in writing (whether in the tenancy agreement or otherwise)"

Comment : It is a further unnecessary interference with the interference with the freedoms of both parties to do business on their own ways. It would appear that a strict interpretation of this clause would prevent such voluntary arrangements as a tenant proposing to do certain work, such as painting, in return for a rental consideration.

28 & 29/1 Section 42 (2)

Delete entirely

Comment : The landlord must retain entire control over the physical condition of the premises.

30/ - new clause (Section 44 ss new clause) after (6)

"Where a tenant assigns a tenancy without the permission of the landlord he commits and unlawful act for which the penalty shall be $1,000 fine or 3 months imprisonment."
Take the others out or leave this in.

Comment : The Federation regards such an act by a tenant as a serious offence.

31/38 - delete entirely (Section 47)

To be deleted entirely.

Comment : The Federation believes that this will cause commercial problems which are adequately covered elsewhere in the Bill.

32/11 - alteration (Section 48 (2)(b)))

Line 11 - change "7.00 pm" to "8.00 pm"

Line 13 - change "48 hours" to "24 hours"

(Section 48 (2)(c))

Line 18 - change "8.00" to "7.00"

Line 18 - change "7.00 pm" to "8.00 pm"

(Section 48 (3))

Line 27 - add after "time" the words "but not longer than in 48 (2)(b) above

32/37 - delete entirely (Section 48(6))

Delete entirely

Comment : All the changes above are designed to facilitate the smooth day to day implementation of the administration of a tenancy. Tradesmen may require access within the times above to work their usual hours or for a specific reason. Similarly, to be consistent with other statements in this submission we oppose the punitive provisions.

39/12 - addition (Section 60 (1))

After the word "goods" add "of obvious value"

Comment : There is no point in storing "rubbish"

41/3 - delete (Section 61(2))

Leave out all the words after "offence"

Comment : Consistent with earlier comments

41/ - new clause (Section 63, ss new clause) after (2)

"The action of being a squatter is an unlawful act"

Comment : The Federation feels this is a very serious breach which requires firm penalty provisions as precedent in Australia shows this to be a considerable problem.

49/ (Section 75 (2) (j) & (k) new clauses to be inserted between (i) & (j)

"To ensure that the ability or right to pursue other remedies through the courts should not preclude a claim for damages under this section."

Comment : Absence of this type of clause has caused considerable trouble to Australian landlords.

Comment : Section 75 (2)(j) and (k) - these clauses seem to be wide open and potentially dangerous, and we believe they should be given further careful consideration.

Query ? If damages are awarded against a party who simply cannot pay them (a very real possibility) in some authority or fund going to pick up the tabs so that the aggrieved party can be compensated ?

NOTE : We note that 'exemplary damages' are usually awarded to punish an offender, and may be in addition to ordinary damages. We question whether they are appropriate in this setting.

Section 75, ss (4) & (5) implication should be considered carefully.

51/ - alteration (Section 75 ss (5) (6) & (7))

(5) Reduce amount to $5,000
(6) Reduce amount to $5,000
(7) Reduce amount to $5,000

Comment : The Federation believes that the sum of $12,000 is unrealistic, particularly if a landlord was to come under this jurisdiction with several tenancies at the same time, the effect could be disastrous for the landlord.

66/ - addition (Section 103)

Insert after (1) "Any work orders should be no more stringent than those provided for under the Health Act and Housing Improvement Regulations."

Comment : Work orders should be restricted to that which other Acts have deemed warranted.

82/11 - delete (Section 129 (2))

Delete ss(2) entirely

Comment : In line with previous Federation comment on penalties.