

# Departmental Disclosure Statement

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| Residential Tenancies Amendment Bill (No 2) |
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

9 May 2017

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## Part One: General Policy Statement

This Bill amends the Residential Tenancies Act 1986 (the *principal Act*) in order to address issues related to—

- liability for damage to rental premises caused by a tenant; and
- methamphetamine contamination in rental premises; and
- tenancies over rental premises that are unlawful for residential use.

### Tenant liability for damage to rental premises

The first group of amendments made by this Bill addresses the rights and obligations of tenants and landlords for damage or destruction to rental premises following the Court of Appeal decision in *Holler v Osaki* [2016] NZCA 130. In that case the Court ruled that residential tenants are immune from a claim by the landlord where the rental premises suffer loss or damage caused carelessly or negligently by the tenant or tenant's guest to the extent provided in sections 268 and 269 of the Property Law Act 2007.

Following this decision, landlords are bearing most of the costs of careless damage caused by tenants (including insurance excess payments) and there is little financial incentive for tenants to take care of rental premises.

The amendments made by this Bill are aimed at creating efficiencies in the way rental premises are covered against the risk of careless damage, incentivising tenants to take care of rental premises, and protecting tenants from excessive risks and costs.

To achieve these objectives, the Bill provides that in relation to each careless act or omission of a tenant (or someone for whom the tenant is responsible) that causes destruction or damage to the premises, the limit of liability for residential and boarding house tenants (including tenants who are paying an income-related rent) is the level of a landlord's insurance excess (if applicable) but not more than 4 weeks' rent applicable to the tenancy.

Tenants will remain liable for intentional damage, damage caused by an act or omission that constitutes an imprisonable offence, or if insurance money that would have been payable in respect of the damage is irrecoverable because of the tenant's act or omission.

In addition, the Bill—

- places an obligation on a landlord to disclose insurance information (insofar as it relates to the tenant's liability for damage to the premises), or the fact that the landlord does not have insurance over the rental premises, to a tenant who requests it at any time during a tenancy; and
- creates unlawful acts for failing to comply with the landlord's insurance disclosure obligation, and for demanding, requesting or accepting payment from the tenant for careless damage over and above the statutory cap provided; and
- limits the ability of insurance companies to pursue subrogated claims (or claims arising out of an assignment) in relation to a tenant's liability under the liability provisions in the Bill; and
- prevents insurance companies from taking into account a tenant's payment to the landlord for careless damage (up to the liability limit) when calculating the insurance amount payable to the landlord under the insurance policy.

### Methamphetamine contamination in rental premises

The second group of amendments made by the Bill is required to protect tenants and landlords from the harmful effects of methamphetamine contamination. The manufacture and use of methamphetamine involves highly toxic chemicals that contaminate indoor surfaces, chattels, furnishings, and personal effects in a home. Contaminated homes pose serious risks to the health of occupants.

The Bill provides a number of measures to address the issues relating to contamination from methamphetamine manufacture or use in residential rental premises, including—

- a landlord may enter premises, on notice and between specified hours of the day, to test for methamphetamine or take samples for testing. A landlord who tests in accordance with regulations (which may, for example, set standards for testing) must notify the tenant of the results. In the case of testing carried out in the common facilities of a boarding house, the landlord must notify all tenants of the results of the testing;
- rights for landlords and tenants to terminate the tenancy in cases where testing carried out in accordance with regulations show that the premises are methamphetamine contaminated.

The Bill also includes a regulation-making power whereby the Governor-General, by Order in Council, may make regulations that—

- prescribe a maximum acceptable level of methamphetamine for premises;
- provide for the way in which methamphetamine testing should be carried out (including sampling, assessing the results of testing, and who is authorised to carry out the process);
- prescribe the decontamination process relevant to the landlord's ability to terminate a boarding house tenancy where any part of the shared facilities is contaminated.

The Bill also makes it an unlawful act (with a maximum level of exemplary damages of \$4,000) for a landlord to provide premises at the commencement of a tenancy if the landlord knows that the premises (or part of the premises) are methamphetamine contaminated.

#### *Rental premises that are not lawful for residential purposes*

The third group of amendments made by the Bill addresses the application of the principal Act to premises that are not lawfully able to be used for residential purposes following the High Court decision in *Anderson v FM Custodians Ltd* [2013] NZHC 2423. The High Court found that where a property is not lawfully able to be used for residential purposes it is not a “residential premises”, as defined in the principal Act, and therefore tenancies over such premises are not covered by the principal Act and the Tenancy Tribunal (the *Tribunal*) does not have jurisdiction.

Since *Anderson*, premises that are used for residential purposes that are not lawfully permitted to be used for residential purposes are not fully covered by the principal Act. The remedies open to the Tribunal in these cases are often limited to those under section 137 of the principal Act (which relates to prohibited transactions).

The amendments in the Bill ensure that the Tribunal has full jurisdiction for premises occupied or intended to be occupied for residential purposes, regardless of whether the occupation would be unlawful. The amendments will enable the Ministry of Business, Innovation, and Employment to take enforcement action against landlords in breach of any of their obligations under the principal Act.

In the Bill, unlawful residential premises are premises that are occupied by a person for residential use but that cannot legally be occupied by that person. A further requirement is that the landlord's failure to comply with certain obligations under the principal Act must have caused the occupation by that person to be unlawful or have contributed to that unlawful occupation (eg, the occupation contravening a resource consent or the relevant district plan). Occupation might not be permitted in general (eg, because the premises are an unlawfully converted garage or a commercial building) or it may be that the particular residential purpose the premises are used for under the tenancy agreement is not permitted (eg, if premises may be occupied only by a person of a specific kind or status, such as an employed security guard, and the tenant is not such a person).

The specific remedies that the Tribunal may order (on its own initiative or on the application of the tenant) in the cases of unlawful residential premises include—

- that the landlord pay the tenant a full or partial rent repayment, having regard to the special circumstances of the matter (including the nature of the premises);
- a work order requiring the landlord to remove or rectify the legal impediment to lawful occupation or to comply with building, health, or safety requirements that apply to the premises. Breaching this order without reasonable excuse will be an unlawful act with a maximum level of exemplary damages of \$4,000:

- any other order in favour of the tenant (including an order for exemplary damages for breach of section 45(1)(c) or 66I(1)(c) of the principal Act).

Under the Bill, where premises are found to be unlawful residential premises, the Tribunal must not, unless having regard to the special circumstances of the matter (including the nature of the premises) it would be unjust not to, order a tenant to pay rent arrears, damages, or compensation to the landlord.

Both tenants and landlords will be able to apply to the Tribunal for termination on the grounds that the premises are unlawful residential premises. However, a tenant will also have a right of termination on notice where the premises were unlawful residential premises at the time the tenancy was entered into.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

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| <b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b> | <b>NO</b> |
| N/A  |           |

### Relevant international treaties

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| <b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b> | <b>NO</b> |
| N/A  |           |

### Regulatory impact analysis

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| <b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>   | <b>YES</b> |
| <p><i>Tenant liability for damage to residential tenancy properties, Ministry of Business, Innovation and Employment, 10 November 2016</i></p> <p>This is available at: <a href="http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-tenant-liability-damage-residential-tenancy-properties.pdf">http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-tenant-liability-damage-residential-tenancy-properties.pdf</a></p> <p><i>Protection of tenants and landlords from the effects of methamphetamine contamination, Ministry of Business, Innovation and Employment, 10 November 2016</i></p> <p>This is available at: <a href="http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-protection-tenants-landlords-effects-methamphetamine-contamination.pdf">http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-protection-tenants-landlords-effects-methamphetamine-contamination.pdf</a></p> <p><i>Application of the Residential Tenancies Act 1986 to rental premises which are not lawful for residential purposes, 15 February 2017.</i></p> <p>This is available at: <a href="http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-unlawful-residential-premises.pdf">http://www.mbie.govt.nz/publications-research/publications/housing-and-property/ris-unlawful-residential-premises.pdf</a></p> |            |

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| <b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>   | <b>NO</b> |
| The Regulatory Impact Statements above did not meet the threshold for needing an independent opinion on the quality of the regulatory impact assessment from the Regulatory Impact Assessment Team in the Treasury. |           |

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| <b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b> | <b>NO</b> |
| N/A  |           |

#### Extent of impact analysis available

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| <b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b> | <b>NO</b> |
| N/A   |           |

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| <b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>                     |           |
| <b>(a) the size of the potential costs and benefits?</b>  | <b>NO</b> |
| <b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b> | <b>NO</b> |
| N/A   |           |

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| <b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b> |           |
| <b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>                  | <b>NO</b> |
| <b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>                          | <b>NO</b> |
| N/A   |           |

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

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| <b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b> |
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| The Bill's effect is localised to the New Zealand domestic residential rental market, however, the amendment is consistent with New Zealand's international obligation to protect the right of people in New Zealand to enjoy adequate housing. This obligation can be found in a number of ratified international treaties, including article 25(1) Universal Declaration of Human Rights and the United Nations Convention on the Rights of the Child, to which this legislation has a particularly important effect due to the positive impacts on the health and wellbeing of children in low-income families. |
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### Consistency with the government's Treaty of Waitangi obligations

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| <b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b> |
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| Te Puni Kōkiri was consulted on the policy proposals in this Bill. Their comments did not indicate that any of the proposals in the Residential Tenancies Amendment Bill are inconsistent with the principles of the Treaty of Waitangi. |
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### Consistency with the New Zealand Bill of Rights Act 1990

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| <b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b> |
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| YES |
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| Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <a href="http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/">http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/</a> |
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## Offences, penalties and court jurisdictions

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| <b>3.4. Does this Bill create, amend, or remove:</b>   |            |
| <b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>   | <b>YES</b> |
| <b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>  | <b>YES</b> |
| <p>The Bill creates the following new unlawful acts in the Residential Tenancies Act 1986:</p> <ul style="list-style-type: none"> <li>• a landlord requiring a tenant to pay for damage that exceeds the specified liability in terms of section 49B of the Act, for which the maximum level of damages is \$1000;</li> <li>• failure by a landlord to disclose insurance information to a tenant who requests it at any time during a tenancy, for which the maximum level of damages is \$500;</li> <li>• providing a rental property or boarding room and facilities which the landlord knows is contaminated by methamphetamine, for which the maximum penalty is \$4000;</li> <li>• failure by a landlord without reasonable excuse to comply with an order to remedy a legal impediment to occupation by complying with the relevant enactment within a specified time, for which the maximum level of damages is \$4,000; and</li> </ul> <p>The Bill:</p> <ul style="list-style-type: none"> <li>• requires the Tenancy Tribunal to enforce the limit to a tenant's liability for careless damage up to the landlord's insurance excess (if applicable) and not more than the value of four weeks' rent for each incident of damage; and</li> <li>• gives the Tenancy Tribunal jurisdiction to determine whether premises are unlawful residential premises and to order specified remedies in cases concerning unlawful residential premises.</li> </ul> |            |
| <b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>  | <b>YES</b> |
| <p>The Ministry of Justice was consulted on the policy proposals being considered in this Bill. Their comments related to:</p> <ul style="list-style-type: none"> <li>• clarifying the distinction between illegal acts or omissions, and "imprisonable offences";</li> <li>• ensuring tenants are aware of the new proposed right of entry to test for methamphetamine contamination, to address privacy issues; and</li> <li>• ensuring there remains a right of appeal available to tenants who have had their tenancies terminated on the grounds of methamphetamine contamination.</li> </ul> <p>The Ministry of Justice's comments have been addressed.</p>  |            |

## Privacy issues

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| <b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b> | <b>NO</b> |
| N/A   |           |

## External consultation

| 3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?   | YES |
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| <p><i>Tenant damage liability proposals</i></p> <p>Consultation was undertaken with the following stakeholders on 26, 27 and 28 October 2016:</p> <ul style="list-style-type: none"> <li>• New Zealand Property Investors' Federation</li> <li>• Christchurch Property Investors' Association</li> <li>• Barfoot and Thompson</li> <li>• Tenants Protection Association (Auckland and Christchurch)</li> <li>• Manawatu Tenants Union</li> <li>• New Zealand Citizens' Advice Bureau</li> <li>• New Zealand Union of Students Associations</li> <li>• New Zealand Council of Christian Social Services</li> <li>• Various property management companies from Auckland, Hamilton, Wellington and Christchurch</li> </ul> <p>The consultation covered the policy proposal for tenant liability announced by Minister Smith on 15 October 2016 (<a href="https://www.beehive.govt.nz/release/tenancy-law-change-damage-claims-being-considered">https://www.beehive.govt.nz/release/tenancy-law-change-damage-claims-being-considered</a>)</p> <p>Some of these groups expressed cautious support with the proposals while others expressed concerns about the workability of the proposals.</p> <p>The Insurance Council of New Zealand was also consulted and does not agree with the proposals.</p> <p>The Principal Tenancy Adjudicator was consulted on the proposal.</p> <p><i>Methamphetamine contamination</i></p> <p>The proposals in this paper about a specific right of entry for testing for methamphetamine contamination and to allow for shorter termination notices in cases of methamphetamine contamination are informed by discussions with the New Zealand Property Investors Federation.</p> <p><i>Unlawful residential premises</i></p> <p>The Principal Tenancy Adjudicator was consulted on the proposed changes to address unlawful residential premises.</p> <p>No consultation was undertaken with other stakeholders on the proposals.</p> |     |

## Other testing of proposals

| 3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete? | NO |
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| N/A  |    |

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

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| <b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b> | <b>NO</b> |
| N/A  |           |

### Charges in the nature of a tax

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| <b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b> | <b>NO</b> |
| N/A  |           |

### Retrospective effect

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| <b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b> | <b>NO</b> |
| N/A   |           |

### Strict liability or reversal of the usual burden of proof for offences

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| <b>4.4. Does this Bill:</b>  |           |
| <b>(a) create or amend a strict or absolute liability offence?</b>   | <b>NO</b> |
| <b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b> | <b>NO</b> |
| N/A  |           |

### Civil or criminal immunity

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| <b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b> | <b>NO</b> |
| N/A   |           |

### Significant decision-making powers

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| <b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>   | <b>NO</b> |
| <p>The tenant liability amendments will apply from the commencement of the Act to existing tenancies for damage caused after the commencement date. The Bill contains a presumption that any damage a landlord discovers after the Act came into force, occurred after the Act came into force unless the tenant proves otherwise.</p> <p>The unlawful residential premises amendments will apply from the commencement of the Act to existing tenancies; accordingly the Tenancy Tribunal will be able to make a determination about whether premises in respect of tenancies entered into prior to the commencement of the Act are unlawful residential tenancies and be able to invoke the clause 78A remedies in such cases.</p> |           |

## Powers to make delegated legislation

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| <b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b> | <b>YES</b> |
| Clause 138C of the Bill creates a regulation-making power to prescribe a maximum acceptable level of methamphetamine for premises.  |            |

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| <b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>   | <b>YES</b> |
| <p><i>Methamphetamine contamination</i></p> <p>Clause 138C of the Bill creates a regulation-making power to:</p> <ul style="list-style-type: none"> <li>• prescribe a maximum acceptable level of methamphetamine for premises;</li> <li>• provide for the way in which methamphetamine testing should be carried out (including sampling, assessing the results of testing and who is authorised to carry out the process);</li> <li>• prescribe the decontamination process required for the purpose of the landlord's ability to terminate a boarding house tenancy where parts of the shared facilities are contaminated.</li> </ul> <p>It is expected that the regulations will refer to the New Zealand Standard for <i>Testing and Decontamination of Methamphetamine-Contaminated properties</i>, currently being developed.</p> |            |

## Any other unusual provisions or features

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| <b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>                            | <b>YES</b> |
| The provisions relating to methamphetamine contamination will be brought into force on 1 July 2018 if not brought into force earlier by Order in Council. |            |