



## **Consultation - Reform of the Residential Tenancies Act 1986**

### **Ministry of Housing and Urban Development**

#### **The Salvation Army New Zealand, Fiji, Tonga and Samoa Territory**

#### **OUR BACKGROUND**

1. The Salvation Army is an international Christian and social services organisation that has worked in New Zealand for over one hundred and thirty years. The Army provides a wide-range of practical social, community and faith-based services, particularly for those who are facing injustice or those who have been forgotten and marginalised by mainstream society.
2. The Salvation Army's interest in the reform of tenancy law stems from our ongoing concern for social justice in Aotearoa and in particular for the interests of the most vulnerable New Zealanders. Tenants are of course amongst this most vulnerable group so the Army's interest in tenancy law reform is in part driven by a desire to see fair and reasonable protections for tenants as part of their social rights to decent secure housing. The Salvation Army is also a significant social housing provider which offers over 300 dwellings to low income households nationwide. As a major landlord the Army also has an interest in ensuring that tenancy laws remain workable and feasible for landlords. Both these perspectives have been brought to this submission.
3. This submission has been prepared by the Social Policy and Parliamentary Unit of The Salvation Army. This Unit works towards the eradication of poverty by encouraging policies and practices that strengthen the social framework of New Zealand. This submission has been approved by Commissioner Andrew Westrupp, Territorial Commander of The Salvation Army's New Zealand Fiji Tonga and Samoa Territory.

#### **THE SALVATION ARMY'S OVERALL PERSPECTIVE ON TENANCY LAW REFORM**

4. The Salvation Army believes that a more fundamental review of New Zealand's tenancy laws is required than that being proposed by Ministry of Business Innovation and Employment (MBIE). We are concerned that the scope of the proposed review will mean that a more fundamental and extensive review of tenancy law will be further postponed.
5. The Army has on several occasions, during the legislative amendments of the Residential Tenancies Act (RTA), raised our concerns over the inadequacy of the Act and of the general approach to tenancy law in New Zealand. These concerns have centred on the very nominal rights which tenants have in practice given the insecurity of their tenure under the RTA and with the dominant practice of periodic tenancies. In effect the 'no fault' provision for the termination of periodic tenancies means that tenants not only have few means to contest

terminations but also have very limited practical ways of exercising their other legal rights given this insecurity.

6. The Army suggests that a broader reform of laws should consider four key issues as follows:
  - the balance between property rights and social rights and especially between the rights of landlords to use their property as they see fit and the social rights of tenants to have adequate, secure housing,
  - tenants' security of tenure and the impact which insecure tenure has on the practical ability of tenants to exercise their other rights under the RTA,
  - housing standards and the extent to which higher housing standards should be enshrined in the RTA and if so how this might occur,
  - Empowering tenants including the recognition of the imbalance of power between landlords and tenants within the current arrangements and legal settings.
7. We note with some regret that the scope of the proposed reforms really only considers the question of tenure security and then in a fairly equivocal way. The Salvation Army believes that the stated objectives of the reform process (p.7 of discussion paper) will not be met by the scope offered. In particular the exclusion of concern and consideration for the definition of an acceptable dwelling or residential premises is unlikely, in our opinion, *'to modernise the legislation so it can respond to changing trends in the rental market'*. We acknowledge the impact which the Healthy Homes Guarantee Act 2017 can have on specifying and lifting standards around moisture control, thermal performance and heating. But a precise definition of what constitutes a premises which can be rented out for residential purposes remains missing. In many other areas of public policy – work safety and road safety are two examples - significant effort has been made to improve practices and attitudes as a way of providing safer environments. The idea of doing the same for rental housing has yet to emerge as an interest for public policy despite the clear evidence that rental housing is often of poor quality and contributes to tenants' poorer health status<sup>1</sup>. It is difficult then to see how a range of limited reforms which do not address out of date practices and attitudes toward the minimum standard of rental accommodation can be seen as modern legislation responding to trends in rental housing markets.
8. The Salvation Army submits that the present reform agenda should be abandoned and a more ambitious one taken up which looks at the issues listed above.

## TENURE SECURITY

9. The Salvation Army shares both the Minister of Housing and Urban Development's and MBIE's desire to modernise tenancy laws *'so that tenants feel more at home'*. However as an idea this is a little vague although it can be interpreted within the context of the discussion paper to include at least four elements which are as follows:
  - the nature of tenancy agreements and whether these are fixed term or periodic tenancies as well as the rights and obligations which go with each tenancy form,
  - the way in which tenancies can be ended and circumstances necessary for such terminations,

- the extent to which long-term tenants can make minor modifications to the property they rent, and,
  - The rights of tenants to have pets.
10. The Salvation Army supports any legislative change which will improve security of tenure of tenants and so supports the main proposals offered in the discussion document (page 10) to end 'no cause' evictions and to extend the period of notice required for terminations of periodic tenancies.
  11. There are however a number of opportunities to extend security of tenure for tenants still further as illustrated by tenancy law in Scotland and Ireland.<sup>ii</sup> In Ireland for example security of tenure is offered through a duration protection requirement in that country's Residential Tenancies Act 2004. Under this requirement tenancies are standardised as fixed term tenancies for four years with an initial six month probationary period. Furthermore limits of rent rises are established during tenancy periods.
  12. It is clear that in New Zealand rental tenure and particularly privately owned rented housing is becoming more commonplace with declining rates of homeownership and larger numbers of households and individuals renting in the private sector for their entire lives. The Minister in fact alludes to this trend in his introduction to the discussion paper. If private rental housing is becoming a more important part of New Zealand's housing system it seems reasonable to expect a more professional approach from landlords and investors both in terms of the quality of what they offer to tenants and the certainty with which it is offered. Parallels with the commercial property market should be drawn here. In the commercial property market buildings are subject to warrant of fitness regimes and landlords are commercially bound to lessees through long-term leases. Why a different regime should apply to residential rented property is difficult to understand and is probably just an accident of history.
  13. An expectation that landlords and residential property investors should have a longer-term and a more professional approach to their businesses of renting houses to people can start with a shift to medium length fixed term tenancy agreements as being standard. There will of course be exceptions to such a standard approach as with student accommodation and workers' housing and most likely with boarding houses as well.
  14. A tenancy agreement regime with longer fixed terms tenancies offers a number of ancillary advantages for tenants within their relationship with landlords. Where the landlord-tenant relationship is more deliberate and defined there is a greater likelihood that both parties will seek remedies in the law whenever their rights have been breached. Under periodic tenancies even with more extended notice periods it seems unlikely that tenants will exercise whatever rights they have under the RTA due to insecure tenure and the discussion document (clause 31) acknowledges this difficulty.

## TERMINATION OF TENANCIES

15. Security of tenure should, in The Salvation Army's opinion, still rest on compliance by tenants with all reasonable conditions of a tenancy agreement, on them behaving and desisting from anti-social behaviour. Furthermore, such security should also provide landlords with a reasonable ability to make alternative uses of their property. To these ends The Army supports the ideas offered in clause 38 relating to anti-social behaviour and clause 39 concerning tenancy agreement breaches by the tenant.
16. We acknowledge the difficulties which landlords sometimes have in providing sufficient proof before the Tenancy Tribunal that a tenant is behaving anti-socially or may damage their property. As suggested in the discussion paper (clause 34), landlords facing this problem can and do resort to issuing a 90 day – no cause termination notice to be rid of the tenant. While there may be evidential problems, recourse to the summary justice of a no-cause eviction seriously compromises the tenant's right to natural justice. This evidential argument as support for continuing with no-cause evictions is in The Salvation Army's opinion quite questionable in terms of achieving a fair balance of rights between landlords and tenants.
17. The Salvation Army has sympathy for inclusion of a variety of reasons for landlords to issue termination notices to end a tenancy. The circumstances offered in clause 40 in our opinion seem reasonable. However, if the standard tenancy agreement becomes a medium term fixed term tenancy the early termination of this tenancy – by either party, imposes costs on the other party which should in some way be compensated for. Such costs may need to be adjudicated by the Tenancy Tribunal on a case by case basis. Alternatively the Tribunal could issue guidelines around suitable levels of settlements where tenants wish to quit a lease early or when landlords need to re-possess a property for their personal use or for sale.
18. A more professional approach to leasing and management of residential property might involve greater use of the Tenancy Tribunal to adjudicate certain aspects of the landlord-tenant relationship. These could include remedies of breaches, early termination of leases as well as disputes over rent setting. To date the Tribunal has really just acted as an eviction court where over 90% of applications to it have been from landlords and where around 70% of applications have sought the termination of a tenancy<sup>iii</sup>. Greater use of the Tribunal would offer tenants the means to assert their various rights under the RTA although such reference will also require more professional behaviour from tenants as well. While it is unlikely that the work of the Tribunal will change significantly should tenants become more active in using it, the fact that they have more at stake by way more secure tenure and perhaps a fairer rent setting process (see submission below) may encourage them to do so? Tenants' advocacy services funded from some of the \$20 million in interest revenue from tenants' bonds may also improve tenant participation in the Tenancy Tribunal. Such a proposal is regrettably outside the scope of this review. We submit that for the new and expanded future review we have proposed in Paragraph 8 of this submission should address the issues raised here, particularly around resourcing and charging the Tribunal to have extended functions around broader aspects of the landlord-tenant relationship.

## RENT SETTING

19. The proposed reform deals partly with rent setting although not fundamentally and perhaps somewhat naively. Suggestions that practices such as rent bidding might be controlled or made unlawful are in The Salvation Army's unrealistic given the currently state of the rental housing market which is very much in short supply in many cities and towns. The economic power of landlords in these markets will make it very difficult to control rent bidding through regulation. Proposed changes to the frequency of rent increases as well as suggestions that landlords disclose their rent setting ambitions at the beginning of a tenancy are in our opinion weak and will achieve little if any change to how rents are determined in the market.
20. While The Salvation Army is concerned about the practice of rent bidding, we see this as a fact of life in a market economy such as ours. The discussion paper offers ideas for how rent bidding may be regulated (clauses 145-154) but in The Army's view neither of the options offered are feasible. This infeasibility is mainly due to the tight rental housing market which has developed in many parts of New Zealand over the past two years and which will, we believe, last for some time yet. In such a sellers' market there is always potential for under-the-table deals or for third parties to enter the market to facilitate higher rents for landlords. Landlords should of course be free to choose who they rent their property to although provisions of the Human Rights Act 1993 relating to unlawful discrimination should always apply to how this discretion is exercised. Most often purely economic considerations are not relevant to anti-discrimination measures so it seems reasonable that landlords are able to seek out a prospective tenant which meets their expectations around a number of criteria including willingness to pay. Given this The Salvation Army would suggest that little time is spent trying to regulate an activity which may be difficult or close to impossible to regulate.
21. The Salvation Army acknowledges that the current rent review provisions of the RTA are '*not intended to be used as a mechanism to influence or change what market rent is*' (clause 156). We however believe that the wide scope for reviewed rents for to be significantly – though not substantially ahead of the market creates scope for rents to be ratcheted upwards with little or no protection for tenants who face a variety of costs in having to shift. The Army certainly supports the proposal – offered in question 3.2.2 that the RTA or perhaps the Tenancy Tribunal offers guidance as to what '*substantially exceeding market rent*' means. However we believe that use of the adverb '*substantially*' condones increases well above expected or justifiable market rents just because they are not deemed to be excessive. As well as defining what the margin above a reasonable market rent might be, this margin in our opinion should be far more limited than it is now by the language being used in the RTA.
22. It is difficult to understand what purpose is to be served by limiting rent reviews to no more than once each year rather than twice yearly unless there is the prospect that rents are actually being ratcheted up via more frequent reviews. The argument that the annual rather than six monthly review of rents '*gives tenants longer term certainty of their housing costs*' (clause 169) is in our opinion thin especially when the discussion paper admits that little is known '*about how often rent increases occur in practice or how landlords calculate how much the rent increases by*' (clause 168). The relief offered by less frequent reviews will of course be short lived and will unlikely influence what rents are paid. The Salvation Army supports the shift to rent reviews no more than once each year although we do not believe that it will address the underlying problems that rents can be ratcheted up for established tenants. Again

the key for us increasing the security of tenure for tenants which means tenants can have the ability to be better informed about rent reviews, and if necessary seek redress with the Tribunal for any support without fear of losing their tenancy.

23. If the standard tenancy agreement becomes a fixed term one for up to four years there will need to be fairly explicit rules within the RTA to direct how rent reviews are undertaken. Ideally rent reviews should occur annually on the anniversary of the commencement of the agreement. Ideally too rents should only be able to be adjusted by the average movement of rents in the local market and provision for rent increases to be just less than 'substantially more' should be avoided. The local market rent data offered by MBIE provides a good guidance for such local increases.

## **BOARDING HOUSES**

24. It is The Salvation Army's experience that boarding houses have most often been housing of the last resort for the most desperate of individuals who often suffer from mental illnesses, addictions and behavioural problems. These problems often make them difficult to live with and leaves them vulnerable to abuse and exploitation by boarding house operators and other residents. The need for radical reform of boarding houses is long overdue – in The Salvation Army's opinion.
25. The discussion paper's proposal to more closely regulate boarding houses is welcomed by The Salvation Army. We have no confidence in the self-regulation model. This is because we have seen few examples across our society of where self-regulation has worked effectively to protect the public interest even in business sectors which are reputable. The Army believes that a warrant of fitness regime for boarding houses is appropriate and that this should be administered by local authorities. Local authorities after all have more general responsibilities for building regulation, land use planning and public health and safety and probably have greater local knowledge than does a central government agency such as MBIE.
26. The Army notes too that the majority of people living in boarding houses are likely to be receiving a welfare benefit which will include an Accommodation Supplement payment. Often too boarding house landlords receive a resident's rent directly from Ministry of Social Development (MSD). We have held for some time that in making such direct payments to landlords, MSD has a duty of care to ensure that the person on whose behalf the payment is being made is receiving adequate housing and care. Such a duty of care occurs for people living in residential care facilities such as rest homes, but is remarkably absent from boarding houses and transitional housing. MSD already know – with some precision, where boarding houses or boarding house type accommodation is located because it will be making rent payments on behalf of several individuals to the same address. MSD's duty of care to these people should at least extend to sharing data with MBIE and local councils to ensure that all boarding houses are covered by regulation and that they are meeting whatever minimum standards are required under the RTA and Building Act.

27. The Salvation Army submits that arguments against direct regulation on the basis of costs to boarding house operators and the possibility of a diminished supply of such accommodation are morally dubious (clause 199). Many boarding houses are marginal businesses in part because those living in them are unable to pay much more than \$300 per week for housing and utilities. This marginality is in some respects a funding issue. This should be addressed as such through the greater provision of social and supported housing rather than through arguments around compromising standards in order to reduce operators' costs

## **ENFORCEMENT MECHANISMS**

28. The Salvation Army welcomed recent 2016 amendments to the RTA which extended the Chief Executive's power to take proceedings against landlords who are renting out unsafe or unhealthy housing. We note recent efforts by MBIE in exercising these powers and the milestone cases which have been taken against rogue landlords. The Army believes that these activities and these cases are shifting attitudes of some negligent or careless landlords and finally establishing a bottom line for unacceptable rental housing and tenancy practice. The extent to which MBIE's extended powers and enforcement activities are eliminating exploitative and irresponsible landlords is not known because nothing is being systematically monitored or reported. This gap is a major failure in the current enforcement regime in our opinion.
29. The Salvation Army supports proposals to extend the enforcement powers of the MBIE Chief Executive under the RTA and specifically the following:
- Powers of entry into common areas of boarding houses without notice where there are reasonable grounds to suspect serious breaches of RTA provisions around building amenities, repairs and compliance.
  - Powers to obtain documents from landlords and property managers to ascertain compliance with the RTA.
  - The ability to take single cases to the Tribunal as illustrative of multiple breaches of the RTA and for these cases – if proven to be basis for much larger penalties.

## **CONCLUSIONS**

30. The Salvation Army believes that a widespread and even radical review of tenancy law in New Zealand is long overdue and wishes to reiterate our earlier point that the reforms being proposed in the discussion document is not such a review. The Army acknowledges that the scope of this review is much wider than the piecemeal amendments to the Act which have been the pattern over the previous three or four years. However since the original passage of the RTA 30 years ago New Zealand's housing market and system has changed significantly. The extent and nature of these changes have been acknowledged at the outset in the Minister's introduction but the proposed reforms are not sufficient to meet the challenges presented by declining homeownership rates and rising rents. In particular the reforms do little to advance security of tenure for tenants although the removal of no-cause terminations is a welcomed first step. Without more secure tenure for tenants, their ability to exercise

other rights under the Act and to have a house which they can call their home remains limited.

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<sup>i</sup> White, v. et al (2017) *BRANZ 2015 House Condition Survey : Comparison of house condition by tenure*

<sup>ii</sup> Bennett, M. (2016) *Security of Tenure for Generation Rent: Irish and Scottish Approaches*. Victoria University of Wellington Law Review. 47 pp.363-384.

<sup>iii</sup> These figures are based on data supplied to The Salvation Army by MBIE under the Official Information Act and relate to the 2012 to 2016 June years