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# Submission on the Reform of the Residential Tenancies Act 1986 (RTA)

To the **Ministry of Housing and Urban Development**

**This submission is from:**

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**Child Poverty Action Group (CPAG)** is an independent charity working to eliminate child poverty in New Zealand through research, education and advocacy. CPAG believes that New Zealand's high level of child poverty is not the result of economic necessity, but is due to policy neglect and a flawed ideological emphasis on economic incentives. Through research, CPAG highlights the position of tens of thousands of New Zealand children, and promotes public policies that address the underlying causes of the poverty they live in.

**We wish to make the following submission to:**

## [The Reform of the Residential Tenancies Act 1986 \(RTA\)](#)

1. It is CPAG's view that New Zealand's tenancy laws require a more fundamental re-think than that currently being considered by Ministry of Housing and Urban Development (MHUD). While we support most of the proposals offered in the discussion document we remain concerned that if these proposals alone are included in an amended RTA, tenants' rights to have a house to call home will remain compromised. We suggest that the MHUD considers delaying this review until such time as a more fundamental review of tenancy law and the respective rights of landlords and tenants can be fully considered.
2. CPAG's primary concern is around tenants' insecure tenure under the RTA and with the dominant practice of periodic tenancies. Effectively the 'no fault' provision for the

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termination of periodic tenancies means that tenants have few means to contest terminations which in turn means that they have limited practical ways of exercising their other legal rights given this insecurity.

3. CPAG suggests that a broader reform of laws should consider four key issues as follows:
  - The new focus on social rights rather than the sole focus on property rights of the RTA where landlords' rights to use their property as they desire are balanced off against the tenants' rights to quiet enjoyment at least until the landlord decides otherwise;
  - Tenants' tenure security and the relationship under the RTA between this insecurity and exercise of other legal rights under the Act;
  - Housing standards and the application of such instruments as building warrants of fitness for rented housing;
  - Recognition of the imbalance of power between landlords and tenants within the current legal settings and ways in which tenants may be more empowered under a revised RTA.
  
4. Regrettably the scope proposed in this review really only considers the question of tenure security and then not in a particularly comprehensive way. On account of this limited scope CPAG remains doubtful that the proposed review will achieve the its stated objective which is, '*to modernise the legislation so it can respond to changing trends in the rental market*'. In particular the proposed review pays little regard to the question an acceptable standards of housing which may be rented out under the RTA. CPAG accepts that the Healthy Homes Guarantee Act 2017 will most likely lift housing standards around moisture control, thermal performance and heating and so will go some way to shifting expectations – by landlords and tenants, around what may and may not be rented out. However in our opinion it would desirable - within one of piece of legislation to have a very clear specification of what an acceptable standard of rental accommodation is. The current legislation – with its vague references to premises and its conditionality around the standard and extent of these makes it easy to rent out quite substandard accommodation – often to the most vulnerable families. It is in our view a legislative priority to ensure that unscrupulous landlords and landowners are no longer able to do this.
  
5. CPAG encourages MHUD to reconsider the scope of the current review perhaps with a view to broadening it and going back a few steps in the consultative process.

## TENURE SECURITY

6. CPAG supports the general idea expressed in the discussion paper that as a country we need to modernise tenancy laws '*so that tenants feel more at home*'. As idea we understand that the discussion paper proposed three things which will apparently make tenants feel more at home. These are as follows:
  - Changing the way in which tenancies can be ended and circumstances necessary for such terminations;
  - Providing for long-term tenants to make minor modifications to the property they rent; and,
  - Allowing tenants to have pets.

7. CPAG remains doubtful that the proposals offered in the discussion document will do much to make tenants feel more at home in their rented property given the lack of secure tenure which these proposals offer and the increasing shortage of rental housing in many parts of New Zealand.
8. Despite our concerns that the proposals for reform don't go far enough, CPAG supports any legislative changes which will improve security of tenure of tenants however modestly. We therefore support 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.
9. A number of opportunities exist to extend security of tenure for tenants still further however as illustrated by tenancy law in Ireland and Scotland – two countries with similar legal institutions and land tenure histories as New Zealand. In 2004 the Irish extended tenants' security through a duration protection requirement in its Residential Tenancies Act 2004<sup>1</sup>. 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.
10. To CPAG it seems reasonable that tenants should expect greater security of tenure than they are normally able to achieve under the RTA and the most commonplace regime of periodic tenancies. Under periodic tenancies even with more extended notice periods it seems unlikely that tenants will be able to exercise whatever rights they have under the RTA due to insecure tenure and the discussion document (clause 31) acknowledges this difficulty.
11. It is our view that extended fixed-term tenancies should become the standard agreement for occupancy in the same way they are in commercial rental property. In the commercial property market tenancies are subject to warrant of fitness requirements and landlords and tenants are commercially bound to leases through long-term leases. These leases most often establish rent setting processes as well. It is difficult to understand why a more casual regime should apply to residential rented property but it appears that this is probably just an accident of history which has suited the typical small scale residential landlord most.

## **TERMINATION OF TENANCIES**

12. While CPAG holds that improved security of tenure for tenants should be the most significant focus of a reformed RTA, such security should still rest on compliance by tenants with all reasonable conditions of a tenancy agreement. Such reasonable conditions should include tenants behaving themselves and desisting from anti-social behaviour. To these ends CPAG supports the ideas offered in clause 38 relating to anti-social behaviour and clause 39 concerning tenancy agreement breaches by the tenant.
13. There also remains a need for the RTA to provide landlords with a reasonable ability to make alternative uses of their property. CPAG acknowledges that there are valid circumstances under which landlords should be able to issue termination notices to end a tenancy prematurely. The circumstances offered in clause 40 to CPAG 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

14. Landlord organisations have indicated that a no-fault 42-day or even 90-day termination right allows them to get rid of poor tenants who may for example be behaving anti-socially toward other tenants and other neighbours. They identify difficulties 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 CPAG’s opinion unreasonable and should be dismissed.
15. A residential tenancy regime where tenants have more secure tenure and are better able to assert their other rights (right to quiet enjoyment for example) under the RTA might subsequently 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. 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.
16. Although it is outside the scope of the review CPAG suggests that some of the \$20 million in interest revenue from tenants’ bonds which is presently used to fund MBIE’s Tenancy Services should also be used to improve tenant participation in the Tenancy Tribunal. This could be by way of better public funding for community based tenants’ advocacy services.

## RENT SETTING

17. In CPAG’s opinion the discussion document fails to realistically address current problems around rent setting. For example 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.
18. Suggestions that practices such as rent bidding might be controlled or made unlawful are in our opinion 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. Like the Government, CPAG is concerned about the practice of rent bidding but 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 our opinion neither of the options offered are feasible. Our scepticism is mainly due to the tight rental housing market which has developed in many parts of New Zealand over recent years – a situation which we believe will 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.
19. CPAG understands and accepts that 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 reality CPAG suggests that little time is spent trying to regulate an activity which may

be difficult or close to impossible to regulate and instead concentrate on existing and quite unfair provisions within the RTA around rent setting.

20. CPAG notes the discussion document's acknowledgement that the RTA is '*not intended to be used as a mechanism to influence or change what market rent is*' (clause 156). While it is undoubtable true that the RTA has not been used to cap rents the default rent setting mechanism in the RTA offers landlords opportunities to do the opposite and to ratchet up rents. This is especially so in tight rental markets.
21. Section 77(2)(d) of the RTA provides the Tenancy Tribunal with jurisdiction '*to determine whether any rent that is, or that was at any material time, being charged in respect of any tenancy to which this Act applies does or does not or did or did not exceed the market rent for that tenancy by a substantial amount, and, where the rent does or did exceed the market rent by a substantial amount, to make such order relating to the rent as it thinks just*'. In essence then unless a tenant can prove that a rent being charged or proposed exceeds the market rent '*by a substantial amount*' then that rent is assumed to be fair and reasonable by the law. In a tight rental market and especially when properties are managed by agents who have a direct incentive to increase rents as frequently as possible<sup>ii</sup> it is feasible to demand rents from established tenants will in excess of the market and then to use these higher rents subsequently as demonstration of market rents and so increase them further in a subsequent round of reviews.
22. CPAG 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. In our opinion the use of the adverb '*substantially*' condones increases well above expected or justifiable market rents just because they are not deemed to be excessive. Not only should the RTA or Tenancy Tribunal determine what the margin above a reasonable market rent might be, but this margin in our opinion should be far more limited in practice than it is now by the language being used in the RTA.
23. CPAG finds it difficult to understand the purpose of 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. In our opinion the argument the annual rather six monthly review of rents '*gives tenants longer term certainty of their housing costs*' (clause 169) is flimsy 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). Any relief offered by less frequent reviews will of course be short lived given that rents can be adjusted by twice the amount every year than they would have with in each of a six-month review. Unless there is some limitation to how much reviewed rents can exceed the current market rent there is little value in CPAG's opinion to limit such review to once every year.
24. CPAG has suggested that the RTA should establish a tenancy regime, similar to that provided for in Ireland, where the standard tenancy agreement is a fixed term one for up to four years. If this becomes the norm then fairly explicit rules will be required within the RTA to direct how rent reviews are undertaken. We anticipate that in such a world rent reviews occur no more than annually on the anniversary of the commencement of the agreement. In such reviews rents should only be able to be adjusted by the average movement of rents in the local market and provision for rent increases larger than this should be made unlawful. Market rent data offered by MBIE from its Tenancy Bond database provides a good guidance for such local increases

## ENFORCEMENT MECHANISMS

25. CPAG acknowledges the 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 also note MBIE's recent efforts in using these powers as well as the notable cases been taken against rogue landlords. However, because we lack any monitoring programme around the conditions of rented housing or compliance with the RTA by landlords, we really have no way of knowing if MBIE's extended powers and recent (but still limited) enforcement activities are eliminating exploitative and irresponsible landlords. This remains a significant weakness in the current law and its administration.
26. While enforcement without monitoring is never likely to be entirely effective, having more effective enforcement powers will in CPAG's opinion improve things for tenants who are at risk of exploitation by unscrupulous landlords. To this end CPAG supports the proposals offered in the discussion document for extending the powers provided to of the MBIE (or MHUD) 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

27. Rental tenure is becoming more commonplace in New Zealand with declining rates of homeownership and increasing numbers of households and individuals renting in the private sector for their entire lives. In the current housing environment where house prices have risen as a proportion of household incomes there is very little prospect today for younger households earning below median incomes of ever owning their own homes. These households are amongst those to which most of New Zealand's poorest children belong. This means that the housing experiences of these households are the housing experiences of the poorest children. We know that housing and specifically housing costs contribute to these children's poverty<sup>iii</sup> although poor quality housing and frequent moves also do. This means that getting residential tenancy law right is essential to reducing the impact of poverty on tens of thousands of New Zealand children's lives.
28. A widespread and more radical review of tenancy law in New Zealand is long overdue in CPAG's opinion. We wish to restate our earlier point that the reforms being proposed in the discussion document to not represent such a review. We recognise that most of the recent reviews to the RTA have been piecemeal and half-hearted – undertaken as they were by a Government with no real interest in changing the nature of the landlord-tenant relationship. CPAG acknowledges that the scope of this review is much wider than these recent amendments. However, New Zealand's market and system has changed significantly since the original passage of the RTA more than 30 years ago and the subsequent amendments to the Act since then have not addressed these changes. 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. Although the removal of no-cause terminations is a welcomed first step, other reforms proposed in the discussion paper do little to advance security of tenure for tenants. Without more

secure tenure for tenants, their ability to '*feel more at home*' and to exercise other rights under the Act remain quite limited.

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<sup>i</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>ii</sup> This incentive is two-fold. As the rent increases so too does the agent's commission for managing the property. If the tenant leaves because the rent becomes too high the agent gains another commission from re-letting the property.

<sup>iii</sup> Perry, B. (2018) Household incomes in New Zealand: Trends and indicators of inequality and hardship 1982 to 2017; pp.124-125.