

28 April 2017

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Residential Tenancies Amendment Bill (No 2)

Purpose

1. We have considered whether the Residential Tenancies Amendment Bill (No 2) ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 21 (right to be secure against unreasonable search or seizure). Our analysis is set out below.

The Bill

3. The Bill amends the Residential Tenancies Act 1986 ('the RTA') in order to address issues related to: liability for damage to rental premises caused by a tenant; methamphetamine contamination in rental properties; and tenancies over rental premises which are unlawful for residential use.

Consistency with the Bill of Rights Act

Section 21 – Right to be secure against unreasonable search or seizure

4. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.¹
5. Clause 27 provides limited powers of entry for landlords for the purpose of testing for the presence of methamphetamine, or taking samples for such testing. Clause 34 inserts an equivalent power in respect of boarding houses.

¹ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J; see also *Williams v Attorney-General* [2007] NZCA 52.

Is the Bill of Rights Act engaged?

6. The Bill of Rights Act applies to actions done by the legislative, executive or judicial branches of government, or by any person or body performing a public function, power or duty conferred or imposed by or pursuant to law.²
7. The State, in certain circumstances, can operate as a landlord (e.g. Housing New Zealand Corporation). When this occurs, its actions as a landlord are subject to the protections and limitations of the Bill of Rights Act. To the extent that the Bill of Rights Act applies to private landlords exercising powers in the Bill, the analysis below applies equally to them.

Do the powers in the Bill engage s 21?

8. Having established that it is possible for the powers in cls 27 and 34 to engage the Bill of Rights Act, the next question to determine is whether exercising those powers constitutes a search for the purposes of s 21. The powers would not be exercised in a criminal law or regulatory enforcement context, and the extent to which s 21 is relevant outside of law enforcement contexts has not been conclusively decided by the courts.
9. Recently, however, Tipping and McGrath JJ have indicated that s 21 has a broader application beyond pure law enforcement. McGrath J was reluctant to limit s 21 to law enforcement, as doing so would “exclude situations where the state undertakes examinations and investigative activities of a kind that significantly intrude physically on private zones albeit for purposes other than gathering evidence.”³ Further, Tipping J was of the opinion that, in determining whether a search for the purposes of s 21 has occurred, “the controlling feature should ... be who is involved and what they are doing rather than the purpose for which they are doing it.”⁴
10. On this basis, we consider that the powers in cls 27 and 34 may constitute a search for the purposes of s 21. Conducting such an inspection would significantly intrude physically into a private area, and this is not diminished by the fact that the State (as a landlord) would be conducting the search for purposes other than law enforcement.

Are the powers in the Bill unreasonable?

11. Ordinarily a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁵ In assessing whether the search and seizure powers in the Bill are reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective.
12. Methamphetamine use and manufacture is an on-going issue both in social rental housing and the private rental market. The manufacture and use of methamphetamine uses highly toxic chemicals, which result in contamination of indoor surfaces,

² New Zealand Bill of Rights Act 1990, s 3.

³ *R v Ngan* [2008] 2 NZLR 48 (SC) at [110].

⁴ *Hamed v R*, above n 1 at [225].

⁵ *Hamed v R*, above n 1 at [162].

furnishings, and personal effects in a home. Contaminated homes create serious risks to the health of occupants.

13. The RTA does not currently provide specific powers to test for methamphetamine contamination, although it does give landlords a right of entry to carry out inspections. Without this power, landlords can only test for the presence of methamphetamine during a routine inspection if testing has been agreed to by the tenant.
14. The powers of entry in cls 27 and 34 are consistent with the existing powers of entry in the RTA. A landlord must give between 48 hours and 14 days' notice to the tenant before entering, and can only enter between 8:00am and 7:00pm. Failing to follow the correct procedure for entry would be an unlawful act, and a landlord could be ordered to pay damages of up to \$1,000 as a result.⁶ Finally, any dispute that arises from the exercise of the powers would be within the jurisdiction of the Tenancy Tribunal.
15. We therefore consider the power of entry for landlords to test for the presence of methamphetamine, or take samples for such testing, is not unreasonable for the purposes of s 21 of the Bill of Rights Act.

Conclusion

16. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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⁶ Residential Tenancies Act 1986, s 48(4)(a).