

The Residential Tenancies Act 1986:

A Progress Report

Diane Stephenson*

Central government has long been involved in the rental sector. As well as the provision of state housing the State, or rather Parliament, has regulated tenancies by statute.

However the new Residential Tenancies Act is a significant movement towards closer supervision of private tenancies. It reflects the culmination of several years of investigation into rental housing problems.

In 1971 Sir Robin Cooke chaired the Royal Commission on Housing. The subsequent report cited uncertainty about the statutory framework as one of the major disincentives for investment in rental housing.

Also, it has become increasingly obvious in recent years that renting is no longer a transitional stage for many New Zealanders. Even professional couples are finding high interest rates a barrier to home ownership.¹ Demographic changes have put further pressure on the rental sector.²

During last year [1985] more than 12,000 people either divorced or separated but only 15,000 new houses were built.

By 1985 the Property Law and Equity Reform Committee had begun research on the law reform required to meet the demands of this social change. The report of that committee was the result of much consultation with interested groups and its proposals provided the foundation for the new Act.

Similar legislation in South Australia was looked at carefully, and many of

* BCom/LLB (Hons)

¹ "Will you ever own your home?". *NZ Women's Weekly*, April 14, 1986.

² *Olly Newland Auckland Star*, April 1, 1987.

the key reforms within that Act were adopted.

The Act is a response to the growing number of renters – 25% of the population, 750,000 people live in rented accommodation.³ It reflects the Labour Government's stated commitment to "an important principle in tenancy matters – that human rights are more important than property rights"⁴.

The purpose of this article is to identify the aims of the Residential Tenancies Act 1986, and to evaluate its effectiveness in the light of these aims and also its inevitable and unintended consequences.

The Aims of the Act

It was hoped that the act would achieve four things:

1. Simplification of the law.
2. Greater security of tenure and the promotion of family welfare.
3. Speedy dispute resolution that would encourage conciliation rather than conflict.
4. An increased awareness of mutual responsibilities and the methods of dispute resolution available.

1. Simplification of the Law

Prior to the Act provisions governing tenancies were scattered throughout several Acts; the Property Law Act, the Rent Appeal Act and the Tenancies Act. Further, the provisions were hard to find amongst other unrelated provisions such as those relating to mortgages. Once found, the relevant sections were often difficult to understand.

Now the rights and duties of both landlord and tenant are outlined more simply, and in more detail, in a single Act. Sections 40 and 45 (which outline these duties) avoid unfamiliar words, such as "waste", although phrases such as "reasonably clean and tidy" preserve a penumbra of vagueness.

The new Act might be thought of as a Charter of Rights. Such a Charter would operate to give both parties clear statutory rights – lending tenancy relationships a human rights perspective rather than its previous freedom of contract framework. However, some Housing Corporation staff prefer to characterise the Act as a rationalisation of the law⁵; perhaps to "play down" the potential the Act has to change radically the attitudes of both tenant and landlord.

In any case, the primary intention was to consolidate tenancy laws in one statute; the precise political character of the Act is likely to be determined in its application by participants.

³ Phil Goff (Minister of Housing) 466 NZPD 6912 (19 Sept 1985).

⁴ Jack Elder (MP West Auckland) 476 NZPD 6012 (9 Sept 1976).

⁵ Peter Klein, Housing Corporation.

2. Security of Tenure and Protection of Family Welfare

Probably the most well known reform in the Act is the increased notice period landlords are now required to give tenants. Ninety days is the norm in the absence of special circumstances.⁶ The increased notice period and the doubling of the notice required before a landlord may visit tenants⁷ make the tenancy relationship much more secure for tenants. These changes recognise that the rental phase is now more lengthy, and that more families than ever are in rented housing. This is important as housing is a key factor in maintaining family health and well-being. Continuity of health care and education are inexorably linked to secure tenure.

In this vein the Hon. Phil Goff said:⁸

There is a need for notice periods that recognise the upheaval involved in moving to a new home, such as changes in schooling for children.

The discrimination provision⁹ is another means by which the Act seeks to enhance tenants' welfare. It is an offence to discriminate against tenants on the basis that they are unemployed or have, or have had, children. The offence carries a fine of \$2,000; however, at the time of writing no prosecutions have been brought. At this point the writer wishes only to note that section 12 is an important addition to the anti-discrimination provisions in the Race Relations and Human Rights Commission Acts which already apply to accommodation.

Balancing these reforms is a change in the way rents can be increased and rent levels are supervised. Previously rent could be put up at will and recourse to the Rent Appeal Board was available only after the event. The Board would then determine what was an "equitable" rent. Perhaps as part of a trade off, the Rent Appeal Board was abolished by the new Act and the basis for assessment of rent increases altered. Now, although rent increases may only occur bi-annually,¹⁰ any challenge to the increase must be made on the ground that the new rent substantially exceeds the market rent.¹¹

The assessment of market rent is supposedly objective, based on the willing tenant and the willing landlord. However, in practice, rent increases by individual landlords raise the market rent. Therefore, as the yardstick for rent assessments is influenced by one of the parties to the dispute, pure objectivity is lost. Unlike the word "equitable", "market" expressly disallows any consideration of the personal circumstances of either party. The jurisdiction is now exercised in a less interventionist, more legalistic manner.

⁶ Residential Tenancies Act 1986, s 51. For example, when the landlord intends to move into the house personally.

⁷ Section 48.

⁸ *Supra* at note 3, at 6898.

⁹ Section 12.

¹⁰ Section 2A.

¹¹ Section 25.

3. Improved Dispute Resolution

Previously a landlord could pursue legal remedies in the District Court or before the Small Claims Tribunal. The District Court procedure was notoriously slow. The Small Claims Tribunal was not often used.¹² Preferable to both was "peaceable re-entry", which was permitted under the Property Law Act. However the re-entry was frequently neither peaceable nor smoothly effected. In such cases the police became involved; disputes were sometimes heated and protracted. Peaceable re-entry is now prohibited.

Many of the difficulties in tenancy relationships arise over the return of the bond. Bonds¹³ are now held by the Housing Corporation under sections 19-22. The return of bond money is made upon application by the parties at the end of the tenancy with the Housing Corporation distributing it where there are competing claims. The amount collected by the Housing Corporation has been lower than that anticipated.¹⁴ However staff at the Housing Corporation say that there was a similar drop in bonds taken in South Australia when similar legislation was implemented. It is also expected that as landlords who take no bond are "burned" by tenants they will revert to bond collection.

The interest on bond money funds a mediation service that is an innovation in tenancy law in New Zealand. It is a measure directly aimed at reducing confrontation and encouraging smooth and speedy dispute resolution.

The Tenancy Tribunal was set up to adjudicate upon disputes that could not be resolved, or were unsuited to mediation. It was established in preference to giving exclusive jurisdiction to the Small Claims Tribunal as speedy remedies were hoped for and specialisation was seen as an advantage.¹⁵ It has jurisdiction to settle disputes over any tenancy covered by the Act. To prevent devices designed to exclude the Tribunal's jurisdiction over a tenancy, section 137 allows the Tribunal to look at the substance of arrangements. This section is essential and has been used to catch would-be Act evaders. *Robbin v Teletax Corporation*¹⁶, in which a "security deposit" was discovered to be, in essence, a bond, is a well publicised illustration of this section at work.

There are two other notable features of the Tribunal's jurisdiction. Firstly, it has power to award exemplary damages – an indication of the government's attitude towards tenancy. Misconduct by either party is contrary to public policy. The punitive limb of civil damages can be invoked.¹⁷

¹² Perhaps this stemmed from the fact that there is no right to legal representation before the Tribunal and landlords felt that they were not being awarded their full legal entitlement.

¹³ Sections 18 and 23 allow landlords to require 4 weeks bond and 2 weeks rent in advance.

¹⁴ "Illegal Landlord Ploy Holds Bonds", *Sunday Star*, 29 March, 1987.

¹⁵ Note too that the Small Claims Tribunal is being replaced as part of a package of reforms in the Disputes Bill.

¹⁶ Wellington TT 42/87; 10 TCL 10/1.

¹⁷ Exemplary damages were awarded in *Whatuira Millar Whitton v Shoulder* Palmerston North TT 12/87, where the landlord began to demolish the property while the tenants were still in residence.

The other feature, also inserted to minimise evasion of the Act, is section 54. This section enables the Tribunal to strike down notice as ineffective if it has been given in response or retaliation to the tenant's exercise of rights, powers or remedies under the Act. The inherent weakness in this provision is the difficulty in establishing the landlord's motives. The issue was considered in *Easton v Marks and Robson*¹⁸. The Tribunal held:

It is one thing to say that an owner of the property has grown somewhat tired of his property being tenanted to persons, it is another thing to say that the tenants gave impetus or incited or impelled the owner to give notice to quit. Although the landlord exhibited a world weariness and signs of exasperation and frustration with the system, the Act was not directed in this context to such world weariness.

Thus the envisaged protection is diminished.

To conclude, the stated purpose of the mediation procedures and the Tenancy Tribunal is to:¹⁹

... replace the law of the jungle in tenancy relations with firm, fair, and readily enforceable rules governing the behaviour of both parties.

4. Increased Awareness of Tenancy Provisions

Another important aim in the implementation of the Act was to lift awareness of its provisions and make information about tenancy more accessible. This was crucial if the parties the Act was designed to help were actually to be assisted.²⁰

It is one thing to have good law, but it is equally important that all parties know of and have access to that law.

To achieve this end the Housing Corporation published "Renting and You" – an inexpensive booklet for participants. There was also extensive advertising of the new Act in leading newspapers and a model tenancy agreement was published itemising responsibilities under the Act.

Beyond this it was suggested that the publicity function rested with the media. There were numerous articles outlining the major reforms.²¹

The Effects of the Act

Decline in Stocks

Prior to its enactment the Residential Tenancies Act had already been labelled "ham fisted State intervention"²² and likened to "calling in the armed

¹⁸ Auckland TT 229/87.

¹⁹ Supra at note 3, at 6896.

²⁰ Supra at note 3, at 6898.

²¹ "Rules to Change Tenants, Owners Advised" *New Zealand Herald* 17 August 1985; "Big Changes to Tenancy Bill" *New Zealand Herald* 16 July 1986; "Government Overhauls Tenancy Laws" *New Zealand Herald* 12 September 1986; "Mediation as Cornerstone of New Tenancy Law" 14 September 1986.

²² Graeme Lee (MP Hauraki) 472 NZPD 2978 (5th July 1986).

offenders squad to stop children from throwing stones."²³ These remarks formed part of an argument that the Act was "overkill" and would lead to a decline in the stock of rental housing.

The Act does not create any rental accommodation. This was not an aim of the Act, and to that extent groups such as the Housing Network and the Shelter for All Coalition have been disappointed. They lobbied for a statutory duty to ensure adequate housing for all; something the Act obviously did not do.²⁴ While in fairness, the Act ought to be assessed in light of what it did aim for rather than what it neglected, the failure of the Act to impose such a statutory duty may be seen as a disappointing omission.

Instead the Act merely regulates the management and use of existing stocks, and indeed the increased regulation may discourage present and future landlords.

Action within the private rented sector . . . depends largely on what incentives landlords have to let their property and keep it in good repair.²⁵

Housing workers, real estate agents²⁶ and landlords associations²⁷ all claim that there has been a reduction in the housing stock since the Act came into force.

The decline, in part, has been engendered by the landlords themselves. Peter Chilwell (Chairman of the Landlord's Protection Association Inc.) hailed the Bill as "anti landlord" and encouraged other landlords to "sell up before you suffer."²⁸ When it is realised that most landlords own only 2-4 rental properties, the weight small operators will give to such directives can be understood. Further Mr Chilwell warned members of his association to:²⁹

Consider the Bill to be law, rearrange your agreements, treat existing tenants and potential tenants alike as potential problems.

Such a hostile response has led not only to a halting of investment³⁰ in new rental housing but also to a change in the type of landlord now letting properties.³¹ The Tenancy Protection Association says that the small time landlord has been scared off and has sold out to speculators with very little equity who then service high interest loans with higher rent receipts. Superficial im-

²³ Roger McClay (MP Waikaremoana) 466 NZPD 6899 (19th Sept 1985).

²⁴ A distinction must be drawn between tackling tenancy problems and the much broader issue of homelessness. In the United Kingdom attempts have been made to counter homelessness by imposing a statutory duty on local authorities, Homeless Persons Act 1977.

²⁵ *Housing Policy - A Consultative Document* 1971, p 71.

²⁶ *Central Leader* (Auckland) March 10, 1987, p 6.

²⁷ Landlords Support Group spokesman Don Stockman; Landlords Protection Association Inc. Newsletter, March 1987.

²⁸ "The Retreat of the Landlord" *Metro*, November 1985, p.188.

²⁹ Landlords Protection Association Inc. Newsletter, November 1986.

³⁰ Don Stockman, Landlord's Support Group.

³¹ Jim Devine, Tenancy Protection Association.

provements are sometimes made in order to justify rent increases.³² In general this new landlord has less interest in the welfare of the tenant. If the Association is right then the Act has evoked a counterproductive response.³³

Publicity/Accessibility of Information

In examining "Act awareness" we are measuring the Act against a stated aim. As mentioned, the Housing Corporation has published "Renting and You". However, it was published in English only; thus seriously detracting from its effectiveness. The Housing Corporation has model tenancy agreement forms, but as the Act applies anyway these are not used extensively.³⁴

Peter Klein suggested that publicity rested mainly with newspapers and there have been several straight-forward articles on the most important reforms.³⁵ All these attempts at increasing awareness have certainly led to landlords knowing of the existence of the Act. The ignorance of some sections which is still displayed by some amateur landlords is worrying³⁶. As for the tenant, despite the publicity, until a situation arises in which there must be recourse to the Act, the need to be familiar with its provisions is not realised.

To improve this state of affairs more could be spent on non-English publicity. However, necessity is likely to prove to be the best teacher. Finally, while the level of publicity as to the effect of the Act generally leaves something to be desired, of particular concern is the fact that the loans which are available to finance low income families into a tenancy are not widely known. It would clearly best promote the aims of the Act – family welfare and general awareness – if these were more widely publicised.

Family Welfare

One factor which played a part in the introduction of the Act was the need to improve the position of families in rental housing. Results have been mixed. It appears to have made the position of families in rental housing more secure but, at the same time, it makes it more difficult for families to get such accommodation in the first place.³⁷

Landlords can now require an initial payment of six weeks rent (4 weeks

³² To comply with section 28.

³³ Note that other factors such as the stock market boom, interest rates on investments, tax clawbacks and economic conditions generally may have worked to reduce investment in housing.

³⁴ The Act does not appear to confer jurisdiction on the Tribunal to ratify privately drawn up agreements. This point was examined by the Tribunal at Auckland on the application of an institutional landlord who wanted his agreement approved; presumably with a view to raising such ratification as a quasi estoppel at any later proceedings.

³⁵ Supra at note 21.

³⁶ Ronald Stockman, Landlords Support Group.

³⁷ See *Decline in Stocks*. To the extent that the Act constricts the availability or affordability of rented accommodation it adds to the numbers of homeless.

bond and 2 weeks rent in advance). Many tenants may be unaware that loans are available to finance them into tenancies. The bond is held by the Housing Corporation and this state administration of bond money has led some landlords to opt for guarantees rather than a bond. Landlords who "let only to those who can provide a guarantor of substance who will also sign"³⁸ make it very difficult for tenants who are new to an area, or who do not have anyone they can rely on as a guarantor. Finding a guarantor can be especially difficult when prima facie there is no limit to the guarantor's potential liability (unlike a bond of fixed amount). Yet it is clear that guarantors are sometimes being required as a prerequisite to the grant of a tenancy.

In other cases "credit applications" are sought. Such an application discloses information about the tenant's finances so enabling selection of a tenant from whom a bond will not be required. This method of circumventing "state bondage" again places a greater onus upon the prospective tenant; rather than being asked to "front up with \$x", s/he is forced to lay bare her/his financial affairs for inspection.³⁹

Thus the Act has brought about a situation where the landlord is much more inquisitive about the tenant's financial affairs, and decisions to grant tenancies are often made on the basis of multiple, miscellaneous snippets of information. As indicated, the information required goes beyond that which is adequate to ensure that the tenant pays the rent. Information gathering of this kind enables landlords to select near zero-risk tenants. Those who, while they could meet all tenancy commitments, do not impress with their credit application, are discriminated against.

The position of already tenanted families is somewhat more heartening.

The Residential Tenancies Act does away with peaceable re-entry.⁴⁰ This is a "very positive"⁴¹ reform as the re-entry power was not always used considerately. Although some landlords' groups set out check-lists for effecting such re-occupation,⁴² stories of tenants "winning" free dinners and arriving home to find their furniture on the street were not uncommon.⁴³ Such practices are now unlawful.

The other reform which was aimed at increasing security of tenure is the new notice requirement. Ninety days notice to the tenant is now the general

³⁸ Landlords Protection Association Inc. Newsletter, November 1986.

³⁹ Credit cards held and their limits must be specified etc. This raises issues of privacy which are beyond the scope of this article but the writer would note that a landlord who acquires this information is in a position of power viz a viz his/her tenant.

⁴⁰ Section 50.

⁴¹ Jim Devine, Tenancy Protection Association.

⁴² See Landlords Protection Association Inc. Newsletter, October 1984..

⁴³ Jim Devine, Tenancy Protection Association. There are numerous other instances of hardship such as a woman whose benefit did not arrive in time to pay the rent due to a mix up. The woman was given 6 days notice which was insufficient to solve the problem and she was forced to take her family to live with another in Otara even though her job was in the city.

rule.⁴⁴ Unfortunately this reform is inherently flawed and unlikely to assist tenants greatly. Previously the notice which tenants were required to give landlords and vice versa was the same. The Act now provides for disparate periods: 90 days for the tenant, 21 days for the landlord.⁴⁵

While the landlord's 90 days notice is running the agreement remains on foot and, therefore, the tenant is required to give 21 days notice of his/her intention to quit during this period. As most tenants cannot afford to pay a double rental, a good tenant is likely to give notice and then begin looking for replacement accommodation. Thus s/he is under even more pressure than before to find housing (3 weeks as compared to 4 weeks as in the past). The only advantage is that the tenant has a discretion within the 90 day notice period as to when to place this pressure on him/herself. But the notion that the new notice requirements lessen family upheaval by giving a family three months to find another house is misguided.

Further, the Tenancy Protection Association says that many tenants do not realise that they have a responsibility to give notice during the 90 days. This is implicit rather than express, and may lead to tenants unwittingly "abandoning" premises and incurring extra liability for rent.

Thus, while the notice provisions and the eclipse of peaceable re-entry have slowed the turnover of tenancies,⁴⁶ defects in the changes are clear.

Another reform that may have backfired is the restriction of rent increases to six monthly intervals.⁴⁷ This statutory opportunity has been read by some landlords as a statutory duty to the detriment of tenants. A more obvious adverse change, from the perspective of the tenant, is the change to market based rent reviews. Disregard of personal circumstances reflects the view that "the burden of a social problem"⁴⁸ ought to be borne by the community as a whole rather than landlords alone. This may be valid but the social problems of sub-standard housing and homelessness remain unresolved.

Discrimination

It would seem much accommodation discrimination is subtle.⁴⁹

A common technique to deter unwanted tenants is to require maximum bond and rent. The prospective tenant is unaware of discrimination and the new legal maximum is manipulated to defeat the Act's intent.

Tenants may also be disadvantaged by landlords' schemes to tie tenancies to employment. The landlord lets to employers who then create a service ten-

⁴⁴ Section 51(1)(d).

⁴⁵ Section 51(1)(d), section 51(2).

⁴⁶ Landlords Support Group estimates tenancies have now lengthened.

⁴⁷ Section 24.

⁴⁸ Property and Equity Law Reform Committee *Report on Residential Tendencies*, p 24.

⁴⁹ Andrew Barney, Senior Mediator, Human Rights Commission.

ancy.⁵⁰ A policy of letting on this basis may fall foul of section 12 as it excludes persons unemployed. But tenant awareness of prohibitions on discrimination is not great. A senior mediator with the Human Rights Commission has commented that:⁵¹

Any landlord or tenant who read the publicity thoroughly would pick up references to our Acts [Human Rights Commission Act, Race Relations Act], but it is likely those who would have done so would already have been aware of the Acts.

Thus, discrimination may go unchecked.

The official attitude to discrimination is strict. All known attempts by an applicant to gain the Tenancy Tribunal's sanction for discrimination have been rebuffed.⁵²

Very few such applications have been made and it seems likely exemptions will be given in exceptional circumstances only.⁵³

While landlords who honestly and openly apply for an exemption from the section are unlikely to succeed, it seems the Act, like similar provisions elsewhere, may succeed only in driving discrimination underground.

Minimising Confrontation

The abolition of peaceable re-entry was supported by the Commissioner of Police as it reduces the role of the police in tenancy disputes.⁵⁴ Tenants, too, have cause for relief as violent skirmishes are on the decline.⁵⁵

It is . . . my feeling that since the Act came into force, there have been fewer disputes which have required the attendances of the police.

The Act provides severe penalties for unauthorised entry,⁵⁶ and this appears to have been an effective deterrent.⁵⁷

So far as section 63 of the Act is concerned, whilst this has been allocated a code for police statistical purposes, I have been unable to find any record of prosecutions for a breach of the section.

The practice of bond holding by the Housing Corporation has avoided two-party haggling over its return. Bond disputes are now resolved by mediation or before the Tribunal.

The new mediation service is the most important reform aimed at reducing conflict within tenancies. It has been headlined as the "Cornerstone of Ten-

⁵⁰ Special shorter notice provisions then apply, section 53.

⁵¹ Supra at note 49.

⁵² e.g. *Mallett* TT2/87 Wanganui. In one application the landlord claimed his property did not have sufficient fencing to keep children off a very busy road frontage. This too was rejected.

⁵³ David G. Mather, Tenancy Adjudicator.

⁵⁴ Phil Goff (Minister of Housing) 474 NZPD 4670 (25th Sept 1986).

⁵⁵ N. Trendle, Chief Legal Adviser to the NZ Police.

⁵⁶ Section 63(2).

⁵⁷ Supra at note 55.

ancy Law⁵⁸.

The mediation service [is] designed to resolve disputes at an early stage by encouraging landlords and tenants to discuss their problems with a corporation mediator and come to a joint agreement.⁵⁹

In this sense it usurps the role the Tenancy Protection Association had been attempting to fill. Accordingly the Association encourages tenants to use the service.

Some problems are unsuited to mediation; for example, where premises have been abandoned. In other cases of serious breach the Principal Tenancy Adjudicator has instructed that there be direct referral to the Tribunal.⁶⁰ Also mediation will not take place where one (or both) of the parties has refused the service.

Where the parties do agree to mediation the success rate is very high. Ninety per cent of cases mediated result in agreement.⁶¹ Thus, while there have been claims that mediation is often being refused⁶² this may reflect the refusing party's goals rather than a lack of faith in the process. A decision to go to the Tribunal directly may be a decision to cut one's losses (often the money orders obtained are unenforceable) and seek termination.

Mediation offers a more conciliative solution. It deals primarily with three classes of dispute:

1. Rent arrears.⁶³
2. Bond disputes.
3. Others.

The last two categories may raise numerous issues and mediators attempt to identify underlying interests in reaching agreements. This commitment to promoting good tenancy relationships is reflected in Iain Potter's⁶⁴ disappointment when mediation is cancelled because the tenant pays up at the last minute. The underlying problem remains unresolved.

Mediation enables a global approach to be taken to tenancy relationships. Flexibility and tailoring of resolutions are unfettered by the Act.⁶⁵ Occasionally mediation is used to resolve problems that lie outside the explicit scope of the Act.⁶⁶

Not only is the mediation service more flexible than the Tenancy Tribunal, it is also quicker. The person against whom the complaint has been made is

⁵⁸ *NZ Herald* September 14 1986.

⁵⁹ *NZ Herald* 28 March 1987.

⁶⁰ Practice Directions p 5, s 87 e.g. breach under s55(1)(b).

⁶¹ Iain Potter, Principal Mediation Officer.

⁶² *Supra* at note 59.

⁶³ Which Iain Potter characterises as a problem rather than a dispute.

⁶⁴ *Supra* at note 61.

⁶⁵ cf Tenancy Tribunal.

⁶⁶ That is, mediation is available for any minor problem although it has not been expressly averted to in the Act.

contacted within two or three days; there is, therefore, more chance of contacting an unscrupulous tenant before they abscond.

The merits of mediation are plain. It offers greater speed and flexibility than the tribunal process, and hence it is not surprising that mediators face an ever increasing work load. Care ought to be taken to ensure that work pressure does not compromise the success of the service. This is crucial as in the words of Associate-Professor Palmer:⁶⁷

In practice, the skills and efficiency of the mediator may well determine the success of the Act . . .

Comprehensiveness and Equity of Cover Under the Act:

Much attention has been directed towards the definitions section⁶⁸ and the exclusions section⁶⁹ in an effort to discern the essential elements of a tenancy. Section 5 sets out the principal exclusions and section 10 puts the onus of proof on the person who contends the Act does not apply. However, there is confusion as to where the line between tenancies and more casual arrangements is to be drawn.

Exclusive occupation is no longer the acid test:⁷⁰

'Tenancy' in relation to any residential premises means the right to occupy the premises (whether exclusively or otherwise) in consideration for rent . . .

Recourse to the definition of "rent" to resolve this problem only illustrates the circularity of these definitions:⁷¹

'Rent' means any money, goods, services or other valuable consideration in the nature of rent to be paid or supplied under a tenancy agreement by a tenant.

Examination of the definitions is an exercise in 'chasing a tail', as Associate-Professor Palmer points out. This ineffectual drafting makes the task of the Tenancy Tribunal very difficult. It has led to ad hoc definitions and inconsistencies. In one instance the confusion led to a Tenancy Adjudicator ordering squatters to pay rent – an order which he did not have power to make under the Act.

The Tenancy Tribunal

"Justice Department statistics show that to the end of June 1987 2,050 substantive applications had been heard by the Tribunal throughout the country."⁷² Although then "the Tribunal is designed to be a flexible and informal

⁶⁷ [1987] NZ Recent Law 235, 242.

⁶⁸ Section 2.

⁶⁹ Section 5.

⁷⁰ *Supra* at note 68.

⁷¹ *Ibid.*

⁷² Wendy Eyre, Principal Tenancy Adjudicator.

body concerned as much with justice as the letter of the law"⁷³ the Act has seemingly engendered a tribunal focus.⁷⁴ It is unquestionably one of the most important reforms – one the Landlords Support Group claims is creating "the litigious tenant."

1. *Constitution*

Section 67 permits the appointment of Tenancy Adjudicators who have a legal qualification or:⁷⁵

who in the opinion of the Minister of Justice, [are] otherwise capable by reason of special knowledge or experience of performing and exercising the duties, functions and powers of a Tenancy Adjudicator.

Pursuant to this section the Justice Department approached "cultural groups, lawyers and real estate institute members to form a pool of tenancy adjudicators."⁷⁶ This was an important attempt to make the Tribunal as representative of the community as possible. But it has also resulted in trade-offs in other respects.

Given that more often than not the Tenancy Adjudicator is being called upon to construe provisions of the Act it is not surprising that errors are made by those unused to such analysis.⁷⁷ The reasonableness of requiring lay people to adjudicate on potentially complex legal issues must be questioned. Practice Directions issued by the Principal Tenancy Adjudicator instruct Adjudicators to refer certain matters (e.g. those involving more than \$3,000) to another with a legal qualification. But this does not solve the problem. Decisions which involve sums of less than \$3000, and those which do not involve monetary issues, still have an important precedential effect. Legally qualified adjudicators are far more aware of the potential legal consequences of their decisions and therefore reach them with an eye to these ramifications.

2. *Exercise of Jurisdiction*

Section 85 states:

(1) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises to which this Act applies.

(2) The Tribunal shall determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

⁷³ Andrew Alston *Residential Tenancies Act 1986* (1987) 4 BCB 157 at 158.

⁷⁴ Suggested by Jim Devine, Tenancy Protection Association.

⁷⁵ Section 67(5)(b).

⁷⁶ *Auckland Star* December 2, 1986.

⁷⁷ It was a non-legal adjudicator who made the order for rent against the squatters, and a different non-legal adjudicator who sat on the cases of *Mount Eden Borough Council* and *Donovan* mentioned later in this article.

The writer submits that this section ought to be construed in the light of two factors:

1. The deletion of clause 130 from the bill. This clause delegated power to the Tribunal to "exclude or modify the operation of any provision of the Bill to any tenancy." (It was deleted as it was seen to abrogate the rule of law.)
2. The intended distinction between the jurisdiction of the Tenancy Tribunal and that of the Small Claims Tribunal.

The 'equity and good conscience' jurisdiction created by section 85 raises issues highlighted by David Beatson when commenting on the Small Claims Tribunal:⁷⁸

Obviously the tribunal is meeting many of its basic objectives – but what kind of justice is it dispensing?

That has been checked out in a survey conducted by the policy and research division of the Department of Justice. An overwhelming majority of people think they have been give a *fair hearing* . . . But was the outcome considered fair? Significantly more claimants (73 per cent) than respondents (55 per cent) thought so. So a significant minority of all people (about 36 per cent), are leaving the Tribunals with what they feel is an *unfair outcome* and almost nowhere else to go. [Emphasis added.]

The Tenancy Tribunal may be "cheap justice"⁷⁹ in more ways than one. There is always a danger when exercising quasi legal power that ad hoc decisions will be made on the basis of "administrative discretion"⁸⁰ rather than a clear legal or moral standard.

While in some instances this can work to the advantage of the underdog⁸¹ – and is supported by welfare agencies⁸² – it compromises intellectually honest and consistent decisions. Further, it may result in a two tier justice system where those with the wherewithal to appeal to a strictly legal body are the ones who get the well honed decision.⁸³

In *Mt Eden Borough Council v Tenancy Tribunal*⁸⁴ the Tenancy Adjudicator dismissed an application to shorten the notice period in respect of pensioner flats as he held that these were outside the Act. It was held that the flats were "part of [a] home, hospital or other institution for the care of sick disabled or aged persons" as per section 5(d). The writer submits that the flats are *not* part of a home, hospital or, ejusdem generis, 'institution'. Further, it is ar-

⁷⁸ *NZ Listener* Editorial, September 17, 1986.

⁷⁹ *Supra* at note 73.

⁸⁰ Sawyer, "The Administration of Morals" in *Essays in Honour of Julius Stone* illustrates the dangers.

⁸¹ *Ibid.*

⁸² The Tenancy Protection Association sees it as advantageous.

⁸³ This may be already be happening in the referral of disputes of more than \$3,000 to legal adjudicators.

⁸⁴ Auckland TT 413/87.

guable that the exclusion only covers homes that care for the aged and mere provision of accommodation does not constitute care.⁸⁵

A similar decision by the same Adjudicator excluded self contained student flats owned by the University from the protection of the Act.⁸⁶ These decisions run counter to the purpose of the Act and section 85 should not be used to condone such decisions.

A rehearing would appear appropriate in such cases. Associate-Professor Palmer views rehearings as providing a safety-check on the process.⁸⁷ However, rehearings are not granted as of right. The applicant merely gets the opportunity to persuade the same Adjudicator that his/her first decision is a "substantial wrong or miscarriage of justice".

While it is understandable that the Tribunal wishes to avoid wholesale appeals, this "do it yourself" review is highly unsatisfactory. Effective review is *independent* review. The wisdom of scheduling the first instance Adjudicator to hear the rehearing application must be questioned – especially when lay adjudicators have difficulty in distinguishing an attack on their decision from a personal insult.⁸⁸ Lay adjudicators have also had difficulty perceiving the difference between determining whether there ought to be a rehearing and holding a rehearing – a distinction which makes an enormous difference to the evidence and argument which the applicant must adduce.⁸⁹

The rehearing provision appears to be an exercise in economy rather than an attempt to establish effective review.

Another inherent defect in the jurisdiction of the Tribunal is its susceptibility to be a purely equitable decision maker. This is demonstrated in *John Crocker Real Estate v Alexander*⁹⁰ when the Tribunal increased the notice period beyond the expired 90 day period as the tenant was homeless. Adherence to the Act may create homelessness⁹¹ but anything less can only result in landlords losing confidence in the Tribunal's impartiality.

The vagueness of the Act, and the existence of decentralised Tribunals, may also import diversity and "particular case" decision making rather than the formulation of definite criteria.⁹²

It is to be remembered that there is *one* Tribunal, its jurisdiction exercisable throughout the country by Tenancy Adjudicators who will usually sit alone. Consistency of practice, interpretation and decisions must be maintained as part of a fair and just system. (Emphasis added.)

⁸⁵ Note also that, contrary to the Act, the Council was represented by a solicitor.

⁸⁶ *Donovan v University of Auckland* Auckland TT 414/87.

⁸⁷ *Supra* at note 67, at 243.

⁸⁸ This was demonstrated by the rehearing application made by Donovan in respect of decision Auckland TT 414/87.

⁸⁹ *Ibid* where the Adjudicator at first saw no distinction and then ruled the rehearing would be granted and held in the same proceeding.

⁹⁰ Auckland TT 380/87.

⁹¹ e.g. as where a woman had to return to Rotorua to live in her brother's hallway.

⁹² Practice Directions, p 7.

On the plus side, the Tribunal's procedures are laudable as an extreme effort to be fair. They are inquisitorial rather than adversarial. They are conducted informally with use of 'Your Honour' being politely discouraged. Principles of natural justice are adhered to as much as possible even when this involves delaying a decision.⁹³ Normally decisions are given immediately after the hearing and reasons are stated.

While this creates a fair process, it is suggested that fair outcomes are more elusive. The flaws in the conscience jurisdiction have not been cured merely by the creation of a separate Tribunal. Finally, it is important to note the optimistic assumption that the participants have the language skills to present their own case.⁹⁴

Accessibility of Information

Summaries of decisions of interest are available from the Principal Tenancy Adjudicator. The Legal Information Service plans to publish these summaries. The limited extent of reporting can be argued to be "inimical to scholarship, as well as to the maintenance of anything like 'equal protection'".⁹⁵ More extensive reporting would enable better monitoring of the Tribunals' consistency, or lack thereof. On the other hand the present situation avoids "citisis" (first diagnosed by Llewellyn), which is a symptom of an increasingly legal approach. The scope of reporting raises policy questions that have been avoided⁹⁶ to date.

Conclusion

Overall, the Act amounts to a substantial advance in the legal and social protection of tenants, yet it retains a fair balance in favour of landlords in respect of the protection and recovery of premises.⁹⁷

This summary is a fair assessment of the effect of the Act from the perspective of most people affected. Although the notice reform is flawed, the abolition of re-entry and the more straight-forward articulation of responsibilities is welcome. Associate-Professor Palmer queries whether the Act's 144 provisions have simplified the law, but this is in part a response to the sections being unfamiliar rather than more complex.

The Act is working well for most. Tenancies are regulated silently. However, it is those premises which are almost sub-standard and those tenants who face financial hardship that are coming to the attention of the Tribunal.

⁹³ *Wood v Stemson* was adjourned several times to allow all parties to be present and prepared.

⁹⁴ Implicit in the limited role given to lawyers and other representatives.

⁹⁵ *Supra* at note 80, at 93.

⁹⁶ Reporting would also facilitate tracing of 'bad' tenants/landlords unless names were deleted.

⁹⁷ *Supra* at note 67, at 243.

These "welfare cases" are being dealt with by a body which gives them a fair hearing, but not necessarily a fair outcome. Substantive justice may be ad hoc and imprecise because of a lack of clear legislative direction. In particular, section 85, which describes the manner in which the jurisdiction of the Tenancy Tribunal should be exercised, requires further elaboration, by way of practice directions or even within the Act, so as to distinguish the character of the Tribunal. The absence of such specificity has resulted in the decisions of the Tribunal varying, if not with the 'foot' of the adjudicator, at least with his/her own interpretation of the broad jurisdiction conferred. Even if substantive justice is achieved, the problem of homelessness may be exacerbated in order to maintain the integrity of the Tribunal.

The resounding success thus far of mediation may ameliorate this difficulty.

However since the passing of the Act the problem of homelessness is in even more need of urgent redress. Evaluation has shown the merits of the Residential Tenancies Act in managing existing tenancies. Its most glaring defect is that it was passed without a sister Act to combat the problems which it has aggravated rather than solved.