

## LAW REFORM

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### TENANCY PROBLEMS

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This paper is entitled 'Tenancy Problems' which is a little misleading. First, I am concerned only with problems of residential tenancies. Secondly, my perspective is limited. I am a tenant, I am active in a Tenants Protection Association and the information on which this paper is based derives largely from the files of that Association. So, while I try to be fair to landlords and agents, I speak from a tenant's point of view.

I propose to start with a brief introduction to the source of my information on the New Zealand problems: The Tenants Protection Association (Christchurch) Inc. This will be followed by an outline of the main types of residential problems in New Zealand. Finally, I will deal with the New Zealand solutions to these problems and some ideas for change.

#### THE TENANTS PROTECTION ASSOCIATION (CHRISTCHURCH) INC.

A Tenants Protection Association was first set up in Christchurch in the early seventies and functioned until 1979 when it voluntarily disbanded. At the time, there was a housing glut and it was thought the few tenancy problems that arose could satisfactorily be dealt with by other voluntary advice services. By the end of 1981 the situation had changed. The housing glut had become a housing shortage. As a result, tenants had less bargaining power and tenancy problems were rife. So, at the end of February 1982, the Tenants Protection Association was reformed.

There are two main aspects to our work. First, we provide an advice service. Most cases are handled over the telephone, but people also come to see us to discuss their problems. Sometimes we follow up our advice with letters to, or direct discussion with, landlords. Secondly, we provide an information and education service. This is in the form of writing and distributing pamphlets, notices and booklets and presenting various talks and seminars.

#### THE MAIN PROBLEMS

Most of the problems with which we deal fall within the following six categories.

1. *Eviction* — This usually involves the question "Is the notice to quit valid?". Occasionally, there is the further problem where the notice to quit has expired and the tenant cannot find alternative accommodation.

2. *High Rent* — We have to consider first, if proper notice has been given of an increase in rent and secondly, if the rent is excessive and if this is a case for the Rent Appeal Board.

3. *Initial Payments* — When a tenant takes premises, he is usually faced with a number of payments: bond, rent in advance, agent's commission, power bond and telephone installation fee. Often tenants cannot afford these amounts, in which case there is usually nothing we can do to help. However, we can help when the amounts claimed are unlawful, i.e., where the rent in advance or the bond exceeds the prescribed limit or where an agent demands a commission from a tenant that he is only entitled to claim from the landlord.

4. *Bonds* — Sometimes questions relate to landlords demanding excessive bonds, but more often they relate to landlords who refuse to pay back bonds. Many of these cases are best dealt with by the Small Claims Tribunal.

5. *Getting Landlords to Repair* — The procedure is set out in the Property Law Act 1952 and we advise tenants accordingly. Many tenants do not bother because of the hassle involved and the risk of standing up to their landlords.

6. *Intrusions on Tenants Rights of Privacy and Quiet Enjoyment* — In this area, the rights of tenants and duties of landlords are clearly set out in the Property Law Act 1952. The problem is more practical than legal. Can a tenant afford to stand up for his rights against his landlord and face the risk of eviction?

#### SOLUTIONS

The New Zealand legislation makes an honest attempt to deal with some of these problems but many of its solutions are vague and incomplete and many of the rights accorded to tenants and to landlords are unenforceable.

I believe that most tenancy problems could be eliminated or eased by legislative reform and I am encouraged in this belief by recent overseas developments, particularly in Victoria and South Australia. My suggestions are culled mainly from the Victorian Residential Tenancies Act 1980 which came into force in November 1981.

#### *Administrative Machinery*

In New Zealand, when a tenancy problem cannot be resolved by the parties themselves, they, or one of them, can take it to either the Rent Appeal Board, the Small Claims Tribunal or the District Court.

The Rent Appeal board will make an assessment of an "equitable rent" on the application of either a landlord or a tenant.<sup>1</sup> Generally, a landlord is bound not to charge more than the equitable rent for a period of twelve months.<sup>2</sup> It is an offence if a landlord evicts a tenant because the tenant applied to have an equitable rent assessed.<sup>3</sup>

<sup>1</sup> Rent Appeal Act 1973 (N.Z.) section 6(1).

<sup>2</sup> *Ibid.*, section 9(1).

<sup>3</sup> *Ibid.*, section 20.

The Small Claims Tribunal deals, *inter-alia*, with contractual and quasi-contractual matters in respect of amounts not exceeding \$500.<sup>4</sup> It provides a cheap and efficient procedure, unencumbered with legalistic trappings. Generally, parties must represent themselves unless they are under a disability.<sup>5</sup> In no circumstances may they be represented by a lawyer.<sup>6</sup> The Small Claims Tribunal is usually the most appropriate forum for disputes over repayment of bonds and unlawfully paid sums.

The District Court is a court in the traditional sense. Proceedings are slow and costly and litigants usually need to be represented by lawyers. It is the appropriate forum — because it is the only forum — for disputes over eviction, repair and maintenance and intrusions on tenants' rights of privacy and quiet enjoyment.

There are two main faults with the New Zealand machinery. First, while some tenancy disputes can be dealt with cheaply and efficiently, others — those which must go before the District Court — can not. Secondly, there are too many forums.

An attractive solution is suggested by the Victorian Act which has established machinery that is separate from the ordinary judicial system. This comprises the Residential Tenancies Tribunal<sup>7</sup> and the Director of Consumer Affairs.<sup>8</sup> The Tribunal provides a low cost and quick way of settling day-to-day tenancy disputes.<sup>9</sup> The Director, *inter-alia*, investigates complaints, negotiates settlements and disseminates information.<sup>10</sup> Almost all tenancy disputes are dealt with by the Tribunal and the Director.<sup>11</sup>

### *Eviction*

In New Zealand, a landlord who wishes to evict a tenant must give the period of notice to quit that is appropriate to the agreement. If no period is specified in the agreement then section 105 of the Property Law Act 1952 applies. This provides that for either party to end the tenancy, he must give one clear month's notice in writing to the other party. If a period is specified in the agreement, section 105 does not apply. Some agreements specify periods of one week or less.

A tenant can also be evicted for non payment of rent but only if he has been in arrears for three weeks,<sup>12</sup> and he can be evicted for breach of any other condition of the agreement<sup>13</sup> but not:

“. . . unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring

<sup>4</sup> Small Claims Tribunals Act 1976 (N.Z.), section 9.

<sup>5</sup> *Ibid.*, section 24(2) and (3).

<sup>6</sup> *Ibid.*, section 24(5).

<sup>7</sup> Residential Tenancies Act 1980 (Vic), sections 14 to 48.

<sup>8</sup> *Ibid.*, sections 11 to 13.

<sup>9</sup> *Ibid.*, sections 18 to 48.

<sup>10</sup> *Ibid.*, section 11.

<sup>11</sup> The Tribunal is limited in its jurisdiction to claims which involve a monetary worth not exceeding \$1500: section 18.

<sup>12</sup> Property Law Act 1952 (as amended by the Property Law Amendment Act 1975), section 107(6).

<sup>13</sup> *Idem.*

the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation therefor in money to the satisfaction of the lessor."<sup>14</sup>

The New Zealand system, allowing as it does for arbitrary eviction at short notice, is manifestly unfair. It is difficult for tenants to find alternative premises when they have been given notice to quit of a month or less. Furthermore, where a tenant knows he can be evicted at short notice, he may be disinclined to stand up for any rights which he may have under his tenancy agreement or which are guaranteed him by law. The fear of eviction diminishes the strength of these rights.

Again, the Victorian Act suggests an attractive solution. It guarantees tenants against short term notices to quit. Where the tenant is not in breach of any covenants and the landlord requires the premises for legitimate purposes other than residential letting, he may give sixty days notice to quit.<sup>15</sup> Where the landlord wishes to evict arbitrarily, he must give at least six months notice to quit.<sup>16</sup> Other lesser periods are specified in the Act for different circumstances.<sup>17</sup>

### *High Rent*

In New Zealand there are no rent restrictions as such.<sup>18</sup> However, as mentioned, if rent is excessive, a tenant can apply to the Rent Appeal Board for an assessment of an equitable rent.<sup>19</sup> The Board may take into account a number of factors in making its assessment, including the locality in which the premises are situated, the standard of accommodation which they provide, state of repair, the prevailing level of rents in the locality, the provision of a proper return to the landlord, the landlord's outgoings and the furniture (if any) provided by the landlord.<sup>20</sup> The Board does not take into account the personal circumstances of either the landlord or the tenant. Nor is it concerned with setting standards for the community. If rents generally are high, the assessments of the Board will also be high. Thus, an equitable rent under the Act may not be equitable in the ordinary sense of the word. It is a rent that conforms with current standards which may themselves be inequitable.

However, I do not recommend that this aspect of the system be changed. One could expand the scope of matters to be taken into account by the Board in making assessments so that it sets standards for the community. But this would effectively give it power to impose rent restrictions which I am not sure are desirable. In any case I would not like to see such a power vested in a quasi-judicial body.

<sup>14</sup> *Ibid.*, section 118.

<sup>15</sup> Residential Tenancies Act 1980 (Vic), section 122.

<sup>16</sup> *Ibid.*, section 123.

<sup>17</sup> *Ibid.*, sections 118, 119 and 120.

<sup>18</sup> This is subject now to the restrictions imposed by the Rent Freeze Regulations 1982 which came into force for a period of one year from the 22nd June 1982.

<sup>19</sup> Rent Appeal Act 1973 (N.Z.) section 6(1).

<sup>20</sup> *Ibid.*, section 8(1).

Nevertheless, some changes are desirable. The following are suggested, but in this case not fully implemented, by the Victorian Act. I recommend first, that landlords be limited in the number of times they can increase rent in a six month period to once and, secondly, that landlords be required to give sixty days notice of a rent increase. Thirdly, as an aspect of my first recommendation, I suggest that a reduction of facilities by a landlord be deemed to be an increase of rent.

### *Initial Payments*

Our main concern here is with rent in advance, bonds and agents' commission.

At the beginning of a tenancy, it is usual for a landlord to demand a payment comprising (a) rent in advance and (b) bond. The amount of this payment must not exceed the equivalent of one month's rent.<sup>21</sup> A landlord could, for example, demand one month's rent in advance and no bond or he could demand bond, the equivalent of one month's rent and no rent in advance. However, it is usual for a landlord to demand two weeks' rent in advance and bond equivalent to two weeks' rent.

The New Zealand provision in this respect compares favourably with the Victorian provisions. In Victoria, if the rent does not exceed \$100 per week, a landlord can demand an initial payment of not more than one month's rent in advance and bond the equivalent of one month's rent.<sup>22</sup> If the rent exceeds \$100 per week, there seems to be no limit.<sup>23</sup>

Apart from rent in advance and bonds, tenants often have to pay an additional sum (usually the equivalent of one week's rent) by way of agents' commission. Recently, a tenant succeeded in a case in the Christchurch Small Claims Tribunal where she claimed that the commission which she had paid an agent was an illegally obtained sum. She relied on section 22(3) of the Rent Appeal Act 1973 which provides:

"Every person commits an offence against this Act who stipulates for or demands or accepts, for himself or for any other person any payment or other consideration (not being commission lawfully payable to a real estate agent) for obtaining any dwellinghouse or property for the occupation of any other person."

This provision is subject to the words "not being commission lawfully payable to a real estate agent" but it was submitted that where an agent is acting for a landlord he cannot assert that the money paid to him by the tenant is lawfully paid commission. The only person from whom he can accept commission is the person for whom he is acting as agent, in this case the landlord.

It is hoped that this decision foreshadows the end of an invidious practice. I was surprised to see that the Victorian Act does not restrict agents in claiming commission from tenants although the original Bill provided that a tenant could not be charged any "fine, premium, bonus, commission or key money."<sup>24</sup>

<sup>21</sup> *Ibid.*, section 21 (a).

<sup>22</sup> Residential Tenancies Act 1980 (Vic), sections 57 and 70(1).

<sup>23</sup> *Idem.*

<sup>24</sup> Residential Tenancies Bill 1978 (Vic), section 109

### *Bonds*

The Tenants Protection Association has discussed the problem of bonds with representatives of the Landlords Association. We are concerned about landlords who retain bonds when they have no right to do so. They are concerned about tenants who regard the bond as rent owing by them and accordingly do not pay the last two weeks' rent. The following suggestions would probably be in both our interests.

First, bonds should be held not by landlords but by an independent authority and they should be invested with an authorised institution. Interest could be used to cover the costs of the expanded administrative machinery.

Secondly, tenants should be given the choice of paying a bond, or paying an insurance premium, annually, to cover loss or damage suffered by the landlord through the failure of the tenant to perform his obligations as tenant.

Thirdly, not more than one bond should be demanded where the tenant is in continuous occupation of premises.

Fourthly, it should be made an offence for a tenant to refuse to pay rent on the ground that he intends to regard the bond as rent owing by him.

All these reforms have been implemented to some extent by the Victorian Act.<sup>25</sup>

### *Repair and Maintenance*

The obligations of landlords and tenants in New Zealand in respect of repair and maintenance may be briefly stated. The landlord must let and keep the premises in a fit and habitable condition for residential purposes<sup>26</sup> and he must ensure that the premises meet local authority housing standards.<sup>27</sup> The tenants must keep the premises clean and tidy and the grounds free from rubbish.<sup>28</sup> They must make good any damage caused wilfully or negligently by them or any person permitted by them to enter or remain on the premises.<sup>29</sup>

Many disputes in this area occur when something, which it is not the tenants' responsibility to maintain, breaks down without causing the premises to be in a less than fit and habitable condition. For example, a landlord must provide adequate facilities for washing clothes; that is, either a washing machine or two tubs. If he provides both and the washing machine breaks down, the premises are still in a fit and habitable condition. Does he have to repair the machine and, if so, can he be compelled to do so by the procedures set out in the Property Law Act 1952 which are referable to the landlord's obligation to let and keep the premises in a fit and habitable condition? The answers seem to be, to the first question, yes and to the second question, no.

<sup>25</sup> Residential Tenancies Act 1980 (Vic), sections 65 to 79.

<sup>26</sup> Property Law Act 1952 (N.Z.), section 116H.

<sup>27</sup> See for example Christchurch City By-Law No. 52 and Housing Improvement Regulations 1947 (N.Z.) which are administered by local authorities.

<sup>28</sup> Property Law Act 1952 (N.Z.), section 116D(a).

<sup>29</sup> *Ibid.*, section 116D(6).

So, the first deficiency in the New Zealand legislation in respect of repairs and maintenance is that it does not clearly define the responsibilities of both landlords and tenants. This could be overcome by more precise and detailed drafting.

The second deficiency is that the machinery for getting landlords and tenants to do their duties is slow and cumbersome. For example, a tenant who requires his landlord to do non-urgent repairs to put premises in a fit and habitable condition may have to serve one month's notice on the landlord to do the repairs and at the end of the month do them himself and claim the cost from the landlord.<sup>30</sup> If the repairs are urgent, the tenant (or, if it is the tenant's responsibility, the landlord) may back his own judgment and do them himself immediately but to claim the cost he may then have to justify his conduct in court.<sup>31</sup>

As a remedy to this deficiency I suggest that landlords and tenants should be able to call on the services of someone like the Victorian Director of Consumer Affairs or his representatives who could investigate a complaint and then require the landlord or the tenant, as the case may be, to do his duty. This would be an inexpensive and speedy procedure and it would avoid uncertainty and conflict that arises under our present system.

#### *Intrusion on Tenants Rights of Privacy and Quiet Enjoyment*

Generally, in New Zealand, a landlord may, after giving not less than 24 hours notice, enter premises at any reasonable time for the purposes *only* of (1) inspecting their state of repair or (2) carrying out work to keep them in a fit and habitable condition for residential purposes.<sup>32</sup>

However, a landlord may enter premises without prior notice to the tenants (1) with the tenants' consent, (2) whenever he believes on reasonable grounds that the premises are being damaged at that time, whether by any person or otherwise or (3) where the tenant has vacated the premises.<sup>33</sup>

The problem here is not that the rights given to tenants are inadequate. It is that, to a large extent, they are unenforceable. A tenant who stands up for his rights is liable to be given notice to quit. This problem would be overcome if the above mentioned recommendations guaranteeing tenants against short term notices to quit were implemented.

#### *Enforcement of Rights*

Rights are meaningless if they cannot be enforced. The present New Zealand legislation contains a number of rights which are unenforceable either because tenants who exercise them face the threat of eviction, or because persons who commit the offences prescribed for breach of their corresponding duties are not prosecuted. For example, not one person has

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<sup>30</sup> *Ibid.*, section 116I.

<sup>31</sup> *Ibid.*, section 116F and 116J.

<sup>32</sup> *Ibid.*, section 116G.

<sup>33</sup> *Idem.*

been prosecuted under the Rent Appeal Act since it came into force in 1973. This is not because offences are not being committed. It is because the authority responsible for administering the Act — the Housing Corporation — refuses to prosecute. If provisions specifying offences are to have any meaning, then the responsible authority must enforce them.

#### CONCLUSION

The Residential Tenancies Act 1980 has not fulfilled the promises of the original Bill. From the time the Bill was introduced in December 1978 it was apparent that forces were mounting against it and that to some extent it would be revised before being enacted. How powerful those forces were and how much it would be revised I, for one, could not have guessed. I suppose there is a lesson to be learnt from this for those of us who are now advocating reform in New Zealand. . . .

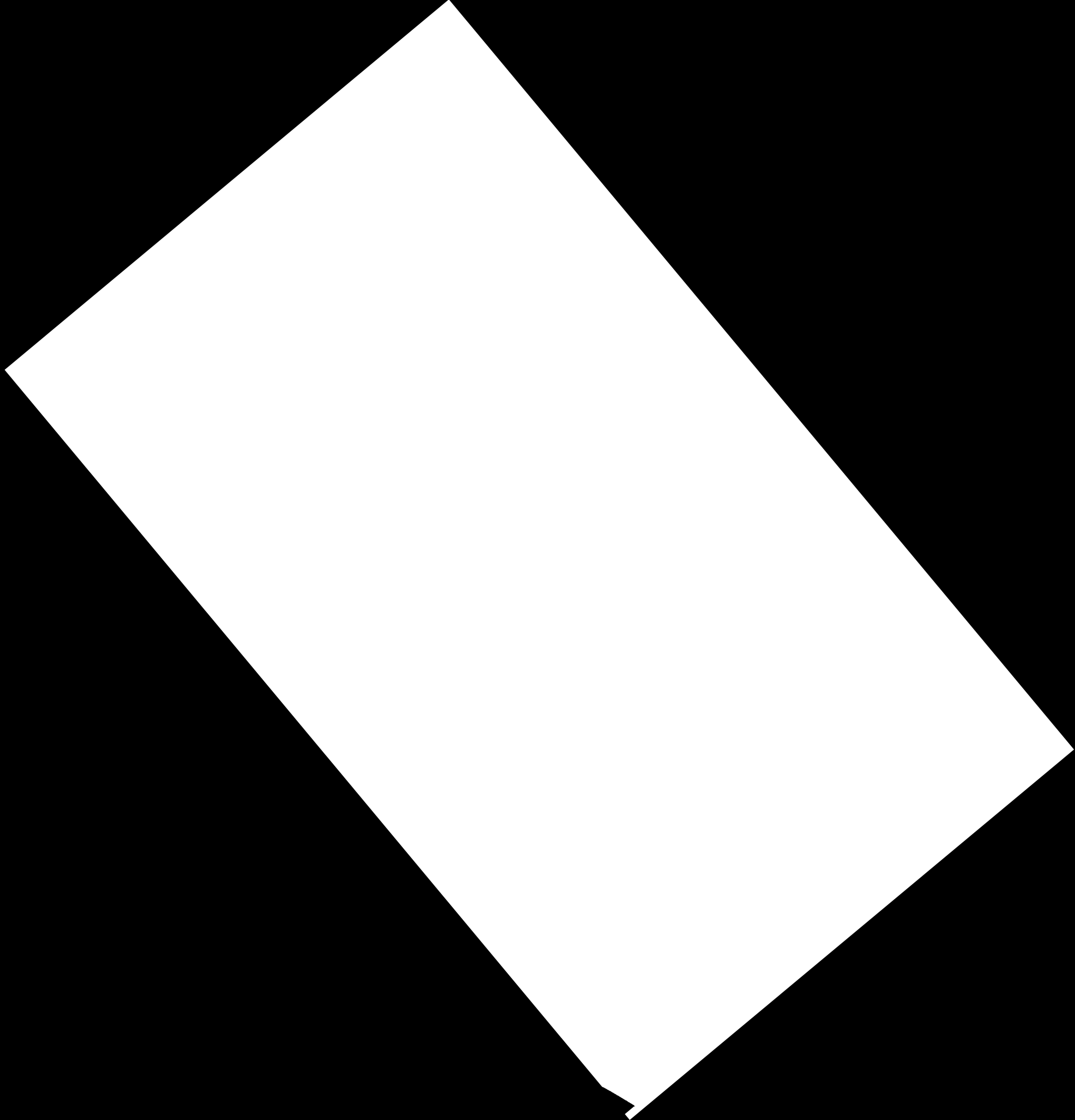
Nevertheless, there is one feature of the Victorian Act which I applaud and which I feel must be adopted in New Zealand. This is the guarantees (albeit relative) against short term notices to quit.

For a long time both Australia and New Zealand have had a high incidence of home ownership and renting has been regarded as an interim stage in a young person's life. Tenants were not regarded, even by themselves, as having much more than a right to occupy the premises in which they lived. In other countries where there is a lesser incidence of home ownership, tenants are more likely to regard the premises in which they live as a home and their interests may be seen to be more proprietary and contractual. These attitudes are reflected in these countries' laws which give tenants greater security of tenure than has been the case in Australia and New Zealand.

Our situation is changing. Renting is more common and it is important that our laws reflect the greater meaning that rented premises have to their occupants. Victoria has made a start. Let us hope that New Zealand will soon follow.







# The Canterbury Law Review

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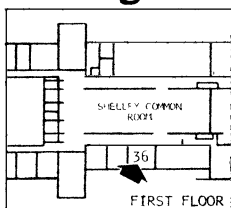
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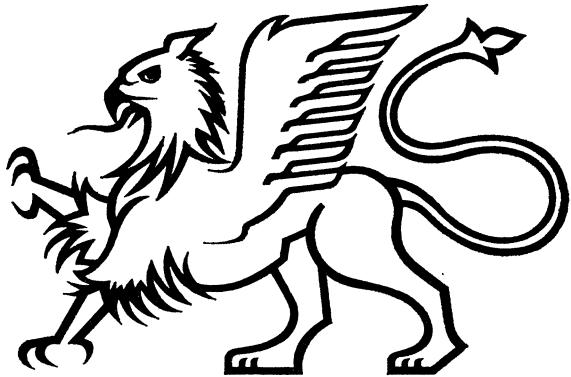
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