

Impact Summary: Residential Tenancies Amendment Bill (No. 2) Supplementary Order Paper

Section 1: General information

Purpose

The Ministry of Business, Innovation and Employment (MBIE) is solely responsible for the analysis and advice set out in this Regulatory Impact Summary, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by Cabinet.

The proposal is to make minor changes to the existing provisions of the Residential Tenancies Amendment Bill (No. 2) (the Bill). The Bill amends the Residential Tenancies Act 1986 (the RTA) to address a number of issues relating to residential tenancies, including contamination of rental premises. The proposed changes to the Bill are to:

- a. insert an additional regulation-making power to those already in the Bill to clarify the circumstances in which landlords should be required to test for contaminants in residential rental properties, and
- b. remove landlord liability under other obligations of the RTA when a tenanted property is found to be contaminated, by deleting the words “*Without limiting subsection (1)*” from the clause relating to landlord responsibilities

Following agreement by Cabinet, the proposed changes will be given effect through a Supplementary Order Paper.

Separate Regulatory Impact analyses will be done as part of the development of the regulations enabled by the Bill, including the additional regulations as a result of the proposed change.

Key Limitations or Constraints on Analysis

As the Bill will amend the RTA, the proposed changes are related to contamination of residential rental properties only.

Separate regulations will be made for different contaminants and full Regulatory Impact Statements will be prepared as part of the regulation making process. Methamphetamine is intended to be the first contaminant for which regulations will be made. The intention of the regulation-making power is to enable proportionate responses to future contaminant threats that may emerge. It is not possible at present to specify which other contaminants may be included in regulations in the future. The limited analysis that can be done therefore only relates to methamphetamine.

There is very limited data on the prevalence of contaminants and extent of remediation activity in rental properties. In the case of methamphetamine, there is limited data on methamphetamine use and manufacture in New Zealand. The New Zealand Health Survey records self-reported use of amphetamines, including methamphetamine. The Survey shows that the prevalence of amphetamine use has remained at approximately 1 percent of the population aged 16 to 64 years since 2011/12, however, people tend to under-report drug use. The rate may therefore be underestimated. The New Zealand Police has advised that

approximately 70 clandestine ‘meth labs’ are identified each year but it is not known how many may be operating undetected.

While it is believed that baseline testing for methamphetamine at the start of each tenancy is common practice, there is limited data available on the actual extent and costs of contaminant testing and decontamination. Tenancy Tribunal orders record cases that have been brought to the Tribunal for adjudication, however this may not reflect all instances of contamination and remediation in rental properties. Remediation costs will vary depending on the amount of contamination found and the extent of decontamination carried out. It is not known to what extent the cost of baseline testing is passed on to tenants.

The range of options considered is limited to the status quo and options that specifically address identified gaps in the current contaminant provisions in the Bill to improve greater clarity on requirements and liabilities.

The criteria used to assess the options are:

1. It improves clarity of obligations, responsibilities and liabilities for landlords and tenants.
2. The rights and obligations are commensurate with the risk of harm.
3. It reduces unnecessary costs in the rental sector.

It is assumed that the regulations will encourage a response to contaminants that is proportionate to risk. However there may be other incentives for landlords to take a precautionary response to testing and decontamination, for example, insurers may still require baseline testing at the start of each new tenancy. The Chief Science Advisor’s report on the risks of methamphetamine exposure has been positively received by the rental and insurance sector. It is therefore assumed that the transition to a risk-based approach will be reasonably rapid.

It is assumed that the regulations that will result from the proposed change will reduce costs to the sector. However, the reduction is dependent on a change in landlords’ behaviour with regard to contaminant testing. Therefore the extent of cost savings to landlords and tenants cannot be estimated at present given the uncertainty of which contaminants will be included in regulations and the resulting impact on landlord behaviour.

There has been no consultation on the proposed changes to the Bill but they will be subject to debate during the Committee of the whole House. The change relating to obligations to test for contaminants will be given effect through regulations and there will be consultation as part of the regulation development process.

Responsible Manager (signature and date):

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Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

Existing provisions of the Bill amend the RTA to address the following issues relating to residential tenancies:

- liability for damage to rental premises caused by a tenant
- tenancies over rental premises that are unlawful for residential use, and
- contamination of rental premises.

By addressing these issues, the purpose of the Bill is to improve the residential rental market by providing safety, protection, and clarity for landlords and tenants.

The Bill enables the Government to make regulations for the purposes of prescribing:

- types of contaminants for the purposes of the RTA
- maximum acceptable levels (or a way of calculating these levels) for contaminants
- testing methods for contaminants
- decontamination processes, and
- the manner in which goods left in contaminated properties should be dealt with.

None of the topics above are affected by the SOP covered by this Impact Statement. The SOP proposed in this Impact Summary addresses the problem of the lack of clarity with regard to when contaminant testing is required, and the rights, obligations and liabilities of tenants and landlords when contamination is found. This lack of clarity has resulted in a precautionary approach rather than a health-based approach commensurate with risk. This incurs unnecessary costs to landlords associated with repeated testing and remediation of low levels of contamination that are not harmful to health. In some cases these costs may be passed on to tenants. These costs are expected to continue if no action is taken.

As an example, there is currently no guidance on when a landlord should test for methamphetamine residue and, as a result, it has become common practice for landlords to conduct baseline screening at the start of every tenancy, regardless of whether there is cause to suspect any contamination that would be harmful to health. The baseline is used as evidence that any subsequent methamphetamine residue found during or at the end of the tenancy was from the existing tenant and the landlord did not fail to meet their obligation to provide the premises in a reasonable state of cleanliness.

This precautionary approach is unique to New Zealand. Methamphetamine testing and decontamination in other countries focuses mainly on identifying and remediating 'meth labs' or former labs.

The underlying cause of the problem is a lack of clear guidance on when properties should be tested for contaminants and when remediation is required when contamination is found. On 29 May 2018, the Prime Minister's Chief Science Advisor released a report showing that most of the testing and decontamination undertaken in New Zealand is unnecessary and not commensurate with the risk of harm.

Approximately 84 percent of rental houses are in the private market. Government regulation regarding when contaminant testing should be carried out is needed to ensure appropriate protection of tenants in properties that are, or are suspected to be, contaminated. The Bill provides an opportunity to enable such regulations to be made. The proposed change will insert the necessary regulation-making power in the Bill to achieve this.

Regulation would also provide a legally binding framework for the Tenancy Tribunal to base decisions on regarding contamination and what constitutes an 'uninhabitable premises' that is based on risk of harm. The proposed change will enable regulations to be made which will be designed to make clear when a landlord is liable if a premises is found to be contaminated.

Without clear guidance in regulation on where testing is required, a similar precautionary approach may develop for other current or future contaminants, rather than a response commensurate with the actual risk they pose. The proposed changes will provide clarity to the sector as to when contamination might be suspected and therefore when testing would be required.

The report of the Chief Science Advisor provides robust evidence in the case of methamphetamine testing and the health risks associated with contamination.

2.2 Who is affected and how?

The proposed change will enable regulations to be made which are intended to change the behaviour of landlords and shift them to a risk-based approach to contaminant testing and decontamination. It will enable an appropriate response to contamination that is commensurate with the risk of harm based on up-to-date evidence on health impacts. This will reduce unnecessary cost and disruption in the rental sector.

Landlords are likely to support the proposed change to enable regulations as they bear the costs of testing and decontamination, which in some cases may be passed on to tenants (for example as part of the costs of moving into a rental property or if an existing tenant is found to have caused of contamination). They also bear the consequences of renting out contaminated properties regardless of whether or not they were aware, or should have been aware, of the contamination. Tenants are likely to support the focus on health risks and clarity on when suspected contamination should be addressed.

Some landlords and tenants may still prefer to know that their rental property has no traces of contamination and want baseline testing to continue. The proposed change will not preclude this approach.

The Tenancy Tribunal, as the adjudicating body, is likely to support greater clarity regarding contamination and liability.

The contaminant testing and decontamination industry is not likely to support an approach that may reduce the level of contaminant testing and remediation.

2.3 Are there any constraints on the scope for decision making?

The proposed changes relate to residential rental properties. Owner occupied and commercial premises are out of scope.

The proposed changes address a gap in the current provisions in the Bill enabling the Government to make regulations relating to contaminants and contamination. Options for the content of the regulations are out of scope as they will be developed separately, and will be subject to separate Regulatory Impact Analyses when the specific regulations are submitted to Cabinet.

The broader review of the RTA is relevant to this proposal but legislative amendments are not expected to be introduced until early to mid 2019. Regulations and minimum standards developed under the Healthy Homes Guarantees Act 2017 will also be relevant. The

standards are currently being developed.

Section 3: Options identification

3.1 What options have been considered?

The criteria for assessing the options are:

1. Clarity of obligations, responsibilities and liabilities for landlords and tenants is improved.
2. The rights and obligations are commensurate with the risk of harm.
3. Unnecessary costs in the rental sector are reduced.

The following options were identified and considered in the development of the proposal to amend the contamination provisions in the Bill.

Status quo

Description

Leave the Bill as is. The RTA does not address contamination of rental premises. The Bill as it currently stands amends the RTA to allow for the making of regulations regarding types of contaminants, testing methods, maximum acceptable levels for contaminants, decontamination processes, and how goods left in contaminated properties should be dealt with. The Bill does not enable the making of regulations to specify the circumstances in which testing would be required.

The Bill amends section 45 of the RTA to include the obligation for landlords to not rent out premises they know to be contaminated and declaring contravention of this obligation an unlawful act. This provision in the Bill includes the phrase “*Without limiting subsection (1)*”, which refers to the subsection of the RTA that specifies other landlord obligations such as to provide the premises in a reasonable state of cleanliness. The contamination provisions will therefore not stand alone in the RTA. Landlords who did not know the premises they were renting out were contaminated may still be found to have committed an unlawful act under the other provision of the RTA to provide the premises in a reasonable state of cleanliness. They could then be liable for a penalty of up to \$4,000.

Advantages

Stakeholders do not need to familiarise themselves with new regulations relating to when to test for contaminants.

Disadvantages

A lack of clarity around when testing is required is likely to result in baseline testing of all rental properties at the start of each tenancy, as currently happens with methamphetamine. This will incur unnecessary costs to landlords, or tenants in cases where the costs are passed on. Those who do not conduct baseline testing and whose properties are found to be contaminated may be held liable under section 45(1) of the RTA for failing to provide the property in a reasonable standard cleanliness even if they were not aware of the contamination. This provides a further incentive for baseline testing.

Option 1: Only amend the Bill to include an obligation to test in prescribed circumstances

Description

Under this option, the Bill would be amended to add a further provision to the existing regulation-making powers enabling regulations to prescribe the circumstances under which contamination testing would be required. This additional provision would enable the required circumstances for testing to be based on the risk of harm. Consultation would be undertaken as part of the development of the regulations and a full regulatory impact analysis would be completed as part of the process. Liability provisions in the Bill would remain unchanged and retain the reference to other landlord obligations under the RTA.

Advantages

This option would enable testing requirements in regulations to be tailored to specific contaminants. It would ensure the rights and obligations of landlords with regard to testing are commensurate with the risk posed by specific contaminants. The amendment would signal a move away from baseline testing towards health-based regimes. Landlords would be able to avoid the costs of unnecessary testing and remediation of low levels of contamination that pose no risk to health.

Disadvantages

The contamination provisions would not stand alone but would be linked to other landlord responsibilities under section 45 of the RTA. Landlords whose rented property is found to be contaminated (and it is not caused by the tenant) and who have not breached their obligation to test in prescribed circumstances, could still be found in breach, and liable, under other obligations in the RTA such as to provide the premises in a reasonable state of cleanliness. As a result, landlords will continue to take a precautionary approach and conduct baseline contamination testing for any evidence of contamination. This would not be commensurate with the potential risk of harm.

Option 2: Only amend the unlawful acts provision of the Bill

Description

The words “*Without limiting subsection (1)*” would be removed from the amendment to landlord responsibilities in the Bill and the contaminant provisions would stand alone in the RTA. Landlords who were unaware that their rental property was contaminated either during the tenancy (and the tenant is found not to be cause) or prior to commencement of the tenancy, would not be in breach of other obligations under the RTA, such as to provide the premises in a reasonable state of cleanliness. It would therefore not be an unlawful act to unknowingly rent out contaminated premises.

Advantages

The contamination provisions of the RTA would stand alone and could not be confounded with other requirements that were not prescribed with contamination in mind. Landlords who do not know a premises they have tenanted is contaminated would not be liable for breaching other obligations under the RTA. This would avoid landlord liability for matters outside their control. It would also remove one of the incentives to conduct repeated baseline testing at the start of each tenancy to prove that the landlord met their other obligation under the RTA to provide the premises in a reasonable state of cleanliness.

Disadvantages

Without the proposed change to specify the circumstances in which landlords are required to test for contamination, there may still be an expectation in the rental sector that landlords test at the start of each tenancy to prove the premises contains no trace of contaminant, regardless of the risk of harm. This option could therefore result in continued unnecessary testing and remediation that is not health-based and not commensurate with the risk of harm, as currently happens in the case of methamphetamine.

Option 3: Include both amendments to the Bill

Description

Under this option, the Bill would be amended to:

- Insert an additional regulation-making power to enable the circumstances under which contamination testing would be required to be prescribed in regulations, and
- delete the phrase “*Without limiting subsection (1)*” from the provision relating to landlord responsibilities to remove liability under other obligations of the RTA when a tenanted property is found to be contaminated.

Advantages

Landlords would only be required to test for contamination in certain circumstances and there would be less incentive to conduct baseline testing of premises. Levels of contamination rendering premises uninhabitable would be specified in regulations and would be commensurate with the risk of harm. Unnecessary testing of contamination would be avoided.

The Tenancy Tribunal would have clear, legally binding regulations and standards to apply when considering cases. Landlords who meet the requirements of the regulations could not be held liable under other provisions of the RTA for contamination they were unaware of, such as the requirement to provide the premises in a reasonable state of cleanliness.

Disadvantages

Some landlords may still choose to test properties between tenancies in order to mitigate insurance risk.

3.2 Which of these options is the proposed approach?

The preferred option is option 3, which is to amend the Bill to:

- add to the existing regulation-making powers by including a provision to prescribe in regulations the circumstances under which contamination testing would be required, and
- remove liability under other obligations of the RTA when a tenanted property is found to be contaminated.

This option meets all the criteria. The insertion of the regulation-making power will enable the circumstances under which landlords should be required to test for contaminants to be clarified in regulations. The testing requirements can be tailored to specific contaminants, along with guidelines for health-based ‘acceptable levels’ of contamination. The amendment to remove liability under other obligations of the RTA will allow the contamination provisions to stand alone and provide clarity on landlords’ liability with regard to renting out contaminated properties.

The amendments enable a shift in the rental sector to a risk-based approach to testing and decontamination and the incorporation of up-to-date evidence on health risks. It will enable an appropriate response to contamination that is commensurate with the risk of harm. This would reduce unnecessary testing of premises, including baseline testing commonly carried out at the start of every tenancy.

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

The proposal is to make minor changes to the existing provisions in the Bill and, as such, the costs will be minimal. A regulatory impact statement has been completed for the Bill, including a cost benefit analysis for the changes that will result from its enactment. Further regulatory impact and cost benefit analyses will be completed for the regulations that will be made as a result of the Bill, including the proposed additional regulation. There is little information on the costs incurred by landlords and tenants in the current situation. It is therefore difficult to estimate the expected benefits of the proposed changes. The expected benefits of the resulting regulations are expected to be high but cannot be quantified until the content is developed. The analysis below is therefore a preliminary estimate of impacts, and more detailed, consulted impact analysis will be developed at the time that regulations are developed.

Affected parties <i>(identify)</i>	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact <i>\$m present value, for monetised impacts; high, medium or low for non-monetised impacts</i>
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Additional costs of proposed approach, compared to taking no action

Regulated parties (landlords)	The insertion of the regulation-making power will not impose additional costs.	Nil
Regulators (MBIE)	Policy and legislative process support, which will be absorbed as business as usual	Low
Wider government	None	-
Other parties	None	-
Total Monetised Cost		Nil
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action

Regulated parties (landlords)	The resulting regulations would reduce costs for landlords by removing the need to conduct baseline testing	High (from resulting regulation)
Regulators (MBIE)	Future-proofed legislation that can include contaminant threats as they	Medium

	emerge	
Wider government	None	-
Other parties (tenants)	The resulting regulations will remove the need for baseline testing and this will reduce costs where these have been passed on	High
Other parties (Tenancy Tribunal)	The resulting regulations will provide a clear, legally binding framework on which to base decisions	Medium
Total Monetised Benefit	Reduction in unnecessary contaminant testing and remediation as a result of the regulations resulting from the proposed approach	High
Non-monetised benefits	Resulting regulations will provide greater clarity of obligations, responsibilities and liabilities	High

4.2 What other impacts is this approach likely to have?

The contaminant testing and remediation industry will be impacted by reduced demand for services if widespread baseline testing stops.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

There has been no consultation on the proposed changes as the Bill has already been to the Governance and Administration Committee. Public consultation will occur on the content of the regulations as part of the development process.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

The proposed changes will be given effect through amendment to the Bill by Supplementary Order Paper.

The regulations will be developed by MBIE and there will be consultation on policy options underpinning the regulations as part of that process. A full Regulatory Impact Analysis will be prepared and the policy and the resulting regulations will be submitted to Cabinet for approval. Once approved by Cabinet, the regulations will be given effect through notification in the New Zealand Gazette.

The regulations will be enforced by MBIE and the Tenancy Tribunal. MBIE can investigate breaches of the RTA where it is in the public interest to do so, for example if there is a significant risk to a person's health or safety. The Tenancy Tribunal holds hearings to settle disputes between tenants and landlords and issues orders that are legally binding on the parties involved in the dispute. The most common orders are for tenancies to end, money to be paid, or work to be done. MBIE can take proceedings to the Tribunal on behalf of any party where it is satisfied there is a cause for action and it is in the public interest to do so.

The new arrangement will come into effect when the Bill is enacted and the regulations are developed. The time required for developing the regulations will allow sufficient preparation time for regulated parties.

There is a risk that some landlords may still choose to test properties between tenancies in order to mitigate insurance risk and to ensure that, if needed, they are able to demonstrate to the Tenancy Tribunal that the property was not contaminated at the beginning of the tenancy. This approach may decline as insurers become more comfortable with the protections in the regulations.

The contaminant testing and remediation industry may advocate for overly conservative acceptable levels of contaminant and continued baseline testing for commercial reasons. This will be mitigated through the communications relating to the regulations developed as a result of the proposed change.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

A monitoring and evaluation plan will be developed once the regulations have been agreed. This plan will leverage off existing monitoring and evaluation activity associated with recent (2016) amendments to the RTA and associated regulations.

Other avenues for reviewing the effectiveness of the proposals would include monitoring MBIE Service Centre calls and Tenancy Tribunal decisions relevant to methamphetamine contamination.

7.2 When and how will the new arrangements be reviewed?

The proposed changes will be reviewed as part of the overall review process for the Bill.