



The Law Reform Commission

REPORT OF THE LAW REFORM COMMISSION

**REVIEW OF THE LAW REGULATING THE
RELATIONSHIP OF LANDLORDS AND TENANTS
IN THE CAYMAN ISLANDS**

**Final Report No. 5
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The Law Reform Commission

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1 INTRODUCTION

- 1.1 After the passage of Hurricane Ivan there were many complaints and issues arising out of the landlord and tenant relationships in the Islands. In response thereto the Leader of Government Business, in October 2005, asked the Law Reform Commission to undertake a review of the landlord and tenant legislation in the Islands. The relevant laws are the Registered Land Law (2004 Revision), the Landlord and Tenant Law (1998 Revision) and the common law rules where statute does not otherwise provide.
- 1.2 The Commission conducted research from October 2005 to September 2006. The Commission was assisted in the initial stage of its research by written submissions received from Island Rental Services & Real Estate Ltd.¹ and Mr. Stephen Hall-Jones.²
- 1.3 On 2nd October, 2006 the Commission published a discussion paper and a draft Bill for public consultation³ and invited comments, both from those professionally involved in the real estate industry and from the general public.
- 1.4 In preparing the discussion paper and Bill the Commission carried out an extensive comparison of the legislation of other jurisdictions and examined the success or the failures of the legislation in the individual jurisdictions. The following legislation was considered by the Commission during its research on the matter-
 - The Residential Tenancies Act 1986 of New Zealand
 - UK Protection from Eviction Act 1977
 - UK Housing Act 1985
 - UK Housing Act 1988
 - The Residential Tenancies Act of New South Wales
 - The Residential Tenancies Act of South Australia
 - The Landlord and Tenant Act of Bermuda
 - The Rent Increases (Domestic Premises) Act of Bermuda
 - The Residential Tenancies Act of Ontario
 - The Tenant Protection Act of Ontario (now repealed)
 - The Landlord and Tenant Act of Barbados

¹ Island Rental Services carry on business as property managers and rental agents. They submitted a report in which they recommended that residential rental properties should meet certain basic minimum standards so as to be fit for habitation and that the terms and conditions implied into tenancy agreements be clearly defined. The Commission agrees with this approach.

² Mr Stephen Hall-Jones is a local lawyer. He submitted a detailed report in which he proposed a wide range of changes such as rent control and the establishment of a Government housing authority which would regulate the residential housing market.

³ See Appendix B

1.5 The persons who made written submissions were as follows-

- The Chief Justice
- The Ministers' Association
- The Valuation Office of the Lands & Survey Department of Government
- The Law Society of the Cayman Islands
- Mr. Stephen Hall- Jones, attorney-at-law
- Island Rental Services & Real Estate Ltd.
- Inter-Island Realty Ltd. on behalf of 35 landlords
- Wayne Newberry (landlord)
- Bodden & Bodden on behalf of client Michael Ewer (investor)
- Mary Jane Kampe for Kamar Investments (landlord)
- Graham Walker
- Tessa Hydes Property Management on behalf of that company and the following companies-
 - (a) The Real Estate Company
 - (b) BCQS
 - (c) Mountain C.I. Ltd.
 - (d) Century 21 Just Condos
 - (e) Ritch Realty
 - (f) V & R Island Home Ltd.
 - (g) Capital Realty
 - (h) Rainbow Realty
 - (i) Remax (Cayman) Ltd.
 - (j) Fortis Bank (Cayman Ltd.)
 - (k) Dunsmore Estates Ltd.
 - (l) Silverhill Ltd.
 - (m) Kmax Ltd.
 - (n) Cambridge Real Estate.

1.6 The Commission considered all of the responses from the above-mentioned persons. The Commission now submits its final report and draft Residential Tenancies Bill⁴ which take into account many of the suggestions from the public as well as from the Valuation Office of the Lands and Surveys Department of the Government. The Commission sought in re-drafting the Bill to provide a balance between the rights and obligations of landlords and tenants and notes that the Law Society, the Chief Justice and the Ministers' Association in particular were in support of the principles in the draft legislation.

⁴ Appendix A

2. EXECUTIVE SUMMARY

- 2.1 During the consultation period the Commission provided a discussion paper which contained a synopsis of the current law i.e. the Landlord and Tenants Law (1998 Revision), the Registered Land Law (2004 Revision) and common law rules.⁵ The Landlord and Tenants Law, Cap 80 (1998 Revision) was enacted in 1838 and its general purpose is to protect the interest of landlords by making it easier for them to collect rent arrears by streamlining the procedure for levying execution upon a tenant's goods and chattels. The Law deals, among other things, with how a landlord may recover rent where there is no written lease; with the circumstances where the tenant leaves the premises with arrears of rent and where the tenant gives notice to quit but subsequently refuses to vacate the premises. The Commission is of the opinion that the Landlord and Tenants Law does not provide modern regulation of tenancies and recommends that it be repealed.
- 2.2 Hurricane Ivan left a large number of office buildings, hotels, retail shops and warehouses so seriously damaged that they were wholly or partially unfit for use. However, the common law rules governing the relationship between landlords and tenants of commercial property operated satisfactorily in the unprecedented circumstances. The Commission concludes that the terms of typical commercial tenancy agreements fairly balance the competing interests of landlords and tenants and does not recommend any legislative change. The Commission recommends the enactment of legislation dealing only with the regulation of residential tenancies and proposes that those provisions of the Registered Land Law which relate to such tenancies be repealed.
- 2.3 Housing reform was called for by some members of the public as, in the aftermath of Hurricane Ivan, the condition of rented housing had become a matter of concern. The Commission believes that any law regulating tenancies should clearly provide for the maintenance of accommodation. It was suggested during the consultation period that a law which seeks to ensure fitness for habitation should provide for a housing authority or other similar body to declare dwellings and whole areas unfit for habitation. It had been proposed that such an authority should be set up, among other things, to serve repair and improvement notices; to control and prevent overcrowding of dwellings; to impose regulations regarding escape from fire and to impose standards of management of dwellings in multiple occupations. The Commission however does not support the call for the establishment of a housing authority⁶ as it is of the opinion that the Public Health Law (2002 Revision) and regulations thereunder can be modernized to deal more effectively with unfit premises. Also, the appointment of a Residential Tenancies Commissioner⁷ would assist both tenants and landlords in complying with obligations relating to the maintenance and cleanliness of rented premises.

⁵ See paragraph 3 of the discussion paper

⁶ See recommendation of Mr. S. Hall- Jones; and paragraph 8.16 of the discussion paper

⁷ See recommendation at para 2.5

2.4 The Commission also recommends the imposition of minimum standards for rental premises. Thus, while a landlord will be under no obligation to repair premises which have been wholly or substantially destroyed the landlord will be required, in normal circumstances, to provide the tenant with premises which are in a reasonable state of cleanliness and fit for human habitation. In determining whether premises are fit for human habitation regard shall be had to their condition in respect of the following matters-

- (a) repair;
- (b) freedom from damp and mould;
- (c) natural lighting;
- (d) water supply;
- (e) stability;
- (f) ventilation;
- (g) drainage and sanitary conveniences; and
- (h) facilities for the preparation and cooking of food and for the disposal of waste water,

and premises shall be considered unfit if they are so far defective in one or more of those matters that they are not reasonably suitable for occupation in that condition.

2.5 The Commission proposes the establishment of the post of Residential Tenancies Commissioner. Many of the problems brought to the attention of the Commission were problems which the Commission believed did not warrant court action but rather mediation. Many tenants cannot afford the costs of employing an attorney to deal with such issues and are intimidated by the idea of self representation in the summary court. The summary court has a civil jurisdiction of \$20,000 or less and is essentially a small claims court yet there is a general reluctance to seek resolution of these matters in this forum. Allegedly, in some cases the police were called to deal with landlord and tenant issues in cases where the matters were clearly civil disputes. The Commission believes that a mediator such as a Commissioner would not only bring speedy, affordable and amicable resolutions to matters but would be of assistance in promoting a better understanding of the legal relationships between landlords and tenants.

2.6 Some members of the public, in the after-math of Hurricane Ivan, called for the implementation of rent control. The steep increase in rent which accompanied the limited amount of housing was the catalyst for such requests. It was suggested that any new law should contain detailed provisions for the service of a notice of intention to increase rent with procedures for the referral of any increase in rent of low income premises to a "Fair Rent Officer" who would adjudicate on any such increase. However, the Commission agrees with the opinion held by many economists that rent control is counter-productive and leads inevitably to a lower quality of housing accommodation. It was felt that in the circumstances which faced the Cayman Islands in 2004 and 2005 that market forces would eventually operate to redress the imbalance. In the short term rents rose as the stock of

accommodation was very limited. Figures in the economic reports in 2006 provided by the Economics and Statistics Office support the view of the Commission that as more rental units became available rental rates decreased. While the Commission does not support rent control it believes that the power to increase rent should be transparent and more closely regulated.

- 2.7 There continues to be much uncertainty regarding the obligations of landlords and tenants especially under oral leases and particularly when a tenant is holding over after the expiration of a fixed term tenancy. The Commission therefore recommends that all leases be in writing in order to avoid such problems and that every tenancy should have certain minimum information for example, the full name and contact address of the landlord; the tenant's address for service; the amount of any security deposit; the amount of the rent payable and the frequency of the rent payments.
- 2.8 The Commission is of the view that all tenancy agreements should be subject to certain terms which cannot be amended or excluded. In addition to the landlord's obligation to keep the premises in repair⁸ such terms and conditions, in relation to the landlord, would include the following-
- (a) premises should not be leased subject to any legal impediments;
 - (b) a tenant should be given vacant possession of the premises at the commencement of the tenancy;
 - (c) a landlord should give a tenant quiet enjoyment of the premises;
 - (d) the landlord should give written notice of the sale of the premises as soon as he has put the premises on the market; and
 - (e) the landlord must give the tenant notice of his desire to enter the premises (except in the case of an emergency) and if he has consent to enter must do so between specified hours.
- 2.9 A tenant's implied obligations under a lease should include the following-
- (a) to pay rent as and when it becomes due;
 - (b) to ensure that the premises are occupied principally for residential purposes;
 - (c) in the absence of express agreement otherwise, to pay charges for electricity, gas, water, television and telephone supplied to the premises;
 - (d) to keep the premises reasonably clean and reasonably tidy;
 - (e) to notify the landlord as soon as possible after discovery, of any damage to the premises of the need for any repairs;
 - (f) on the termination of the tenancy, to quit the premises, remove all possessions from the premises, leave the premises in a reasonably clean and reasonably tidy condition, and remove or arrange for the removal from the premises of all rubbish.

⁸ Ante

- 2.10 The Commission noted the many allegations of harassment of tenants by landlords, both as set out in the local media and in the complaints received by the Commission. There were allegations that landlords used methods (such as the cutting-off of utilities) of evicting tenants in some cases in order to re-let the premises at higher rents. Section 84 of the Penal Code (2007 Revision) outlaws the forcible entry of premises but the Commission recommends that landlord and tenant legislation itself should expressly offer protection against harassment and illegal eviction. The Commission has therefore recommended that provisions similar to section 84 be included in the Residential Tenancies Bill and that other provisions outlawing harassment be also included.
- 2.11 The payment and retention of security deposits are not currently regulated by the law although most rental agreements on the Islands require a deposit. There have been and there continues to be issues relating to the repayment of the deposits to tenants at the termination of a lease. There were allegations that many landlords unlawfully retained such deposits; that either no reasons are given for the return of the deposits or the landlords allege damage where there may be in fact no damage to the premises. Many tenants, due to limited resources, do not contest the retention of such deposits as the legal costs which may be incurred in seeking the return of the deposit may in fact exceed the security deposit. The Commission recommends that the terms upon which landlords retain deposits should be regulated and should always be stated in the written agreements.
- 2.12 One of the proposals submitted to the Commission was that landlords should be legally obligated to insure their premises. This proposal was considered by the Commission but while the Commission agreed that there was merit in the proposal, the Commission is concerned about the possible social consequences. Apart from the difficulty in enforcing such a provision the Commission believes that this measure could have the effect of reducing the number of premises which are available on the rental market and could as a result, cause some persons to become homeless, temporarily at least. The Commission is of the view that an impact study to assess the effect on the property market would have to be carried out by the Government to determine whether such a provision should be brought into force.

3. MAIN ISSUES

3.1 The Commission conducted a general review of the relevant landlord and tenant laws but the main matters which were focused on during the review process⁹ were the following -

- (a) calls for rent control legislation and the establishment of a housing authority;
- (b) holding over by tenants and the legal consequences of holding over;
- (c) the unlawful eviction of tenants and harassment of tenants by landlords;
- (d) the liability to repair damaged premises;
- (e) how deposits are dealt with;
- (f) the need for low cost and speedy mediation in landlord and tenant disputes;
- (g) whether commercial tenancies needed to be regulated; and
- (h) the implied obligations of landlords and tenants under tenancy agreements.

4. THE CURRENT LAW REGULATING LANDLORD AND TENANT RELATIONSHIPS

4.1 The discussion paper provided a synopsis of the current law which regulates landlord and tenant relationships in the Islands i.e. the Landlord and Tenant Law (1998 Revision), the Registered Land Law (2004 Revision) and common law rules.¹⁰

4.2 The Landlord and Tenants Law, Cap 80 (1998 Revision) was enacted in 1838 and its general purpose is to protect the interest of landlords by making it easier for them to collect rent arrears by streamlining the procedure for levying execution upon a tenant's goods and chattels. The Law deals, among other things, with how a landlord may recover rent where there is no written lease; with the circumstances where the tenant leaves the premises with arrears of rent and where the tenant gives notice to quit but subsequently refuses to vacate the premises. The Commission concluded that the Landlord and Tenants Law does not provide modern regulation of tenancies and should be repealed.

4.3 The Commission believes that there should be separate legislation regulating residential tenancies and that the Registered Land Law should be amended to reflect this. The Valuation Office of the Lands and Surveys Department of the

⁹ See also discussion paper

¹⁰ See para. 3 of Report

Government (“the Valuation Office”), in its response, supported the reform of the Landlord and Tenant Law. According to the Valuation Office-

“The existing law is archaic, has no relevance in modern day society and deals with little more than the landlord’s rights of distress in the event of forfeiture or default by the tenant.”.

- 4.4 Mr. Stephen Hall-Jones in his submission of 24th November, 2005 was of the opinion that Part V, Division 2 of the Registered Land Law (2004 Revision) and The Landlord and Tenant Law should be repealed and, where appropriate, incorporated into a new compendium law dealing with leasehold property and other housing law matters. He also noted that the Landlord and Tenant Law mainly deals with “distrainment” and related topics rather than any wider matters of the law of leaseholds.
- 4.5 The Commission is of the opinion that the law regulating commercial tenancies does not require reform. The common law rules governing the relationship between landlords and tenants of commercial property operated satisfactorily in the unprecedented situation which existed in the aftermath of Hurricane Ivan. The terms of typical commercial tenancy agreements fairly balance the competing interests of landlords and tenants. In that regard the Commission does not recommend any legislative change.
- 4.6 The Valuation Office did not agree with the Commission on this matter and addressed the same in its submission. The Office was of the view that any revision to landlord and tenant legislation should include all tenancies and supported this opinion by noting the following-
- (a) there is no distinction between commercial and residential tenancies within the Registered Land Law, the Stamp Duty Law or the existing Landlord and Tenants Law;
 - (b) some commercial leases do not grant basic tenant rights such as the right to quiet enjoyment;
 - (c) the lack of formal leases for many commercial premises in the Islands- of the 1500 units administered under the Stamp Duty Law at least 670 have been renewed orally thus affecting the issue of stamp duty;
 - (d) there were similar experiences of price gouging in the commercial market as in the residential market after Ivan.
- 4.7 The Commission is not however persuaded that there is any need for change in this area. As indicated in the discussion paper,¹¹ tenancies of offices and retail premises are usually granted for fixed periods on the terms of written agreements which are subject to compulsory registration. Historically, offices were usually

¹¹ Paras 4 to 4.6

let for fixed terms of three or five years, subject to an option to renew exercisable by the tenant. In recent years, there has been a tendency for tenants of office buildings to commit themselves to longer terms, in some cases as long as twenty years. It is the established practice for tenancies of commercial properties to impose express repairing covenants upon the landlord to the effect that he will have responsibility for repairing and maintaining the structure of the building and the service equipment (such as air conditioning systems; electrical systems, elevators etc). The typical terms of a commercial lease generally fairly balance the competing interests of landlords and tenants. During the consultation period, apart from the submissions made by the Valuation Office, there were no complaints or comments made to the Commission which would suggest that this should be an area of reform. The Commission therefore does not recommend legislative change in this area.

5. THE RESIDENTIAL TENANCIES COMMISSIONER

- 5.1 In October 2006 the Commission proposed the establishment of the office of Residential Tenancies Commissioner. A Commissioner would have the responsibility of resolving conflicts and of imposing orders relating to the repair of premises, the observance of the terms of a lease and such other issues which arise under the landlord and tenant relationship. It was noted by the Commission that many of the tenants who approached the Commission in the belief that the Commission could give legal advice were unable to afford the attorney's fees to pursue matters in court. Other tenants, when advised that they could represent themselves in the summary court, were intimidated by the court process.
- 5.2 Under the draft Bill of 2006 the Residential Tenancies Commissioner was given the role of both adjudicator and mediator. The Commission in drafting the relevant provisions took into account the role of the Residential Tenancies Tribunal in South Australia under the Residential Tenancies Act 1995. In accordance with that Act, the Residential Tenancies Tribunal has exclusive jurisdiction to hear and determine claims or disputes arising from landlord and tenant relations. The Tribunal may make a variety of orders including an injunctive order or an order for specific performance.
- 5.3 If before or during the hearing of proceedings, it appears to the Tribunal that the parties seem willing to settle the matters in dispute, the person constituting the Tribunal may appoint, with the consent of the parties, a mediator to achieve a negotiated settlement. If the proceedings are settled, the Tribunal may embody the terms of the settlement in an order. A member of the Tribunal who attempts to settle proceedings by way of mediation is not disqualified from hearing or continuing to hear further proceedings in the matter.
- 5.4 Similarly under the Residential Tenancies Act 2006 of Ontario the Landlord and Tenant Board may both adjudicate and mediate¹².

¹² See Part IX of the Act

5.5 The Law Society generally agreed with the role of the Commissioner as set out in the Bill of 2006 but was of the opinion that a Commissioner should be a legally qualified person. The Society also expressed the view that the Commissioner should have a power to review excessive rents and to hold deposits paid under tenancy agreements.

5.6 The Valuation Office expressed the view that the principle of the Residential Tenancies Commissioner, that of an approachable authority to which disputes are referred, is to be supported. However the Office further indicated as follows-

“We question however the relevance of a Residential Tenancies Commissioner, and the role which would be played, and instead would recommend that very serious consideration be given to using this as an opportunity to establish a small claims court, or the beginnings of such. The remit of the Commissioner is relatively small, and there is a risk that it would simply become a bureaucratic and costly addition to Government. I mention costly, for whilst the Act allows for fees, these would need to be de minimus to avoid disenfranchising those on the lowest incomes. As such, it is unlikely that the Commissioner would ever be self financing.

The alternative, a small claims court, would allow for residential tenancy claims to be heard, but would also allow a plethora of other, relatively minor disputes, to be heard in a very similar fashion. At present an individual has little recourse other than summary court in the event of dispute. A small claims court would allow claims to be filed without need for an attorney and heard in a timely manner. It would also address a more general perception of ‘they just get away with it – it’s not worth pursuing’ which is regularly heard in respect to minor, unresolved disputes.”.

5.7 The Valuation Office called for a small claims court but fails to appreciate that the summary court of the Cayman Islands is just that.

5.8 After considering all of the comments on the role of the Commissioner, the Commission proposes instead that a Commissioner be a mediator only and that parties should be mandated to mediate tenancy disputes. The Commission believes that there are many matters arising in tenancy arrangements which would best be resolved by mediation and is of the opinion that a Commissioner would be able to provide such mediation. In normal circumstances a Commissioner’s post could be a part-time post which may be filled by an officer of the Valuation Office for example. In an emergency situation more than one Commissioner could be appointed.

5.9 In accordance with the draft Bill parties to a tenancy dispute would first have to go to a Commissioner. The Commissioner would inquire fully into any such

dispute and make such suggestions and recommendations and do all such things as he thinks right and proper for inducing the parties to come to a fair and amicable settlement.¹³

5.10 Where parties are able to settle the dispute the Commissioner would prepare a written agreement to be signed by the parties and such agreement would form part of the tenancy agreement. If parties are unable to agree then the Commissioner should advise them of their rights to take the matter to court. Mediation would therefore be mandatory under the Bill for all disputes. If a matter goes to the court the Bill provides that the court should refuse to hear a case if there is evidence that the applicant had not first sought mediation or if either party had refused to partake in such mediation.

5.11 The Commission in arriving at the recommendation regarding the role of the Commissioner considered the benefits of mediation which may be briefly summarised as follows-

- mediation hearings are informal;
- mediation emphasises cooperative problem solving and communication;
- mediation is usually a much quicker process than the court process;
- mediation is significantly less expensive than the court process;
- mediation is confidential to the parties unless specifically agreed otherwise unlike the potential publicity of court proceedings;
- parties in mediation avoid the uncertainty and dissatisfaction often experienced in court where they may have little choice but to accept the judgment made with which none of them may be happy.¹⁴

5.12 As noted in an article in the San Francisco Chronicle¹⁵ mediation programs in housing disagreements have a very high success rate in resolving cases, generally in the range of 75 to 90 %. According to the article-

“Mediation works because it allows disputing parties to discuss their issues and resolve them in a safe, confidential environment facilitated by neutral mediators. The mediator’s role is to open communication and develop trust between parties, who can then explore options and alternatives, and eventually reach a mutually acceptable resolution to their dispute.”.

5.13 Going to court can be time consuming, expensive and emotionally draining. Mediation also enhances the future relationship of the parties involved in a

¹³ See clause 10 of the Bill

¹⁴ “An overview of mediation from Consensus Mediation”, www.consensusmediation.co.uk; Landlord and Tenant Mediation Services, Berkeley Rent Stabilization Program

¹⁵ “Mediation preferred over court to resolve housing disagreements”- December 9 2006

dispute by making the process can be less adversarial and formal. This is facilitated by the fact that in general the rules of evidence and formal court procedures do not necessarily apply to mediation.¹⁶ Settlement can salvage business and personal relationships that would otherwise have been lost.¹⁷

- 5.14 The Commission is of the view that a Commissioner would assist in fostering more positive relationships between the landlords and tenants in the Islands and discourage the quick resort to police complaints and illegal self-help.

6. HOUSING AUTHORITY; HOUSING STANDARDS

- 6.1 Mr. Stephen Hall-Jones in his submissions indicated that there was a need for rent control on leasehold properties let on periodic terms of one year or less where the monthly rent for the dwelling is CI\$1,000 or less, however payable and whether furnished or unfurnished. He opined that a housing authority should be set up to regulate the rents of such properties and to ensure their fitness for habitation. He proposed that such an authority could be given the following powers-

- (a) to serve repair notices under the Law;
- (b) to serve improvement notices under the Law;
- (c) to serve condemnation notices in respect of dwellings or areas unfit for human habitation;
- (d) to serve clearance orders in respect of areas unfit for human habitation;
- (e) to control and prevent overcrowding in dwellings otherwise fit for human habitation by abatement notices;
- (f) to control houses in multiple occupation;
- (g) to impose regulations regarding escape from fire;
- (h) to impose standards of management of dwellings in multiple occupation; and
- (i) to regulate the financial accounting of regulated housing associations.

- 6.2 The Commission does not recommend the establishment of a housing authority. The problems relating to unfit premises can be better solved by widening the landlord's duty to repair under the law and by giving more effect to the Public Health Law (2002 Revision) and regulations thereunder. Currently complaints about defective and unfit premises can be made to the Chief Environmental Health Officer under the Public Health Law (2002 Revision) which provides for the abatement of nuisances by the Chief Environmental Health Officer. The Law provides that the Chief Environmental Health Officer may take such steps as he deems necessary to remove or secure the abatement of all statutory nuisances and, if the circumstances so warrant, proceed at law against any person committing

¹⁶ See www.mediationphelps.com

¹⁷ J. Abrams "Compulsory mediation: the Texas Experience

any such nuisance. The Commission is of the opinion that this Law should be modernised to make it easier to deal with unfit premises and that the penalties for offences should be increased.

6.3 The Residential Tenancies Bill at clause 40 deals with the obligations of a landlord under a lease. The Bill provides, among other things, that a landlord shall at the commencement of the tenancy provide the tenant with premises which are fit for human habitation. In determining whether premises are fit for human habitation regard shall be had to their condition in respect of the following matters-

- (a) repair;
- (b) freedom from damp and mould;
- (c) natural lighting;
- (d) water supply;
- (e) stability;
- (f) ventilation;
- (g) drainage and sanitary conveniences; and
- (h) facilities for the preparation and cooking of food and for the disposal of waste water,

and premises shall be considered unfit if they are so far defective in one or more of those matters that they are not reasonably suitable for occupation in that condition.

6.4 The Bill also provides that, during a tenancy, a landlord shall keep premises in a reasonable state of repair and shall ensure that they remain fit for human habitation. A landlord should also, during the tenancy, comply with all requirements in respect of the structure of buildings, health, and safety under any enactment so far as they apply to the premises.

6.5 Clause 40 of the Bill also deals with the issue of urgent repairs. It provides that where-

- (a) premises are in a state of disrepair that does not arise from a contravention of the tenancy agreement by the tenant;
- (b) the state of disrepair is, unless remedied, likely to result in personal injury or damage to property or undue inconvenience;
- (c) the tenant notifies the landlord of the state of disrepair or makes a reasonable attempt to do so and the landlord fails to make the necessary repairs;
- (d) the tenant incurs costs in having the state of disrepair remedied; and
- (e) the repairs are carried out by a person who is licensed to carry out the necessary work and the tenant provides the landlord with a report on the work carried out and the apparent cause of the state of disrepair,

the tenant is entitled to recover from the landlord the reasonable costs of having the repairs carried out.

Where the landlord fails to compensate the tenant within one month after the tenant has incurred expenses, the tenant may deduct the expenses from the next due rent or rents as the case may be; except that in the case of a periodic tenancy for a period of one month or less he shall not deduct more than one-third of the rent due for any period.

- 6.6 The Valuation Office strongly supported proposals to increase the standard of housing within the Islands through minimum standards that must be applied to all leases. But the Office noted practical difficulties and submitted that-

“Whilst the principle is admirable, the practicalities are more difficult. Firstly, as mentioned previously, we believe that Government may be better off addressing this through the existing Public Health Law which is applicable to all properties, as opposed to using a different law to achieve the same via a ‘back door’. Secondly, if implemented as is, a sizeable portion of the residential accommodation pool could become blighted. This can be remedied by improvements to bring it up to standard, however in doing so rents will inevitably rise. This rent inflation at the lowest end of the market threatens to displace persons who, it is probably fair to say, can least afford it, without adequate alternative provision for them. The impact of this needs to be considered, both on this segment of the population in both the short and long term, but also in its impact on wage inflation (as workers demand more to pay increased rents).”.

- 6.7 As a starting point a prospective tenant should feel confident that on tenancy agreement that property meets certain basic standards which facilitate safety and comfort. This may mean that the landlord will have to invest more into his property which could mean some displacement of those for whom affordability could be an issue. However this should not be a reason to avoid revisiting standards. In the long term a tenant may be worse off if he occupies a property which is below acceptable standards, property which for instance cannot withstand adverse weather conditions. Cayman Islands have witnessed the displacement and inflation which arises when substandard houses are destroyed en masse and should by all means seek to avoid a similar situation in the future.

7. RENT CONTROL

- 7.1 The Consumer Price Index in 2005 confirmed the fact that after Hurricane Ivan rent increased as much as 34% during one period.¹⁸ This was indeed a result of the shortage of housing which immediately followed Ivan. The Government sought to address the price gouging which took place by the Price Gouging Control (Emergency Circumstances) Law of 2004.¹⁹ This Law did not assist much in the aftermath of the hurricane. The Commission to which complaints can be made under the Law has never met and the Legal Department reported in 2006 that no complaints had ever been made under the Law. The Law itself only permits complaints for a limited period of time.²⁰ The complaints regime under the Law is not currently in effect and will only be re-activated upon another declaration of emergency.
- 7.2 The Commission, after researching the issue of rent control which was put forward as a remedy for the increases in rent, does not support the implementation of such a system in the Islands. The Commission agrees with the opinion held by many economists that rent control is counter-productive and leads inevitably to a lower quality of housing accommodation. It was felt that in the circumstances which faced the Cayman Islands in 2004 and 2005 that market forces would eventually operate to redress the imbalance. In the short term, rents rose as the stock of accommodation was very limited. However, as noted in the Cayman Economic report of March 2006, over the year from March 2005 to March 2006 rents fell in the areas studied i.e. in Prospect by 20%, in West Bay by 13.5% and in South Sound by 13%. The semi-annual report of 2006 showed that the average price index for housing fell by 5.3% due to declines in rental prices for the second quarter of 2005. The third quarter report of 2006 again gave evidence of a decline in rental cost. The report stated that the average price index fell by 3.3% due to declines in rental prices of 2006. According to the report, “this trend was expected in view of the increasing supply of housing accommodation in the post-Ivan recovery period.” The March 2007 economic report indicated that the overall housing price index was 4.5% above the level in March 2006 due in part to overall increase in rent. A decline was seen however in June 2007 where the housing index settled at 0.1 per cent below the level in June 2006.

¹⁸ See paragraph 5.1 and 5.2 of the discussion paper

¹⁹ See discussion of the Law at paragraphs 5.6 to 5.10 of discussion paper

²⁰ The prohibition on unconscionable increase stays in effect-

- (a) until the declaration expire;
- (b) where no tropical storm or hurricane occurs to which the tropical storm or hurricane watch or warning related, until the tropical storm or hurricane watch or warning is discontinued;
- (c) for such longer period after the declaration has expired as may be specified by order of the Governor in Cabinet; or
- (d) for such other period as may be specified by order of the Governor in Cabinet

7.3 The Commission is of the opinion however that in order to avoid the social dislocation caused by excessive increases in rent which occurred in 2004 and 2005, the power to increase rent should be better regulated. As noted in the discussion paper many parties to leases do not appear to know that unless there is a review clause in a written lease a landlord has no right as a matter of law to increase the rent unilaterally. The Commission has recommended that the Law should set out the conditions which must be followed in order for a landlord to effect a rent increase. Clause 26 of the Bill provides that a landlord must give the tenant a notice in writing of the increase and the other conditions that must be complied with are -

- (a) the notice shall specify the amount of the increased rent and the day upon which the increased rent shall become payable;
- (b) the day upon which the increased rent shall become payable shall be not less than 60 days after the date on which that notice is given;
- (c) the rent shall not be increased within one year after the date on which the last increase took effect;
- (d) in the case of a tenancy which is not subject to annual rent adjustment, the rent shall not be increased within 180 days after the date of the commencement of the tenancy;
- (e) in the case of a tenancy which is subject to annual rent adjustment, no rent increase shall take effect-
 - (i) less than 60 days after the notice required by paragraph (a) is given; and
 - (ii) other than on the specified date in any year or with effect on the next day on which any rent is to be paid within 28 days after the specified date in any year;
- (f) a landlord under a fixed-term tenancy shall not increase the rent otherwise than as permitted by the agreement.

7.4 The Law Society was of the opinion that the Commissioner should have greater powers than those set out in the Bill. The Society submitted that, in considering if rent increases pursuant to the mechanism set out in clause 26 is excessive, the Commissioner should consider the following criteria-

- (a) the general level of rents for comparable premises in the same or similar localities;
- (b) the estimated capital value of the premises at the date of the application;
- (c) the outgoings for which the landlord is liable under the agreement;
- (d) the estimated cost of services provided by the landlord and the tenant under the agreement;
- (e) the nature and value of furniture, equipment and other personal property provided by the landlord for the tenant's use;
- (f) the state of the condition of the premises; and

(g) any other relevant matter.

7.5 According to the Society, where the Commissioner ascertains that the rent payable under a residential tenancy agreement is excessive the Commission should be able, by order, to-

- (a) fix the rent payable for the premises and vary the agreement by reducing the rent payable under the agreement accordingly;
- (b) fix a date from which the variation take effect; and
- (c) fix a period (which for example cannot exceed one year) for which the order is to remain in force.

7.6 It was also suggested by Islands Rental Services²¹ that landlords should be able to increase rent annually pursuant to a pre-set rate of between 5% and 10%. The company's rationale was that a fixed rate is best as it forewarns the tenant of exactly what the increased renewal would be.

7.7 The suggestion by Island Rental Services for the increase of rent by a fixed rate annually supports rent control which the Commission does not recommend. The Commission also believes that the Law Society's recommendation that the Commission should have the power to fix rents in the instances where rent is excessive is also a recommendation for a rent control regime and neither proposal is supported by the Commission.

8. **HOLDING OVER; WRITTEN LEASES**

8.1 The issue of holding over came to the forefront in the local case of *Kelly and Powis v Lookloy*²². A tenant holds over when after the expiration of lease agreement he continues in occupation of the land as a lessee with the consent of the landlord. The assumption held by some landlords and tenants prior to the Court of Appeal decision in that case was that a landlord, where he is seeking to obtain vacant possession, must give the tenant a notice of termination which complies with that set out in the expired lease or that no notice to quit can be given until the expiration of another fixed term. Thus, for example, if the lease had previously been for 12 months where the tenant holds over the landlord must allow another 12 month period to run before he could seek possession of his premises. The Court of Appeal held that if the rent is not being paid annually (it was not in this case) the tenant is considered to be holding over on a monthly tenancy and therefore only one month's notice was required.

8.2 In order to avoid such uncertainty the Commission recommends that all tenancies should be in writing (with certain minimum terms and conditions) and that the principle of holding over should be abolished. Clause 15 of the Bill sets out the

²¹ See Appendix B

²² 2004-5 CILR 273; see discussion paper paras 6.4 to 6.8

minimum terms and conditions which should be contained in a tenancy agreement. The clause provides as follows-

“15. Every tenancy agreement shall include the following minimum information-

- (a) the full name and contact address of the landlord including any person with superior title to the landlord;
- (b) the full name and contact address (where that is different from the address of the premises to which the agreement relates) of the tenant;
- (c) the address of the premises;
- (d) the date of the tenancy agreement;
- (e) the date of commencement of the tenancy, where that is different from the date of the tenancy agreement;
- (f) the landlord’s address for service;
- (g) the tenant’s address for service;
- (h) the amount of any security deposit;
- (i) the amount of the rent payable;
- (j) the period of notice required to vacate premises;
- (k) the frequency of the rent payments;
- (l) the place or bank account number where the rent is to be paid;
- (m) a statement, (if applicable) that the tenant shall pay any fee or other charge for services rendered by any attorney-at-law or real estate agent relating to an assignment of the tenancy;
- (n) a list of any chattels, if any, provided by the landlord;
- (o) a statement as to which party is responsible for the payment of utilities and any other assessments arising under the tenancy agreement;
- (p) an option to renew and vary (if accepted); and
- (q) if the tenancy is a fixed-term tenancy, the date on which the tenancy will terminate.

8.3 The Bill also provides that every variation of a tenancy agreement, and every renewal of a tenancy agreement, shall be in writing and signed by both the landlord and the tenant.²³

8.4 The Commission wishes to emphasise that minimum conditions set out in clause 15 are just that, minimum conditions. The Commission does not wish to take away the bargaining power of landlords and tenants and believes that the legislation need not provide any more conditions.

9. UNLAWFUL EVICTIONS; HARASSMENT OF TENANTS

9.1 The Commission noted in its discussion paper the allegations of harassment of tenants by landlords.²⁴ There had been many complaints that landlords used

²³ See clause 17

unlawful methods (such as the cutting off of utilities) of evicting tenants in some cases in order to re-let the premises at higher rents. Section 84 of the Penal Code (2007 Revision) outlaws the forcible entry of premises but the Commission has recommended that landlord and tenant legislation should expressly offer protection against harassment and illegal eviction. The Commission has therefore recommended that provisions similar to section 84 be included in the Residential Tenancies Bill.²⁵ A person who commits an offence under this section would be liable on summary conviction to a fine of \$4000 and imprisonment for four years.

- 9.2 Clause 34 of the Bill also provides that a landlord should not interfere with the supply of gas, electricity, water, telephone services, or other services to the premises, except where the interference is necessary to avoid danger to any person or to enable maintenance or repairs to be carried out or is beyond the control of the landlord.

10. SECURITY DEPOSITS

- 10.1 The payment and retention of security deposits are not currently regulated by law although most rental agreements on the Islands require a deposit. The issues relating to security deposits generally relate to the return of a deposit to the tenant at the termination of a lease. There have been and continue to be allegations that many landlords unlawfully retain such deposits; that either no reasons are given for the failure to return the deposit or the landlords allege damage where there may be in fact no damage to the premises. Many tenants due to limited resources do not contest the retention of such deposits as the legal costs which may be incurred in seeking the return of the deposit may in fact exceed such deposit. Landlords on the other hand complain of tenants leaving outstanding rents or damages and of the deposits not being enough to cover their losses.

- 10.2 There were many comments submitted on this matter²⁶ and clauses 20 to 25 of the Bill are drafted to take account of such comments. The Bill provides in part that-

- (a) the security deposit should be held by the landlord in trust;
- (b) a security deposit held by a landlord for a tenant is not attachable under any garnishee proceedings, injunction freezing or receiving order or exigible under a writ of execution.
- (c) a landlord shall not assert a claim against a tenant or the security deposit –
 - (i) for damages to the premises or any defective conditions that pre-existed the tenancy;

²⁴ Paras 7 to 7.11

²⁵ See clause 68

²⁶ See Appendix B

- (ii) for ordinary wear and tear or the effects thereof whether the wear and tear pre-existed the tenancy or occurred during the tenancy; or
- (iii) for the cumulative effects of ordinary wear and tear occurring during one or more tenancies.

10.3 The Bill further provides that at the termination of the tenancy agreement the landlord should inspect the premises and compile a comprehensive and detailed list of any damage to the premises which is the basis for any charge against the security deposit and the estimated dollar cost of repairing such damage. The tenant should have the right to inspect the premises to ascertain the accuracy of the list. A tenant who disputes the accuracy of the final damage list may apply to a Commissioner for a determination of such list; and the tenant's claim shall be limited to those items from which the tenant specifically dissented. If the tenant fails to sign the list or to specify his dissent he shall not be entitled to recover any part of the deposit disputed by him. A deposit should be returned within 14 days after the termination of the tenancy (excluding Saturdays, Sundays and public holidays). Where the landlord intends to keep the deposit or a portion of the deposit in order to pay for damages or rent due and the tenant objects, either the tenant or the landlord may apply to a Commissioner for a determination of the matter.

10.4 In the Bill of October 2006 it had been provided that the landlord should invest the security deposit in an interest bearing account at a Class "A" bank in the Islands and that the landlord should, at the termination of the tenancy agreement, pay to the tenant interest on the security deposit at the applicable market rate calculated from the date on which the landlord receives the full amount of the security deposit. There were many negative responses to this recommendation. The Valuation Office's opinion on the provisions of the Bill relating to security deposits was as follows-

"Whilst the principle of payment of interest on deposits is equitable, and one which may well have been applied elsewhere, we anticipate inherent difficulties for landlords in the Cayman Islands. Banks would likely have to calculate the interest (on a specific deposit, held for a specific amount of time, at a varying rate of (nominal) interest), by hand, an extremely cumbersome process.

Commercial tenants with substantial deposits would likely require such a clause in the free market in any case. For residential tenants the gain (CI\$17.50 on a CI \$1,000 deposit held for a year) is probably offset by the delay in the return of the deposit that will inevitably occur while trying to calculate interest on it.

In addition unless the cheque is deposited on the day of execution (impossible on Saturdays and Sundays), the landlord would technically be out of pocket, until received by the bank, as interest immediately accrues.

As such, we recommend the removal of all reference to interest being payable.

As an alternative, the Commission may wish to review the soon to be implemented Tenancy Deposit Protection Scheme within the UK..... for residential tenancies. Of particular interest is the ‘custodial scheme’ which is self financing through the retention of interest. From a tenant’s point of view the security provided by such a scheme would more than outweigh the interest otherwise gained, and should therefore be considered, at the very least for residential leases.”.

- 10.5 Tessa Hydes Property Management was of the opinion that the funds should not be held in an interest bearing account because “the interest received in these Islands would not set off the cost of calculating and administrating this for landlords with multiple tenancies.”. Mr. Wayne Newberry stated that if the Bill was followed calculating the interest to be charged on deposits would be an accounting nightmare for both small and large property owners. According to him, “security deposits should be held in an interest bearing account with fixed interest calculated from the date of the tenancy to the date the security deposit is returned.”.
- 10.6 The Law Society was of the opinion that instead of the landlord holding the security deposit in trust it should be lodged with the Commissioner at the commencement of the tenancy. According to the Society, the security deposits could be paid into a “Residential Tenancies Fund” which would be kept and administered by the Commissioner. This Fund could consist of deposits and other amounts paid into the Fund which would be invested in a manner approved by the Governor.
- 10.7 The Society indicated that other Commonwealth jurisdictions had such funds and that the income of the Fund could be applied, for example, toward-
 - (a) the cost of administering and enforcing the Law;
 - (b) the education of landlords and tenants about their statutory and contractual rights and obligations; and
 - (c) the payment to tenants of interest on amounts of security deposits repaid to them at the end of their tenancies.
- 10.8 The Commission considered the above responses and has decided that it is in the best interests of parties for a deposit to accrue interest. The Commission does not recommend the holding of deposits by the Commissioner as the role of the Commissioner should be one of mediator only. The Bill retains the provisions relating to interest on security deposits but provides that persons may agree to contract out of such provisions.

11. RIGHTS AND OBLIGATIONS OF PARTIES

11.1 The Commission recommended that all tenancy agreements should be subject to certain terms which cannot be amended or excluded. In addition to a landlord's obligation to keep the premises in repair²⁷ a landlord would be subject to the following implied terms-

- (a) premises should not be leased subject to any legal impediments;
- (b) a tenant should be given vacant possession of the premises at the commencement of the tenancy;
- (c) a landlord should give a tenant quiet enjoyment of the premises;
- (d) garbage fees, strata fees, insurance premiums would be payable by the landlord;
- (e) the landlord should give written notice of the sale of the premises as soon as he has put the premises on the market;
- (f) the landlord must give the tenant notice of his desire to enter the premises (except in the case of an emergency) and if he has consent to enter must do so between specified hours.

11.2 The tenant would be under an implied obligation under a lease-

- (a) to pay rent as and when it becomes due;
- (b) to ensure that the premises are occupied principally for residential purposes;
- (c) in the absence of expressed agreement otherwise, to pay charges for electricity, gas, water, television and telephone supplied to the premises;
- (d) to keep the premises reasonably clean and reasonably tidy;
- (e) to notify the landlord as soon as possible after discovery, of any damage to the premises of the need for any repairs; and
- (f) on the termination of the tenancy, to quit the premises, remove all possessions from the premises, leave the premises in a reasonably clean and reasonably tidy condition, and remove or arrange for the removal from the premises of all rubbish.

11.3 While some submitters felt that the balance of rights and obligations in the Residential Tenancies Bill is about right many of the landlords and property managers were of the view that the Bill favours tenants. The Valuation Office, while supporting the principle of the Bill to provide basic, fundamental requirements to be implied in every lease, was of the opinion that the Bill was nevertheless to some extent intrusive. The Office felt that, for example, it should not be government's role to determine that a tenant pays electricity and gas charges.

²⁷ Ante

11.4 The rights and obligations of both tenants and landlords as set out in the law are, in part, a codification of the rights and obligations as determined by the common law such as the right to quiet possession and the right to vacant possession at the commencement of the tenancy. The provisions of the Bill are not novel and have also been modelled on legislation of developed countries such as the UK, Australia and New Zealand. The Commission therefore does not agree with the comments regarding lack of balance and over-regulation.

12. **DISCRIMINATION AGAINST TENANTS WITH CHILDREN**

12.1 The Law Society and Island Rental Services were of the opinion that the law should seek to eliminate the continued discrimination in the tenancy market against tenants with children. According to the Society, “as a matter of human rights ... the landlord must not refuse to grant a tenancy on the ground that it is intended that a child should live on the premises.”. The Society further stated that a landlord must not instruct a person not to grant or state an intention (by advertisement or in any other way) not to grant a tenancy on the ground that it is intended that a child should live on the premises. The Law Society suggested the inclusion of a clause which would declare void any provision in a tenancy agreement which purports to prohibit or restrict a tenant’s right of co-habitation with his children.

12.2 The Commission agrees with the call by the Law Society and by Island Rental Services for the end of discrimination against tenants with children but acknowledges the right of the landlord to contract freely. The discrimination against tenants with children is a problem in the Islands but is of the view that a landlord should have a choice in his selection of tenants provided that he does not breach any human rights in so doing. Most premises on the Islands are rented furnished and this may be one of the reasons why children are not preferred tenants. The potential damage to the property of the landlord is perceived as being much greater. There are also some properties which may cater only to a particular age range and the tenants of such properties would have only agreed to rent those premises because of the lack of children. The inclusion of a clause as suggested by the Law Society is therefore not recommended.

13. **INSURANCE**

13.1 The Commission noted in the discussion paper that in practice landlords of residential property are likely to insure their buildings against all usual risks, including the risk of hurricane damage. Typically, the sums insured will comprise the re-instatement cost of the building and one year’s loss of rent (on the basis that it might take as long a year to re-instate a building following its destruction by an insured risk). It is in the interests of individual tenants that their landlords should have insurance, otherwise they might not be able to perform their repairing obligations. Arguably, it is in the wider public interest that all landlords of residential property should have the benefit of insurance and that all property

should not be let unless it is in an insurable condition. The Commission invited comments on this matter.

- 13.2 In response, the Valuation Office expressed the view that landlords should be under an obligation to insure their properties. According to the Valuation Office-

“Hurricane Ivan demonstrated the absence of insurance in so many instances, and the perception that Government will provide a ‘bail out’ in such cases must be changed. Ownership of property, in particular investment property, comes with both benefits and obligations - tenant’s must have assurance on this most basic of point, hence landlord’s should be compelled to provide it.”.

- 13.3 After due consideration of this issue, the Commission, while agreeing that there was merit in obliging landlords to insure their property, is concerned about the social consequences of the proposal. Apart from the difficulty in enforcing such a provision the Commission believes that this measure could have the effect of substantially reducing the housing stock and inevitably causing some persons to become homeless temporarily at least. The Commission is of the view that an impact study to assess the effect on the property market would have to be carried out by the Government to determine whether such a provision should brought into force.

14. **INSPECTION SHEETS**

- 14.1 The Commission agrees with the suggestions of the Law Society that at the time that a residential tenancy agreement is entered into, the landlord or his agent must complete and provide to the tenant two signed copies of an inspection sheet in the form determined by a Commissioner that-

- (a) provides for the residential premises to be identified;
- (b) provides comprehensive details of fixtures, furniture and other contents in the premises;
- (c) provides for the condition of the premises and the fixtures, furniture and other contents of the premises to be described by both the landlord and the tenant, both at the time of commencement and termination of the agreement;
- (d) provides for the signature of the parties of the agreement both at the time of commencement and termination of the agreement;
- (e) advises the tenant that if a dispute arises in relation to the condition of the premises the tenant may contact the Commissioner about the matter.

- 14.2 According to the Society, the introduction of inspection sheets in the prescribed form could prevent situations whereby the landlord and tenant argue about the

condition of the premises and its fixtures etc. at the commencement, during the tenancy and at the termination.

15. **CONCLUSION**

The Residential Tenancies Bill provides a comprehensive revision of the law of landlord and tenant and is influenced by considerable public input as well as by legislation which has been tried and tested in developed countries, such as New Zealand, Australia and the U.K. The Commission is grateful for the assistance given by the persons and companies named in this report. The Commission is of the view that the Bill provides an effective balance of the rights and obligations of both landlords and tenants and hopes that it would be effective in ensuring that there would be no repeat of the problems which occurred in the early post- Ivan period.

Chairman: Langston R. M. Sibblies

Date: 11/08/08