



DOIA21/22030706

s 9(2)(a)

Dear [REDACTED]

Thank you for your email on 2 March 2022 requesting the following information under the Official Information Act 1982 (the Act):

- 1. All briefings and background papers related to rental controls or other market intervention to reduce rental costs, prepared between November 2020 and now.*
- 2. All briefings and background papers related to reform of the accommodation supplement or the income related rent subsidy, prepared between November 2020 and now.*

Regarding part 1 of your request, you clarified on 9 March 2022 that you were just interested in papers on rent controls or regulations, rather than papers on Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development's (the Ministry) broader work programme to increase supply and, therefore, affordability.

We have identified 14 documents in scope of part 1. Of these, five documents are withheld in full, including four titles; seven documents are refused; and two documents are released to you with some information withheld under the following sections of the Act:

- 9(2)(a) to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source,
- 9(2)(f)(iv) to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials and it is in the public interest that such information should continue to be supplied
- 9(2)(g)(i) maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisation in the course of their duty
- 9(2)(h) maintain legal professional privilege
- 18(d) that the information requested is or will soon be publicly available.

The above information is summarised in the attached document schedule.

In terms of section 9(1) of the Act, I am satisfied that, in the circumstances, the decision to withhold information under section 9 of the Act is not outweighed by other considerations that render it desirable to make the information available in the public interest.

The second part of your request for papers related to reform of the Income Related Rent Subsidy (IRRS) is refused under section 18(e) of the Act, that the documents requested do not exist. As you know, the part of your request that relates to Accommodation Supplement was transferred to Ministry of Social Development to respond.

You have the right to seek an investigation and review of my response by the Ombudsman, in accordance with section 28(3) of the Act. The relevant details can be found on the Ombudsman's website [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz).

As part of our ongoing commitment to openness and transparency, the Ministry proactively releases information and documents that may be of interest to the public. As such, this response, with your personal details removed, may be published on our website.

Yours sincerely



Claire Leadbetter  
**Manager, Policy and Legislation Design**

## Document schedule

Date	Tracking number	Title	Section of the Act applied
04/12/20	BRF20/21120809	Improving housing supply and affordability: Initial high level advice (Annex A page 9)	18(d) <a href="https://www.hud.govt.nz/assets/News-and-Resources/Proactive-Releases/BRF20-21120809.pdf">hud.govt.nz/assets/News-and-Resources/Proactive-Releases/BRF20-21120809.pdf</a>
22/12/20	AMI20/21120425	Potential impacts on existing landlords and tenants of proposed changes to the treatment of rental properties	18(d) <a href="https://www.hud.govt.nz/assets/News-and-Resources/Proactive-Releases/1-AMI2021120425-Potential-impacts-REDACTED.pdf">hud.govt.nz/assets/News-and-Resources/Proactive-Releases/1-AMI2021120425-Potential-impacts-REDACTED.pdf</a>
21/01/21	BRF20/21010833	Options for rent indexation and further protection for tenants	18(d) <a href="https://www.hud.govt.nz/assets/News-and-Resources/Proactive-Releases/DOIA2021070595-response.pdf">hud.govt.nz/assets/News-and-Resources/Proactive-Releases/DOIA2021070595-response.pdf</a>
11/02/21	AMI20/21020448	Speaking points: options for protecting renters from the impacts of demand side measures	
26/02/21	DPMC-2020/21-583	Findings from a literature scan on rent regulation	
18/02/21	AMI20/21020459	[Title withheld]	
			Withheld in full 9(2)(f)(iv)
06/09/21	AMI21/22090623	Supporting material for Cabinet paper: Policy decisions for amending the Residential Tenancies Act in response to COVID-19 outbreaks	9(2)(a) 9(2)(h)
19/08/21	BRF21/22081078	Residential tenancies under COVID-19 Alert Level 4 – initial advice	9(2)(a) 9(2)(g)(i) 9(2)(h)
09/21	Cabinet paper	Cabinet paper – Policy decisions for amending the Residential Tenancies Act 1986 in response to COVID-19 outbreaks	18(d) <a href="https://www.hud.govt.nz/assets/News-and-Resources/Proactive-Releases/02-REDACTED-Cab-paper-policy-decisions-Residential-Tenancies-Act-1986 -Proposed-Amendments-in-Response-to-COVID-19.pdf">www.hud.govt.nz/assets/News-and-Resources/Proactive-Releases/02-REDACTED-Cab-paper-policy-decisions-Residential-Tenancies-Act-1986 -Proposed-Amendments-in-Response-to-COVID-19.pdf</a>
15/02/22	IREQ21/22021246	A3 High level options to address rent increases	Withheld in full 9(2)(f)(iv)
19/03/21		HUD submission on petition of Kamal Badawy: System to limit overpriced rentals for residential and commercial properties	18(d) <a href="https://parliament.nz/en/pb/sc/submissions-and-advice/all?custom=PET_93755">parliament.nz/en/pb/sc/submissions-and-advice/all?custom=PET_93755</a>
26/03/21	BRF20/21030899	[Title withheld]	Withheld in full 9(2)(f)(iv)
30/06/21	BRF20/21040936	[Title withheld]	Withheld in full 9(2)(f)(iv)
01/03/22	BRF21/22021232	[Title withheld]	Withheld in full 9(2)(f)(iv)



# Aide-memoire

**Supporting material for Cabinet paper: Policy decisions for amending the Residential Tenancies Act in response to COVID-19 outbreaks**

<b>Date:</b>	Monday 6 September	<b>Security level:</b>	In Confidence
<b>Priority:</b>	High	<b>Report number:</b>	AMI21/22090632

### Information for Minister(s)

Hon Poto Williams <b>Associate Minister of Housing</b> <b>(Public Housing)</b>	<b>Note</b> the contents of this briefing, attached talking points and questions and answers, in preparation for the COVID-19 Ministerial Group meeting on Tuesday 7 September.
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### Contact for discussion

Name	Position	Telephone		1 <sup>st</sup> contact
Claire Leadbetter	Manager, Tenures and Housing Quality	04 832 2431	s 9(2)(a)	✓
Katherine Slaney	Principal Advisor, Tenures and Housing Quality	04 830 6912	s 9(2)(a)	
Courtney Carson	Senior Advisor, Tenures and Housing Quality	04 830 6964	-	

### Other agencies consulted

The following agencies were consulted on the Cabinet paper: Ministries of Business, Innovation and Employment, Health, Justice, Social Development and Pacific Peoples; the Treasury; Te Puni Kōkiri; Parliamentary Counsel Office, the Department of Prime Minister and Cabinet and Kāinga Ora.

## Minister's office to complete

- ☐ Noted  
☐ Seen  
☐ See Minister's notes  
☐ Needs change  
☐ Overtaken by events  
☐ Declined  
☐ Referred to (specify)

### Comments

Date returned to HUD:





## Aide-memoire

### Supporting material for Cabinet paper: Policy decisions for amending the Residential Tenancies Act in response to COVID-19 outbreaks

**For:** Hon Poto Williams

**Date:** Monday 6 September

**Security level:** In Confidence

**Priority:** High

**Report number:** AMI21/22090632

#### Purpose

1. To provide material to support discussion on your Cabinet paper, *Policy decisions for amending the Residential Tenancies Act in response to COVID-19 outbreaks*, at the COVID-19 Ministerial Group meeting on Tuesday 7 September 2021. Suggested talking points and questions and answers on the proposals are attached at Annexes A and B.

#### Cabinet paper seeks agreement to RTA COVID-19 amendments

2. The Cabinet paper seeks agreement to policy decisions for urgent amendments to the Residential Tenancies Act 1986 (RTA) to enable the Minister to make a Ministerial order (a 'RTA COVID-19 order') which restrict tenancy terminations during future outbreaks of COVID-19 during the critical 'stay at home' period. An RTA COVID-19 order would preserve existing tenancies, allow tenants to revoke termination notices (whether tenant or landlord initiated) and continue fixed-term tenancies that otherwise would have expired.
3. The Cabinet paper also seeks agreement to RTA amendments to enable the Tenancy Tribunal to conduct proceedings on the papers, for a period of twelve months after commencement, to assist in addressing the backlog of applications due to the current outbreak of COVID-19, as the Tribunal cannot currently hold face to face hearings at Alert Levels 3 and 4.

#### Supporting information for Cabinet meeting

##### Ministerial orders are more agile than other forms of delegated legislation

4. Ministerial orders are a form of delegated legislation. This type of instrument can be activated quickly, and is therefore more appropriate to respond to an emergency than other types of delegated legislation, such as making an Order in Council or regulations. Orders made under section 11 of the COVID-19 Public Health Response Act 2020 are a similar type of instrument, and can be made by either the Minister for COVID-19 Response or the Director General of Health. However, a key difference is that whereas the detail of the COVID-19 Public Health Response Orders are not pre-drafted, under the RTA proposals, COVID-19 tenancy termination restrictions will 'sit' in the RTA (i.e. in the primary legislation) but could be 'switched on' if an RTA COVID-19 order is made by the Minister.
5. The Minister would only be able to make an order relating to a geographic area if satisfied that:
  - a. a COVID-19 Public Health Response Order is or will be made containing measures that generally restrict people from moving house in that area; and
  - b. the order is necessary or desirable to align with or support those stay-at-home measures.
6. This statutory test is appropriate because it allows the restrictions to align with a relevant COVID-19 Public Health Response Order which restricts people from moving house to limit



movement as much as possible (generally only under 'Alert Level 4').  
s 9(2)(h)

Currently, landlords are still able to terminate tenancies or enforce terminations under Alert Level 4 under the RTA (therefore compelling tenants to vacate and move).

7. Because the Ministerial orders will have wide reaching effects, we propose that the Minister must consult with the Prime Minister and the Minister for COVID-19 Response before making an order. The Ministerial orders will also be disallowable, meaning that they must be presented to Parliament within 16 sitting days and Parliament may invalidate them.
8. This is a more agile and responsive approach than the model used for the temporary RTA restrictions in 2020, where termination restrictions were in place for a fixed period of three months, and meant that the restrictions applied not just during Alert Level 4, but also subsequently during Alert Levels 3, 2 and 1, across the country. At the lower levels, the relatively strong restrictions were not necessary to achieve the goal of limit movement to protect public health, and the termination restrictions had unintended consequences. For example, they caused huge disruption for the agricultural sector, when farmers were not able to move in farm workers over Moving Day in June 2020, due to current on-farm workers refusing to move out (discussed below).

#### **Tenant and landlords are unclear about their rights and responsibilities in Alert Level 4**

9. Over the past two weeks, tenant advocacy organisations and Tenancy Services have received a number of enquiries from tenants and landlords who are unclear about their tenancy rights under Alert Level 4.
10. Citizens Advice Bureau has heard from tenants and landlords who are seeking advice on whether landlords can give notice to terminate during Alert Level 4, the validity of termination notices served prior to Alert Level 4, and whether evictions are permitted during Alert Level 4 for antisocial behaviour. This supports the need for the proposed RTA COVID-19 order to provide certainty for landlords and tenants about whether and how tenancies may be terminated during outbreaks of COVID-19.
11. There have also been reports of tenants who were due to move houses in Alert Level 4 but were unable to do so, and are being asked to pay double rent (at the property they are currently occupying and at the new tenancy). For renters who are struggling to meet rent payments, there are some Ministry of Social Development support products available to assist. Tenancy Services are also encouraging landlords and tenants to come to a fair agreement in these situations and consider reducing the rent for both tenancies so that the cost is spread across all parties.
12. Tenants Protection Association noted any legislation relating to terminations should be flexible and linked to both Alert Level 3 and Alert Level 4, as this will provide a time buffer for tenants to organise a new tenancy.

#### **Agency feedback on the proposal to restrict terminations**

13. Agencies have been generally supportive of the proposals. The Ministry of Health is receiving exemption requests from people whose tenancy agreements are due to expire under the current COVID-19 Public Health Response Orders. RTA COVID-19 Orders would therefore give tenants and landlords greater certainty and reduce administration as well as wait times for people applying.
14. Initially, the Ministry of Justice and Ministry of Health were concerned the conditions for issuing an RTA COVID-19 Order were relatively broad, and that further specificity was needed on the circumstances where it is appropriate for the Minister to utilise such a wide-reaching power. We have made the proposed statutory clearer and more specified because of this feedback, and also feedback from the Parliamentary Counsel Office.
15. Te Puni Kōiri support the proposals to restrict tenancy terminations during future outbreaks of COVID-19, but would like rent increase freezes reinstated during Alert Level Four periods, as they do not consider the one year limit to increasing rents a sufficient protection for tenants during an already stressful period.

16. Regarding the proposal to not reinstate a rent increase freeze, the Ministry of Social Development notes there are limited housing support products available, especially with the temporary increases in rent arrears assistance as a response to COVID-19 ending in June this year, so the amount of funding available is significantly less than what was provided last year to clients.
17. The Ministry of Primary Industries (MPI) supports the proposals as they will mean a more flexible regime for farmers, particularly if regions are moving between Alert Levels and lockdowns over a period of time, as on-farm tenancies are linked with farm employment and there is a lack of private rental accommodation in rural areas.

### **Key issues to note**

*Landlord and tenants will still be able to agree to end tenancies, even when termination restrictions are in place*

18. Protections against terminations help to ensure tenants can comply with restrictions under a relevant COVID-19 Public Health Response Order. But we have not gone as far as recommending that a tenant should be restricted from being able to terminate their tenancy, or from agreeing with their landlord to end their tenancy, when an RTA COVID-19 order is in place.
19. There are a range of circumstances where a tenant may need to move out of their rental property during Alert Level 4, which could include because they need to move into more suitable or affordable accommodation, or they are essential workers and need to be closer to work (e.g. farm workers), or they would otherwise have to pay two lots of rent (due to tenancies 'overlapping').
20. When tenants are considering termination and moving, we consider that the relevant COVID-19 Public Health Response Order would be the appropriate way to restrict their movement to achieve public health objectives. We note that the Ministry of Health processes exemption requests from people whose tenancy agreements are expiring and need to move. Travel must be reasonably necessary and consistent with purposes of the Order and the COVID-19 Public Health Response Act 2020.

*Moving between areas in different Alert Levels will need to be guided by the COVID-19 Public Health Response Orders*

21. The proposed legislative amendments will have implications for tenants wanting to move between different areas, where those areas are at different Alert Levels. For example, Alert Level 3 rules generally allow people to move houses, but not at Alert Level 4. Tenants and landlords will need to be guided by the relevant COVID-19 Public Health Response Order when making decisions about moving and how to do so (e.g. adhering to social distancing protocols).

*Proposed termination notice periods are different this time*

22. To balance the disruption of the termination restrictions on landlords and the uncertainty for tenants who need to find alternative accommodation after the restrictions are lifted, the Cabinet paper proposes that unless otherwise agreed, most termination notices will take effect once termination restrictions are lifted, on the later of the date originally provided for in the notice; or 28 days after the restrictions end. This means that termination notices are not cancelled or paused, but the notice period effectively keeps running, but with a 28 day 'top up' once restrictions are lifted, if below 28 days.
23. For tenancies with shorter notice periods and different termination provisions (including service tenancies), landlords would need to re-serve termination notices once restrictions were lifted.
24. The proposal means landlords will generally not have to 'restart' termination notices once restrictions are ended (now generally 63 days or 90 days). But to ensure tenants are not 'locked in' to tenancies once restrictions end (e.g. a tenant has arranged to go into another rental property and does not want to pay for an additional 28 days' rent), tenants will be able to end their tenancy on the date originally provided for in the notice (if it falls on or after the restrictions are lifted).



### *Rural issues*

25. If a future Alert Level 4 occurred during Moving Day<sup>1</sup>, or during a major horticultural harvest time, termination restrictions would present significant disruption for farmers, including sheep and beef farmers (who may experience staff turnover at any time during the year).
26. Aligning termination restrictions to Alert Level 4 areas will help. Termination notice periods for service tenancies are only 14 days, so workers could be moved on relatively quickly once terminations restrictions were lifted. We also note that when the COVID-19 provisions expire farmers will have the ability to terminate service tenancies with less than 14 days' notice under section 53(2)(b) of the RTA. This applies in circumstances where a worker/tenant's contract for services is terminated or the tenant is transferred to another district, and it is necessary for the conduct of the landlord's business to bring in a replacement employee in less than 14 days and no suitable alternative accommodation is available for the replacement worker.

### *Tenancy Tribunal ability to hear applications on the papers*

27. The Tenancy Tribunal have requested the ability to conduct hearings on the papers in appropriate cases to assist with managing large volumes of cases that accrue following COVID-19 level 3 and 4 restrictions. The Residential Tenancies Act 1986 limits the Tribunal to conducting hearings either in person (in court), or by telephone or other audio-visual link.
28. Because the Tribunal cannot conduct in person hearings during levels 3 and 4, it has been conducting hearings by telephone where possible. The Tribunal is managing to hear around half of the applications by telephone, with the balance adjourned to be rescheduled to a court hearing once there is a move to Alert Level 2, which inevitably means a large backlog of work to schedule and hear. To provide context, during Alert Level 1 Tenancy Services would normally have less than 40 applications to schedule, whereas there are currently 603 applications to be scheduled (as of 3 September 2021).
29. The Tribunal had the ability under the previous emergency legislation to conduct hearings on the papers. That was an effective option for some cases that were not disputed. The Tribunal's practice was to first contact the respondent to check if they wanted to dispute the claim, or to have the matter heard in a hearing. If the application was not disputed, or the respondent did not request a hearing, then it would consider a 'on the papers' option.

### *No rent increase freeze this time*

30. Rent increase freezes are not proposed this time, because since August last year, landlords are only able to increase rent once every 12 months. "Freezing" rents every time areas go into Alert Level 4 would be short term and would only delay, rather than stop increases. For renters who have lost jobs or cannot work due to Alert Level 4 or 3 restrictions and are struggling to meet rent payments, there are some Ministry of Social Development support products available to assist.

### **Next steps**

31. Following Cabinet agreement, officials will issue drafting instructions for the Parliamentary Counsel Office on Tuesday 7 September. We understand the Leader of the House is considering the preferred legislative vehicle for these changes and whether they can be accorded urgency.

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<sup>1</sup> Moving Day is at the end of May beginning of June, when many dairy farming families, sharemilkers, contract milkers and employees move to new farms to commence new employment and milking contracts with their families, personal possessions, livestock and farm machinery.



32. Subject to that consideration and other legislative priorities, an indicative timeline is set out in the table below:

Date	Activity
7 Sept	COVID Committee considers policy proposals
7 – 17 Sept	PCO drafts RTA amendments
20 Sept	RTA Amendment Bill goes straight to Cabinet for approval for introduction.
21 Sept	Introduction of Bill to Parliament and Minister moves an urgency motion for RTA Amendment Bill
22 Sept	Subject to House according urgency, Bill passes through all stages
23 - 24 Sept	Earliest time period for drafting, issuing and gazetting a Ministerial order applying termination restrictions (depending on Alert Levels and whether Minister seeks Cabinet approval)

#### Annexes

Annex A: Suggested talking points for COVID-19 Ministerial Group meeting


Annex B: Questions and Answers on proposals

## Annex A: Suggested talking points for COVID-19 Ministerial Group meeting

### Background

- For the first Alert Level 4 lockdown in March 2020, three sets of temporary changes were made to the Residential Tenancies Act 1986 through the COVID-19 Response (Urgent Management Measures) Legislation Act 2020:
  - restricting tenancy terminations,
  - imposing a freeze on rent increases, and
  - empowering the Tenancy Tribunal to operate flexibly.
- Together, the provisions helped support the COVID-19 health measures by facilitating people to stay in their rental homes, sustaining tenancies to the greatest extent possible, and protecting tenants from becoming homeless during the COVID-19 outbreak.
- Those RTA COVID provisions were time limited and have now expired.
- Cabinet previously agreed to reinstate temporary RTA restrictions in the event of a return to Alert Level 4.

### The current situation

- s 9(2)(h)  

- I am increasingly hearing from tenancy stakeholder groups that the lack of legal clarity under Alert Levels is becoming problematic for tenants and landlords.
- For example, there is pressure on vulnerable tenants to have to 'push back' on landlords pursuing terminations.

### I propose restricting tenancy terminations

- Accordingly, I am recommending urgent amendments to the RTA that will enable the Minister to make 'RTA COVID-19 orders' to restrict tenancy terminations during current and future outbreaks of COVID-19.
- This will help provide clarity and certainty for the tenancy sector, and aligns with public health objectives to keep people at home during a COVID-19 outbreak.
- This is a more agile and flexible approach than the approach taken in 2020, where termination restrictions were in place for fixed time periods of three to six months. This meant that the restrictions applied not just during Alert Level 4, but also at lower levels where the relatively strong restrictions were not necessary to achieve the goal of protecting public health. 'Tying' the restrictions to Alert Level 4 enables a sufficiently targeted response that effectively protects public health while minimising unintended consequences.

### How will the RTA COVID-19 order work?

- I propose the COVID-19 tenancy termination restrictions will 'sit' in the RTA but only apply from time to time if a Ministerial order is made by the Minister responsible for the RTA.
- The Minister would only be able to make an order relating to a geographic area if satisfied that:
  - a COVID-19 Public Health Response Order is or will be made containing measures that generally restrict people from moving house in that area; and
  - the order is necessary or desirable to align with or support those stay-at-home measures.
- Because the Ministerial orders will have wide reaching effects, I consider it appropriate that the Minister consult with the Prime Minister and the Minister and the Minister for COVID-19 Response before making an order.

- Termination restrictions would be guided by COVID-19 Public Health Response Orders and would not be automatically tied to Alert Levels. However, in practice, termination restrictions are likely to only apply during Alert Level 4 due to the proposed statutory criteria that requires an order to be in place only for as long as there are 'stay-at-home' measures in place.

*I propose to allow the Tenancy Tribunal to conduct proceedings on the papers*

- I am also seeking agreement to allow the Tenancy Tribunal to conduct proceedings 'on the papers', as it sees fit for twelve months from commencement of an amendment bill. This means the Tribunal can decide an application based on written submissions, without the parties having to attend.
- This would help address the backlog of cases which the Tribunal will need to clear after the current Alert Levels are lifted, and if Alert Levels are re-escalated in the foreseeable future.

*I do not recommend restrictions on rent increases*

- Cabinet previously agreed to also reinstate a rent increase freeze if New Zealand went back into Alert Level 4.
- On further consideration, I do not consider a rent increase freeze is necessary for future Alert Level 4 scenarios and I seek Cabinet's agreement to rescind that decision.
- This is because since August last year, landlords are only able to increase rent once every 12 months and must give at least 60 days' notice to tenants of a rent increase. Previously landlords could increase rents every six months.
- This change gives tenants longer term certainty about rent costs and makes them less likely to have rent increased during Alert Level 4 periods.
- In addition, rent increase freezes are not directly aimed at supporting the health response to keep people at home, but more at temporarily addressing some of the economic impact of an Alert Level 4 lockdown. Renters who are struggling to meet rent payments may be eligible for the COVID wage subsidy or other Ministry for Social Development support packages.

*Next steps*

- If you agree, I will authorise HUD to work with PCO to draft the amendments. I seek your authorisation to making any further policy decisions, consistent with the proposals in the Cabinet paper.
- The Leader of the House will consider the preferred legislative vehicle for these changes (a standalone RTA amendment bill or a COVID-19 omnibus bill) and whether they can be accorded urgency.



## **Annex B: Questions and answers on policy proposals**

### **What if a tenant and landlord has made alternative arrangements as to a moving date – will the legislation override those arrangements?**

The tenant will have the right to revoke the agreed moving date and remain in the premises. At a minimum, they have a right to a further 28 days' notice once the RTA COVID-19 order is revoked (unless it is a special tenancy type with a shorter notice period or different termination provisions, for example a service tenancy for farmers / farm workers).

However, if both the landlord and the tenant want the tenancy to end earlier, they can still agree to this – the legislation does not override this agreement.

### **Can a landlord issue a termination notice during the period an RTA COVID-19 order is in place?**

No, generally a landlord will need to wait until the order is revoked to issue a termination notice.

### **What about renters who are having to pay double rent because of overlapping tenancies – will the legislation help them?**

The legislation does not make any changes to rent obligations.

Tenants still have a legal obligation to pay rent in accordance with signed agreements, unless they make arrangements with landlords. Tenancy Services has published guidance encouraging landlords and tenants to consider rent reductions where a tenant is paying rent for a property they are not occupying.

Tenancy Services has also published guidance that if landlords are unable to provide incoming tenants with the property (for example, because the old tenants remain in the property), then rent generally should not be charged to the incoming tenants.

The proposed amendments will also clarify that where vacant possession of a premises cannot be delivered to an incoming tenant as a consequence of the effect of the termination restrictions, tenants and landlords would be exempt from obligations owed to each other and landlords would need to let the incoming tenant know the premises are no longer available.

### **What Housing Support products are there to assist renters?**

Housing Support Products (HSPs) support clients to access or retain housing. These products provide additional assistance where the client's needs can't be met by existing products and services the Ministry currently offers. For example, Accommodation Supplement, Housing related recoverable assistance. HSPs are discretionary and are based on a client's situation, their needs and what will make a difference for their household.

There are seven individual HSPs as described below.

#### *Bond Grant*

A non-recoverable payment to help clients moving from social housing into alternative housing, where there is a gap between the client's existing bond using Income Related Rent and bond payable at usual rent amounts.

#### *Moving Assistance*

Helps with the physical cost of moving. It is recoverable to ensure that clients find the most economical way to move.

#### *Rent Arrears Assistance*

A recoverable payment to help clients who have rent arrears and are at risk of losing their tenancy due to those arrears.

#### *Rent in Advance*

A non-recoverable payment to help clients moving into alternative housing.

### *Statement of Satisfactory Tenancy*

A reference from social housing providers that directly targets landlords' three core tenant selection concerns (rent arrears, damages and behaviours).

### *Tenancy Costs Cover*

Aims to reduce the (perceived) risks for landlords of letting to clients in disadvantaged groups.

### *Transition to Alternative Housing Grant*

An incentive payment that may be offered to clients in social housing living in areas with high waiting lists or who voluntarily exit their social housing.

All information on HSPs can be found also on MSD's Work and Income site:

<https://www.workandincome.govt.nz/map/income-support/extra-help/housing-support-products/index.html>

### **What's the point of the termination restrictions if landlords and tenants can agree to end a tenancy in an Alert Level 4 area?**

The termination restrictions give tenants more control over their circumstances by ensuring that tenants generally will not be forced to leave their home in breach of the COVID-19 Public Health Response Order.

The termination restrictions still allow tenancies to be terminated where tenants agree, because there may be many unique circumstances where it is appropriate for the tenancy to be terminated – for example, because the tenant had already moved out prior to Alert Level 4 and is staying in a different home, or because the tenant had to move homes due to an immediate risk to their health and safety.

Regardless of the tenancy termination rules, tenants still have to abide by the COVID-19 Public Health Order Response, which restricts their movements for public health.

### **Will farmers still be able to move in workers when an RTA COVID-19 order is in place?**

Under the COVID-19 Health Order at Alert Level 4, people are only permitted to relocate their home where required by a court order or where they need to use an emergency or temporary home, for example to receive care while sick, or to see refuge from family violence. Therefore, tenants generally will not be able to move into a new tenancy on a farm during Alert Level 4.

Once their area moves to Alert Level 3, farmers will be able to give any existing tenants notice to move out, so that they can move in new farm workers. Landlord farmers tend to use service tenancies for their farm workers, which only require 5 or 14 days' notice depending on the circumstances.

### **Why does the notice period not pause during Alert Level 4?**

Allowing notice periods to continue to run rather than pausing them is a clearer and simpler approach than stopping and starting them. To address the concern that tenants do not have sufficient time to find new accommodation once the restrictions end, the proposals will require a minimum notice period of 28 days.

### **What if a tenancy has already ended during Alert Level 4 and the tenant is still occupying the premises without the written agreement of the landlord – do they get to stay?**

This depends on the circumstances.

For example, if a landlord wanted to evict a tenant who is occupying the premises unlawfully, they would have to apply to the Tenancy Tribunal and obtain a possession order. The landlord could then seek eviction by a bailiff. Where these occur during Alert Level 4, the Ministry of Justice works with Police and MSD to ensure the eviction can be completed by a court Bailiff safely and that the evicted party has a residence to move to where they can continue self-isolation.

However, if tenants and landlords had informally agreed to a tenancy continuing, the proposed changes would sustain the tenancy, and the tenant would be able to stay on in the premises.

### **Why aren't we doing temporary rent increase freezes this time?**

In 2020, the Government amended the Residential Tenancies Act to limit rent increases to once every 12 months. This provides additional protection for tenants.

Freezing rents every time areas go into Alert Level 4 would only be short term and confusing and to some degree, just delay increases.

For renters who have lost jobs or cannot work due to Alert Level 4 or 3 restrictions and are struggling to meet rent payments, there are some Ministry of Social Development support products available to assist.

### **What about flatmates – are they protected by the proposed changes?**

Depending on the circumstances, flatmates may not be covered by the RTA (for example if they are not on the tenancy agreement). Therefore, any changes to the RTA will not provide additional protection for flatmates.

### **What about emergency and transitional housing clients – are they protected from termination restrictions?**

Emergency and transitional housing is not covered by the RTA.

It is understood that Transitional and Emergency Housing Providers are working together with whānau, HUD and MSD to avoid evictions during Alert Level 4, and where evictions are necessary for the security and safety of others, efforts are made to find those involved alternative accommodation.

### **What about social housing tenants – are they protected?**

Yes, social housing tenants are covered by the RTA and receive the same protections as tenants in the private rental market.

Termination notices served under section 53B(1)(b)(iii) by social housing providers prior to RTA COVID-19 orders will keep running and be 'topped up' to 28 days after the restrictions lift. That section allows social housing providers to require a tenant to transfer to different social housing if the transfer is necessary or desirable for any reason and the alternative housing is appropriate for the tenant's housing needs as most recently assessed.





## Briefing

Residential tenancies under COVID-19 Alert Level 4 – initial advice			
Date:	19 August 2021	Security level:	In Confidence
Priority:	High	Report number:	BRF21/22081078

Action sought		
	Action sought	Deadline
Hon Poto Williams Associate Minister of Housing (Public Housing)	Note the contents of this briefing and attached talking points, in preparation for Cabinet on Friday 20 August.	19 August 2021

Contact for discussion			
Name	Position	Telephone	1 <sup>st</sup> contact
Claire Leadbetter	Manager, Tenures and Housing	04 832 2431	✓
Katherine Slaney	Principal Policy Advisor	04 830 6912	

<b>Other agencies consulted</b>
Tenancy Services (MBIE), Ministry of Justice, Ministry for Primary Industries, Ministry of Health, Ministry of Social Development, Department of Prime Minister and Cabinet, the Treasury Kāinga Ora, Parliamentary Counsel Office.

## Minister's office to complete

	Comments
<input type="checkbox"/> Noted <input type="checkbox"/> Seen <input type="checkbox"/> Approved <input type="checkbox"/> Needs change <input type="checkbox"/> Not seen by Minister <input type="checkbox"/> Overtaken by events <input type="checkbox"/> Declined <input type="checkbox"/> Referred to (specify)  	

**Date returned to HUD:**



# Briefing

## Residential tenancies under COVID-19 Alert Level 4 – initial advice

**For:** Hon Poto Williams, Associate Minister Housing (Public Housing)  
**Date:** 19 August 2021 **Security level:** In Confidence  
**Priority:** High **Report number:** BRF21/22081078

### Purpose

1. This advice responds to your request for advice about managing residential tenancies issues under COVID-19 Alert Level 4, in preparation for your meeting with Cabinet tomorrow (Friday). We attach talking points to support you at Cabinet (**Annex A**).

### Executive summary

#### *What approach was taken last time we moved to Alert Level 4*

In the context of the first outbreak of COVID-19 and subsequent Alert Level 4 lockdown in New Zealand in March 2020, temporary changes were made to the Residential Tenancies Act 1986 (RTA) through the COVID-19 Response (Urgent Management Measures) Legislation Act 2020 (the COVID Act) to support the health measures (RTA COVID provisions). The RTA COVID provisions restricted tenancy terminations, imposed a freeze on rent increases and empowered the Tenancy Tribunal to operate flexibly. Because it was unclear how long the Alert Levels would be in place and because the restrictions were a significant imposition on property rights, the RTA COVID provisions were time limited for three months (termination restrictions) and six months (rent increase freeze). The restrictions have now expired. The Tenancy Tribunal flexible operations were set to expire after six months but were subsequently extended to 25 March 2021 through a change made by Residential Tenancies Amendment Act 2020.

#### *Why the situation is different this time*

In March 2020 New Zealand moved up to Alert Level 4 more gradually and de-escalated down Alert Levels over 11 weeks; this meant there was a window of opportunity for Parliament to pass the COVID-19 Act, the Alert Level rules could be communicated in advance, and people had time to adjust to the rules and restrictions. This time, the immediate escalation to Alert Level 4 for the whole country on Tuesday evening (due to the highly transmissible nature of the Delta variant) has meant there has been no lead in time to the significant rules and restrictions under the COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021 (the COVID Health Order) and no time to pass legislation amending the RTA.

The Tenancy Tribunal is continuing to operate and is hearing all matters that can proceed by telephone, rather than adjourn everything (as it did last year). A conversation with REINZ indicated that the industry is implementing their protocols for operating from last time the country was in Alert Level 4 so are managing in the short term.

#### *Legal advice*

The COVID Health Order mandates people to remain living at their home or place of residence, unless required to move by court order or law enforcement or if they need to use a temporary or emergency home, for example for care while sick or to seek refuge in a women's refuge accommodation. s 9(2)(h) [redacted]. Te Tūāpapa Kura Kāinga – the Ministry of Housing and Urban Development (HUD) and Tenancy Services have developed and published guidance that encourages landlords and tenants to ensure compliance with the COVID-19 Health Order, for example by agreeing to extend a tenancy that is due to expire during Alert Level 4.



Ultimately, fines can be imposed on a tenant for either breaching the COVID Health Order or breaching the RTA requirement to vacate the property following termination of the tenancy. While we expect landlords and tenants to work together during Level 4, this could place tenants in a difficult situation if their landlord insists on enforcing a termination. Without legislative change, landlords will retain their current legal rights to terminate tenancies under the RTA and the Government cannot require landlords to delay or withdraw any terminations to facilitate tenants complying with the COVID Health Order.

*What this means for the approach we recommend this time.*

We recommend a tailored and proportionate approach to addressing residential tenancies going forward, meaning if Alert Level 4 is not extended beyond three weeks the current guidance will be sufficient and no legislative changes will be required. If the current outbreak cannot be quickly brought under control by containment measures and Alert Level 4 is subsequently extended beyond three weeks (or looks like it will be extended), Ministers could consider passing legislation to reinstate the RTA COVID provisions (with modifications), as contemplated by Cabinet in December 2020 (in the context of the paper, *Economic response to future resurgences of COVID-19*).

Similar to last time, we recommend the RTA changes comprise restrictions on tenancy terminations linked to Alert Level 4 (and possibly Alert Level 3), and a freeze on rent increases for Alert Levels 4 and 3 (subsequent to Alert Level 4) in the regions which go into Alert Level 4. However, we would need to undertake further work with Parliamentary Counsel Office on how the amendments could be linked with Alert Levels and regions, for example through an Order in Council mechanism, so that the rules could be applied if the country enters Alert Level 4 and a COVID Public Health Response Order is made.

Consideration needs to be given to a number of matters, including whether to apply the rules at Alert Level 3 as well as Alert Level 4, as it would be confusing and disruptive to have RTA restrictions applied and then disapplied if the country or regions were to move up and down Alert Levels 3 and 4 in response to an uptick in COVID-19 case numbers.

## Recommended actions

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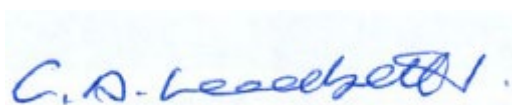
2. It is recommended that you:

1. **Note** that last year temporary changes were made to the Residential Tenancies Act 1986 (RTA) to support the health measures to keep people in their rental homes including termination restrictions, a freeze on rent increases and Tenancy Tribunal powers to operate flexibly and these provisions have now expired. Noted
2. **Note** s 9(2)(h) [redacted] landlords still have the legal ability to terminate tenancies under the RTA despite the requirements the COVID Health Order to stay at home. Noted
3. **Note** officials recommend a tailored and proportionate approach to addressing residential tenancies: if Alert Level 4 is not extended beyond three weeks the current guidance that encourages landlords and tenants to ensure compliance with the COVID-19 Health Order will be sufficient and no legislative changes will be required. Noted
4. **Note** if the current outbreak cannot be quickly brought under control by containment measures and Alert Level 4 is extended, Ministers could consider passing legislation to reinstate the RTA COVID provisions (with modifications), as contemplated by Cabinet in December 2020. Noted
5. **Note** we recommend a rent increase freeze is reinstated for Alert Levels 3 and 4, as there are less Government COVID-related support products this



time (the temporary changes made last year to the Rent Arrears Assistance Housing Support Product, expired on 1 July 2021). *Noted*

6. **Note** we would need to undertake further work with Parliamentary Counsel Office on how the amendments could be future-proofed by linking them with Alert Levels and regions, through an Order in Council mechanism, for example that applies any or all of the rules if the country or region enters Alert Level 4 and a COVID Public Health Response Order is made. *Noted*



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Claire Leadbetter  
**Manager, Tenures and Housing Quality**

..... / ..... / .....

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Hon Poto Williams  
**Associate Minister of Housing (Public Housing)**

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## Background

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### You have asked for advice in the context of the community outbreak of COVID

3. The country is currently at Alert Level 4 after the detection of a community case of the COVID-19 Delta variant in the Auckland region. There have been subsequent community cases. You have asked for advice and talking points on Alert Level 4 and residential tenancies (specifically rent increases and terminations) in preparation for a discussion at Cabinet tomorrow. You have requested that the advice cover:
  - a. What approach was taken last time we moved to Alert Level 4
  - b. Why the situation is different this time and
  - c. What this means for the approach we recommend this time.

### Cabinet has previously agreed to reinstate tenancy restrictions and rent increase freezes in the event of a return to Alert Level 4

4. In relation to the December 2020 Cabinet paper, *Economic response to future resurgences of COVID-19*, Cabinet noted that, in the event of COVID-19 Alert Level escalations, a comprehensive package of economic support is critical to minimise the associated economic and social impacts, and to support compliance with the public health response.
5. In relation to residential tenancies, Cabinet:
  - a. noted that further design work and new legislation will be required to reinstate a freeze on residential rent increases and restrictions on tenancy terminations and
  - b. agreed (if New Zealand went back into Alert Level 4) that a freeze on residential rent increases and restrictions on tenancy terminations be reinstated, subject to the passage of the required legislation and approval by Cabinet at the time of an escalation to Alert Level 4 (CAB-20-MIN-0521)

### What approach was taken last time we moved to Alert Level 4

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#### There were extensive restrictions during Alert Level 4 during March - April 2020

6. In response to the COVID-19 outbreak in New Zealand in March 2020, the Government pursued an elimination strategy, underpinned by a four-tier Alert Level regime of restrictions aimed at eliminating the transmission of the virus in New Zealand.
7. The Alert Level system is linked to a risk assessment, whereby under Alert Level 4 – Lockdown - “sustained and intensive community transmission is occurring and widespread outbreaks.” Alert Level 3 – Restrict – means there is a high risk the virus is not contained, that community transmission might be occurring, and new clusters may emerge, controlled through testing and contact tracing.
8. COVID-19 Alert Level 4 was in place across the country between 25 March and 27 April 2021. During that time:
  - a. people were instructed to stay at home in their bubble other than for essential personal movement, and to work from home unless that was not possible;
  - b. workplaces could only open if certain strict conditions applied and they were considered essential services;
  - c. only safe recreational activity was allowed in a local area within a reasonable distance;
  - d. all educational facilities were closed;
  - e. travel was severely limited; and
  - f. all gatherings were cancelled and all public venues were closed.

## **Temporary COVID-19 changes to Residential Tenancies Act supported people staying at home to stop the spread of the virus**

9. Temporary changes were made to the Residential Tenancies Act 1986 (RTA) to support the health measures by facilitating people to stay in their rental homes. The amendments, which helped sustain tenancies to the greatest extent possible and protected tenants from becoming homeless during the COVID-19 outbreak, were made by the COVID-19 Response (Urgent Management Measures) Legislation Act 2020 (the COVID-19 Act). The COVID-19 Act was drafted and passed under urgency and came into force on 26 March 2020. The COVID-19 Act included the following amendments to the RTA, set out in Schedule 5:
  - a. Temporary termination restrictions: the changes restricted a landlord's ability to serve termination notices. In many instances, tenancies could only be terminated by order of the Tenancy Tribunal on limited grounds, including for significant anti-social behaviour or if tenants were at least 60 days in rent arrears (instead of the usual 21 days). In the case of rent arrears, the Tribunal could refuse to terminate the tenancy if the tenant had made reasonable efforts to pay rent and the Tribunal considered termination unjustified.
  - b. Tenants were still able to terminate their tenancy as normal but were also able to revoke termination notices that they had given before 26 March 2020, in case they needed to stay in the tenancy during the termination 'freeze'.
  - c. A freeze on rent increases: the freeze prevented landlords from increasing rents but did not prevent them from agreeing to reduce the rent.
  - d. If, as a result of the tenant remaining in the premises, the landlord was no longer able to provide vacant possession to an incoming tenant, the incoming tenant had no right to occupy the premises and any obligations between the landlord and the incoming tenant were cancelled.
  - e. A freeze on rent increases: the freeze prevented landlords from increasing rents but did not prevent them from negotiating reduced rent.
  - f. Tenancy Tribunal flexible operations: the Tenancy Tribunal was enabled to make decisions on the papers and to hold hearings by telephone or video conference.
10. The COVID-19 Act:
  - a. invalidated termination notices that had been given by landlords, but which had not yet taken effect;
  - b. allowed tenants to revoke termination notices, if they had not yet taken effect;
  - c. continued fixed-term tenancies that otherwise would have expired. These fixed-term tenancies were converted to periodic tenancies upon their expiry; and
  - d. suspended certain Tribunal orders.

## **RTA COVID-19 provisions were time limited and have expired**

11. Because of the impositions on property rights, these provisions were time-limited, as it was unclear how long New Zealand would spend in Alert Levels 3 and 4. The restrictions on tenancy terminations were set to expire after three months, unless they were extended by up to a further three months by Order in Council, if the Minister was 'satisfied that it is necessary or desirable to support measures taken to contain or mitigate the outbreak of COVID-19 or its effects'.
12. Following advice in early June, Ministers agreed not to use the extension and the provisions expired on 25 June 2020. This was primarily because the significant public health risks were well managed and there was greater movement around the country under Alert Level 2.
13. The other changes (rent increase freeze and Tenancy Tribunal flexible operations) were set to expire after six months. The restrictions on rent increases expired on 25 September 2020.
14. The Tenancy Tribunal flexible operations provisions were subsequently extended to 25 March 2021 through a change made by Residential Tenancies Amendment Act 2020 (the RT Amendment Act 2020).



15. In addition to the temporary RTA changes, the Residential Tenancies (Healthy Homes Standards) Regulations 2019 were amended. Landlords were originally required to provide a compliance statement for any new or renewed tenancies after 1 July 2020. This date was changed to 1 December 2020, to allow landlords an opportunity to assess properties for compliance.

### **Additional government support assisted renters**

16. The Government also provided assistance to cushion the economic impact from COVID-19, which supported renters who were struggling to meet rent payments. These included wage subsidies, COVID-19 Income Relief Payments and temporary changes to the Rent Arrears Assistance Housing Support Product.

### **The COVID-19 Public Health Response Act 2020 allows for COVID-19 Public Health Response Orders**

17. In May 2020, the COVID-19 Public Health Response Act 2020 (the Act) came into force. The Act is designed to provide various legal mechanisms for the Government to respond to COVID-19 risks, including making COVID-19 Public Health Response Orders to support the purposes of the Act.
18. Under the Act, the Minister responsible for the administration of the Act (currently the Minister for COVID-19 Response) or the Director-General of Health can make an order if they consider it is needed to prevent or contain the outbreak or spread of COVID-19 and it is the most appropriate way of addressing those matters at the time. This can include requiring people to stay in a specified place or refrain from going to a specified place, exercise physical distancing, be isolated or quarantined; and refrain from travelling to or from any specified area. The COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021 (COVID Health Order) is a COVID-19 Public Health Response Order. This order establishes the current restrictions on people's movement during Alert Level 4.

### **Why the situation is different this time**

#### **In 2020, New Zealand moved up to Alert Level 4 in a few days and moved down Alert Levels gradually...**

19. The first COVID-19 case in New Zealand was reported on 28 February 2020. On 21 March 2020 the 4-tiered Alert Level system was introduced, when the Prime Minister announced that New Zealand was at Alert Level 2. The Prime Minister announced a move to Alert Level 3 on 23 March, and that New Zealand would move into Alert Level 4 at 11.59pm on 25 March. At that time, New Zealand had just over 100 cases of COVID-19.
20. The measures and restrictions on movement associated with the different Alert Levels were designed to contain the outbreak as quickly as possible. There was a balance between the short-term economic costs and inconvenience the restrictions caused and managing the health risks and the long-term economic impacts of further outbreaks if the virus was not eliminated and re-emerged in the community, which may have prompted a re-escalation up Alert Levels.
21. New Zealand moved from Alert Level 4 to 1 over nearly 11 weeks:
  - a. Alert Level 4 was in place from 25 March - 27 April 2020
  - b. Level 3 from 28 April – 12 May 2020
  - c. Level 2 from 13 May – 7 June 2020 and
  - d. Level 1 from 8 June 2020 onwards.
22. The slightly slower escalation in Alert Levels meant there was a window of opportunity for Parliament to pass legislation (including changes to the RTA) to support the COVID-19 response, the Alert Level rules could be communicated in advance and people had time to adjust to the restrictions.

23. There have been further escalations up to Alert Levels 2 and 3 since the August 2020, in various parts of the country for different periods of time:
- a. August – October 2020: Following community cases recorded in Auckland, Auckland moved to Alert Level 3 and the rest of New Zealand moved to Alert Level 2 from noon 12 August, and subsequently moved down the Alert Levels.
  - b. February – March 2021: Following community cases recorded in Auckland, Auckland moved to Alert Level 3 and the rest of New Zealand moved to Alert Level 2 from 11:59pm 14 February, and subsequently moved down, back up, and down the Alert Levels again.
  - c. June 2021: Following the confirmation that a tourist from NSW who visited Wellington tested positive for COVID-19, Wellington moved to Alert Level 2 from 11:59pm 23 June, and subsequently moved down to Alert Level 1.

**... but the Delta variant is 'a game changer' - so this time the country went straight into Alert Level 4**

*The Delta variant is more transmissible – as evidenced in New South Wales*

24. The new community case announced on 17 August 2021 is the Delta variant of COVID-19. As compared with previous variants, the Delta variant is more transmissible, the viral load is higher, and it incubates for a shorter time. It is a greater threat to the health of individuals and life of individuals infected and presents a greater challenge to contain in an outbreak.
25. Australia effectively suppressed COVID-19 throughout much of 2020 and the first half of 2021. On 16 June 2021, a community case of the Delta variant was confirmed in New South Wales. NSW has since struggled to contain transmission of the Delta variant. Since 16 June 2021, there have been 9,280 community cases as of 8pm 17 August 2021 and 60 deaths linked to the virus since the 16 June outbreak. Daily case numbers have trended upwards, with 633 new community cases in the 24 hours to 8pm 17 August 2021.

*It was imperative to shift from Alert Level 1 to 4 immediately - and the situation is evolving rapidly*

26. Subsequent to the Prime Minister's announcement on Tuesday evening, the country went into Alert Level 4 at 11.59pm on 17 August 2021. In accordance with the COVID Health Order issued at that time, government advice is everyone must now stay home. People can only move house if required to do so by court order or law enforcement or if they need to use a temporary or emergency home, for example for care while sick or to seek refuge in a women's refuge accommodation. Public guidance is that people can only leave home to shop for groceries, access necessary healthcare, get a COVID-19 test, exercise in your local area, or go to work if they are working in an Alert Level 4 service and cannot work from home. People must only make physical contact with those in their household unit.
27. As of this 1.00pm today, there are 21 community cases of COVID-19 and this case number is expected to rise. The situation is rapidly evolving. Currently, Auckland and the Coromandel Peninsula is at Alert Level 4 for seven days and the rest of New Zealand is at Alert Level 4 for three days when it will be reviewed by Cabinet tomorrow (Friday).
28. It is not yet decided whether all, or parts of New Zealand will remain at Alert Level 4 for a longer period, whether some areas (where the risk of community transmission of the virus is lower) will go into Alert Level 3, or whether there may be escalations up and down Alert Levels ('short sharp' lockdowns) over the coming weeks.

**The usual RTA rules currently apply, despite the COVID Order**

29. As the RTA Schedule 5 COVID provisions have now expired, the usual RTA rules apply to tenancies under Alert Level 4, notwithstanding the requirements of the current the COVID Health Order.

*Landlords can still increase rent*

33. Landlords may still increase rent in accordance with rent increase notice provisions in the RTA. Rent may be increased once every 12 months and landlords must give at least 60 days' notice. There is no restriction on the amount that rent can be increased, although tenants can apply to the Tenancy Tribunal to reduce the rent where it is substantially above market rent.

*Tenancy Services have issued guidance to encourage tenancies to remain in place and postpone rent increases if appropriate*

34. Te Tūāpapa Ku a Kāinga – the Ministry of Housing and Urban Development (HUD) and Tenancy Services (Ministry of Business, Innovation and Employment) have developed guidance for the tenancy sector, emphasising the importance of complying with the extensive restrictions on people's movements under the latest the COVID Health Order. The key points in the guidance are:
- a. At Alert Level 4, tenants can only move house if required to do so by court order or other law enforcement measures or if they need to use a temporary or emergency home, for example for care while sick or to seek refuge in a women's refuge accommodation.
  - b. Landlords and tenants should talk to each other if tenancies are due to expire during Alert Level 4 so that tenancies can continue during Alert Level 4, for example they could agree to either renew or extend the tenancy during Alert Level 4, and landlords should be mindful that tenants may need extra time to find a new tenancy once Alert Levels are de-escalated.
  - c. Landlords and tenants can continue to make applications to the Tenancy Tribunal and where possible, hearings will take place remotely. No in person hearings will take place at Alert Level 4. Hearings that can't be held remotely will be rescheduled.
35. Although it is lawful to increase rents during Alert Level 4 (if the RTA requirements are met), the guidance asks landlords to be mindful that tenants may be experiencing financial stress during Alert Level 4 if they cannot work, and recommends that they consider the financial

situation of their tenants and postpone rent increases if appropriate. As above, a landlord can only increase rent once every 12 months.

36. However, the guidance is not enforceable, and landlords may legally terminate tenancies or raise rents in accordance with the RTA during Alert Level 4.

### **What this means for the approach we recommend this time**

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37. The current situation suggests an approach to residential tenancies during Alert Level 4, and possibly Alert Level 3, is needed which takes into account:
- a. The highly transmissibility nature of the Delta variant and overriding imperative to keep people at home to stop the spread out of control (as witnessed in NSW)
  - b. the need to support tenancies to be sustained (through termination restrictions and ensuring renters do not lose their home due to a reduced ability to meet rent payments caused by COVID-related job losses or a drop in income)
  - c. the need for interventions to be clear and proportionate, so that disruption to landlords' businesses and to tenants' living arrangements are mitigated as far as possible
  - d. the value in providing certainty to the tenancy sector, particularly if regions are to move up and down Alert Levels and
  - e. the importance of landlords and tenants having access to the Tenancy Tribunal so that when disputes (inevitably) arise, they can be resolved quickly.

### **We recommend flexible, tailored and proportionate measures**

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#### **Guidance will be sufficient if Alert Level 4 is not extended beyond several weeks**

38. In the event there are indications the latest outbreak can be brought under control relatively quickly (through Alert Level 4 restrictions, testing, and contact tracing) and a decision is made to move down to Alert Level 3 in the next several weeks, we consider further urgent legislative changes to the RTA would be unnecessary, untimely and disproportionate to the problems outlined above.
39. In this scenario, the current temporary guidance 'work around' will be sufficient and we would continue to emphasise the importance of landlords and tenants maintaining a good relationship and attempting to resolve issues between them in the first instance. Tenancy Services continues to be available to provide mediation services to help landlords and tenants discuss and resolve residential tenancy disputes
40. Once there is a de-escalation to Alert Level 3, moving house is allowed, and guidance can be issued which assists landlords and tenants to understand rights and obligations under the relevant COVID-19 Public Health Response Orders, for example that moving properties should be undertaken with extreme caution to abide by public health imperatives.

#### **If Alert Level 4 is extended beyond several weeks, legislative changes may be justified**

41. If Level 4 is extended beyond several weeks, the inconsistencies between the COVID Health Order and the RTA provisions will become increasingly difficult and unhelpful for the tenancy sector, and more protection and certainty may be justified through reviving the COVID RTA amendments as contemplated by Cabinet in December 2020. However, we note that the steps necessary to pass legislation would need to be completed at pace: policy decisions obtained, amendments drafted and approved, and a Bill passed under urgency.

### **Legislative changes should be more 'agile' than last time to ensure they are proportionate**

*We recommend the similar restrictions as last time but tied to Alert Levels and regions*

42. The fixed periods for the temporary RTA restrictions in 2020 (three or six months) were inflexible and meant that the restrictions applied not just during Alert Level 4, but also subsequently during Alert Levels 3, 2 and 1, across the country. At the lower levels, the



relatively strong restrictions were not necessary to achieve the goal of protecting public health. Any new temporary changes to the RTA could avoid some of the issues which arose during 2020 by allowing for the ability to link the restrictions to Alert Levels and if appropriate, to regions.

43. If Level 4 is extended beyond several weeks and a legislative response is considered justified, we recommend the following set of 'tweaked' RTA COVID provisions:
  - a. reinstate restrictions on tenancy terminations for Alert Levels 4 and 3 (subsequent to Alert Level 4), in the regions which go into Alert Level 4 (depending on whether shifts up and down between Alert Levels 3 and 4 are contemplated – discussed below) and
  - b. reinstate a freeze on rent increases for Alert Levels 4 and 3 (subsequent to Alert Level 4), in the regions which go into Alert Level 4.

#### *Initial thinking on the detail of restrictions*

44. Even in Alert Level 4, landlords still need to be able to terminate tenancies in extreme circumstances. Any future approach to restricting terminations at this Alert Level should include the previous termination grounds (as specified in the COVID-19 Act), where landlords can apply to the Tenancy Tribunal to terminate a tenancy in specified circumstances, including where the tenant: substantially damages the premises, assaults or threatens to assault the landlord, their family, or the neighbours, abandons the property, engages in significant anti-social behaviour or is 60 days or more behind in rent.
45. We recommend the rent arrears ground only applies during Alert Level 3, because without temporary supports for rent arrears this time, allowing for terminations after 60 days' rent arrears still risks some evictions at Alert Level 4, which would put pressure on emergency housing.
46. Where a termination notice had been served prior to Alert Level 4 and has not taken effect by the time the RTA COVID provisions commence, that notice would be invalidated and would have to be served again once the termination restrictions expired, that is, the notice period 're-started' (unless other arrangements are agreed between the parties).
47. The rent increase freeze and termination restrictions would apply to tenancies relating to rental properties in an area which goes into Alert Level 4, which is in place for the period of both Alert Levels 4 and 3. This is justified because movement is still heavily restricted at Alert Level 3. A rent increase freeze would mean tenants are not faced with additional rent stress during a time in which they may not be able to work or they lose their job as a result of the lockdown and will support people to stay in their tenancy. The rent increase freeze would not preclude landlords and tenants agreeing to a discounted rent for that period. The only Government support products this time which may assist renters are the COVID-19 Wage Subsidy and the COVID-19 Leave Support Scheme. Temporary changes were made last July to the Rent Arrears Assistance Housing Support Product, which allowed applicants to be considered for RAA HSP in the first instance and provided an increased level of support available in a 52-week period (to \$4,000 from \$2,000). These temporary settings reverted back on 1 July 2021 (i.e. this is an option of last resort with a maximum payment of \$2000).

#### *Activate the RTA COVID provisions when there is an escalation to Alert Level 4*

48. Passing urgent primary legislation every time the country moves back into lockdowns (regionally or nationally) is impractical and creates uncertainty for the tenancy sector about what the rules are for a particular Alert Level.
49. A more enduring approach to 'future-proof' the policy would be to amend the RTA to establish the RTA Alert Level rules regarding temporary tenancy restrictions. These rules would 'sit' in the RTA but would only apply if an order by the Minister or the Governor-General is made. The RTA would create a power for the Minister (or the Governor-General, by Order in Council) to make an order that applies any or all of the rules if the country enters Alert Level 4 and a COVID Public Health Response Order is made. This would allow the Minister or Governor-General to determine when the rules can be applied and disappplied.

50. The power for the Minister/Governor-General to make an RTA order could be linked to the COVID-19 Public Health Response Act 2020 so that, in effect, an RTA order can only be made once Alert Level 4 applies (activated through a COVID-19 Public Health Response Order made by the Minister of Health or Director General). The details of this option would be worked through with Parliamentary Counsel Office, including how the rules could be activated under Alert Level 4, and only continue under Alert Level 3, for example in prescribed circumstances or if specified criteria or conditions were met.
51. An RTA order could either be made by the responsible Minister (a Ministerial order) or the Governor-General (an Order in Council). Any RTA order would need to be approved by Cabinet in the usual way. If the RTA order is an Order in Council, it would have the additional steps of being approved by the Executive Council and signed by the Governor-General.

*Implementing legislative changes would require announcements to be aligned with the commencement of the COVID provisions*

52. s 9(2)(g)(i)

We recommend a similar approach to that taken last year, which is making the announcement on the same day amendments to the RTA are passed through all stages under urgency. Policy decisions would need to be obtained, and the Bill drafted, before any public announcement.

### Issues to discuss with your Ministerial colleagues

53. We recommend you discuss testing the appetite for legislative change with your Cabinet colleagues. If Ministers agree there is a case for urgent temporary amendments to the RTA to support the COVID response, you may like to discuss the following elements of the changes:
- How long would Alert Level 4 have to be extended before the RTA restrictions were applied?** As noted above, we consider if the current Alert Level 4 restrictions are extended beyond three weeks, application of the RTA COVID provisions would be justified, to make the RTA provisions consistent with the COVID Health Order and provide certainty for the sector and protections for renters.
  - Should the temporary RTA COVID provisions be applied in Alert Level 3 as well as Alert Level 4, after those regions have been in Alert Level 4?** For example it would be confusing and disruptive to have RTA restrictions applied and then disapplied if the country/regions moved in and out of Alert Level 4 (due to an uptick in case numbers). For this reason, and because the RTA changes would need to go through a Cabinet process each time Alert Levels were escalated, our recommendation would be that the restrictions were applied on a case-by-case basis, but with the objective of applying them for both Alert Levels 3 and 4.
  - Should termination notices be paused or reissued?** Under the previous COVID-19 provisions, any notices to terminate tenancies which had not yet taken effect mostly became invalid. This meant that when the provisions expired on 25 June 2020, new notices needed to be served, and the full notice period applied. As above, although having to restart termination notices may create inconvenience, we recommend this option, as the alternative is that tenants may not be left with sufficient time to find a new place to live after the restrictions end. It would also be confusing as to how much notice period remained after the termination restrictions ended.
  - Should a tenant's ability to terminate be restricted, to ensure compliance with restrictions under a COVID Public Health Response Order?** Our recommendation is not to restrict this ability, as doing so may cause tenants significant cost and inconvenience, for example by compelling them to remain in a tenancy they can no longer afford, due to the economic impact the COVID-19 outbreak may have.
  - Should landlords be able to terminate tenancies where a tenant is undertaking unlawful activities?** This would be additional to the limited termination grounds last time



and was raised by the Tenancy Tribunal adjudicators. We consider this ground may undermine the overriding public health imperative to keep people in their homes during Alert Level 4 and note that landlords would still be apply to the Tribunal to terminate tenancies on the basis of significant anti-social behaviour (defined as harassment or any intentional act that reasonably causes significant alarm, distress, or nuisance). Landlords can still serve anti-social behaviour notices during Alert Level 4. If the activity or anti-social behaviour is not significant but is more than minor, which puts tenants on notice that their tenancy may be at risk if such behaviour is repeated once the termination restrictions are lifted.

- f. **How would movement between regions in different Alert Levels be managed?** Tenants and landlords will need clarity about whether they can move between regions that are subject to different Alert Levels. We think this is an issue that would need to be addressed through public health mechanisms rather than tenancy legislation. For example, if a tenant wanted to move from an Alert Level 1, 2 or 3 region into a new tenancy located in an Alert Level 4 region, they would need to refer to the public health requirements that would stipulate whether movement is permitted. Another scenario is a tenant who lives in one region (in Alert Level 2) but works in another (in Alert Level 3 or 4) and suffers financial hardship because they cannot access their job in a Level 3 or 4 area.
- g. **Should service tenancies have different rules?** Under the previous COVID-19 provisions, any notices to terminate tenancies which had not yet taken effect mostly became invalid and no notices could be issued, this included when employment relationships came to an end. This meant that employers were left housing ex-employees, which was problematic particular for rural employers with on-farm tenancies, where there was no alternative accommodation to house in-coming workers. It was greatly exacerbated for farmers and workers by the fact the restrictions applied during Moving Day (June) last year.

## Risks

54. Because the RTA COVID provisions in Schedule 5 have expired, there is a risk that landlords may try to enforce terminations falling during Alert Level 4, through pressure on tenants to leave or applying to the Tenancy Tribunal, despite the requirements of the COVID Health Order. This would compromise the health objectives of the lockdown, s 9(2)(g)(i)
55. As discussed, this risk can be managed by providing guidance to the tenancy sector if Alert Level 4 lasts does not extend past three weeks. It is also mitigated by the approach the Tenancy Tribunal and Ministry of Justice (MOJ) is taking to possession order applications. While the Tribunal can issue immediate possession orders during Alert Level 4 which the landlords can act upon, it is at the discretion of the Bailiff as to when to execute that eviction. MOJ would need to make sure the tenants are able to continue following the lockdown requirements prior to eviction, as well as making sure the Bailiffs are safe when doing so. Last time MOJ worked with Police and MSD to find alternative accommodation for tenants before they were evicted.
56. The Tenancy Tribunal is continuing to operate and is hearing all matters that can proceed by telephone, rather than adjourn everything (as it did last year) and deal with only a discreet group of urgent or essential applications. We understand the adjudicators are taking a practical approach and if there are serious safety issues / anti-social behaviour or property damage applications it is likely that the termination order would be made effective immediately. For other matters where the grounds for termination are met, the effective date of the order might be delayed to a date post the end of the Alert Level 4 lockdown.

## Legal advice

57. s 9(2)(h)
- Ultimately, fines can be imposed on a tenant for either breaching the COVID Health Order or breaching the RTA requirement to vacate the property following termination of the tenancy. While we expect



landlords and tenants to work together during Level 4, this could place tenants in a difficult situation if their landlord insists on enforcing a termination.

58. s 9(2)(h)

### Consultation

59. We have consulted with relevant agencies on this briefing however in the timeframe available not all were able to provide feedback.
60. The Ministry for Social Development (MSD) support a tailored and proportionate approach to addressing residential tenancies during Alert Levels and agree that interim measures or messaging to the public should be clear about encouraging landlords and tenants to comply with the COVID Health Order. MSD considers the aim of any interventions beyond three weeks should be stability, given the lockdowns and market conditions mean household income changes may not be able to be absorbed at this time by some renters. Therefore, tenancies ending during Alert Levels will undoubtedly result in a rise in emergency housing use and homelessness (noting that demand for emergency housing is already high).
61. Tenancy Services advises the main issue for the Tenancy Tribunal at present is the enforcement of terminations, s 9(2)(h). Guidance has been provided to adjudicators on how to deal with termination requests and they have been asked to take into account public interests and the expectation of keeping people in their homes.
62. HUD officials also had an online meeting with representatives of the Real Estate Institute of New Zealand (REINZ) on Wednesday. REINZ, whose membership includes a large group of property managers, advised there is a lot of potential disruption and confusion in the sector caused by the sudden announcement of Alert Level 4, and their members are seeking clarity about what is and isn't permitted under a range of scenarios. Based on experiences last year, they are anticipating many tenants will be financially impacted (particularly as there are less support products this time) and their property managers may come under pressure to give rent reductions to which they are not able to agree.

### Next steps

63. Officials are available to discuss the contents of this briefing. Subject to the outcome of discussions with Cabinet tomorrow, we can provide further advice as required.

### Annexes

Annex A – *Talking points for Cabinet on Friday 20 August: approach to residential sector issues to support the COVID response*



## Annex A

### Talking points for Cabinet on Friday 20 August

#### Approach to residential sector issues to support the COVID response

##### *Approach last time we moved to Alert Level 4*

- For the first Alert Level 4 lockdown in March 2020, temporary changes were made to the Residential Tenancies Act 1986 through the COVID-19 Response (Urgent Management Measures) Legislation Act 2020.
- These RTA COVID provisions restricted tenancy terminations imposed a freeze on rent increases and empowered the Tenancy Tribunal to operate flexibly.
- Those RTA COVID provisions were time limited and have now expired.

##### *Situation this time*

- Unlike last year when the whole country moved up and down Alert Levels more gradually, emergence of the Delta variant of COVID-19 in the community has meant an immediate escalation to Alert Level 4 for the whole country.
- This means there has been no lead in time to the significant restrictions under the current COVID Health Response Order and no time to communicate the rules or pass legislation amending the RTA. It is also a time of uncertainty as the situation evolves rapidly.
- s 9(2)(h) [REDACTED]  
[REDACTED]. To facilitate people staying at home, Tenancy Services has published guidance that encourages landlords and tenants to work together to ensure compliance with the COVID-19 Health Order, for example by agreeing to extend a tenancy that is due to expire during Alert Level 4.

##### *What should we do this time?*

- I recommend a tailored and proportionate approach to addressing residential tenancies going forward.
  - If Alert Level 4 is not extended beyond three weeks the current guidance will be sufficient and no legislative changes will be required.
  - If the current outbreak is not quickly brought under control and Alert Level 4 is extended beyond three weeks, legislation could be passed to reinstate the RTA COVID provisions (with modifications), as contemplated by Cabinet in December 2020.
- Similar to last time, the RTA changes could comprise restrictions on tenancy terminations linked to Alert Level 4 and possibly Alert Level 3 and if Ministers wish, a freeze on rent increases for Alert Levels 4 and 3.

- Officials would need to undertake further work with Parliamentary Counsel Office on how the amendments could be linked with Alert Levels and regions, for example through an Order in Council mechanism, so that the rules could be applied if the country enters Alert Level 4 and a COVID Public Health Response Order is made.
- A number of design details would need to be considered, including:
  - *How long would Alert Level 4 have to be extended before the RTA restrictions were applied?* I consider if the current Alert Level 4 restrictions are extended beyond three weeks, legislation allowing for the application of the RTA COVID restrictions would be justified – to make the RTA provisions consistent with the COVID Health Order and provide certainty for the sector and protections for renters.
  - *Should the temporary RTA COVID provisions be applied in Alert Level 3 as well as Alert Level 4, after those regions have been in Alert Level 4?* Restrictions could be applied on a case-by-case basis, but with the objective of applying them for both Alert Levels 3 and 4 to provide certainty and protection for the sector
  - *Should termination notices be paused or reissued?* Under the previous COVID-19 provisions any notices to terminate tenancies which had not yet taken effect mostly became invalid and landlords had to reissue and ‘restart’ termination notices. I recommend sticking with this option, both because it is simple and because as the alternative is that tenants may not be left with sufficient time to find a new place to live after the restrictions end.
- Subject to other COVID-related decisions made today and the views of Ministers, I could return to Cabinet to seek policy decisions underpinning further RTA changes in the following two weeks.