SUPPLEMENTAL SUBMISSIONS BY THE LAW SOCIETY'S PROPERTY COMMITTEE ON THE LANDLORD AND TENANT (CONSOLIDATION) (AMENDMENT) BILL 2001

Background

1. The Law Society's Property Committee has, on 18 April 2002, put forward its submissions on the Landlord and Tenant (Consolidation) (Amendment) Bill 2001 ("*The Bill*"). The Committee has since the benefits of reviewing the following further documents on the subject and wishes to provide additional comments in this paper:

   (a) a letter dated 16 April 2002 from the clerk to the Bills Committee attaching the Administration's response to the concerns raised by the Bills Committee;
   (b) a letter dated 16 May 2002 from the clerk to the Bills Committee attaching the Administration's response to the Committee's submissions;
   (c) 2 letters dated 19 and 26 September 2002 from the clerk to the Bills Committee concerning the Committee Stage amendments to be moved by the Administration on Clause 11 of the Bill.

The Committee's Further Comments

Thorough Review of the Ordinance

2. The Committee notes that the Administration has agreed to further explore the feasibility of the Committee's proposal for a thorough review of the Ordinance to be conducted and shall await further news from the Administration in this regard.

Clause 11

3. Save as stated below, the Committee has no general objection to the Committee Stage amendments proposed by the Administration to clause 11, which would simplify the repossession procedure for landlords.

4. The Committee suggests that the words "*unnecessary annoyance, inconvenience or disturbance* " in the newly proposed section 117(3)(c) of the Landlord and Tenant (Consolidation) Ordinance ("*the Ordinance*") should be replaced by "*nuisance*"

5. The Committee also supports the Administration's view that the new section 117(3)(d) of the Ordinance currently proposed under the Committee Stage amendments should be maintained rather than to imply a forfeiture clause for Unauthorized Building Works.

Clauses 12 and 13

6. The Committee remains of the view that the period of "*not more than 3 nor less than 2 months*" affords sufficient time for the landlord and tenant to negotiate for renewal of the tenancy before going to the Lands Tribunal. The tenancy terms in Hong Kong are usually of relatively short duration (e.g. 6 months, 1 year or at most 2 years, with usual "*early termination*" provisions). Events move very quickly for tenancy matters because of the volatility of the market and should be reflected in the legal process for practical purposes.

Clause 16(c)

7. The Committee also remains of the view that courts should not be given the discretion to entertain applications not adhering to the statutory time limits. Tenancy is a very pragmatic area of law. Landlords and tenants are fully aware of their rights and desires, and should proceed diligently with their negotiations. Giving the Lands Tribunal discretion to extend time will invariably result in unwarranted delay in settling matters, and is not conducive to expeditious application of the law. The legal process may also be blamed as being obstructive to such simple matters as deciding on the amount of rent.

Clause 17

8. The Committee reiterates its previous view that for the sake of consistency and clarity, amendments should be made to state clearly that failure to state a ground of opposition will not invalidate form CR101, otherwise the Tenant may be misled into thinking otherwise.

9. The proposed amendment to section 119E(1) of the Ordinance is to introduce flexibility so that a landlord may rely on such other grounds at the hearing for renewal, which are not stated in CR101, without ruining the

validity of the CR101. However, the requirement in section 119(5) would still at least ask for a ground to be stated before the CR101 is considered to be valid. It seems, as in the Committee's previous comments, irreconcilable in that the amendment gives flexibility in section 119E(1) while unintentionally restricts its flexibility by the stringent requirement in section 119(5).

10. The Committee has suggested to the Administration that section 119(5) should be amended to "*put the matter beyond doubt that failure to state a ground of opposition in the event of electing opposition to a new tenancy would not invalidate the notice*". The Administration remains of the view that a ground must at least be stated in CR101. It is really doubtful if the existing amendment, as preferred to by the Administration, could really enhance the flexibility, namely to facilitate the repossession of the landlords who should not be burdened with unnecessary pitfalls.

11. The Committee's concern becomes acute in view of a Court of Appeal case, *Abdoolally Ebrahim & Co., (HK) Ltd v. Formalex Ltd* [2001] 1 HKC 548. The case held that for a landlord to rely on the ground in section 119E(1)(d), namely, "…*the tenant has caused unnecessary annoyance, inconvenience or disturbance to the landlord or to any other person*", the landlord must note that "*no ground shall be established under this paragraph unless the Tribunal is satisfied that the annoyance, inconvenience or disturbance had continued after a warning in writing has been served by the landlord on the tenant causing the same"*.

12. This Court of Appeal case is clear authority that there is pre-requisite to be met by a landlord before the above ground on "*annoyance, inconvenience or disturbance*" can be invoked for opposition, the pre-requisite being the previous written warning by the landlord.

13. As such, unless each of the grounds given by the legislation for opposition is also carefully scrutinized to remove such pre-requisites, the amendment to section 119E purportedly allowing the change of grounds for the landlord may not be useful at all. For instance, if a landlord states his ground of opposition as "*self-use*" in CR101 while he sees fit to change his ground to "*annoyance*" at the hearing, despite that the amendment may now allow the landlord to do so, in fact, he would still not be able to avail himself of such ground if he did not previously give any written warning to his tenant in respect of the annoyance.

14. To require a landlord to state a ground while a change is allowed anytime later in the hearing does not, in the Committee's view, do any good to the

parties in terms of certainty, as the Administration seemed to have suggested in her response. If "*flexibility*" for landlords is really intended for in the amendment, the Administration should perhaps go one step further, as we proposed, to make a corresponding amendment to section 119(5) to allow the court further discretion to treat the landlord's notice as still valid notwithstanding that it fails to state any ground.

Clause 27

15. The Committee remains of the view that Clause 27 should be tighten up for reasons mentioned in its previous submissions.

Distraint

16. The Committee notes that the Administration is seeking advice from the Judiciary Administrator on whether the current distress procedures could be streamlined and awaits the Administration's further response in this regard.

Extension of Part V protection to Licence Agreements

17. The Committee agrees with the Administration and does not think that the protection of Part V should be extended to licence agreements. In the event of dispute, the Court has clear guidelines under the common law as to whether a tenancy or a licence has in fact been created.

Interest Provisions

18. The Committee also does not support the proposal to include specific interest provision on rent in arrears in the Bill. Many standard tenancy agreements already include interest provisions.

The Property Committee
The Law Society of Hong Kong
21 October 2002