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

Fundamental Review of the Ordinance

1. The Law Society's Property Committee has reviewed the various proposals made under the Landlord and Tenant (Consolidation) (Amendment) Bill 2001 ("*The Bill*"), which are broadly made for the benefits of tenants.

2. The Committee observes that the existing Landlord and Tenant (Consolidation) Ordinance ("*the Ordinance*") is heavily weighted in favour of the tenants. This should be the case as historically, the value of property in Hong Kong (and rent) increased rapidly and constantly, and it was desirable to protect tenants against exorbitant rent escalation.

3. The situation has now reversed: property value has plunged, rent has fallen and do not appear to have reached bottom yet. Given the change in the local market and with the provisions under Part I and II having expired on 31 December 1998, the Committee believes that that it is high time for a complete overhaul of the spirit behind the Ordinance. **The Committee recommends that a thorough review should be conducted to reassess the needs of the current market and after having balanced the interests of the landlords against those of the tenants, to consider whether there is a continual need for tenure protection.** In undertaking the review, perhaps it should be borne in mind that tenants nowadays have stronger bargaining positions in making sure that the tenancy will be tailor-made to suit their case through inclusion of suitable provisions such as break clause and option to renew.

The 2001 Bill

4. Regarding the various proposals under the 2001 Bill, the Committee has the following comments:

Clauses 12 and 13

The Committee proposes to further reduce the statutory period within which notices to terminate a tenancy or to request a new tenancy should be served to "*not more than 3 nor less than 2 months*".

Clause 16(c)

The Committee does not think that the court should be given discretion to entertain an application for a new tenancy when the statutory time limits for giving notices have not been strictly adhered to. The Committee notes that there is already mechanism in place for the tenant to take the initiative to apply for a new tenancy and believes that the existing law should be maintained to achieve certainty.

The Committee objects to the proposal in Clause 16(c)

Clause 17

Under Clause 17 of the Bill, it is proposed that the landlord be granted the right to change or add grounds of opposition to a tenancy renewal application. The Bill proposes an amendment to section 119E(1), which deals with grounds for the landlord's opposition to a new tenancy, in the following terms: "*The grounds on which a landlord may oppose an application under section 117(1) are any of the following grounds, whether or not they were stated in the landlord's notice under section 119, or as the case may be, the notice under section 119(6)*"

The Bill does not propose any amendments 119(5) of the Ordinance, which relates to the format of the notice Form CR101 served by the landlord on the tenant. Section 119(5) provides: "*A notice under this section shall not have effect unless it states whether the landlord would oppose an application to the Tribunal under this Part for the grant of a new tenancy and, if so, also states on which of the grounds mentioned in section 119E he would do so.*"

The implication of this amendment is that a Form CR 101 notice would not be invalid as a result of failure to state the grounds of opposition. However, the clear meaning of section 119(5) is that if the landlord indicates he would oppose the grant of a new tenancy, he must also state the grounds. Failure to do so would render the notice invalid.

Although there are no cases directly on point, section 119(5) has been the subject of much judicial comment in the past. For example, in *Speakman v. Huang Investment Ltd. [1987] 1 HKC 258*, it was held that a CR 101 notice which neither indicated whether or not the landlord would oppose the grant of a new tenancy nor on which grounds he opposed, was invalid. Similarly, in *Bradstone Ltd. v. Carry Express Investment Ltd. [1995] 2 HKC 508*, section 119(5) was considered in some detail. In that case, a CR 101 notice which, although failing to clearly make an election between opposing or not opposing a new tenancy, had indicated a ground of opposition, was held to be valid upon the application of two English case law precedents where the principle was established that a notice of termination could be construed liberally to consider whether its overall effect satisfied all of the legislative requirements.

Under the circumstances, section 119(5) has proved problematic in the past, and in light of the proposed amendments to section 119E(1), **the Committee submits that consideration should be made for section 119(5) to 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.** As it stands in the new Bill, section 119(5) of the Ordinance and the new section 119E(1) are somewhat difficult to reconcile.

Clause 27 – new Section 119V of the Ordinance

Clause 27 seeks to repeal and replace the existing section 119V of the Ordinance with a new section 119V. Under the new section 119V, it will be an offence for "*any person*" to commit certain stated acts which he knew or had reasonable case to believe that this action would likely cause the tenant or sub-tenant to give up occupation of the premises or refrain from exercising any right or pursuing any remedy in respect of the premises. The use of the words "*any person*" rather than "*the landlord*" presumably is to cover persons employed by the landlords to do the stated acts. However, this would also, albeit unintentionally, cover neighbour who may take action (perhaps rightfully) to prevent the use of an essential service by the other. This neighbour could be caught by the wordings of the new Section although his act is obviously not a mischief at which the new section is targeted.

The Committee believes that the drafting of Clause 27 should be tightened up to exclude the stated circumstances.

Distraint/ Deserted Premises

The Committee notes that the present distress procedure is cumbersome. In the case of deserted premises, three appointments are necessary before the

Bailiffs will execute the Writs of Possession and/or an indemnity has to be given to the Bailiffs. Whilst the Bill has not addressed these problems, **the Committee believes that the consideration should be made to simplify the distress procedure.**

The Administration's Response to the Bills Committee

5. The Law Society has been supplied with a copy of the Administration's response to the concerns raised by the Bills Committee on the Bill after close of business on 16 April. Due to the constraint of time, members of the Society's Property Committee do not yet have the opportunity to consider the paper and would reserve its overall position on the Bill.

The Property Committee
The Law Society of Hong Kong
18 April 2002