



Strategic Responses to the review of the Residential Tenancies Act

*A discussion paper prepared for
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Introduction

Private rental tenure is becoming more common in New Zealand as the rate of homeownership declines and the proportion of the housing stock held as social housing diminishes. There are now twice as many private rental properties in New Zealand as there were in 1986 when the Residential Tenancies Act was first passed. While there have been amendments to the RTA since 1986, these have been relatively minor or procedural and have not fundamentally reconsidered the role of private rental housing in New Zealand's housing landscape and the status of tenants within this.

The current review of tenancy law offers us an opportunity to move beyond tinkering with current legislation. We have as a nation the opportunity to re-consider the role which private rental housing is likely to play in providing people not just with accommodation but a home and from this to think about the extent of rights which tenants should reasonable enjoy. Such a re-consideration might possibly look at the reform of tenancy law from four angles as follows:

- the balance between property rights and social rights and especially between the rights of landlords to use their property as they see fit and the social rights of tenants to have adequate, secure housing,
- tenants' security of tenure and the impact which insecure tenure has on the practical ability of tenants to exercise their other rights under the RTA,
- housing standards and the extent to which higher housing standards should be enshrined in the RTA and if so how this might occur,

- empowering tenants including the recognition of the imbalance of power between landlords and tenants within the current arrangements and legal settings.

Background to each of these issues is offered below.

1. Recognising social rights

There remains a clear need to balance the various interests of landlords and tenants in policy and legislation and in particular to decide an appropriate trade-off between tenants' right to decent housing with landlords' right to utilise their property optimally. This is the balance between a right to housing versus the right to buy and sell housing. Because of its age, the Residential Tenancies Act does not have a stated purpose so it would be unfair to criticise it for not considering tenants' right to housing. This should be rectified in any significant re-draft of the legislation and in doing so explicitly efforts should be made to recognise the not altogether complimentary interests of landlords and tenants.

Finding an acceptable and appropriate balance in the rights of tenants or landlords is not simply a matter of balancing property interests. For example: the right of security of occupation and tenure of tenants, with the right of landlords to have reasonable access to their property in order to utilise it in other ways. The reason it is not simply a balance of property rights is because there is an implicit trade-off in the tenant-landlord relationship where the landlord is foregoing alternative uses of his/her property in order to provide housing services to the tenant and by doing so to derive an income from the property. This is quite different from the notion that the landlord is simply allowing the tenant to use their property until he/she decides an alternative use for it.

It might be seen that the balance of rights between landlords and tenants is not simply then a trade-off in property rights but also of an exchange of social and economic value - of housing services with an income stream from rent. If this is the case then what do such housing services comprise?

It might however be argued that the landlord-tenant relationship is simply one of an exchange of economic value – of accommodation for rent. But this is where the question of social rights can be seen as especially pertinent. For if social values are not also implicit in the landlord-tenant relationship where do tenants gain any social rights around housing from? Moreover if tenants do not gain such rights through the house they rent do they have no rights to decent housing at all?

It can be argued that landlords as private citizens have no obligations to others to ensure that their social rights are fulfilled. Furthermore it might be argued that if such rights exist it is incumbent on the state not individuals to protect them and even fulfil them.

This is where the role of the state in the rental property market can be seen as being broader than one of just mediating competing rights but of also protecting rights.

However social rights as these relate to housing are somewhat vague or non-existent. Internationally these rights are encompassed in the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹. Article 11.1 refers to housing related rights thus:

¹ Available at <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>

'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.' New Zealand ratified ICESCR in 1978.

Although many other articles within the ICESCR have legislation in New Zealand which supports the various rights expected, this is not the case for housing. The most relevant legislative reference to housing related rights is offered in the Social Security Act 1964 Part 1K which legislates for the Accommodation Supplement. Section 61DH of the Act says that the purpose of the Accommodation Supplement is *'to provide targeted financial assistance to help certain people with high accommodation costs to meet those costs.'* This purpose statement says nothing about any right to adequate housing or indeed to any housing. For a fuller discussion on the legislative framework around housing rights in New Zealand see Johnson (2015).²

But even Article 11.1 of ICESCR has some value as a reference point in any re-drafted tenancy legislation. Such a reference at least reminds us that decent housing is a fundamental human need and that we operate markets, policies and public programmes to meet this need.

Such a reference would act as a reminder that landlords become landlords and decide to enter or to remain in the rental property market on the basis that they have both social and economic obligations to tenants. Such an idea is not unusual in markets – for example an employer has a social obligation to ensure that his/her employee is safe at work and a retailer has a social obligation to ensure that the things she/he sells are safe for consumers.

It might be argued that burdening landlords with some obligation to respect the economic and social rights of tenants will deter further or continued investment in rental housing. This is a 'don't spook the markets' argument. The analysis offered in Chapter 2 suggests that private investment sentiments might not on any account be sufficient to meet demand for housing from the large group of New Zealand households which fall through the gap between home ownership and social housing. If this is so then moderating policy and abstracting any broader social value from it in order to placate expected market sentiment will achieve little. This is a tactical call on the part of policy makers.

It is however important to appreciate that any reference to social rights in re-drafted residential tenancy legislation is not simply a token gesture but will require at least three substantive changes around how we conceive of tenants' and landlords' rights and responsibilities. These three changes relate to security of tenure, housing quality and tenants' procedural rights.

2. Providing greater security of tenure

Providing tenants with more secure tenure can be seen as a fundamental change to current tenancy law and one which will acknowledge and establish the social rights of tenants.

² Johnson, A. (2015) *Every child's right to housing* in Child Poverty Action Group's *Welfare fit for families in a changing world – Summit Proceedings* pp39-46. Available at <https://www.cpag.org.nz/assets/Summit/151029SummitProceedings.pdf>

Under the Residential Tenancy Act a periodic tenancy may be ended by the landlord for no reason with 90 days notice or as little as 42 days notice if the property is required by the landlord or his/her family (s.51 and 52). In essence this is what Morris et al (2017) describe as *de jure* insecurity³.

This insecurity tends to undermine all other rights which tenants have under the Act for the simple reason that an attempt to enforce these rights can easily be met with retaliatory responses from the landlord to terminate the tenancy. Granted such responses are prohibited under section 54 of the Act but this requires empowered tenants who are prepared and able to challenge a termination notice from the landlord in the Tenancy Tribunal. As noted above and reported in Appendix 3 around 90% of cases taken to the Tribunal are taken by landlords and the majority of these are not even contested by tenants.

There are a number of approaches to extending tenure security for tenants under re-drafted tenancy laws. The excellent paper by Mark Bennett provides a very useful basis for such an extension drawing as it does from Scottish and Irish experiences⁴. Both Scotland and Ireland have reformed their tenancy law to offer tenants greater security of tenure and they have done so off a similar legal system and cultural base as New Zealand. The approach of both countries is essentially as follows:

- the law and practices encourages fixed terms tenancies of three years or longer more or less as the default option;
- fixed term tenancies are subject to a probationary period of six months over which time the performance and reliability of the tenant is tested;
- landlords can only seek to have a tenancy terminated before the end of the mandatory term if there has been result of a serious breach of the tenancy conditions by the tenant or it is required for personal use by the landlord;
- there are rent review rules set down in legislation for the period of the tenancy.

Such an approach applied to New Zealand's tenancy law would have the advantage of shifting expectations around the permanence of tenancies, potentially encouraging more professional behaviours from landlords and tenants and maintaining landlords' reasonable expectations for alternative uses of their property.

3. Setting housing standards

It is notable that the Residential Tenancies Act avoids using the words house or dwelling but instead refers to premises. The Interpretation to the Act makes an effort to define what sort of physical structure a premises might be but it does not venture to define what a premises is for. A residential premises is also defined in the Interpretation as '*a premises used or intended to be used by any person as place of residence.*' This evasion is continued into the body of the Act where in section 45 it is a requirement that the landlord shall

³ Morris, A. Hulse, K. and Pawson, H. (2017) *Long-term private renters: Perceptions of security and insecurity*. Journal of Sociology 53(3) pp.653:669.

⁴ Bennett, M. (2016) *Security of Tenure for Generation Rent: Irish and Scottish Approaches*. Victoria University of Wellington Law Review. 47 pp.363-384.

- (a) *provide the premises in a reasonable state of cleanliness; and*
- (b) *provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes; and*
- (c) *comply with all requirements in respect of buildings, health, and safety under any enactment so far as they apply to the premises;*

Essentially then the standards for rental housing are set by reasonableness tests bearing in mind the remaining economic life of the building being rented out. If a building is nearing the end of its economic life then clearly it is reasonable (under this test at least) to expect it to be of poorer quality than a newer building. The question of the reasonableness of a person living in such a building is not part of the test.

A recent regulatory impact standard considering proposed amendments to the Residential Tenancies Act reported that the *'Tenancy Tribunal relies on the Housing Improvement Regulations in some circumstances when it is applying the 'reasonable state of repair' test, but has indicated that updated standards would be welcome.'*⁵

In 2016 changes to the Residential Tenancies Act introduced modest building quality requirements for rental properties. These related to a mandatory requirement to install smoke detectors and a light handed regulatory approach to push landlords to insulate their houses. At the time this legislation was introduced, it was noted that as many as 100,000 rented houses would not be insulated because of the physical difficulties in doing so⁶. Under current legislation these buildings will remain uninsulated, unhealthy and able to be rented out for the remainder of their economic life.

As mentioned above tenants have the worse housing and they suffer the most from the poor quality of their housing. This being the case it would seem reasonable – especially if a social rights approach was adopted, to ensure that tenancy law is both more explicit about which housing standards are to be applied to rented housing and that ensuring the liveability of a dwelling is a clear landlord's obligation.

The extent to which quality standards for rental housing should be enforced through such things as warrants of fitness and inspection regimes needs to be considered against the cost of such regimes and their effectiveness. Given the probable medium-term shortage of rental housing, it seems likely that many rental properties and landlord-tenant relationships will remain under the radar – that landlords rent out poor quality accommodation and desperate tenants pick them up. This will mean that licensing and inspection efforts will pick up compliant landlords with good quality housing while those on the margin go undetected and effectively unregulated. A better approach may be to have clear standards and a more stringent enforcement regime with heavy penalties for breaches. The recent move to enforcement of standards by the Ministry of Business Innovation and Employment is a useful

⁵ Ministry of Business Innovation and Employment (2016) *Regulatory Impact Statement : Smoke alarms and insulation in residential rental properties*. Clause 10.

⁶ Ibid clause 56.

start although clearer standards may help clarify – to tenants especially what their rights are around housing quality.

4. Empowering tenants

A third area of reform to the Residential Tenancies Act could be an extensive reform of the institutions behind the Act to ensure that tenants have more power in their relationships with these institutions and with landlords. The basis of this possible reform is that tenants are provided with better access to advice and advocacy services so that they are able to better understand their rights and obligations under the Act and so have a greater ability to assert their rights at mediation and at the Tenancy Tribunal. Furthermore these advice and advocacy services need to be tenant focused and independent of any state agencies rather than with the present approach around mediation and independence. Ideally these services can be financed from the interest income from tenants' bonds and the unclaimed bonds – monies which are presently appropriated by the Crown.

The Crown holds in trust in excess of \$500 million in tenants' bonds. The interest from these bonds amounts to more than \$20 million annually and is allocated toward the costs of administering the bonds system. This is an unusual approach to administering a property rights regime given that only one party is paying, and that party is often disadvantaged in the property rights relationship. For example the Crown provides significant public funding to maintaining such property rights regimes as the land title system, insolvency management and corporate records.

Equity would suggest that the administration of tenancy records is a public good just as the administration of other records of property rights are. As such this public good could be paid for from general taxation, meaning the interest from tenants' bonds could be spent on services to support tenants.