

**EDWARD SHARPE-DAVIDSON**

**BAD LANDLORDS: IS REGISTRATION THE ANSWER?**

LAWS 529: The Opportunities and Pitfalls of Regulatory Reform

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**Abstract:** *This paper considers that there is an issue with substandard property management in New Zealand’s private rental sector because of amateur landlords and that the current regulatory regime does little to raise those standards. The registration of landlords and their properties is thought to install a means of quality checking landlords and their properties and represents a level of regulatory oversight that the current regulatory regime lacks.*

**Key words:** Residential Tenancies Act 1986, registration, regulation, landlords, tenants.

The word count of this paper is: 14,994 (including substantive footnotes that amount to 219 words).

## *I PURPOSE*

A troubling trend facing the private rental sector (PRS) in New Zealand is the unprofessional way private landlords manage their properties and the sub-standard conditions of rental properties. This situation is thought to have arisen because there are no mandatory background checks on landlords or their properties.<sup>1</sup> New Zealand must lift property management standards if it is to deliver quality housing to its burgeoning tenant population.

This essay will look at lifting property management standards from a regulatory perspective, regulation having the meaning of:<sup>2</sup>

a sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes.

After establishing that the behaviour of landlords in New Zealand needs to be, this paper will show why it is the responsibility of the State to regulate to address this problem.

The ability of a regulatory regime to alter the behaviour of the regulated community can be assessed against three criteria:

- 1 The ease with which compliance is secured from the regulated community
- 2 How well the regulator monitors compliance from the regulated community.
- 3 Whether breaches of the regulation are competently enforced.

When the current complaint-based regime is assessed against these criteria it fails to lift property management standards, particularly in regards to repeat offenders. The result being that the regime falls short of meeting the need for quality housing options in the PRS.

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<sup>1</sup> Department of Building and Housing *Getting the Balance Right: Review of the Residential Tenancies Act 1986* (2004) at 16.

<sup>2</sup> Julia Black "Critical Reflections on Regulation" (2002) *Australian Journal of Legal Philosophy* 1 at 27.

The creation of a centralised system for registering suitable landlords and their properties is proposed as a means of altering the behaviour of landlords. The system operates by excluding from the PRS all landlords and properties that fail to meet the requirements of registration. The author considers that the goal of better outcomes for tenants is frustrated under this system because of the adverse effects enforcing registration has on tenants.

The last part of this paper will discuss what a registration scheme could look like, taking inspiration from Scotland's landlord registration and rental property registration schemes in the United States to propose a compromise that aspires to install confidence in the PRS.

## ***II NEW ZEALAND'S HOUSING MARKET***

In examining New Zealand's housing market the important question for the purposes of this paper is whether or not market forces by themselves are likely to succeed in regulating the behaviour of private landlords. If they can, then regulation which limits contractual freedom and creates expense for the taxpayer may not be necessary.

### ***A The home seeker***

New Zealanders face significant obstacles in exiting the PRS as a response to poor property management. Homeownership rates are declining<sup>3</sup> and one of the reasons for this is related to affordability. The average value of residential property has increased by nearly \$100,000 since 2012.<sup>4</sup> The Massey University Housing Affordability Index (which takes into account average weekly earnings and mortgage interest rates) deteriorated by 7.5 per cent in the November 2013 quarter and 3.8 per cent over the year.<sup>5</sup> Buying a house is increasingly difficult for many New Zealanders.

Therefore more New Zealanders must go renting. There has been a 16 per cent increase in households renting their home between 2006 and 2013.<sup>6</sup> Increased reliance on rental

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<sup>3</sup> "2013 Census QuickStats about housing - Home ownership by households " (18 March 2014) Statistics New Zealand <<http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-housing/home-ownership-households.aspx>>

<sup>4</sup> "Property Statistics and Trends" Quotable Value Limited <<https://www.qv.co.nz/>>.

<sup>5</sup> Bob Hargreaves and Fong Mee Chin "Home Affordability Report" (Massey University, Wellington, 2013)

<sup>6</sup> See Statistics New Zealand, above n 3.

accommodation can also be attributed to the negative impact of debt on those seeking home ownership, changing lifestyle preferences and employment needs.<sup>7</sup> An influx of households into the rental market creates competition between those who need to be housed for the rental properties that are provided by the public and private sectors.

The supply of rental accommodation by the public sector is limited. While Housing New Zealand, local authorities and city councils do provide housing support for the less fortunate, the State depends on the private sector to fulfil national housing demands.<sup>8</sup> In early 2014 over 5000 people were on the waitlist for social housing.<sup>9</sup> The private sector in 2013 housed 83.7 per cent of renting households compared to the 16.3 per cent by the State.<sup>10</sup>

New Zealand's dependence on the private sector to meet the nation's housing suggests that it is important for the State to regulate the relationship between landlord and tenant. For many households it is not realistic to expect them to exit the rental market as a response to poor property management. Further the influx of households in the PRS creates competition between households trying to secure tenancies. Where demand for housing in the PRS exceeds supply, the tenant's threat to end the tenancy does little to influence the behaviour of private landlords towards their tenants. Regulation may be used to address this imbalance.

### ***B “Mum and dad” landlords***

There are no restrictions to who can or cannot be a landlord.<sup>11</sup> Do quality controls need to be introduced to lift property management standards? Small-time landlords (“mum and dad” landlords) dominate the PRS.<sup>12</sup> In 2014 52% of investors owned one to three properties with only 13% of investors owning 10 or more properties.<sup>13</sup> It will be argued that the dominance of these “mum and dad” landlords has contributed to a lowering of property management

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<sup>7</sup> Ministry of Housing *Building the Future: Towards a New Zealand Housing Strategy: Discussion Document*, (Wellington, 2004) at 8-9.

<sup>8</sup> Ibid.

<sup>9</sup> Michael Fox “Housing NZ waiting lists swamped” (9 April 2014) Stuff.co.nz <<http://www.stuff.co.nz/national/politics/9920658/Housing-NZ-waiting-lists-swamped>>

<sup>10</sup> Ibid.

<sup>11</sup> See Department of Building and Housing, above n 1, at 16.

<sup>12</sup> “The Need for a Warrant of Fitness for Private Rental Housing in Christchurch” (July 2013) Community Public and Health <<http://www.cph.co.nz/Files/WOFRentalHousingFAQ.pdf>>.

<sup>13</sup> Cameron Bagrie, David Croy, Mark Smith and Steve Edwards “Feature Article: The 2014 ANZ Property Investors Survey” *New Zealand Economics ANZ Property Focus* (online ed, New Zealand October 2014) at 7.

standards and housing quality because of their typically unprofessional and “hands-off” approach to property management.

Investment in residential property attracts a large number of investors because of the high demand for housing.<sup>14</sup> By comparison large corporate landlords are rare, with estimates showing that only 13 per cent of landlords own 10 or more properties.<sup>15</sup>

The lack of corporate landlords in New Zealand can be explained by a series of economic factors that favour small time landlords. The returns from renting are often too low to justify large scale investment. A 2014 survey of New Zealand landlords identified the most common reason for not buying another investment property was poor rental returns.<sup>16</sup> Potential returns are negatively influenced by outgoings such as arrears, tenant damage and necessary maintenance work.<sup>17</sup> Arrears are a particular problem. Claims for unpaid rent made up over 70 per cent of the 40,000 of the claims lodged with the Tenancy Tribunal between July 2013 and May 2014.<sup>18</sup>

Against the low returns is the high upfront cost of buying residential property, the values of which continue to climb.<sup>19</sup> “Mum and dad” landlords may have an advantage over corporate investors in acquiring residential property. Many small time landlords have inherited or previously occupied property as their investment.<sup>20</sup> Part-time landlords may also gain a tax advantage by offsetting income from other sources against expenditure on rental property investments.<sup>21</sup>

The absence of a capital gains tax and increasingly high house prices encourages investors to realise their asset and discourages serious commitment to developing a portfolio of rental properties.<sup>22</sup> The government has recently made moves to discourage such

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<sup>14</sup> See Department of Building and Housing, above n 1, at 10.

<sup>15</sup> See Cameron Bagrie, above n 13, at 7.

<sup>16</sup> Ibid at 8.

<sup>17</sup> Julie Rugg and David Rhodes *The Private Rented Sector: its contribution and potential* (Centre for Housing Policy University of York, 2008) at 19.

<sup>18</sup> Nikki Preston “Landlords ‘too lenient’ when tenants go off rails” (10 June 2014) *The New Zealand Herald* <[http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11270785](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11270785)>.

<sup>19</sup> See discussion at IIA.

<sup>20</sup> See Department of Housing, above n 1, at 17.

<sup>21</sup> Ibid.

<sup>22</sup> See discussion at IIA and Geordie Hooft “More details on the coming capital gains tax on property” (14 July 2015) *Stuff.co.nz* <http://www.stuff.co.nz/the-press/business/70183062/more-details-on-the-coming-capital-gains-tax-on-property>

speculation by taxing the profits made on reselling a property last purchased within two years.<sup>23</sup> This rule does not include properties inherited or transferred as part of a relationship which are two key ways that “mum and dad” landlords enter the PRS.<sup>24</sup> “Mum and dad” landlords continued to be favoured over large landlords.

### *C Poor property management*

It is argued that a number of “mum and dad” landlords inadequately manage their properties due to their unprofessional or “hands off” approach. This is a behaviour that needs to be altered if better housing outcomes are going to be achieved for New Zealand’s tenants.

A laissez-faire approach does not favour tenants because of the poor conditions of rental properties. Only a small proportion of stand-alone houses in New Zealand are purpose-built for being rented to the public.<sup>25</sup> Consequently many rental properties are old, most over 10 years old, with over one fifth being older than 50 years.<sup>26</sup> A rental sector of older housing stock creates issues in terms of housing quality due to deterioration or out-dated building techniques. A variety of surveys and studies have confirmed that dampness, mould and other housing quality issues are a greater problem in the PRS than in owner-occupied housing.<sup>27</sup>

The issue of inferior housing stock in the PRS is exacerbated by a “hands-off” approach. A national survey of landlords managing a single property found that 69 per cent had “no known budget” when asked about their annual budget for maintenance.<sup>28</sup> Around 21 per cent dedicated less than \$2,500 to maintenance each year.<sup>29</sup>

There is also neglect when it comes to property inspections with 36.4 per cent of “mum and dad” landlords responding that they failed to regularly inspect their property.<sup>30</sup> Recently

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> See Department of Building and Housing, above n 1, at 15.

<sup>26</sup> Saville-Smith, K and Fraser, R *National Landlords Survey: Preliminary Analysis of the Data* (Wellington: CRESA, 2004) at table 3.

<sup>27</sup> Sarah Bierre, Mark Bennett and Philippa Howden-Chapman “Decent Expectations? The use and interpretation of Housing Standards in Tenancy Tribunals in New Zealand” (2014) 26 NZULR 153 at 158.

<sup>28</sup> See K Saville-Smith and R Fraser, above n 26 at table 7.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid at table 14.

an article was written on a Waikato landlord who took over 12 months to repair his rental property and leaky water pipes had caused parts of the floor to fall in.<sup>31</sup>

Notably a national survey of landlords saw many respondents citing retirement income as the main benefit of owning a rental property.<sup>32</sup> The association of landlordism with retirement in New Zealand reflects an attitude that being a landlord is different from assuming a profession or a career. It is perceived as a low maintenance investment not requiring any special skill or effort.

This laissez-faire attitude is further reflected by the fact that relatively few landlords use professional property managers or real-estate agents to manage their property on their behalf.<sup>33</sup> There is a perception that the services are an unnecessary cost.<sup>34</sup> However it is at least arguable that the increased use of such services would bring with it a level of proactivity that is missing in the sector.<sup>35</sup> Of course, such professionals are not immune to poor practices,<sup>36</sup> but it may be that they have a greater commercial incentive to improve their practices than “mum and dad” landlords in order to market their services.

Given that the take up of professional agents has been slow it is important that “mum and dad” landlords are educated about their rights and obligations under tenancy law. Groups such as the New Zealand Property Investors Federation (NZPIF) provide such opportunities to its members through publications, workshops and advice.<sup>37</sup> The NZPIF has a significant reach with 20 local Property Investors' Associations throughout the country with a significant number of landlords frequently attending monthly meetings.<sup>38</sup>

A laissez-faire approach may not always result in a bad outcome for the tenant. Undoubtedly many tenants value the independence. However it is central to renting that the property is regularly maintained and that landlord and tenant respect each other. The

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<sup>31</sup> Elton Smallman “Landlord didn't realise home was in bad State” (24 October 2014) Stuff.co.nz <[www.stuff.co.nz/waikato-times/news/10656286/Landlord-didn-t-realise-home-was-in-bad-State](http://www.stuff.co.nz/waikato-times/news/10656286/Landlord-didn-t-realise-home-was-in-bad-State)>

<sup>32</sup> See K Saville-Smith and R Fraser, above n 26, at 9.

<sup>33</sup> See Cameron Bagrie, above n 13, at 7.

<sup>34</sup> Helena Harbrow “The Dilemma Facing Landlords and Tenants: Enforcing Tenancy Tribunal Orders While Upholding Privacy Interests” (2005) 36 VUWLR 581 at 584

<sup>35</sup> See Department of Building and Housing, above n 1 at 18.

<sup>36</sup> Ibid.

<sup>37</sup> See Helena Harbrow, above n 34 at 583.

<sup>38</sup> “Investor Associations” New Zealand Property Investors Federation <<http://www.nzpif.org.nz/items/view/55216/associations>>

unprofessionalism of property management in the PRS suggests a need for regulatory steps to be taken.

#### ***D Conclusion***

Market forces by themselves cannot be relied upon to raise property management standards in the PRS. The lack of housing options available to tenants puts them in a weak bargaining position vis-à-vis private landlords. The increasing reliance on private landlords is a cause for concern because their unprofessionalism and laissez-faire management prejudices the interest tenants have in quality housing. Having established a need to lift property management standards, the question becomes: why is it the State's responsibility to regulate to address this issue?

### ***III THE RESIDENTIAL TENANCY AGREEMENT***

The difficulty in deciding how and why to regulate residential tenancies can be attributed to the conflicting ways the tenancy is viewed by the various stakeholders involved. Any regulation will necessarily be a compromise between these interests, deciding which interests to promote and which to suppress. This part will evaluate the different interests involved in a residential tenancy agreement to determine whether a response from the State is justified.

#### ***A Private contract***

A tenancy agreement in the PRS is prima facie a private agreement. A private landowner grants the right to occupy the premises to another private person in consideration for regular rent payments. In one landlord's view a tenancy is simply a:<sup>39</sup>

...private business deal between...two parties, bond and all. It has absolutely nothing to do with the Government or the Housing Corporation... If I own a property and decide to rent it out I feel I have a right to call the tune - it is not for the Government to handcuff me in making a private business deal.

This conception of tenancy is often cited by landlords as a reason for why the State should not regulate tenancies. Regulation impinges on a person's freedom to deal with their

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<sup>39</sup> I. Mackey. "Submission made to the Social Services Select Committee hearing submissions on the Residential Tenancies Bill 1985" numbered IW.

asset as they see fit. Landlords do not rely on the State save to the extent of enforcing their contracts.<sup>40</sup>

Freedom of contract is important because it allows parties to structure their relations in a way which best suits their circumstances and interests.<sup>41</sup> With tenants as an increasingly portion of the population, flexibility is needed to meet the range of their housing needs. Regulation encroaches on this freedom by limiting the terms which the parties can agree to, implying terms into the contract and requiring other procedural requirements before the parties can call upon the State to enforce the agreement.

The freedom of contract rationale is bolstered by the law's high esteem for property rights. Property rights are generally enforceable "against the world".<sup>42</sup> Property can be used for any lawful purpose, including leasing it to others.<sup>43</sup> However property rights are not completely indefensible because the State can exercised its power to compulsorily seize property.<sup>44</sup> This indicates that a freedom of contract or indefeasibility of property rights analysis in not a full answer to the question of whether the State should regulate or not. Clearly property rights are compromised on when it is in the public interest to do so.

Further the freedom of contract argument assumes that both parties have equal bargaining power in negotiating terms.<sup>45</sup> The landlord is often going to be in a stronger position. They are likely more knowledgeable about the state of their property by virtue of their ownership. Many tenants are from lower socio-economic groups and thus may have difficulty appreciating what they have signed up for.<sup>46</sup> The tenant is at a further disadvantage in that they face the increasing likely prospect of homelessness if they cannot agree to the terms of the lease. With a range of tenants being called to attend open homes, landlords can choose the tenants who are most compliant with their terms.

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<sup>40</sup> Anthony Kronman "Contract Law and the State of Nature" (1985) 1 JLEO 5 at 5.

<sup>41</sup> Ibid.

<sup>42</sup> See generally, S Bright, "Of Estates and Interests: A Tale of Ownership and Property Rights" in S Bright and J Dewar, *Land Law: Themes and Perspectives* (Oxford, Oxford University Press, 2013).

<sup>43</sup> Ibid.

<sup>44</sup> Public Works Act 1981, s 16.

<sup>45</sup> Kate Tokeley *Consumer Law in New Zealand* (Butterworths, Wellington, 2000) at [1.3.1].

<sup>46</sup> Ministry of Social Development Household Incomes in New Zealand: Trends in Indicators of Inequality and Hardship 1982 to 2011 (Wellington: Ministry of Social Development, 2012).

While a tenancy agreement is prima facie a private contract, this conception favours the interests of the landlord. Tenants often lack the power to effectively bargain for the terms which are in their interests to do so. This inequality may provide a rationale for State regulation.

### ***B Business transaction***

The corollary of viewing tenancy as a private agreement is its conception as a business transaction. The main reason landlords lease their property is to realise a return from their investment.<sup>47</sup> These returns must be enough to justify the landlord not selling their property and realising capital gain. From this perspective, regulation must appreciate the landlord's need to earn a profit.

Regulations that require landlords to meet certain standards or to otherwise spend money in order to lease their property may mean that renting becomes a less profitable venture for the landlord. However from a long term perspective such standards may actually benefit the landlord. It may mean that landlords do not spend as much money and effort fighting tenants over maintenance issues and it may also increase the value of their property for when the landlord decides to sell. Given the State's dependence on the PRS to provide housing, cost is an important consideration to take into account when considering the degree to which to regulate residential tenancies. At least the State may need to identify incentives for landlords so as to counteract such costs.

### ***C A home***

With more families and older people renting, rental property is more often being characterised by the tenant as their 'home' rather than simply a means of short term accommodation.<sup>48</sup> The conception of the tenancy as a home deemphasises the landowner's freedom to do what they wish with their asset and values the social advantages of affordable, stable and good quality housing. This conception often conflicts with a business-orientated perspective that does not look beyond the need to remain competitive in the housing market.

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<sup>47</sup> Shamubeel Eaqub and Selena Eaqub *Generation Rent Rethinking New Zealand's Priorities* (Bridget Williams Books, Wellington, 2015) at 54.

<sup>48</sup> *Ibid* at 56.

Given the deficiencies that have been discussed in regards to the housing market it is not likely that the conception of the tenancy as a home will be protected without State regulation.

#### *D A consumer product*

While emphasising tenancy as a ‘home’ may be a subjective conception that brings unnecessary sentimentalism into the law, the need for State regulation could be argued for from the perspective of consumer law. It is clear that rental property is not a passive investment like that in shareholdings or some other commodity; rather the activity is properly part of the service industry.<sup>49</sup> The consequence of ill-advised dealings in shares is primarily economic loss; the consequence of poor property management is potentially the health and safety of the tenant. Tenants readily satisfy the definition of a consumer in the Consumer Guarantees Act 1993 as a person who:<sup>50</sup>

- (a) acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption;

The tenant acquires the services of the landlord because they receive accommodation. This accommodation is clearly acquired for domestic use. If tenants are consumers then they should receive the guarantees of information, quality, safety and other guarantees afforded by the State to consumers generally.<sup>51</sup>

It is not clear whether in reality a tenant could bring a claim under the Consumer Guarantees Act.<sup>52</sup> The Law Commission has argued that residential tenancies should be explicitly excluded from the Consumer Guarantees Act because they are “adequately protected by the mechanisms to be found in the Residential Tenancies Act 1986”.<sup>53</sup> Nevertheless the Consumer Guarantees Act provides an analogous precedent for the State to intervene in the market and to provide statutory guarantees to protect weaker parties from the perceived harshness of the operation of the freedom of contract doctrine.

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<sup>49</sup> Gordon Stewart “The Residential Tenancy Bond in New Zealand” (LLM dissertation, Victoria University of Wellington, 1989) at 1.06.

<sup>50</sup> Consumer Guarantees Act 1993, s 2(1).

<sup>51</sup> Consumer Guarantees Act, s 1A.

<sup>52</sup> Barry Barton *Energy efficiency and rental accommodation: dealing with split incentives*. Report for the University of Waikato Centre for Environmental, Resources and Energy Law. Hamilton: University of Waikato, 2012 at 9.

<sup>53</sup> Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at 165.

### *E A health and safety issue*

Related to the conception of tenancy as a consumer service, is the idea that tenancy should be regulated because of the health and safety issues raised. If the State regulates health and safety in the workplace and of the public generally it seems intuitive that the same should be true in relation to tenancies.<sup>54</sup> This is especially so given the amount of time the tenant spends at the property.

A tragic example of health and safety issues involved in tenancies is the case of the toddler, Emma-Lita Bourne, whose death the coroner linked to the cold and damp house she was living in.<sup>55</sup> This was not an isolated event, figures show that each year 40,000 children are admitted to hospital with respiratory conditions linked to poor housing.<sup>56</sup>

Emma-Lita's case sparked a wider debate in the media that firmly located the State as responsible for providing adequate housing for New Zealanders.<sup>57</sup> While Emma-Lita may have been living in a State home, much of the debate following this tragedy focused on substandard private rental properties and calls on parliament to require private rentals to enact warrants of fitness.<sup>58</sup> The government response in unveiling a plan to require rental properties to meet minimum standards shows the responsibility the State has assumed for the PRS.<sup>59</sup>

It is in the economic interests of the State to regulate health and safety in the PRS. The Canterbury District Health Board estimates that a night in hospital costs \$14,000.<sup>60</sup> By comparison it costs under \$1,500 to install insulation in a ceiling, an expense which may reduce hospitalisations due to cold and damp homes.<sup>61</sup> However the cost of making a property compliant with health and safety requirements potentially makes renting less

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<sup>54</sup> See for example Health and Safety in Employment Act 1992 and New Zealand Public Health and Disability Act 2000

<sup>55</sup> Adan Dudding "Emma-Lita Bourne death: will anything change?" (14 June 2015) Stuff.co.nz <<http://www.stuff.co.nz/national/69335033/emmalita-bourne-death-will-anything-change>>

<sup>56</sup> Phil Goff "Phil Goff: Rental homes need a warrant of fitness to keep kids healthy" (14 June 2015) Stuff.co.nz <<http://www.stuff.co.nz/national/politics/opinion/69307464/phil-goff-rental-homes-need-a-warrant-of-fitness-to-keep-kids-healthy>>

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Vernon Small "Rental properties face minimum standards rules" (8 June 2015) Stuff.co.nz <<http://www.stuff.co.nz/national/politics/69212752/Rental-properties-face-minimum-standards-rules>>

<sup>60</sup> "The Need for a Warrant of Fitness for Private Rental Housing in Christchurch" (July 2013) Community Public and Health <http://www.cph.co.nz/Files/WOFRentalHousingFAQ.pdf>.

<sup>61</sup> Ibid.

profitable for the landlord. The question then becomes whether the State should recognise tenancy as a business transaction and to subsidise the costs of making the property compliant.

### *F A responsibility of the State*

New Zealand has assumed an obligation to provide adequate housing to those within its jurisdiction by virtue of its ratification of international human rights law.<sup>62</sup> The State must now take measures to ensure that housing is adequate.<sup>63</sup> This can be achieved in two ways, as a housing provider or as a facilitator of “the production and improvement of shelter”.<sup>64</sup>

Because housing provided by the State is limited in New Zealand, it is more accurate to describe New Zealand as taking a facilitating approach. Through this lens, private landlords can be seen as agents or delegates of the State in meeting the former’s obligation to provide adequate housing. This conception of the PRS was described by Hon R McClay in passing the Residential Tenancies Bill in 1986:<sup>65</sup>

The State cannot manage to house people in some areas now, and there are almost 12,000 people on the waiting list for houses. The private sector must be able to assist the State as it always has done.

Private landlords play a public role and are thus distinguishable from other investors who pursue commercial gain. As agents, it can be argued that private landlords must accept and submit to regulation by the State whom they act on the behalf of.

### *G Conclusion*

While tenancy agreements can be described as a private contract or business transaction, they are increasingly seen from a public interest perspective as a health and safety issue, a

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<sup>62</sup> United Nations “Status of International Covenant on Economic, Social and Cultural Rights” <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en)> and International Covenant on Economic, Social and Cultural Rights 1966, Art. 2(1) and 11.

<sup>63</sup> International Covenant on Economic, Social and Cultural Rights, Art. 11.

<sup>64</sup> Office of the United Nations High Commissioner for Human Rights *The Right to Adequate Housing* (Office of the United Nations High Commissioner for Human Rights, Geneva, 2009) at 6.

<sup>65</sup> Hon R McClay (9 December 1986) 476 NZPD 6009.

consumer service and a responsibility of the State. These latter conceptions of tenancy are strong justifications for why the PRS is properly the subject of regulation.

## ***IV THE CURRENT REGULATORY FRAMEWORK***

If it is accepted that the State has an obligation to regulate the PRS, it follows that it must do so in a way that is fair to all stakeholders and provides effective options for redress. It is argued that property management in New Zealand's PRS is not adequately regulated and tenants are poorly placed to enforce breaches of tenancy laws.

### ***A Regulatory Goals***

Tenancies are poorly regulated in New Zealand because, using the criteria identified in section I:

1 *Securing Compliance*: There are considerable obstacles to landlords complying with the rules of the current regime because of the multiple sources of tenancy law they must familiarise themselves with and there is no compulsory mechanism in place to ensure that the parties understand what is required of them.

2 *Monitoring Compliance*: There are limited means to communicate to landlords that they risk breaching property management standards and that they must change their behaviour short of having disputes being heard at the Tenancy Tribunal.

3 *Enforcement*: Tenants, limited by their personal interests, are not in a position to take claims against offenders that pose a risk to the public generally. The State's limited role in enforcing tenancy laws burdens tenants with this task.

### **1 Securing compliance**

The Residential Tenancies Act 1986 (RTA) regulates property management by treating landlords and tenants as having agreed to the rights and obligations provided for in the Act. The rationale is that (a) such terms are necessary for a functioning and fair tenancy and (b)

the parties would not have agreed to such terms because of power imbalances or ignorance.<sup>66</sup> For example the Act deems landlords to have agreed to do maintenance work and the tenants to have agreed to repair the damage they intentionally or carelessly cause.<sup>67</sup> Generally tenancy agreements will not be enforceable to the extent that they are inconsistent with these rights and obligations.<sup>68</sup>

The effectiveness of a regulatory scheme that relies on mandatory statutory terms to achieve a result is influenced by a series of factors including understanding of those terms. Since landlords and tenants are under no obligation to familiarise themselves with the RTA, there is the potential for landlords to inadvertently breach the RTA and for equally uninformed tenants, to suffer.

However there are many free and readily accessible avenues for people to gain information and guidance on the rules. A prospective tenant or landlord can visit their local Community Law centre or Citizen Advice Bureau for advice, search the Tenancy Services website or ring the Tenancy Services helpline.<sup>69</sup> Nevertheless all these options rely on the landlord or tenant being motivated to actually seek out this information

Further the RTA is not a comprehensive source of tenant and landlord responsibilities. This adds complexity and makes compliance more difficult. Tenancy law being “scattered over several Acts” was a problem identified by the draftsmen, but the vision for “all law relating to landlords and tenants [being] in one statute” was not fulfilled.<sup>70</sup> For example the following sections of the RTA require the landlord to familiarise themselves with other legislation:

#### S 12 Discrimination to be unlawful act

(1)Each of the following is hereby declared to be an unlawful act:

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<sup>66</sup> See Tokeley, above n 45, at 1.31.

<sup>67</sup> Residential Tenancies Act, ss 40 and 39.

<sup>68</sup> At s 11.

<sup>69</sup> See Community Law’s website at <http://communitylaw.org.nz/>, Citizen Advice Bureau at <http://www.cab.org.nz/Pages/home.aspx>, Tenancy Services at <http://www.tenancy.govt.nz> or call Tenancy Services on 0800 836 262.

<sup>70</sup> See Hon PB Goff (19 September 1985) 457 NZPD 6896, Hon PB Goff (19 September 1985) 457 NZPD 6897 and Bierre, above n 27, at 2.

(a)discrimination against any person in respect of the grant, continuance, extension, variation, termination, or renewal of a tenancy agreement in contravention of the Human Rights Act 1993

S 66O Landlord may make house rules

...

(2)(b)(ii)purport to permit anything that would breach the Privacy Act 1993.

Notably the RTA does not list the relevant grounds of discrimination or what would amount to a breach of privacy.

S 45 Landlord's responsibilities

(1)The landlord shall—

...

c) comply with all requirements in respect of buildings, health, and safety under any enactment so far as they apply to the premises

Section 45(1)(c) introduces significant complexity because it requires landlords to be cognizant with: “any [applicable] enactment” relevant to building, health and safety laws”.

Given that discrimination of prospective tenants and low housing quality are both significant problems facing New Zealand’s PRS, it is important that landlords and tenants are educated about legislation such as the Human Rights Act and Building Act and how they pertain to their tenancy.<sup>71</sup> The fact that parties must be aware of multiple sources of legislation creates a compliance issue and emphasises the importance of educating tenants and landlords about their rights and obligations outside the RTA.

The tenancy agreement itself is another source of rights and obligations that the parties have to consider, necessitating knowledge of contract principles such as those relating to intention, formation and privity, and how those principles interact with legislation like the RTA.

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<sup>71</sup> J MacDonald *Racism and Rental Accommodation* (Social Research and Development Trust, Auckland, 1986) at 87.

In limited circumstances contractual rights trump the rules in the RTA. Landlords are allowed to waive “all or any” of their rights and powers under the RTA or to assume more onerous obligations.<sup>72</sup> Such freedom is not given in relation to the tenant’s rights and obligations.<sup>73</sup> This protects tenants from inadvertently or being coerced into reducing their entitlements under the Act. Why is the same benefit of the doubt not given to landlords? A response would be that landlords are in a stronger position to dictate terms than tenants are.<sup>74</sup> However as has been discussed, there is a view that landlords are not well educated as to their right and obligations.<sup>75</sup> Therefore it may be overestimating the landlord’s understanding of the benefits and perils of contracting out as opposed to maintaining their rights under the RTA.

Even without the landlord exception, the RTA allows for freedom of contract if it is consistent with the rules in the Act. Parties can agree to various arrangements such as to duration, whether the tenancy is fixed or periodic, whether pets are allowed or whether the tenancy is incidental to services performed by the tenant.<sup>76</sup>

While the RTA requires tenancy agreements to be in writing, the lack of writing does not invalidate the agreement.<sup>77</sup> The terms of oral agreements are often unclear with parties relying on circumstantial evidence. The various types of contractual arrangements that are drawn up to meet unique living arrangements add significant complexity to the tenancy relationship.

The potential confusion arising from oral arrangements and poorly drafted or complicated agreements has been mitigated to an extent by the Ministry of Business, Innovation and Employment’s (MBIE) provision of standard-form contracts.<sup>78</sup> The templates provide a room-by-room furniture inventory and the option to strike out terms that do not apply. A survey found that the use of such agreements made renting seem “less confusing and

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<sup>72</sup> Residential Tenancies Act, s 11(2) and *Chief Executive Officer (Housing) v Brown* (2000) 156 FLR 158 at 164 per Thomas J (Tenancy Act 1979 (NT) “is not a code in the sense that it sweeps away the application of the common law”).

<sup>73</sup> At s 11(3).

<sup>74</sup> See discussion above at IIIA and B.

<sup>75</sup> See discussion above at IIB.

<sup>76</sup> Grinlinton, *DP Residential Tenancies: The Law and Practice* (4th ed, Wellington, LexisNexis, 2012) at 1.2.

<sup>77</sup> Residential Tenancies Act, ss 13 and 13C.

<sup>78</sup> PDF able for free download from <http://www.tenancy.govt.nz/assets/Forms-templates/Residential-Tenancy-Agreement.pdf>

fragmented”.<sup>79</sup> These templates are widely used and available online or in print and there is a wide perception that they are the ‘tenancy agreement’.<sup>80</sup>

However confusion between contractual obligations and the RTA remains an issue. This is illustrated by reliance on the terms of the tenancy agreement in ignorance of the requirements of the Act. A common problem is that landlords include clauses in their contract requiring the tenant to commercially clean the property when they leave and many tenants assuming that this is binding on them in all circumstances.<sup>81</sup> However such clauses represent a more onerous obligation than what is required of tenants under the RTA, namely the obligation to keep the property “reasonably clean”.<sup>82</sup> Such clauses are not valid because they breach the rule that tenants cannot contract out of the RTA.<sup>83</sup>

The RTA does not say in positive terms that automatically requiring the tenant to commercially clean in the property constitutes a breach. It is an inference made from the use of the word “reasonable” in the section 40 requirement that tenants must “keep the premises reasonably clean and reasonably tidy”.<sup>84</sup> What is reasonable depends on the circumstances so it cannot be assumed at the time of contracting that commercial cleaning will be required for the tenant to meet the standard when the tenancy terminates.<sup>85</sup>

The operative word in section 40 is “reasonable” and without further definition it is prone to subjective interpretations. This is because of the inherently conflicting ways which tenants and landlords view the tenancy.<sup>86</sup> A landlord is likely to have a higher standard of “reasonableness” because they are conscious of the need to re-let and the property’s attractiveness to new tenants. A tenant is likely to have a lower standard of “reasonableness”

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<sup>79</sup> Diane Lister “Learning lessons from New Zealand — the reform of landlord and tenant law in England and Wales” (2004) 11 BCB 58 at 59.

<sup>80</sup> An observation made from the author’s employment as a Client Service Advisor at Tenancy Services 2014-2015.

<sup>81</sup> Diana Clement “Double check tenancy clauses” (14 April 2012) The Herald  
<[http://www.nzherald.co.nz/property/news/article.cfm?c\\_id=8&objectid=10798612](http://www.nzherald.co.nz/property/news/article.cfm?c_id=8&objectid=10798612)>

<sup>82</sup> Residential Tenancies Act, s 40(1)(c)

<sup>83</sup> At 11(3).

<sup>84</sup> At s 40(1)(c).

<sup>85</sup> For example in *Harnett Ltd v Payne* [2011] NZ TT Nelson 329 all that was required was for the tenant to clean the carpet with a Rug Doctor.

<sup>86</sup> See discussion at III, particularly at C.

and claim that the landlord is out of touch with what is truly the inevitable wear and tear of the property for which the tenant is not responsible.<sup>87</sup>

The lack of meaningful objective standards has also been discussed in relation to the obligation to maintain and repair the property.<sup>88</sup> The RTA again uses the word “reasonable” with little elaboration to guide landlords and tenants as to what is expected in regards to maintenance work.<sup>89</sup> This lack of definition is exacerbated by the lack of guidance given from the Tenancy Tribunal, the body that hears the majority of disputes under the RTA. This may be because of several reasons including the general prohibition of lawyers from the Tribunal, the fact that the Tribunal itself is not bound by precedent or to give effect to strict legal rights.<sup>90</sup>

The complexity of tenancy law makes compliance difficult. This is especially true for a sector dominated by “mum and dad” landlords. There needs to be greater education of landlords if there is going to be improved property management in the PRS. Confusion arising from the different contractual arrangements made in the PRS and subjective interpretations of the ‘reasonableness’ requirement illustrates the importance of regulations that are framed in a way that makes it easy to secure the compliance of the regulated community.

## **2 Monitoring compliance**

There is a lack of viable interim options for tenants when the landlord has failed to meet their obligations under the RTA. Unlike several other jurisdictions, tenants in New Zealand are not allowed to withhold rent if, for instance, the landlord has failed to perform essential repairs to the rental property.<sup>91</sup> The tenant faces the problem of the landlord refusing to do the repairs or not being able to contact the landlord to do them. If the tenant does withhold rent for a period longer than 21 days then the landlord is within their rights to apply to the

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<sup>87</sup> *Jeffery v Houia* [2013] NZ TT Christchurch 3389.

<sup>88</sup> See Sarah Bierre, above n 27, at 14-15.

<sup>89</sup> Residential Tenancies Act, s 45(1)(b).

<sup>90</sup> At s 85.

<sup>91</sup> Compare the uncompromising position under New Zealand’s Residential Tenancies Act, s 40(1)(a) with the grounds for withholding rent established in the New York case *Semans Family Ltd. Partnership v. Kennedy*, 675 N.Y.S.2d 489 (N.Y. City Civ. Ct., 1998).

Tribunal to terminate the tenancy.<sup>92</sup> Similarly the general position is that the tenant is not able to end the tenancy as a response to other incidents of poor property management unless they give the correct notice or apply for an order from the Tenancy Tribunal.<sup>93</sup>

The tenant is permitted to get repairs done themselves if the issue is “likely to cause injury to persons or property or is otherwise serious and urgent” and the tenant has made reasonable efforts to contact the landlord.<sup>94</sup> However many tenants are not in the financial position to cover the cost of doing the repairs themselves. This is especially so given that they have to continue to pay full rent during this period.

If the repairs are not urgent the tenant may apply to the Tribunal for a work order.<sup>95</sup> Tenants have to serve a “14 day (written) notice to remedy” on the landlord if they wish to access the Tribunal.<sup>96</sup> On top of the 14 days requirement is the time for service (four working days for post) and usually 4-5 weeks to get a hearing at the Tribunal.<sup>97</sup> The total process is potentially drawn out to more than 7 weeks if the parties cannot agree to mediate the dispute. Ultimately it may be that the landlord cannot do the repairs because of financial hardship. In such cases work orders or compensation do not provide meaningful forms of redress for the tenant.

The one circumstance where the tenant is relieved of their responsibility to pay rent is when, due to a reason other than the tenant’s breach of the tenancy agreement, the premises are destroyed or are so seriously damaged as to be uninhabitable.<sup>98</sup> This is a very high standard and therefore its usefulness as an interim remedy is limited. A property that was left without electricity for 5 days, water or sewerage for 10 days or a usable toilet for 3 weeks did not meet the standard to be declared “uninhabitable” and subsequently the obligation to pay full rent during this period remained.<sup>99</sup>

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<sup>92</sup> Residential Tenancies Act, s 55(1)

<sup>93</sup> At ss 50, 51 and 56.

<sup>94</sup> At s 45(1)(d).

<sup>95</sup> At s 78(1)(e).

<sup>96</sup> At s 56(1)(b).

<sup>97</sup> Catherine Harris “Tenancy Tribunal delays cost landlords” (16 July 2012) Stuff.co.nz  
< <http://www.stuff.co.nz/business/money/7287019/Tenancy-Tribunal-delays-cost-landlords>>

<sup>98</sup> Residential Tenancies Act, s 59.

<sup>99</sup> *Watkin v Brazier Property Investments Limited & Joan Hazellhurst* [2012] DCR 186.

Priority is given to landlord's entitlement to receive rent even when they are not carrying out their duties. The approach reflects a regulatory scheme that does not effectively monitor compliance and only steps in to address tenancy issues once they have become so serious as to threaten the tenancy agreement as a whole. This devalues the significance of any remedy the tenant ultimately achieves. The merits of allowing tenants to withhold rent as a response to poor property management will be considered below within the context of the proposed registration scheme.<sup>100</sup>

The State does play a limited role in monitoring trouble landlords. Within the Ministry of Business, Innovation and Employment (MBIE) are the Outbound and Compliance Services Team and investigating officers who investigate on-going or repeat breaches of the RTA.<sup>101</sup> By examining patterns in the information available to them from bonds, tenancy agreements, Tribunal orders online and complaints lodged with MBIE directly, internal compliance units are able to target particular problem areas. In 2014, through examining tenancy agreements submitted to MBIE, the compliance unit was able to contact relevant landlords to let them know that their tenancy agreements contained unlawful clauses and that those clauses would be of no effect.<sup>102</sup> This has the potentially advantageous consequence of ensuring that the contacted landlords no longer use those terms on future tenants and also to pre-empt disputes over such terms arising between landlord and tenant. However the powers of the compliance unit are restricted in that they rely on information such as agreements and bonds being submitted to them by the landlord or tenant. The unit does not have jurisdiction outside of the RTA and their work cannot result in a direct remedy for an individual complainant.<sup>103</sup> Yet it does indicate a degree of oversight in a regulatory system that is predominantly focused on responding to individual claims as will be seen in the Enforcement section immediately below.

### **3 Enforcement**

#### **i The tenant as enforcer**

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<sup>100</sup> See discussion at VFIL.

<sup>101</sup> Paul Davies "Residential Tenancies Act 1986 Compliance Unit – its role and function" (paper presented to the Christchurch Housing Forum, Christchurch, June 2014).

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

Breaches of the RTA by private landlords are enforced in most circumstances only because a current or previous tenant has made a Tenancy Tribunal application and the Tribunal finds in favour of the tenant.<sup>104</sup> Because tenants, in deciding whether to bring a claim, are primarily motivated by their personal interests, they are ill-suited for the role of disciplining landlords who pose a threat to the public more generally.

Firstly the tenant claimant is in most cases prohibited from being represented by a lawyer at the tribunal.<sup>105</sup> While this may encourage tenants bring claims because it reduces associated costs and facilitates the Tribunal's vision for justice that is not tied down by legal niceties,<sup>106</sup> it has the collateral effect of making it difficult for a number of tenants to successfully present their claims. There are an increasing number of tenants for whom English is a second language and for whom it may be difficult to communicate their concerns to the Tribunal without a lawyer.<sup>107</sup> Many tenants have family responsibilities which may pose an obstacle to them attending and preparing for a Tribunal hearing.<sup>108</sup> A legally represented tenant or representatives of the State itself are likely to be in a stronger position to challenge rogue landlords than the lay tenant.

Secondly tenants do not have meaningful protections against the landlord retaliating against them for making a complaint relating to the tenancy. The fear of repercussions discourages tenants from bringing claims and may in fact be reflected by the underrepresentation of tenants bringing claims at the Tribunal.<sup>109</sup> The provision in the RTA invalidating termination notices given by the landlord in retaliation to a tenant's complaint is not effective.<sup>110</sup> Even if the Tribunal decides to declare a particular notice invalid, the landlord could serve another notice terminating the tenancy shortly after, forcing the tenant to make a whole new claim if they are unsatisfied.<sup>111</sup> The tenant faces difficulty in making the claim of retaliation itself. Proving the motivation of the landlord can be problematic if the

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<sup>104</sup> Under s 77(1)(a) the jurisdiction of the Tribunal is limited to disputes between the landlord and the particular tenant involved in the dispute.

<sup>105</sup> Residential Tenancies Act, s 93(2)

<sup>106</sup> At s 85(2).

<sup>107</sup> See Department of Building and Housing, above n 1, at 11.

<sup>108</sup> *Ibid.*

<sup>109</sup> Ministry of Housing *Statement of Intent 2004 (Wellington 2004)* at 15 and Lyndon Rogers *Paper Walls: The Law that is Meant to Keep Rental Housing Healthy* (Anglican Life, Christchurch, 2013) at 30-31.

<sup>110</sup> Residential Tenancies Act, s 54.

<sup>111</sup> See Rogers, above n 109, at 30-31.

landlord can point to other explanations for termination. Because of the power imbalance between landlords and tenants, psychological pressure is also likely to play a role in discouraging tenants from making complaints against their landlord.<sup>112</sup>

Thirdly tenants can become disinterested in pursuing a work order. The landlord under the RTA is given the option to offer to pay the tenant rather than do the necessary work.<sup>113</sup> Taking a pay-out and terminating the tenancy may be more attractive to a tenant than staying and putting up with the inconvenience and hassle of living in a property that is undergoing repairs, especially when those repairs would mean that the tenant has to move out of the rental property for a period of time. The result of this is that the rental property can be leased to the next tenant without the necessary repairs being done. The personal interests of the tenant claimant do not serve the interests of future tenants.

Similarly there does not appear to be any cases or Tribunal orders where the tenant has relied on section 109A to restrain the landlord from “committing a further [unlawful] act of the same kind”.<sup>114</sup> This provision could potentially be used to restrain a landlord from leasing a property until the necessary work is done because an order granted under this section is not limited to the particular tenancy and can last for up to 6 years.<sup>115</sup> The fact that tenants do not use this section illustrates a lack of interest in what happens to the rental property after they have left it or have settled with the landlord. Tenants are therefore not well placed to control landlords who persistently breach the RTA.

## **ii The State as enforcer**

The alternative to the tenant bringing a claim against the landlord is that the State does. The State is an appropriate enforcer given that the provision of adequate housing is arguably a responsibility of the State.<sup>116</sup> In practical terms the State can bring the necessary resources, expertise and objectivity to act in the public interest.

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<sup>112</sup> Ibid, at 30.

<sup>113</sup> Residential Tenancies Act, s 78(2).

<sup>114</sup> This was concluded from a search of the Tenancy Tribunal Database on “Search Tenancy Tribunal orders,” Ministry of Justice, <http://www.justice.govt.nz/tribunals/tenancy-tribunal/search-tenancy-tribunal-orders>, entering the terms “tenancy+tribunal+order+s+109A” into the Google search engine and referring to Rogers, above n 5, at 25.

<sup>115</sup> Residential Tenancies Act, s 109A(3).

<sup>116</sup> New Zealand has assumed an obligation to provide adequate housing to those within its jurisdiction by virtue of ratifying international human rights law such as the International Covenant on Economic, Social and Cultural

However when the RTA was being passed it was argued that the State's role in disciplining should be rolled back with less criminal offences being used to punish landlords.<sup>117</sup> The rationale being that it was important to ensure speedy resolution of tenancy disputes and that criminal sanctions were unduly harsh on landlords who have simply "slipped up" or were inexperienced.<sup>118</sup> Particularly in New Zealand inexperience can be explained by the fact that many people become landlords by accident through inheritance or otherwise.<sup>119</sup> Is it fair to criminalise such landlords?

Landlords assume responsibility over the wellbeing of their tenants and the gravity of the potential harm done by a careless landlord provides a justification for criminal sanction to enforce substantive obligations. In 2014, for example, a tenant died because a landlord illegally installed a gas cooker that caused a house fire.<sup>120</sup> Further the coercive powers of the State may provide a more meaningful response to poor property management than the landlord simply compensating after the fact or "paying the tenant off" to avoid doing repairs. It seems necessary to restrain landlords who repeatedly breach tenancy laws given the ease a landlord has in re-letting a poorly managed or sub-standard property under the current regime.

In terms of claims at the Tribunal, the State will only intervene if it considers it is in the public interest to do so.<sup>121</sup> To do so MBIE can file a cross application against a landlord at the Tribunal and pursue an exemplary damages claim.<sup>122</sup> The Ministry of Housing (now part of MBIE) used this power when it discovered repeated incidents of a landlord illegally taking payments from tenants in a supposed 'rent to buy' scheme.<sup>123</sup>

Yet overall the current regulatory scheme depicts a general reliance on tenants to bring complaints against landlords. The State's support of tenants in this role is limited to cases

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Rights. See United Nations "Status of International Covenant on Economic, Social and Cultural Rights" <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en)> and International Covenant on Economic, Social and Cultural Rights 1966, Art. 2(1).

<sup>117</sup> Property and Equity Law Reform Committee. *Report on Residential Tenancies*, May 1985 at [11].

<sup>118</sup> *Ibid* at [74].

<sup>119</sup> See Department of Building and Housing, above n 1, at 17.

<sup>120</sup> Robert Kidd "Landlord sentenced over woman's death" (25 May 2014) *Stuff.co.nz* <<http://www.stuff.co.nz/national/crime/10199060/Landlord-sentenced-over-womans-death>>

<sup>121</sup> Residential Tenancies Act, s 124.

<sup>122</sup> *Ibid*.

<sup>123</sup> Steve Maharey "'Rent to buy' dangers highlighted" (press release, 19 May 2003)

which they regard to be in the public interest. This is unsatisfactory because many tenants are not in a suitable position to enforce property management standards.

### ***B Conclusion***

In 2014 alone the Tribunal disposed of over twenty thousand cases, which was 69 per cent of new business in the tribunals and authorities administered by the Ministry of Justice in New Zealand.<sup>124</sup> It reflects a regulatory system orientated around responding to individual disputes as they arise rather than taking steps to prevent them from the outset. The current system has created this problem because of the lack of systematic quality checks on landlords and their properties and a lack of an effective means to combat repeat offenders.

## ***V REGISTRATION***

This essay looks to find a way to lift property management standards in New Zealand by using regulation. Given that private landlords are in a favourable position in the market in that there is a high demand for their properties and alternatives such as state housing and home ownership are often out of reach for tenants, there is insufficient pressure from the market to compel landlords to improve their standards.

Similarly the current regulatory regime does not significantly alter landlord behaviour in a way that delivers quality housing for tenants. It is a system that focuses on responding to individual complaints as they arise rather than putting in place means to prevent those complaints arising in the first place.

It is thought that a regulatory framework with a registration scheme at its centre may be able to raise property management standards because it reverses the overly optimistic assumption that underlies the current regime. A complaints-based system assumes that a landlord is a suitable person to lease their property and that the property is safe to live in until a complaint is made. A registration system takes the more cautious assumption that a landlord is not a fit and proper person to lease their property and that the property is unsafe to live in until the landlord can prove otherwise. Only when the landlord has shown this, can they lease

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<sup>124</sup> “Annual Statistics Specialist Courts and Tribunals June 2014” Courts of New Zealand  
<<https://www.courtsofnz.govt.nz/from/statistics/annual-statistics/june-2014/specialist-courts-and-tribunals>>

or continue to lease their property. In this way registration proactively seeks to eliminate substandard landlords and unsafe properties from the PRS.

### ***A What is registration?***

At the most general level registration is the formation of a list of people or things that meet the entry requirements of the list.<sup>125</sup> Because they have met these requirements, others are encouraged to deal with these people or things exclusively.<sup>126</sup> Prospective members are incentivised to meet the necessary qualifications for registration because of the desirability of being seen as a member or because of other entitlements membership brings.<sup>127</sup> The risk of being removed from the list encourages the continued compliance of its members.<sup>128</sup>

### ***B Regulatory Goals***

Registration may provide an effective means of altering the behaviour of private landlords because, using the criteria identified in section I:

1 *Securing Compliance*: Registration secures compliance from the regulated community because the entry requirements for registration provide a guarantee that all the landlords or properties entered into the register meet a certain standard, at least at the time of registration.

2 *Monitoring Compliance*: A register of landlord or their properties provides the regulator a large source of information about the PRS and a means for regulators and tenants to contact landlords. It also facilitates the State taking action before more serious enforcement steps are necessary.

3 *Enforcement*: It is thought that registration would competently manage breaches of tenancy law because the regulator itself takes responsibility for enforcing breaches. However

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<sup>125</sup> Oxford University Press “Register (noun) (definition 1)” Oxford Dictionaries  
<<http://www.oxforddictionaries.com/definition/english/register>>

<sup>126</sup> See discussion of the grant of licences from the State to individual utility enterprises in Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, Cambridge, 2007) at 3.2.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

registration is not completely successful in this because the consequences of enforcement still fall on the tenant as will be seen.

## **1 Securing compliance**

Registration seeks “to eliminate undesirable behaviour by designing out the possibility for its occurrence”.<sup>129</sup> In a regime where all landlords have to join the register in order to lease their property and only “good landlords” are accepted for registration, “bad landlords” would supposedly no longer exist because they would never be accepted for registration.

Yet in Scotland mandatory registration of private landlords has not had such a comprehensive effect on property management standards. A survey five years after the scheme had been in operation found that less than half of local authorities believed that it has improved property management and property conditions in the private rented sector.<sup>130</sup> The reason why registration cannot exclude all “bad landlords” is because landlords are able to set up letting arrangements incognito, advertising their properties to small groups of people. To work effectively registration relies to a large extent on landlords en masse co-operating and buying into the scheme.

Further there is still a need to monitor the behaviour of “good landlords” or housing quality to check that they continue to meet that description. New tenancies introduce new dynamics which could provoke otherwise “good landlords” and it is clear that housing quality deteriorates overtime.

Registration cannot lift property management standards by itself because it is procedural measure that looks at a landlord’s conduct or a property’s condition as a whole. It does not address compliance with specific obligations contained within tenancy law. There remains a need for the complaint-based system such as the current regime.<sup>131</sup> It is suggested that a registration system is formulated to complement the current regime.

## **2 Monitoring compliance**

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<sup>129</sup> Ibid at 3.2.5.

<sup>130</sup> Freya Lees & Dr. John Boyle *Evaluation of the Impact and Operation of Landlord Registration in Scotland* (Scottish Government Social Research, July 2011) at 2.6.

<sup>131</sup> See Morgan, above n 126, at 3.2.1.

Registration utilises communication-based techniques of control by redressing the informational imbalance in favour of the landlord and providing a means for landlords to be contacted.<sup>132</sup> A centralised system where private landlords are required to provide details relevant to the tenancy upon registration would open up avenues for the State to monitor the PRS.<sup>133</sup> For instance MBIE would have a greater ability to contact individual landlords to advise them of new laws and how they apply, investigate complaints or to explain areas of confusion. This is important because under the current regime the emphasis is on landlords and tenants taking the initiative to learn about their rights and obligations. There is a presumption that landlords are fit to lease their properties to the public. This may not be true of the many “mum and dad” landlords that dominate the sector and who manage their properties in an ad hoc and unprofessional way.<sup>134</sup> There is also a barrier of complexity that arises from the multiple sources of law which are relevant to tenancies.<sup>135</sup>

Registration can reduce the informational asymmetry which disadvantages the tenant. Listing the landlord’s contact details on a register would aid the tenant in contacting the landlord when problems arise. The tenant could also check if they were uncertain as to whether the person they are dealing with is in fact the landlord and not actually another tenant or someone else without the proper authority to grant a lease.<sup>136</sup> Tenants are thereby put in a more informed position vis-à-vis the landlord.

However the benefits of communication should not be overstated. Communication is simply a means of indirectly putting pressure on private landlords to influence their behaviour.<sup>137</sup> Information once communicated may be disregarded or forgotten. Further it may be largely redundant given that under the present regime many landlords lodge a bond with MBIE or provide an address to the tenant and are therefore potentially contactable.<sup>138</sup> Nevertheless a greater level of communication between private landlords and the State by

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<sup>132</sup> Ibid at 3.2.4.

<sup>133</sup> See Lees, above n 130 at 2.5

<sup>134</sup> See discussion at IIB.

<sup>135</sup> IVA1.

<sup>136</sup> This is important because under s5 of the Residential Tenancies Act flat mates and tenants living in the same property as their landlord or the landlord’s family are excluded from the protections of the Act.

<sup>137</sup> See Morgan, above n 126, at 3.2.4.

<sup>138</sup> All landlords are required to lodge bonds under s 18 of the Residential Tenancies Act, approximately 500,000 bonds transactions take place each year see Paul Davies “Residential Tenancies Act 1986 Compliance Unit – its role and function” (paper presented to the Christchurch Housing Forum, Christchurch, June 2014).

virtue of the former's registration may still facilitate greater education of landlords and reduce breaches of tenancy legislation.

A key weakness identified in the current regulatory framework is the lack of interim options for tenant.<sup>139</sup> This means that tenants can only avail themselves after a serious breach has occurred. A scheme where registration is contingent on the property passing inspections would enable the regulator to identify issues with housing quality long before the tenant must file a complaint or the costs of repair have become too expensive for the landlord to repair. A study of Greensboro, North Carolina where a rental property registration schemes operates, saw a 61% decrease in complaints from tenants after two years of the scheme operating.<sup>140</sup> A decrease in residential fires was also observed, a result that may be linked to practices such as inspectors checking fire alarms and wiring.<sup>141</sup> Greensboro illustrates the effectiveness of a scheme which has the oversight to target issues before they result in harm to the tenant or conflict between the landlord and tenant.

### **3 Enforcement**

A scheme requiring the registration of all landlords or rental properties could give the State a range of enforcement options to manage compliance that are not available under the current complaint-based system. It is important that the regulator has enforcement options which are legally and politically appropriate to meet the degree of uncooperativeness from the regulated group.<sup>142</sup>

#### **i Late registration fees**

Late registration fees are charged to landlords who apply to register after the required time frame to register has lapsed. Such landlords undermine an accurate and comprehensive register. In Ireland the late fee is twice the standard fee to register.<sup>143</sup> Because these landlords have ultimately complied with the scheme, they represent a low level of uncooperativeness

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<sup>139</sup> See discussion at IVAIL.

<sup>140</sup> Way, Heather K., Stephanie Trinh, and Melissa Wyatt, *An Analysis of Rental Property Registration in Austin*. (Prepared for Green Doors, Austin, Texas, July 2013) at 2.

<sup>141</sup> Ibid.

<sup>142</sup> See Morgan, above n 126, at 4.3.

<sup>143</sup> "Registration FAQ's" Private Residential Tenancies Board <<http://www.prtb.ie/landlords/helpful-info-documents>>.

and this should be reflected in the reasonableness of the additional fee. Given that the introduction of a mandatory registration scheme would represent a major change to how landlords lease their property in New Zealand, due regard should be had to allow time for the mostly amateur landlord population to adjust.<sup>144</sup>

Nevertheless ignorance of the law does not excuse. A late fee is a justifiable incentive for landlords to register early; it does not pose a significant restriction on a landlord's ability to lease their property. Further in jurisdictions like Scotland prior warnings are always served on the landlord, so it is understandable that authorities in most cases do not allow late fees to be waived or challenged by landlords.<sup>145</sup>

## **ii Removal of a subset of the landlord's rights**

Where the threat of a late registration fee is insufficient to compel compliance, the regulator is justified in taking more coercive steps to require cooperation. The next step in a number of regulatory schemes has been to remove a number of the rights landlords would otherwise have. Scotland's Rent Penalty Notice takes away a landlord's right to collect rent while the notice is in force.<sup>146</sup> Since rent payments are a landlord's main income from leasing their property, this represents a severe financial limitation on the landlord.

Can such notices be effective against an errant landlord when it is the tenant who is called upon to refuse the landlord rent? As discussed earlier, the suggested move away from tenants as enforcers is based on their limited ability to challenge a "bad" landlord.<sup>147</sup> A landlord, who has already refused to register, may similarly disregard a rent penalty notice. A tenant who attempts to rely on such a notice is likely to face significant pressure and intimidation from their landlord for doing so.<sup>148</sup>

Because of its restrictive nature, it is fair that a Rent Penalty Notice is appealable and that rent is backdated if the notice is found to have been served in error.<sup>149</sup> This raises significant problems for tenants who have relied on the notice and no longer have the funds to pay back

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<sup>144</sup> See Department of Building and Housing, above n 1, at 17.

<sup>145</sup> See Lees, above n 130 at 2.51.

<sup>146</sup> Antisocial Behaviour etc. (Scotland) Act 2004, s 94.

<sup>147</sup> See above at IV A III.

<sup>148</sup> See Lees, above n 130, at 2.53.

<sup>149</sup> Antisocial Behaviour etc. (Scotland) Act, s 97.

the rent presently owing.<sup>150</sup> The challenges tenants have in relying on Rent Penalty Notices undermine the ability of these notices to influence the behaviour of landlords.

Similar enforcement measures enacted elsewhere have the potential to put tenants in a difficult position. In Mesquite, Nevada an unregistered landlord is not able to have water services connected.<sup>151</sup> In Ireland, unregistered landlords cannot receive the rent-supplements meant to make it easier for poorer members of the population to pay their rent.<sup>152</sup> These enforcement approaches may not appreciate that it is the tenant who suffers the most for the landlord's noncompliance in that they are the ones potentially being forced to go without water or having to pay full rent. These measures seek to push tenants out of the properties of non-compliant landlords, but do not recognise that this may be a difficult option for the tenant.

### **iii Criminal law**

If other options are exhausted, the State may look to prosecute landlords. Criminal law uses the threat of public censure, financial penalties and potentially a restriction of a person's liberty to compel compliance.<sup>153</sup> The use of these substantial punishments to enforce registration may be disproportionate if criminalisation is justified on the basis that harm is caused to others.<sup>154</sup> However criminalisation can also be justified on the basis that harm is highly likely to result from the activity as can be seen from crimes such as drink-driving or speeding. The consequence of a landlord failing to register falls into this latter category and aligns well with tenancy as a latent health and safety issue because it recognises the risk poorly managed properties pose to the public.<sup>155</sup>

However the use of criminal penalties on landlords who fail to meet the requirements of the scheme can be problematic. This is illustrated by a number of the rental property registration schemes that operated in the United States. Under such schemes, all landlords

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<sup>150</sup> Arneil Johnston *Good Practice Review of the implementation of Landlord Registration* (The Scottish Government, January 2008) at 7.2.

<sup>151</sup> See Way, above n 140, at 19.

<sup>152</sup> Department of Social Protection "Key areas of reform in new Social Welfare Bill" (press release, 19 November 2010 at 1.

<sup>153</sup> See Morgan, above n 126, at 4.4.

<sup>154</sup> *Ibid.*

<sup>155</sup> See discussion at III.E.

had to have their properties inspected before they could be registered.<sup>156</sup> The schemes imposed a criminal penalty on landlords or tenants who refused entry to the officials who completed the inspections.<sup>157</sup> This was found to be in breach of Fourth Amendment protections against unreasonable searches, landlords were being criminalised for not submitting to what were in effect warrantless searches.<sup>158</sup> Developments in the United States suggest that simple noncompliance with the obligation to register may not be enough by itself to justify criminal penalties. There must be something more that points to the fact that the particular landlord leasing their property poses a threat to others by doing so.

The schemes that were deemed unconstitutional were later amended to allow landlords and tenants to legally refuse searches, and if they did so, inspectors would be required to seek a warrant.<sup>159</sup> Even so the protection from unreasonable searches afforded by the warrant process is nominal at most. The Supreme Court has held that specific knowledge of the condition of the particular dwelling is not necessary for inspectors to be granted a warrant.<sup>160</sup>

The meaningfulness of prosecution as a deterrence is challenged by the difficulties authorities have had in bringing claims against landlord. In 2010 it cost the Edinburgh Council between £2000 and £3000 to successfully prosecute an unregistered landlord who failed to register three of his properties.<sup>161</sup> The landlord was fined only £65 for each property.<sup>162</sup> Another challenge to successful prosecutions is the significant numbers of tenants who are unwilling to give evidence against their landlords for fear of repercussions.<sup>163</sup> As has been already described there are significant difficulties in defining and punishing landlord retaliation.<sup>164</sup>

The cost and associated challenges in gathering evidence may mean that it is not feasible for regulators to comprehensively prosecute non-compliant landlords. New Zealand could consider giving regulators wide investigatory powers to gather evidence and to prosecute

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<sup>156</sup> *Camara v. Municipal Court of City and County of San Francisco* 387 U.S. 523 (1967) at 386-7.

<sup>157</sup> *Ibid* at 387.

<sup>158</sup> U.S. Const., amend., IV

<sup>159</sup> *Tobin v. City of Peoria* 939 F.Supp. 628 (1996) at 634.

<sup>160</sup> See *Camara*, above n 156, at 386

<sup>161</sup> Scottish Parliament Local Government and Communities Committee. *Official Report (10 November 2010)* col 3694.

<sup>162</sup> *Ibid*.

<sup>163</sup> See Lees, above n 130, at 2.10.

<sup>164</sup> See IVA3i

landlords. Otherwise an ineffective prosecution process would mean that criminal law becomes less of a deterrent and therefore lacking in power to alter the behaviour of landlords who are intent on avoiding registration.

Again the use of criminal law demonstrates how the pressure on tenants to give evidence or to submit to arguably invasive searches means that the burden of enforcing tenancy law does not substantively shift from the tenant under the current regime to the State under the proposed registration scheme.

#### **iv Deregistration**

The ultimate enforcement tool regulators have against uncooperative landlords is to take away their rights to be a landlord by refusing to register them. Despite it being the regulator's most powerful tool, it is rarely used. In the first seven years that landlord registration operated in Scotland only 40 landlords were refused registration.<sup>165</sup> This cannot reflect the number of "bad" landlords in a sector when hundreds of thousands of landlords operate.<sup>166</sup> Similarly in Richardson, Texas, the city inspected nearly 700 properties in 2012 and only one property failed to pass.<sup>167</sup>

One reason for low rates of deregistration may be because it is seen by regulators as "a last resort," only to be used in the most serious cases.<sup>168</sup> If it is continually viewed as such, the rule risks lapsing into disuse, with uncooperative landlords disregarding it as a mere bluff. A more optimistic analysis would be that the low rates of deregistration can be explained by the fact that regulators, as has been seen above, have a series of increasingly coercive tools that follow the increasing uncooperative landlord. Therefore it could be said that many noncompliant landlords have already yielded in the face of increasing pressure from the State before they reach the point where deregistration is necessary.<sup>169</sup>

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<sup>165</sup> David Lawrenson "Scottish Landlord Registration Scheme Fails and Implications for the Rest of the UK" (30 January 2013), Letting Focus, <<http://www.lettingfocus.com/blogs/2013/01/scottish-landlords-registration-scheme-fails-and-implications-for-the-rest-of-the-uk/>>.

<sup>166</sup> Ibid.

<sup>167</sup> Matthew Watkins "Landlord and tenant fight Richardson's rental registration rules" (11 December 2012) The Dallas Morning News <<http://www.dallasnews.com/news/community-news/richardson-lake-highlands/headlines/20121211-landlord-and-tenant-fight-richardsons-rental-registration-rules.ece>>

<sup>168</sup> See Arneil Johnston, above n 147, at 6.

<sup>169</sup> Shelter Scotland *Landlord Registration: three years on* (Shelter Scotland, April 2009) at 8.

While deregistering landlords or the landlord's property is designed to protect tenants from poor property management, this action directly displaces their tenant through no fault of their own. This may have a serious effect on family life or the tenant's work life. A way Scotland has tried to mitigate this consequence is by requiring deregistered landlords to end their tenancy according to their agreement with the tenant.<sup>170</sup> However if a landlord has a fixed term arrangement with the lease continuing to the end of the year or longer, this could mean that an unregistered landlord can continue leasing his property for a significant time after deregistration. A suitable response may be to set a statutory maximum period for which a landlord can continue to lease their property following deregistration. Nevertheless there remains a conflict between respecting the tenant's contractual rights to stay in a property and efficiently removing "bad" landlords from the sector.

## **v Conclusion**

The proposed regulatory shift from a complaint based system to one where the State uses the framework of registration to regulate landlord behaviour was thought to relieve tenants of the burden of being enforcers. Arguably this has not been seen. As the regulator imposes stricter obligations on the landlord under the registration scheme, the results is an increasing burden on the tenant to the point where they are displaced from the property itself.

### ***C Structuring a registration scheme***

#### ***1 Legitimacy***

The effectiveness of a rule can be determined by how well it is received by those whose behaviour it purports to influence.<sup>171</sup> If a rule is perceived as unfair, unreasonable or

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<sup>170</sup> "About landlord registration" Shelter Scotland

<[http://scotland.shelter.org.uk/get\\_advice/advice\\_topics/renting\\_rights/landlord\\_registration/about\\_landlord\\_registration#8](http://scotland.shelter.org.uk/get_advice/advice_topics/renting_rights/landlord_registration/about_landlord_registration#8)>.

<sup>171</sup> See Stewart, above n 49 at 3.10.

otherwise unjust, the potential response from the regulated group could range from criticism and resistance to disobedience.<sup>172</sup>

The fairness or justice of a rule on a group can be calculated by reference to whether the rule helps that group reach their goals.<sup>173</sup> The somewhat irreconcilable problem identified within the tenancy relationship is that landlords and tenants are pursuing different and conflicting goals.<sup>174</sup> The landlord wants rules that help them to earn money and to save expenses incurred from the tenancy.<sup>175</sup> While the tenant wants rules that help them get value for their rent payments by making the landlord incur expense to make the rental property more amenable.<sup>176</sup>

Therefore a key issue challenging the legitimacy of registration is the perception that it unfairly favours one of the parties to the tenancy agreement over the other. New Zealand in particular has a history of tenancy regulation being criticised as “pro-tenant”.<sup>177</sup> The Property and Equity Committee in their investigations of the PRS found that landlords:<sup>178</sup>

seem[ed] to believe that the power of the State [was] being directed against them as a social class.

The potential for this feeling of bias to manifest in uncooperative and evasive behaviour is demonstrated by the following excerpt from this 1984 newsletter of the Landlords Protection Association Inc., Auckland:<sup>179</sup>

Avoid approaching the Housing Corp.<sup>180</sup> for advice since it will be slanted in favour of the tenant. Do not discuss your ideas and affairs with any officer as you may entrap yourself. Do not answer questions put to you by their officers should they ring you but find out all you can without disclosing anything and then require it sent to you by letter. If summonsed do not plead guilty but have your lawyer engender delay by using the blockages in the judicial system. If your lawyer won't play that game or is not helpful then ring your Association and we will give you the name and telephone number of our honorary barrister and solicitor.

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<sup>172</sup> Ibid at 3.10.

<sup>173</sup> See Morgan, above n 126 at 3.2.5.

<sup>174</sup> See discussion above at III.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> See Property and Equity Law Reform Committee, above n 117, at [10].

<sup>178</sup> Ibid.

<sup>179</sup> Landlords Protection Association Inc. Auckland. Newsletter. June 1984 at 4.

<sup>180</sup> Today known as the Ministry of Business, Innovation and Employment (MBIE)

Be clever and do not raise rents in breach of the regulations, simply adopt a new approach and do things outside the scope of the regulations.

This newsletter was circulated before the RTA and its amendments were passed so may be of limited usefulness in reflecting the feelings of landlords towards the current regime. However what it does show is how conflict has arisen because of the different ways the tenancy agreement is interpreted by landlords and tenants.<sup>181</sup> On a general level it illustrates the importance of the regulated group accepting the proposed regulations as fair and just. If regulations are not accepted as such then, as this newsletter suggests, the regulated community may attempt to avoid or otherwise undermine the regulator.

The legitimacy of registration, in its mandatory form, may be attacked as unjust by landlords because of the comparatively few benefits it brings to them as compared to tenants. While a landlord being on the register gains the reputational benefit of being seen as having met the register's standards by potential tenants, registration represents an additional cost to property investors. Not only in registration fees but also in the money spent in order to meet the standards required for registration.

Deregistration, from a mandatory scheme, has the drastic effect of preventing a landlord from leasing their property and being criminalised if they persist in doing so. The process of registration represents added bureaucracy for landlords where there was previously none. Commenting on mandatory insulation, Andrew King of the Property Investors' Federation used the analogy of the "stick and carrot" approach to influencing behaviour. He argued there was no reward (carrot) to counterbalance the punishment (stick).<sup>182</sup> A similar argument could be made against requiring landlords to register before they lease their property.

A related argument from the landlord's perspective is that mandatory registration is an unfair limit on the freedom of "good landlords" in order to deal with the small number of "bad landlords". A commenter from Penn Hills, Pennsylvania, where a registration

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<sup>181</sup> See above at III.

<sup>182</sup> Ibid.

ordinances has been passed by the council, thought that “it's a shame good landlords are going to get hit”.<sup>183</sup>

However it is not entirely accurate to portray the PRS as a conflict between good and bad landlords or for that matter, commercial and “mum and dad” landlords. The groups are all unified by the objective fact that they are in the business of leasing property to the public. Differences in quality are tempered by a subjective lens that the law cannot fairly distinguish upon without introducing unnecessary uncertainty. For example saying that commercial landlords are those who lease more than five properties and the rest are amateur begs the question why “five properties” is decided upon as being the basis for a distinction that does not objectively exist. The principle of rule of law requires that rules apply equally to all.<sup>184</sup>

The response that tenants are treated differently, in that they do not have to register, can be dismissed by reference to the fact that landlords and tenants play inherently different roles. It has been seen that landlords play a public role in that they are delegates of the State, while the tenant is limited by their personal interest in the housing.<sup>185</sup>

## 2 *A public register*

Registration may also be attacked as an illegitimate restriction on the basis that it represents a threat to the landlord’s privacy in that information about a landlord or their property is published on a register. The landlord has little choice as to who sees the information, and if they want to be a landlord, then they have to agree to the release of this information.

Arguably the information on the register needs to be public to allow viewers to make judgments about the landlord. This is potentially harmful if details on the register are listed incorrectly or there is a delay in details being updated. Another fear is that information on the register could be used for improper purposes such as stalking and other reasons unrelated to

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<sup>183</sup> Kelsey Shea “New Penn Hills ordinance draws opposition from landlords” (21 June 2015) Triblive <<http://triblive.com/neighborhoods/yourpennhills/yourpennhillsmore/8585336-74/ordinance-landlords-hills#axzz3jVjzainw>>

<sup>184</sup> Tom Bingham *Rule of Law* (Penguin Books, London, 2011) at 2-3.

<sup>185</sup> See discussion at III.

the tenancy.<sup>186</sup> Yet an official register may be preferable to the status quo of amateur “bad landlord” or “bad tenant” websites where reviews are based on opinion rather than an objective process conducted by the State.<sup>187</sup>

The intended purposes of a public register include tenants being able to use it to identify and contact their landlords if there is a problem.<sup>188</sup> This is particularly an issue where an oral agreement is made or contact addresses are lost or changed. It assures tenants that who they are dealing with has the authority to gain a lease and that they are living in a compliant property or under a “fit and proper” landlord. Information on the register gives greater power to the State to investigate problems in the private sector.<sup>189</sup>

Some schemes have adopted methods to limit improper use of the register. Scotland may not have done so very effectively. Anyone who knows the address of a rental property registered under the scheme can enter those details into the search engine on the scheme’s website.<sup>190</sup> The results which are returned are the landlord’s name, whether the landlord has any repairing standard enforcements outstanding and a contact address.<sup>191</sup> Such information arguably needs to be made available to the public generally to prevent a prospective tenant moving into a property which does not meet quality standards. The publication of landlord’s address can be seen as necessary for the service of documents relating to the tenancy or Tribunal proceedings. Yet one cannot search by using the landlord’s name by itself, the postcode from one of their rentals must be identified as well.<sup>192</sup> This may have some impact on preventing speculative searches.

Inefficiencies in updating the website to reflect landlord’s compliance may be unfair on the landlord. A tenant who sees that the landlord is yet to be registered may infer that the landlord does not meet the requirements of registration. Given the size of the PRS in New Zealand, a drastic action such as requiring the registration of all landlords will undoubtedly

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<sup>186</sup> Privacy Commissioner “Review of the Privacy Act 1993: Public Register Submissions” at 3.

<sup>187</sup> See Helena Harbrow, above n 34, at 596-600.

<sup>188</sup> Andy Sawford (25 October 2013) 569 GBP D HC at 592.

<sup>189</sup> Ibid.

<sup>190</sup> The Scottish Government “Public Searches” Landlord Registration Central Online System for Scotland <<https://www.landlordregistrationscotland.gov.uk/Pages/Home.aspx>>

<sup>191</sup> Ibid.

<sup>192</sup> The Scottish Government “Searching” Landlord Registration Central Online System for Scotland <<https://www.landlordregistrationscotland.gov.uk/Pages/Process.aspx?Command=ShowHelpSearchSite>>

mean that processing delays will develop such as those that continued for at least four years when landlord registration came into effect in Scotland.<sup>193</sup>

In contrast the Republic of Ireland's tenancy register cannot be used by members of the general public to identify a landlord, excepting the present tenant.<sup>194</sup> A neighbor who wishes to contact a landlord to resolve a matter directly affecting the neighbor may, on application to the registrar, be given the contact details of the landlord.<sup>195</sup> Such a case may be in order to make a noise complaint against the landlord's tenant. This scheme's narrow focus protects the landlord's right to privacy, while respecting the interests of third party affected by the operation of the tenancy. The one disadvantage of this narrow focus is the inability of prospective tenants to confirm the status of the landlord whom they seek to sign a tenancy agreement with.

### ***3 What is registered?***

Two examples of registration are landlord registration in Scotland and rental property registration in the United States. Evaluating how well these schemes meet their regulatory goals may provide insights into how New Zealand could structure their own registration scheme.

The two systems pursue distinct regulatory goals. Landlord registration has aims to alter the behaviour of landlords who advertently or inadvertently breach tenancy law. This is purported to be achieved by the regulator ensuring that only landlords who are "fit and proper" persons are allowed to lease their property. Rental property registration seeks to lift the quality of housing in the PRS by requiring all rental properties to meet a certain standard. The necessary corollary being that all properties in the PRS are routinely inspected.

#### **i Landlord registration in Scotland**

The main issue with requiring the registration of landlords is that it may not be clear who actually manages the property. The landlord may use an agent or give a tenant the authority

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<sup>193</sup> See Lees, above n 130, at 3.10.

<sup>194</sup> Private Residential Tenancies Board "Published Register" Private Residential Tenancies Board <[https://portal.prtb.ie/public\\_registrations.aspx](https://portal.prtb.ie/public_registrations.aspx)>

<sup>195</sup> See Morgan, above n 126, at 4.3.2.1

to sub-let the property. The interchangeability of personnel may mean that while the person listed on the register formally meets the requirements of the register, the reality is that another, potentially unscrupulous, person is managing the property.

In Scotland agents are not legally obligated to register but the landlord must register and if they are using an agent, this fact must be disclosed to the registrar as well as proof that the agent is a “fit and proper” person.<sup>196</sup> A weakness in this scheme arises from the fact that a landlord who would otherwise fail the “fit and proper” test can still be accepted for registration if it satisfies the registrar that their use of an agent will lead to fit and proper letting for the tenant.<sup>197</sup>

While there are checks on the actual property manager, the Scottish scheme may underestimate the influence the landlord has over their agent. The fact that the property manager is employed by the landlord introduces a conflict of interest which may impede the agent in managing the property in a fit and proper manner. This may be true where the agent is a friend or family member. Further the agency contract itself may be set up in a way that severely limits the ability of the agent to manage the property independently of the landlord. However the Scottish scheme does make clear that there may be some landlords who will not be accepted even with an agent.<sup>198</sup>

*a. Requirements on registration – the fit and proper person test*

There are issues around what should be required of a landlord and/or their agent before they are accepted for registration. As has been referred to above, Scotland uses the standard of “fit and proper” person as a ‘hurdle’ to registration. The assessment is made by the local authority where the landlord intends to lease their property. The following evidence is relevant:<sup>199</sup>

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<sup>196</sup> Antisocial Behaviour etc. (Scotland) Act 2004, s 88.

<sup>197</sup> “How Does the Fit and Proper Test Work?” The Scottish Government  
<<http://www.gov.scot/Topics/Built-Environment/Housing/privaterent/landlords/registration/fit>>

<sup>198</sup> Ibid.

<sup>199</sup> See “How Does the Fit and Proper Test Work?”, above n 197.

- offences involving fraud, dishonesty, violence, drugs, discrimination, firearms, or sexual offences
- breaches of law relating to housing and letting
- failure to act in relation to antisocial behaviour; or antisocial behaviour by the landlord, the tenant, or at the property
- breaches of the repairing standard
- concerns and other information which come to the local authority' s attention in relation to a property, through its other functions.

The above suggests an approach which regards past behaviour as an accurate predictor of future behaviour, a particular focus being on preventing repeat offenders from registering. This focus may help remove the worse landlords from the sector but only once they are identified as such. Problematic landlords who pressure tenants into settling in private or resolving disputes through mediation may remain undetected. There is also the risk that landlords give false information about their history, but authorities under the Scottish scheme do have the power to require a criminal record certificate or to otherwise investigate if suspicions arise.<sup>200</sup> While the focus is primarily on the behaviour of the landlord, the relevance of breaches of the repairing standard to eligibility for registration potentially has positive flow on effects for housing quality in the PRS.

A barrier to the “fit and proper” test being an acceptable means of regulating landlords is that it is ultimately a subjective judgment, weighing up the different factors. This means that what is “fit and proper” to one person is different from what is “fit and proper” to another. Without a consistently applied test, there is less confidence that those listed on the register will maintain the confidence of tenants generally.

This problem is demonstrated in Scotland where there has been inconsistency in how the “fit and proper” test is applied by the different local authorities.<sup>201</sup> The result is that landlords can

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<sup>200</sup> Private Rented Housing (Scotland) Act 2011, s 2.

<sup>201</sup> See Johnston, above n 150, at 4.1

be authorised to lease their property in one area but be denied to do so in another area.<sup>202</sup> However local authorities are encouraged to share information on applicants which decreases the chance that decisions are made on a local authority having a lack of information.<sup>203</sup> The problem of inconsistent application may be mitigated in New Zealand if a centralised system of registering landlords was adopted.

While looking at the past behaviour of the landlord may help to reduce the number of landlords who intentionally breach tenancy law, it may not be as effective in protecting tenants from first-time landlords who inadvertently breach tenancy law through ignorance or inexperience. This is an issue for New Zealand given the large number of “mum and dad” landlords and the compliance difficulties identified above.<sup>204</sup>

An alternative may be to require landlords to pass a rudimentary test of their knowledge of tenancy law before they are allowed to lease their property to the public. This would serve as an indication and assurance that prospective landlords have a basic understanding of their rights and obligations. Provided that the answers to the test are unambiguous, this option may be able to be more consistently applied than a subjective analysis of the landlord’s character as knowledge of tenancy law can be objectively determined through multi-choice tests. However this testing would only address the behaviour of inadvertent offenders and would do little to stop advertent offenders for which the “fit and proper” test remains superior at dealing with.

Because of the investigation necessary to assess whether a landlord is “fit and proper” administrative delay has been a main challenge facing landlord registration in Scotland.<sup>205</sup> This has created tensions with the landlords awaiting registration.<sup>206</sup> A test of tenancy law, particularly an online multi-choice test could be processed almost immediately, enabling a landlord to proceed with its registration. The results of tests, such as commonly wrong

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<sup>202</sup> See “How Does the Fit and Proper Test Work?”, above n 197.

<sup>203</sup> Ibid

<sup>204</sup> See discussion above at IIB and VAIII.

<sup>205</sup> See Johnston, above n 150, at 3.3.6.

<sup>206</sup> David Lawrenson “Scotland Landlord Registration Scheme Review Makes Grim Reading” (5 December 2011) Letting Focus <<http://www.lettingfocus.com/blogs/2011/12/scotland-landlord-registration-scheme-review-makes-grim-reading/>>

answers, could provide valuable information on the sector that could be used to inform the State of problem areas.

*b. Conclusion*

The Scottish system of landlord registration faces obstacles in influencing the behaviour of landlords who lease their properties. This is because of the inconsistency in which the “fit and proper” person test is applied and the ease at which a change in personnel can cloud the identity of the true, and potentially less scrupulous, property manager. Rental property registration improves on these two drawbacks albeit it does so in the pursuit of quality housing rather than the influencing the behaviour of landlords.

**ii Rental Property registration in the United States**

The regulator could focus on registering the rental property subject to it meeting certain standards of quality. This would necessitate widespread inspection of properties in the PRS, an expense which is commonly perceived as excessive.<sup>207</sup>

*a. Justifications*

Rental property registration is advantageous for the regulator because it does not give rise to the difficulties landlord registration has in defining its subject matter. In the absence of the landlord fraudulently or mistakenly registering the wrong address, registration of rental property locates a readily discoverable and immutable asset.

In terms of reaching the regulatory goal of quality housing, rental property registration is a direct and thus efficient way of regulating. Ensuring a house meets a certain standard is a methodical task; it could be achieved by reference to a checklist. In contrast suitability of a person to managing a property is a much more difficult quantity to measure. If housing quality is one of the goals of landlord registration, it is an indirect one at best, relying on the promise that improved property management will manifest itself in better housing in the PRS. Rental property registration achieves this result in a more direct fashion.

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<sup>207</sup> See Small, above n 59.

Requiring the registration of the rental property can be justified on the basis that it asks no more of the landlord than for them to prove to the State that they are abiding by pre-existing obligations under the RTA. Specially, the obligation to provide and maintain the premises in a reasonable state of repair and the obligation to comply with the requirements in respect of building, health, and safety laws.<sup>208</sup>

In contrast landlord registration sees the regulator making decisions, not necessarily as a response to an outstanding breach of the RTA, but from a subjective assessment of the landlord's history. From a critical perspective the scheme could be seen as punishing landlords twice for their offences, particularly in cases where registration can be revoked on the basis of offenses unconnected to property management as is the case in Scotland.<sup>209</sup>

#### *b. Inspections*

Under the rental property registration schemes in the United States, inspection is controversial condition of registration. Requiring that all rental properties must be inspected before they can be leased and inspected regularly hence is arguably a substantial intrusion on the property rights and privacy of tenants and landlords. The repugnancy of this measure to rule of law principles arises from the state not needing evidence of non-compliance or a breach of tenancy law to carry out such inspections.

Yet tenancies raise potential health and safety issues and similar inspections are conducted in relation to places where food is sold.<sup>210</sup> However arguably there is a greater expectation to privacy in a rental property than in a restaurant based on the fact that the former is a private residence, while the latter is open to a potentially large customer base. Notably inspectors under the Food Act 1981 are expressly forbidden from entering and inspecting dwellinghouses.<sup>211</sup> This may be taken to illustrate that while rental property is technically the site of the landlord's business, so to speak, it is distinct from other businesses in the eyes of the law.

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<sup>208</sup> Residential Tenancies Act, s45(1)(b).

<sup>209</sup> See Antisocial Behaviour etc. (Scotland) Act 2004, s 85(2). The Registrar may consider any offence involving fraud or other dishonesty, violence or drugs.

<sup>210</sup> Food Act 1981, s 12.

<sup>211</sup> At s 12(2)(a).

Section 21 of the New Zealand Bill of Rights 1990 provides a protection from unreasonable search and seizure. The section involves balancing public interests against private interests.<sup>212</sup> As discussed above, tenants increasingly conceive the tenancy as being their private home and it well established that reasonable expectations of privacy are higher in the home than in public places.<sup>213</sup> It is natural that tenants should want to keep private the contents of their home and their personal and family activities free from intrusions by the State.<sup>214</sup>

However the tenant's reasonable expectation to privacy must be lower than that of individuals who live in owner-occupied homes. The tenant is under the present New Zealand regime obliged to allow access to their landlord and his or her agents to inspect the property, to check if the tenant has completed work and to do maintenance work.<sup>215</sup> The tenant does not have a right to refuse the landlord entry if the landlord has given the required notice.<sup>216</sup> Nevertheless both owner occupiers and tenants consider where they are living as their home and it seems unfair to discriminate on the basis of tenure.

There is a real concern that if inspectors have the authority to test rental property for housing quality they will report the tenant for things unrelated to their mandate.<sup>217</sup> Inspectors are put in the compromising position of respecting a tenant's privacy or ignoring unacceptable conduct. Therefore despite legislation preventing the disclosure of certain information about the tenant, the reality is that there is a risk that such information could nevertheless be leaked to others in gossip or to the media.<sup>218</sup>

Red Wing, Minnesota, where rental property registration operates, promises landlords and tenants that the City will generally not share information about the rental property or its

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<sup>212</sup> Bill of Rights Act 1990, s 21.

<sup>213</sup> See discussion at IIIC and *R v Simmons* [1988] 2 SCR 872.

<sup>214</sup> Patrick J. Kelly and Bennett Evan Cooper "Brief of Amici Curiae Cato Institute, Reason Foundation, Minnesota Free Market Institute at the Center of the American Experiment, Electronic Frontier Foundation, and Libertarian Law Council in Support of Appellants" (27 September 2012) for *McCaughtry et al v City of Red Wing* 808 N.W.2d 331 (Minn.2011) at 5-6.

<sup>215</sup> Residential Tenancies Act, s 48.

<sup>216</sup> *Ibid.*

<sup>217</sup> See Kelly, above n 214, at 19-20.

<sup>218</sup> *Ibid.*

occupants obtained through inspections with any law-enforcement agency.<sup>219</sup> However exceptions are made in relation to methamphetamine labs and mistreatment of other people.<sup>220</sup> There is no principled reason why these offences and not others, such as burglary, are reportable by inspectors.<sup>221</sup> Such an arbitrary approach undermines the rule of law. Red Wing inspectors are also obliged to disclose information “as required by law”, which increases the range of information gained from inspections that can be used against the landlord or tenant.

The landlord has a much lower expectation of privacy of the rental property than the tenant. In most letting arrangements, they do not occupy the rental property. They are not able to exclude the tenant except in accordance to the tenancy agreement and the RTA.<sup>222</sup> Advertising the property generally and encouraging prospective tenants to inspect the property before signing a tenancy lowers the landlord’s reasonable expectation to privacy.<sup>223</sup> Further it is not reasonable for landlord to believe that they have an interest in keeping private the fact of their noncompliance with health and safety and building laws.<sup>224</sup> The conception of landlords as delegates of the State, suggests that landlords should submit to the quality checks the State would conduct if it was leasing the properties itself.<sup>225</sup>

There is a strong public interest in the State conducting inspections on private rental property. As has been expanded on above, New Zealand’s rental property is generally inferior to owner-occupied stock.<sup>226</sup> Therefore in the interests of health and safety, there is a need to inspect these properties. Further it has been seen that the complaints procedure under the RTA is insufficient to raise housing quality. Firstly tenants often lack the technical expertise to identify housing quality issues.<sup>227</sup> Secondly they lack the confidence to bring a claim with the threat of retaliation not assuaged by the RTA and thirdly they are primarily concerned with their personal interests, rather than the threat a noncompliant property has to the public

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<sup>219</sup> Rental Dwelling Licensing Code 2011, § 4.31, subd. 1(3)(q).

<sup>220</sup> *Ibid.*

<sup>221</sup> See Kelly, above n 214, at 19-20.

<sup>222</sup> Residential Tenancies Act, s 63.

<sup>223</sup> *Butcher v. City of Detroit*, 401 N.W.2d 260, 264 (Mich. Ct. App. 1986) (“Many inspections will occur just prior to sale when the structures are vacant and the owner’s expectations of privacy are relatively low.”)

<sup>224</sup> *City of Vincennes v Emmons*, 841 N.E.2d 155, 159 (Ind. 2006) at 7.

<sup>225</sup> See discussion at III F.

<sup>226</sup> See discussion at II C.

<sup>227</sup> See Way, above n 140, at 6.

generally.<sup>228</sup> The unreliability of the complaints process suggests a need for the State to inspect all properties in the PRS, not only those where there has been a complaint.

Clarity around what inspectors are authorised to examine is important so that landlords are given guidance as to what they need to do and so tenants and landlords do not feel that inspections are too invasive. The RTA obligation to provide the premises in a “reasonable state of repair” does not give sufficiently specific guidance to inspectors because, as has been discussed, the meaning of the word “reasonable” is open to conflicting interpretations.<sup>229</sup> Ambiguity in the inspector’s mandates creates a risk that the privacy interests of the tenant and landlord are unnecessarily infringed.<sup>230</sup> An example to follow may be that of Richardson, Texas where inspectors are given a list of 42 criteria to check the property against, with properties having to meet a certain score overall.<sup>231</sup> The criteria include checks on plumbing, electricity and sanitary conditions.<sup>232</sup> A list can clearly define what inspectors are to look at and provides an objective measure for deciding whether the property meets or fails the inspection.

Rental property registration should be structured in a way that infringes on private interests only so far as necessary to realise the public interest. One way to do this would be to follow the lead of Houston, Texas and limit inspections to the exterior of the property.<sup>233</sup> This would be a less invasive method of inspection, but the trade-off would be the information able to be gathered from such an inspection. A follow-up interior inspection could be justified on the basis that an inspector has a reasonable suspicion of issues or if the exterior inspection fails.<sup>234</sup> This would defeat criticism that entry into a tenant’s private residence is simply a “fishing expedition”.

Intrusions on privacy could also be minimised by conducting inspections only before the tenant moves in. However given that long-term accommodation is required by a number of tenants and that housing quality decreases overtime, there is a need to regularly inspect the

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<sup>228</sup> See discussion at IV A III

<sup>229</sup> See discussion at V A I.

<sup>230</sup> Residential Tenancies Act, s 45(1)(b).

<sup>231</sup> See Watkins, above n 167.

<sup>232</sup> Ibid.

<sup>233</sup> See Way, above n 140, at 12.

<sup>234</sup> Ibid.

property. Typically re-inspections in the United States are conducted every 3-5 years.<sup>235</sup> To respect the privacy of tenants there should be some flexibility in re-inspection dates to fit around the start and end of tenancies.

## ***VII CONCLUSION***

This essay suggests that in New Zealand market forces cannot by themselves improve property management in the PRS. Private landlords are in a powerful position vis-à-vis tenants with the nation's increasing reliance on the PRS due to declining rates of home-ownership and reduced social housing.

The increasing reliance on private landlords is a cause of concern because there are no restrictions on who can lease their property. This has meant that landlords who incompetently manage sub-standard properties have become a real problem. In the interests of the growing tenant population, property management standards need to be improved.

Having identified the issue, it was asked why the State should intervene in what are, in substance, private business transactions. It was argued that adequate housing is a commitment that New Zealand has assumed by virtue of adopting international law, that there is precedent for state intervention where there is an inequality of bargaining power and that tenancies create health and safety issues which it is in the public interest for the State to address.

Having evaluated New Zealand's current regulatory scheme it was found that the system is unsatisfactory as a means of lifting property management standards. The current system is undermined by the false assumption that all landlords competently manage their properties until a tenant's complaint suggests otherwise. The reality is that an amateur landlord population faces difficulties in complying with the various obligations imposed under tenancy law. A similarly unskilled tenant population are relied on to hold landlords accountable for their breaches, but it is clear that tenants are not competent to effectively carry out this responsibility.

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<sup>235</sup> See Way, above n 140, at 1.

What can be learnt from the current approach is that the State must play a greater supervisory role. Registration is put forth as a regulatory system that provides this necessary oversight. It requires regulators to be satisfied that the landlord or their property meet a certain quality and to remove them if they do not.

However there are difficulties with registration, in that it creates privacy concerns and added bureaucracy. Regulations must be considered as legitimate by the regulated community if it is going to create widespread compliance. There are also issues as to how the entry criteria for registration are to be applied in a consistent and accurate manner and how registration can be structured to lessen the burden that enforcement has on tenants.

Given the lacklustre reception to warrant of fitness proposals in the PRS from the government and landlords, a landlord-friendly registration scheme is considered the most realistic.<sup>236</sup> This scheme could be structured as follows:

Both landlords and their properties would be listed on a register which would be accessible to the public generally so that prospective tenants could base their expectations on the information held on the register. A rudimentary online test of the landlord's knowledge of tenancy law would be the only hurdle required of landlords pending their registration. The test would be able to be re-sat until a passing mark was achieved. The testing would have the advantages of being applied consistently, limiting the delay and costs of registration and illuminating key areas of confusion in the PRS.

Privacy concerns would be met by limiting inspections to the exterior of the rental property. But these inspections would be conducted regularly, every 3-5 years, with flexibility around tenancy start and end dates. Inspections would be against a list of pre-determined and publicised criteria.

Interior inspections would be conducted if the inspector has grounds to suspect non-compliance with tenancy law or the landlord voluntarily submits to an interior inspection.

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<sup>236</sup> Phill Goff "Phil Goff: Rental homes need a warrant of fitness to keep kids healthy" (14 June 2015) Stuff.co.nz.  
<http://www.stuff.co.nz/national/politics/opinion/69307464/phil-goff-rental-homes-need-a-warrant-of-fitness-to-keep-kids-healthy>

Whether an interior inspection has been completed would be apparent from the register as well as information as to when the last inspection was carried out and when the next inspection is scheduled. If a tenant is living in a property that fails its inspection, there would be a statutory period in which they could live at the property before having to move out.

The proposed system is a compromise in that it does not address landlords who advertently abuse tenancy law. However the educational and inspection aspects of the registration scheme are hoped to restore confidence in the PRS.

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