Mi Casa es Tu Casa: Exploring a Problem-Solving Approach to Landlord-Tenant Disputes at the Tenancy Tribunal

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I Introduction

Civil justice traditionally looks only at determining legal rights between parties. However, in other areas of the law there has been movement to use the court process not simply to determine rights, but to ameliorate the social problems that underlie the case. This includes movements towards therapeutic justice in the criminal courts and the use of problem-solving courts internationally.[1] In this dissertation, I use the example of New Zealand's Tenancy Tribunal and tenancy law to explore whether a problem-solving approach could be used to address the underlying social problems in a civil justice context. I use this example because tenancy issues tend to arise from a foundation of complicated social problems and power dynamics. The Tenancy Tribunal is also one of the most common legal institutions that the public interacts with, hearing more civil claims than any other civil court or tribunal.[2]

The Tenancy Tribunal has exclusive jurisdiction to hear all residential tenancy disputes. Of the 20,000 disputes it hears each year, 90 percent are brought by landlords against tenants, 75 percent of which relate to seeking payment for rental arrears.[3] If a tenant's rental payments are in arrears for more than 21 days, it is mandatory that the Tenancy Tribunal terminate the tenancy upon application by the landlord.[4] This requires the tenant to move, generating a large number of social problems associated with residential transiency including, in some cases, homelessness.[5] In addition, there are problems with the low quality of New Zealand's rental housing stock. Houses are often cold, damp and in poor state of repair.[6] In this dissertation I explore whether the Tenancy Tribunal could be used to address the social problems that underlie or result from the disputes that come through its doors: the residential transience generated by tenants not meeting rental payments and the low quality of housing stock.

Chapter I canvases the current Tenancy Tribunal model and how it operates within New Zealand's private rental sector. I will focus on the socioeconomic factors informing landlord-tenant relations in New Zealand, and the extent to which these are (or are not) addressed by the Tribunal currently. Whilst Housing New Zealand is frequently a party to Tenancy Tribunal cases, I will not be addressing the public housing sector. I also briefly introduce problem-solving jurisprudence to the extent it is applicable to a civil tribunal context.

In Chapter II, I look at how the Tenancy Tribunal might be used by tenants to improve, or at least monitor, the quality of rental housing stock in New Zealand. Drawing on models of problem-solving housing courts in the United States, I look at whether the Tenancy Tribunal could serve this broader problem-solving function in New Zealand and if so, what reform

[1] For New Zealand examples of specialist criminal courts, see Jan-Marie Doogue "Specialist Courts: Their time and place in the District Court" (2017) 905 LawTalk 30. For examples of problem-solving housing courts in the US, see Raymond L Pianka "Cleveland Housing Court – a problem-solving court adapts to new challenges" in *Future Trends in State Courts 2012* (National Centre for State Courts, Williamsburg, Virginia, 2012) 44; Jessica K Steinberg "Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court" (2017) 42 Law & Social Inquiry 1058. For problem-solving and therapeutic jurisprudence generally, see Michael King and others *Non-Adversarial Justice* (2nd ed, The Federation Press, Sydney, 2014).

[2] Courts of New Zealand "Annual statistics Specialist Courts and Tribunals June 2015" (June 2015) <www.courtsofnz.govt.nz>.

[3] Ministry of Business, Innovation and Employment *Reform of the Residential Tenancies Act 1986: Discussion Document* (2018) at 48.

[4] Residential Tenancies Act 1986, s 55(1)(a).

[5] Matthew Desmond and Rachel Tolbert Kimbro "Eviction's Fallout: Housing, Hardship, and Health" (2015) 94 Social Forces 295 at 299.

[6] Philippa Howden-Chapman *Home truths* (1st ed, Bridget Williams Books Limited, Wellington, New Zealand, 2015) at 72.

would be required to achieve this. Chapter III addresses the other major problem that generates tenancy disputes, rental arrears and the tenancy terminations that result. I examine the plausibility of introducing a problem-solving approach for these cases and what reform would be required for this to be effective.

Reforming the Tenancy Tribunal towards a problem-solving approach would not resolve all of the social problems that exist in the private rental sector. However, this approach may improve tenants' abilities to bring actions against their landlords for poor quality homes and may reduce levels of residential instability and involuntary displacement to some extent. A problem-solving civil justice approach is more likely to reap wider social benefits than the traditional adversarial model.

II The Status Quo – Renting in New Zealand and the Tenancy Tribunal

Before turning to look at whether the Tenancy Tribunal could become a problem-solving body, it is important to understand its current function. In this chapter, I look at the Residential Tenancies Act 1986 ("RTA") and the jurisdiction of the Tenancy Tribunal before outlining the social problems of poor housing conditions and residential transiency that are prevalent in New Zealand's rental sector. I include an evaluation of the extent to which the Tenancy Tribunal currently addresses these problems. I will also briefly introduce the jurisprudence behind the problem-solving approach, and how this jurisprudential model sits within the New Zealand civil justice context.

A Jurisdiction of the Tenancy Tribunal and the Residential Tenancies Act 1986

The Residential Tenancies Act 1986 ("RTA") was enacted to "reform and restate" residential tenancy law, especially regarding defining the rights and obligations of landlords and tenants.[7] This included establishing the Tenancy Tribunal to determine landlord-tenant disputes "expeditiously".[8] The Tenancy Tribunal is headed by a Principal Tenancy Adjudicator who must have held a practising certificate as a solicitor and/or barrister for at least five years.[9] All Tenancy Adjudicators ("Adjudicators") must hold a practising certificate as a barrister or solicitor or, in the opinion of the Minister of Justice, be otherwise suited to the Adjudicator position (i.e. by special knowledge or experience).[10] Throughout Part 3 of the Act, there is a strong focus on the "efficient and expeditious" resolution of disputes.[11]

The Tenancy Tribunal follows goals common to most tribunals, aiming to resolve disputes efficiently, substantially fairly, and encouraging a sense of finality.[12] The Tenancy Tribunal is required to operate in a manner "most likely to ensure the fair and expeditious resolution of disputes" and must consider "the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities".[13]

Hearings are typically open to the public[14] and parties are not usually entitled to legal representation.[15] All parties have a right to be heard, call evidence and conduct witness examinations and cross-examinations.[16] Aside from this, the Tenancy Tribunal has broad discretion and flexibility to "regulate its own procedure in such manner as it thinks fit".[17] Reinforcing these justice goals and limited procedural restrictions, Adjudicators presiding over any particular case "may give all such directions and do all such things as are necessary or desirable for the expeditious and just hearing and determination of the case".[18]

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[7] Long title.
[8] Long title.
[9] Section 67.
[10] Section 67(5).
[11] See, for example, sections 67(2)(c); 67(6)(b); 71(1); 72(3); 85(1); 95(5); 123(1)(da).
[12] Law Commission *Tribunal Reform* (NZLC SP20, 2008) at 5.
[13] Section 85.
[14] Section 95.
[15] Section 93. Section 93(2) entitles parties to legal representation if the other party consents; or, the dispute exceeds $6000; or, the case is conducted by the Chief Executive (see ss 124 and 124A). As per s 93(3), the Tenancy Tribunal has discretion to allow legal representation if the nature or complexity of the issues require it, or if there is a significant disparity between the parties affecting their ability to represent their respective cases.
[16] Section 93(1).
[17] Section 96(4).
[18] Section 96(5).

Section 77 of the RTA provides the Tenancy Tribunal with wide jurisdictional powers to resolve landlord-tenant disputes. Tribunal powers include, but are not limited to:[19] determining whether a residential premises and/or tenancy agreement exists for the purposes of the Act;[20] determining and making orders regarding entitlement to possession of a premises;[21] ordering payments to either landlord or tenant;[22] and ordering the landlord or tenant to do, or refrain from doing, anything necessary to remedy a breach.[23] The Tenancy Tribunal can also make orders "of a consequential or ancillary nature necessary to exercise or perfect the exercise of any of its jurisdictions".[24]

The Tenancy Tribunal has a monetary jurisdictional limit of $50,000, but parties may abandon the part of a claim exceeding this limit to bring it within the Tribunal's jurisdiction.[25] Orders can be in the form of declarations; orders for monetary payment; orders to yield possession; orders varying/setting aside agreements; and work orders.[26] Parties cannot limit or 'contract out' of the Tenancy Tribunal's jurisdiction.[27] Part 3 also establishes Tenancy Mediators who can assist parties to resolve their dispute without a Tenancy Tribunal hearing. Mediators can provide assistance in early dispute resolution via facilitating agreements between the parties. However, they cannot determine any matters in a dispute or exercise Tenancy Tribunal duties or powers.[28]

B Renting in New Zealand: Social Context

The Tenancy Tribunal does not exist in a vacuum. To be able to examine whether the Tenancy Tribunal can problem-solve, we need to understand the social problems that sit behind tenancy disputes. Poor housing conditions and residential transiency due to tenancy termination are key issues for tenants and contribute to a wide array of social problems. These social problems will be discussed in this section, including examining the Tenancy Tribunal's current approach to these issues.

New Zealand is experiencing a falling trend of home ownership as more people are finding renting to be the only attainable option.[29] Almost one third of households currently rent in New Zealand.[30] Eaqub and Eaqub state that approximately half of all individuals over the age of 15 live in rental properties in New Zealand.[31] With a lack of availability of social housing, the vast majority of non-home owners are renting from the private sector.[32]

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[19] See, s 77(2): "Without limiting the generality of subsection (1)…"
[20] Section 77(2)(a) and (ab).
[21] Section 77(2)(g).
[22] Section 77(2)(k).
[23] Section 77(2)(l) and (m)
[24] Section 77(2)(q).
[25] Section 77(5)-(8).
[26] Section 78. A work order is an order to make repairs and/or do work on the property (see, s 2 interpretation for full definition).
[27] Section 81.
[28] Section 76.
[29] Statistics New Zealand "2013 QuickStats about housing" (March 2014) <http://archive.stats.govt.nz> at 12. 54.5% of households own their home in 2006 compared to 49.9% in 2013.
[30] Shamubeel Eaqub and Selena Eaqub *Generation Rent* (Bridget Williams Books, Wellington, New Zealand, 2015) at 66.
[31] At 66.
[32] Statistics New Zealand, above n 29, at 15. In 2013, 83.7% of tenants rent from the private sector.

1 The problem with housing conditions

It is important to understand the societal ramifications of poor housing conditions and the power imbalance between landlords and tenants to be able to assess whether the Tenancy Tribunal could be doing more to uphold tenants' rights via a problem-solving approach. The RTA requires landlords to meet minimum housing conditions, establishes requirements for repairs and maintenance, and protects tenants from discriminatory behaviour. Despite the RTA setting out the legal rights and responsibilities for both landlords *and* tenants, Statistics New Zealand found that in 2014 and 2015, 67 percent of renters reported the need for maintenance or repairs on their homes.[33]

It is widely recognised that New Zealand has a problem with damp and cold housing, especially in low socioeconomic households.[34] Rental properties tend to be of significantly worse condition than owner-occupied homes.[35] Poor housing conditions lead to serious public health consequences including higher rates of respiratory disease and mental health problems.[36] Housing quality has been identified as a social determinant of serious infectious diseases, which correlates with ethnic and social inequalities.[37] Due in part to Māori, Pacific people, and socioeconomically disadvantaged groups being more likely to live in poor quality and overcrowded homes, these groups have a disproportionately high rate of poor health.[38] The result is that "one way or another, all taxpayers pay for the effects of poor housing, whoever owns or rents it".[39]

Bierre and others explore how the Tribunal applies minimum legal standards for rental housing quality.[40] The study found standards and application to be variable, especially regarding cold and dampness. The structural impediments to bringing a case before the Tribunal mean that "it is not clear that tenants can 'in practice' effectively enforce the rights that they theoretically hold in law".[41] Even if a tenant succeeds in proving the landlord failed to provide the premises to a reasonable state of repair, the solution is most likely to be a termination of a fixed-term tenancy and/or a compensatory award, as opposed to requiring the landlord to take positive steps to bring the property up to a habitable standard.[42]

The fact that the Tenancy Tribunal is almost solely used by landlords and almost entirely for the recovery of unpaid rent indicates that there is a "gap between legal rights and social

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[33] Statistics New Zealand "Perceptions of housing quality in 2014/15" (15 October 2012) <http://archive.stats.govt.nz>.

[34] Howden-Chapman, above n 6, at 72.

[35] See, for example, Statistics New Zealand, above n 33; 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 New Zealand Universities Law Review 1.

[36] Michael Keall and others "Assessing housing quality and its impact on health, safety and sustainability" (2010) 64 Journal of Epidemiology & Community Health 765.

[37] Michael G Baker and others "Increasing incidence of serious infectious diseases and inequalities in New Zealand: A national epidemiological study" (2012) 379 The Lancet 1112.

[38] Baker and others, above n 37.

[39] Howden-Chapman, above n 6, at 64.

[40] Bierre, Bennett and Howden-Chapman, above n 35.

[41] At 11.

[42] Furthermore, damp and mouldy home cases are sometimes dealt with under s 66 (unforeseen hardship), and other times under s 56 (condition breaches). The same problem may succeed under one ground and fail under another, yet adjudicators seldom seem to consider both options. At 19.

reality".[43] Landlords are extensively utilising the Tenancy Tribunal for its intended purpose of enforcing rights and obligations, whilst tenants are rarely using the Tenancy Tribunal at all. Bezdek looks at the deeply-rooted landlord-tenant power imbalance as a potential explanation for why tenants so seldom enforce their rights.[44] Merely having knowledge of statutory rights on paper does not automatically translate into the power to enforce those rights.[45] Chisholm and others interviewed tenant advocates to identify key issues with the RTA and Tenancy Tribunal that reinforce these problems.[46] Chisholm and others' findings supported the claim that the Tenancy Tribunal is a "toothless kitten designed to do very little for the tenant and even less to encourage landlords to improve their offerings".[47] Enforcing landlord responsibilities to maintain the quality of housing relies almost entirely on self-reporting. Maintaining a positive relationship with the landlord is "highly valued"[48] by tenants, contributing to a reluctance to go to the Tenancy Tribunal because tenants perceive the costs in time and energy to outweigh the low potential for reward.[49] Highlighting the socioeconomic inequalities outlined in housing and renting generally, tenant advocates reported that educational and cultural differences made it particularly difficult for some groups to access the Tenancy Tribunal.[50] For example, Pacific communities were reported to find it especially hard to speak up against a problematic landlord, and groups with low literacy or limited English often found the process too daunting.

Bezdek looked at the subordination of poor tenants in the United States and how class and race play into the landlord-tenant power imbalance.[51] Aside from fear of negative landlord response, Bezdek argued that a more deeply internalised reason why this subordinated tenant group did not attempt to enforce their legal rights was because they developed "personalised ethics of survival encompassing denial of an individuated intent by the perpetrator of the discrimination and a belief that 'toughing it out' demonstrates one's own moral courage".[52] This dynamic could also play into New Zealand's particularly poor standard of housing and low levels of reporting for Māori, Pacific and low-income communities. In a 2017 BRANZ report, it was found that tenants were usually cognisant of the importance of warm, dry homes, yet "a strong cultural norm of stoicism and making do appeared to prevail" over complaining to the landlord.[53]

Insecurity of tenure is repeatedly identified as a factor that "works against the effective enforcement of the RTA".[54] Under s 54 RTA, it is unlawful for landlords to terminate a tenancy in retaliation against a tenant making a complaint.[55] However, landlords do not have to provide a reason for issuing a 90-day termination notice in periodic tenancies, nor for refusing to renew a one-year tenancy. This gives landlords ample leeway to come up with an alternative reason

[43] At 11.
[44] Barbara Bezdek "Silence in the Court: Participation and subordination of poor tenants' voices in legal process" (1992) 20 Hofstra L Rev 533.
[45] At 591.
[46] Elinor Chisholm, Philippa Howden-Chapman and Geoff Fougere "Renting in New Zealand: Perspectives from tenant advocates" (2017) 12 Kōtuitui: New Zealand Journal of Social Sciences Online 95. Note that tenant advocates are defined as "volunteers and professionals working for social service organisations specialising in tenancy and housing issues", at 96.
[47] Howden-Chapman, above n 6, at 50.
[48] Karen Witten and others *The New Zealand Rental Sector* (ER22 BRANZ, 2017) at 9.
[49] Chisholm, Howden-Chapman and Fougere, above n 46, at 101.
[50] At 99.
[51] Bezdek, above n 44.
[52] At 603.
[53] Witten and others, above n 48, at 9.
[54] Chisholm, Howden-Chapman and Fougere, above n 46, at 105.
[55] Section 54.

for terminating the tenancy. Difficulties are compounded by s 54's reliance on the tenant self-reporting the retaliatory nature of the notice and being able to collate convincing evidence to prove this at the Tribunal.[56]

While these studies suggest wider reform to tenancy law and housing policy is necessary to improve issues regarding housing quality, both note that simply improving the Tenancy Tribunal process to make it more user-friendly for tenants could help to improve landlord-tenant relations and housing conditions. The RTA already puts an obligation of repair and maintenance on landlords, houses are required to be free from dampness, and remedies for work orders, compensation and exemplary damages already exist. As will be discussed in Part III, significant improvements could be made to the Tenancy Tribunal by simply changing the application and interpretation of these pre-existing Tribunal.[57]

2 The problem of rental arrears and tenancy terminations

Disputes over rental arrears arise from a complicated social context. The social dynamic is different from disputes involving poor housing conditions because it is the landlord enforcing their property rights against the tenant, as opposed to tenants ensuring landlords comply with their obligations. There are no structural barriers dissuading landlords from initiating disputes seeking arrears from their tenants. Therefore, it is important to understand the specific factors that contribute to tenants getting into rental arrears and the consequences of the tenancy terminations that result in order to address whether the Tenancy Tribunal could take a problem-solving approach to this type of dispute.

As stated above, of the 90 percent of tenancy disputes brought by landlords, 75 percent of these are regarding seeking rental arrears. Once rent is at least three weeks in arrears, the Tenancy Tribunal must make an order terminating the tenancy upon application by the landlord.[58] There is no discretion for the Tenancy Tribunal to make an order to the contrary unless satisfied that a remedy has already been provided and the tenant is unlikely to commit any further breaches.[59] Rent can also be increased with 60 days' notice every six months.[60] Once tenants are in arrears, there is nothing the Tenancy Tribunal can do to prevent the high social costs that result from terminated tenancies.

Tenancy terminations due to rental arrears can have distressing ramifications for tenants who lose their homes. Losing one's home can be traumatising in itself, especially if it means families have to uproot from their community and pull children out of schools.[61] Residential transiency has negative impacts on education outcomes in school children.[62] The more students move school, the more likely they are to underachieve in formal education and display worse student engagement and participation.[63] Having a record of arrears may prevent tenants from being able to obtain credit which can seriously hamper their financial stability.[64] It can also make

[56] Section 54(1).
[57] Bierre, Bennett and Howden-Chapman, above n 35, at 13.
[58] Section 55(1)(a).
[59] Section 55(2).
[60] Section 24(1).
[61] Matthew Desmond and Monica Bell "Housing, Poverty, and the Law" (2015) 11 Annual Review of Law and Social Science 15 at 25.
[62] Ministry of Education *Transient students* (2018).
[63] At 9.
[64] Chester Hartman and David Robinson "Evictions: The hidden housing problem" (2003) 14 Housing Policy Debate 461 at 469.

them an unattractive option for landlords in what is already a competitive market for tenants.[65] Immediate short term consequences of losing one's home include having to sell, abandon or store belongings; expending high levels of energy and resources trying to secure new housing at short notice; relatedly, having to forego basic necessities whilst trying to obtain housing; and, sometimes, experiencing homelessness.[66] New Zealand has the highest rate of homelessness in the OECD with 41,207 people reportedly homeless in 2015.[67] Tenancy terminations and homelessness have a direct cost on society as public resources are often needed to support people once terminations occur. For example, 19 percent of applicants on the Social Housing Register record their primary reason for needing housing assistance as "tenancy ending/eviction".[68] A further 20 percent of applicants recorded homelessness as the primary reason.[69]

Involuntary residential mobility can also lead to serious long-term consequences.[70] One US study has indicated that tenants who have been forcibly displaced from their home are more likely to experience material hardship, financial instability, psychosocial instability and further residential instability long term than matched tenants who have not experienced involuntary residential mobility.[71] Desmond and Bell concluded that, despite a lack of research into low-income experiences in the private rental sector, there is enough literature to suggest that "involuntary displacement is a cause, not simply a condition, of poverty and social suffering".[72] The negative outcomes of residential transiency and instability create a persuasive foundation to developing preventive measures in order to reduce the prevalence of these problems.[73]

Tenancy terminations due to rent arrears are not caused by financial problems in isolation.[74] There are also social, relational and health factors that contribute to an inability to pay rent. Housing policies, housing market conditions and homelessness prevention policies all contribute to rates of tenancy terminations, yet the way that the Tenancy Tribunal currently addresses rental arrears ignores all of these wider societal issues. New Zealand is amongst many other Western developed jurisdictions that have a "chronic shortage" of affordable rental housing for low-income tenants.[75] This results in low income households being excluded from and discriminated against within the rental market because they are perceived as "higher risk".[76] Unregulated market forces in the private rental sector tend to impact certain vulnerable subpopulations more than others.[77] In New Zealand, this vulnerable subpopulation tends to be

[65] Desmond and Tolbert Kimbro, above n 5, at 299.
[66] At 299.
[67] OECD Directorate of Employment, Labour and Social Affairs *HC31 Homeless Population* (OECD Social Policy Division, 2017). The OECD report noted that New Zealand has a broad definition of homelessness which may provide a partial explanation for the high rates of homelessness. However, Australia and the Czech Republic have similarly broad definitions and significantly lower rates of homelessness. From 2001 to 2015, the number of homeless people increased from 28,649 to 41,207. Today, 0.94% of the population are homeless. Even with a broad definition, these levels of homelessness are telling of the inefficacy of the housing and homelessness prevention policies under the previous government.
[68] Ministry of Social Development *Housing Quarterly Report – June 2018* (2018) at 11.
[69] At 11.
[70] Desmond and Tolbert Kimbro, above n 5.
[71] Desmond and Tolbert Kimbro, above n 5.
[72] Desmond and Bell, above n 61, at 26.
[73] Desmond and Tolbert Kimbro, above n 5, at 319.
[74] Marieke Holl, Linda van den Dries and Judith RLM Wolf "Interventions to prevent tenant evictions: A systematic review" (2016) 24 Health & Social Care in the Community 532 at 533.
[75] Kath Hulse and Vivienne Milligan "Secure Occupancy: A New Framework for Analysing Security in Rental Housing" (2014) 29 Housing Studies 638 at 646. Examples include Scotland, Ireland, Australia and Ontario.
[76] At 646.
[77] Hartman and Robinson, above n 64, at 468.

Māori and Pacific families, single parents, and women.[78] The more this low-socioeconomic group is stereotyped as being a "risky" option for landlords, the less likely that tenants in this group will be able to find homes they can afford.[79] Tenants in lower socioeconomic areas tend to pay higher than average rents relative to house prices in the area.[80] Therefore, this high-risk stereotype is likely to be a key contributor to high rent rates as landlords 'protect' themselves against perceived risks of rental arrears and property damage.[81]

The social costs of involuntary residential mobility are significant, leaving lasting impacts on families, communities and society as a whole. Currently, the Tenancy Tribunal addresses disputes over rental arrears from an individual property rights perspective with no capacity to respond to or take into account the wider costs of residential transiency. Once arrears have accrued, the Tenancy Tribunal cannot even turn its mind to trying to prevent these issues. In Part IV, I will explore the extent to which the Tenancy Tribunal could develop problem-solving techniques to respond to the social costs that arise out of tenancy terminations.

C Small Steps Towards Reform of the Tenancy Tribunal?

There is limited literature considering any aspects of the Tenancy Tribunal, including its efficacy. Thomas Gibbons questions the lack of scholarly criticism of the Tenancy Tribunal in light of evident dissatisfaction from both tenants and landlords.[82] In 2010, the Tenancy Tribunal's monetary jurisdiction increased from $12,000 to $50,000. Despite a high case volume and significant costs at stake (compared to, for example, the Disputes Tribunal's limit of $15,000 or $20,000 with consent from both parties), it is surprising that so little focus has been placed on whether the Tribunal is functioning as effectively and efficiently as possible.

The Law Commission has made extensive recommendations on reforms for New Zealand's tribunals collectively, but has not engaged with the Tenancy Tribunal specifically.[83] In the 2008 study paper, *Tribunal Reform*, the Commission expressed concern over how far the Tenancy Tribunal could depart from strict legal principles.[84] The wording of section 85(2) states that the Tenancy Tribunal "shall not be bound to give effect to strict legal rights or obligations", but case law has given this a narrow interpretation. In *Welsh v Housing NZ Limited*, the High Court interpreted s 85(2) to require the Tenancy Tribunal to strictly apply legal principles unless adherence would lead to clear injustice.[85]

In August 2018, the Ministry of Business and Innovation ("MBIE") released the *Reform of the Residential Tenancies Act 1986: Discussion Document.*[86] MBIE consistently noted that tenants are not raising valid complaints with landlords, nor are they accessing the Tenancy Tribunal to

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[78] Sarah Bierre, Philippa Howden-Chapman and Louise Signal "'Ma and Pa' Landlords and the 'Risky' Tenant: Discourses in the New Zealand Private Rental Sector" (2010) 25 Housing Studies 21 at 31.
[79] At 34.
[80] Arthur Grimes and Andrew Aitken *House Prices and Rents: Socio-Economic Impacts and Prospects* (Motu Economic and Public Policy Research 2007) at 17.
[81] At 18.
[82] Thomas Gibbons "The Tenancy Tribunal: Tensions of Jurisdiction, Coherence, and Economics" (2012) 12 Otago L Rev 703.
[83] Law Commission *Delivering justice for all: A vision for New Zealand courts and tribunals* (NZLC R85, 2004); Law Commission, above n 12.
[84] Law Commission, above n 12, at 91..
[85] *Welsh v Housing NZ Limited* (9 March 2001) HC, Doogue and Goddard JJ, WN AP 35/2000, cited in Law Commission *Tribunal Reform* (NZLC SP20, 2008) at 91.
[86] Ministry of Business, Innovation and Employment, above n 3.

enforce their rights. MBIE also note that the current system relies too heavily on tenants self-reporting problems, and that "the most serious breaches of the Act tend to be observed in circumstances where tenants are most vulnerable".[87] Even regarding actions brought by the MBIE Chief Executive against landlords, it has been difficult to gather sufficient evidence to support enforcement actions against uncooperative landlords.[88] Given these difficulties, and that the Chief Executive will only bring a case to the Tenancy Tribunal in more extreme "public interest" cases, it is perhaps surprising that MBIE has decided not to include the Tenancy Tribunal within the scope of reform discussions.

Generally, the Law Commission recommended tribunals ensure they develop a "culture of informality" as much as possible whilst remaining within the bounds of a fair and efficient process.[89] They also recommended tribunals adopt a more investigative and inquisitorial role in proceedings. This is the preferable option when parties are not legally represented.[90] Given that the Disputes Tribunal and Tenancy Tribunal are serviced through the District Court, the Commission questioned whether they can achieve the desired approach of a "classic tribunal".[91] The Wellington Tenancy Tribunal, for example, uses the District Court rooms so hearings have the same physical formality as a District Court proceeding. However, the Law Commission found that the Disputes Tribunal and Tenancy Tribunal were still able to function as informal, low-level tribunals with a strong accessibility focus.[92] The lack of tenant-initiated participation at the Tenancy Tribunal, and reports of tenants feeling overwhelmed and intimidated by the process, give rise to questions about the accuracy of the Law Commission's conclusion.

D Tendency for a Tribunal to Problem-Solve

Tribunals tend to sit somewhere between the inquisitorial and adversarial justice model, often utilising more investigatory powers to obtain information and evidence, and adopting a more informal procedure.[93] However, it is important to remember that the Tenancy Tribunal is a civil tribunal, existing within the confines of civil law and private legal disputes. The civil jurisdiction is adversarial in nature. Private disputes are perceived to be the result of individuals entering into voluntary legal relations. Cost-saving and efficiency are at the forefront of every process in civil litigation.[94] This attitude is reflected in the Tenancy Tribunal, as well.

In the criminal jurisdiction, there have been significant shifts away from this adversarial position towards a more holistic and socially aware justice system. Often referred to as therapeutic jurisprudence or non-adversarial justice, legislature and the courts are developing creative solutions to societal problems which can be carried out through the justice system, while remaining within the confines of the rule of law.[95] Although notoriously difficult to

[87] At 49.

[88] At 50.

[89] Law Commission, above n 12, at 90.

[90] At 92.

[91] At 61.

[92] At 61.

[93] King and others, above n 1, at 227.

[94] See, Jane Glover "Therapeutic judging in civil and commercial litigation" in *Therapeutic jurisprudence: New Zealand perspectives* (Thomson Reuters, Wellington, 2015) 257.

[95] In New Zealand, specialist criminal courts are developing innovative therapeutic solutions in an attempt to address 'revolving door' criminal offending and improve relations between society's most vulnerable and neglected and the justice system. See, Doogue, above n 1.

define, the key tenet of therapeutic jurisprudence stems from the idea that the legal system should be aiming to maximise the therapeutic value for participants in the system.[96] Warren Brookbanks describes therapeutic jurisprudence as a "jurisprudential field" that "acknowledges that in the scheme of things, people are more important than law, and should be regarded as such".[97]

However, the civil sector has proven far more stagnant and has generally maintained traditional adversarial and formalistic civil procedures. Jane Glover contributes the only civil perspective to Brookbank's *Therapeutic Jurisprudence: New Zealand Perspectives*. Glover appears to concede that therapeutic jurisprudence is not a good fit in civil litigation. On a sliding scale of emotional and physical intensity, she places civil litigation on the far end of the spectrum, with the paradigm therapeutic example of drug and alcohol offending on the opposite side.[98] However, civil litigation can be highly emotionally charged and the legal consequences can have just as much "social force" in producing therapeutic and "anti-therapeutic" consequences as criminal cases.[99] Landlord-tenant disputes are a prime example of how civil litigation is heavily influenced by socioeconomic factors and power dynamics. By solely focusing on how civil litigation can be improved via case management and improving procedural justice within the courtroom, Glover misses an opportunity to assess whether a more radical problem-solving model could be applicable to a civil court, especially a specialised civil court such as the Tenancy Tribunal.

E Summary

This chapter has outlined how the Tenancy Tribunal operates within its enabling statute and in the social context of poor housing conditions and high residential transiency rates. I have outlined the issues with how the Tenancy Tribunal responds to, or fails to address, these social issues. I have briefly highlighted how a lack of scholarly and political engagement with the Tenancy Tribunal has meant that there has been little social reform despite poor societal conditions in the private rental sector. In the next chapter, I turn to the question of whether the Tenancy Tribunal can address the problem of poor-quality housing stock in New Zealand.

[96] Warren J Brookbanks "Introduction" in *Therapeutic jurisprudence: New Zealand perspectives* (Thomson Reuters, Wellington, 2015) 3.
[97] At 3–4.
[98] Glover, above n 94, at 260–261.
[99] At 260.

III It's a Fixer-Upper – Renovating the Tenancy Tribunal to Effectively Respond to Poor Quality Homes

In this chapter, I will use two models of housing courts in the United States to explore how the Tenancy Tribunal could evolve and adapt to address the problem of poor housing stock. By taking a more flexible and innovative approach, Adjudicators can guide disputes to practical resolutions whereby necessary repairs and maintenance are made to tenants' homes. An inquisitorial approach is more likely to preserve or improve landlord-tenant relations, which is vital to encouraging tenants to access the Tenancy Tribunal in the first place. Although straying from a traditional adversarial approach to civil litigation, the suggested reforms still uphold the rule of law and ensures tenants *and* landlords comply with their legal obligations under the RTA.

A What Can New Zealand Learn from the United States?

Some housing courts in the United States have used problem-solving methods to resolve disputes. These courts could inform a new approach for the Tenancy Tribunal. Two examples that I will refer to in this chapter are the Cleveland Housing Court (CHC) and Washington DC's Housing Conditions Court (HCC) which have developed innovative and effective solutions to the specific housing conditions within their jurisdiction. I introduce these courts briefly here and then discuss in more detail how their problem-solving mechanisms could work in the New Zealand context.

The HCC developed in response to the social and health issues caused by "egregious habitability issues".[100] It has a narrow jurisdiction, dealing solely with housing code violations. If an eviction suit has already been initiated, the HCC loses its jurisdiction. With such a narrow focus and broad problem-solving powers, the HCC has proven to be "very successful at achieving a modest goal".[101] The CHC has broad and exclusive subject-matter jurisdiction over all landlord-tenant civil actions. It also has exclusive jurisdiction over code violations, which fall under the criminal jurisdiction. There is no monetary jurisdictional limit on claims, and the CHC has extensive ancillary jurisdiction over other matters if original subject-matter jurisdiction is established. The CHC responds to Cleveland's housing context whereby entire neighbourhoods were falling into disrepair and abandonment due to a mortgage crisis, extensive foreclosures and opportunistic but inexperienced and absentee landlords.[102]

One of the most effective features of both courts is their emphasis on ensuring not only just adjudication, but also just enforcement of orders and remedies. One of the key methods that the CHC and HCC employ to achieve this is through constant use of specialised staff who improve case management, thus creating better results in terms of civil justice for tenants. By employing "housing specialists" with subject-matter expertise, the CHC provides landlords and tenants with access to resources and information before disputes have even been initiated, and through until repairs have been made or the dispute is otherwise resolved.[103] Housing specialists help landlords and tenants access financing options and community services.

[100] Steinberg, above n 1, at 1063.
[101] At 1075.
[102] Pianka, above n 1, at 45.
[103] At 46.

1 Reforming Tenancy Mediators towards a problem-solving capacity

New Zealand's Tenancy Mediators ("Mediators"), established under the RTA, could adapt their role to become more like the CHC's housing specialists. Currently, the Mediator's primary function is to attempt to bring parties to a settlement.[104] They are supposed to inquire into the dispute and its merits in order to make suggestions and recommendations for what they think is "right and proper for inducing the parties to come to a fair and amicable settlement".[105] Without directions from the Tenancy Tribunal, Mediators cannot exercise any powers or functions beyond this quite limited role.[106] Currently, the role of the Mediator is to facilitate settlements in the interests of cost and efficiency. By reforming this role, the Mediator could instead engage problem-solving methods and work with the Tenancy Tribunal to promote resolutions that get to the heart of the problem. The Mediator could still maintain its function of helping the parties negotiate and identify issues whilst taking inspiration from the CHC's housing specialists by going beyond merely reaching a settlement, to ensuring repairs to substandard houses are actually made. Mediators should be encouraged to take an interagency approach, helping landlords to find resources to assist them if repairs are financially difficult, or helping landlords and tenants to come to an agreement on a timeline for extensive repairs to be carried out (e.g. for more extreme structural issues).

Building on this highly assistive and problem-solving role that is complementary to the dispute resolution process, the HCC employs an independent housing inspector which Steinberg says has revolutionised the trial process.[107] The housing inspector investigates tenant complaints after the initial hearing, producing an independent report of all violations found (not just violations submitted by the tenant).[108] The inspector appears at every HCC session and plays an ongoing role in disputes over whether repairs have been made, are sufficient or are needed at all. The independence and expertise of the housing inspector takes away the need for parties to produce persuasive and effective evidence.

For the Mediator to adopt this role, there would have to be legislative reform. Currently, any statements made in mediation are subject to privilege.[109] No oral or written statements made during, or in connection to, mediation are admissible in a proceeding before the Tenancy Tribunal.[110] However, if the Mediator's role is changed to facilitating the resolution of poor housing conditions, rather than reaching a financial settlement, then confidentiality may not be so vital to the efficacy of the mediation process. If Mediators could sit on Tenancy Tribunal proceedings to help the Adjudicator understand the concerns over housing conditions, and relay what they have discovered through their investigative inquiries, it is likely to reduce the adversarial nature of the proceeding. Having an impartial Mediator communicate with the Adjudicator, alongside the landlord and tenant, may make the tenant feel less like they are confronting or directly challenging their landlord. They may gain comfort from an experienced and specialised Tenancy Mediator who is able to support their claims.

[104] Section 88(1).
[105] Section 76(5)(c).
[106] Sections 76(6)-(7).
[107] Steinberg, above n 1, at 1067.
[108] At 1066.
[109] Section 89.
[110] Section 89(2). Statements made in mediation are not admissible in any court or tribunal proceeding. There are some exceptions to this, including if both parties consent to the admission of the statement (s 89(4)(a)).

Currently, the Tenancy Tribunal can order a Mediator to make an inquiry or report into any matter of fact in a proceeding.[111] The Tenancy Tribunal has broad powers to direct the Mediator on how to conduct this inquiry, including authorising the Mediator to enter the residential premises and inspect the premises, fixtures, fittings and chattels.[112] However, it is unlikely to be realistic for Mediators to carry out the full extent of the HCC housing inspector role. The HCC and CHC only serve their respective cities, not the entire country. Although it is unclear how many cases tenants would bring to the Tribunal if the process were changed, given that poor housing conditions are pervasive in New Zealand, Mediators could rapidly become overwhelmed and under resourced if they tried to emulate the full HCC housing inspector role. For this reform to be plausible, significant additional government funding would be required.

It may be more feasible to suggest that the Mediator adopt a role that is a hybrid of the CHC housing specialist and the HCC housing inspector. For example, Mediators could facilitate an interagency approach by working with local council housing inspectors to gain evidence into whether rental properties are meeting habitability standards. Unlike the HCC housing inspector which is a "fully institutionalised part of the HCC, not an investigatory device deployed at random or only in selected areas",[113] Mediators could use reports from council housing inspectors only when the Mediator cannot, in collaboration with the tenant and landlord, come to a decision themselves on what repairs are needed. Like the housing inspectors and housing specialists, Mediators could also extend their role to ensuring repairs are made once landlords have either agreed or been ordered to make them.

2 Reforming adjudication and enforcement procedures to ensure repairs are made

Another problem with the Tenancy Tribunal that reduces its efficacy in ensuring adequate housing quality is its weak powers to enforce orders against landlords. While both are problem-solving courts, the CHC and HCC take distinctly different approaches to ensure that landlords make repairs on homes. As will be discussed below, the CHC takes a more conservative but paradigmatically therapeutic approach by withholding the imposition of fines on landlords until repairs are made. The HCC has developed an episodic and highly inquisitorial hearings process that entails intensive judicial involvement from initiation until repairs are made. The HCC diverges further from the traditional adversarial civil model than the CHC. I will explore to what extent the Tenancy Tribunal could adapt to these models, and whether this would improve its effectiveness in solving the problems that come before it, instead of just issuing orders and then leaving participants to ensure compliance.

Currently, the Tenancy Tribunal lacks power and flexibility to effectively enforce the orders that they make. Whilst the Tenancy Tribunal can make work orders for landlords to carry out repairs, Adjudicators must also make an alternative money order as an alternative to compliance with the work order.[114] In New Zealand, tenants cannot unilaterally stop paying rent if the landlord fails to undertake repairs, especially given that once three weeks of arrears has accrued, termination is mandatory. Tenants may carry out the repairs themselves and charge the cost to the landlord,[115] but this is a risky or even unattainable option for tenants with low disposable income. Tenants may elect to pay their rent to the Chief Executive until enough

[111] Section 99. However, see s 99(1), the Mediator must not have conducted mediation for the parties (due to mediations being privileged under s 89.
[112] Sections 99(1) and 114.
[113] Steinberg, above n 1, at 1070.
[114] Sections 78(1)(e) and 78(2).
[115] Sections 78(2AAB)-(2AAC).

has accumulated for repairs to be carried out.[116] However, the CHC has a similar rent deposit scheme and feedback indicates that it is not an effective method due to the confrontational and potentially relationship damaging nature of the mechanism.[117] To enforce any orders other than possession or work orders (e.g. monetary awards), District Court mechanisms must be used.[118] This involves filing District Court forms and fees.[119] There are no forms specifically for enforcing Tenancy Tribunal orders, which makes it difficult to determine what is required for tenants to enforce their orders via the District Court, especially as the language used is often highly formal and legalistic.[120]

As outlined above, there are powers under the RTA to improve the condition of housing, but these are not practical. Enforcing Tenancy Tribunal orders is complicated, technical and formalistic. This goes against the purpose of the Tenancy Tribunal to ensure the "fair and expeditious *resolution* of disputes"[121] whilst not being bound by "legal forms or technicalities".[122] The statistics strongly suggest that tenants are not initiating action at the Tenancy Tribunal. Given the often vulnerable or disadvantaged position that tenants find themselves in compared to landlords, and the fact that enforcement relies almost entirely on the tenant's initiative to be able to navigate the limited enforcement mechanisms, this method appears to be both ineffective and inappropriate.

One way in which the CHC achieves effective enforcement of orders is analogous to the paradigmatic therapeutic justice model. Because the CHC deals with housing code violations under the criminal jurisdiction, the court will often suspend the imposition of fines until repairs have been made and the code violations have been corrected. Once made, the fines may be reduced to a nominal fine. This is reflective of the classic paternalistic therapeutic drug court model of holding sentencing over criminal offenders until they have been through rehabilitative and/or restorative justice programmes. In the RTA, there is scope for Adjudicators to adopt a similar tactic to ensure landlords carry out repairs. If the landlord commits an "unlawful act", the Tenancy Tribunal has discretion to award exemplary damages to the tenant up to a set amount.[123] For example, if the landlord fails to provide the premises in a reasonable state of repair or fails to comply with health and safety requirements, exemplary damages may be awarded up to $4000.[124] If a landlord fails to comply with a work order without reasonable excuse, exemplary damages up to $3000 may be awarded.[125] In MBIE's *Discussion Document* regarding the RTA, there is a proposal to amend this power of the Tenancy Tribunal so that an unlawful act results in a "penalty", instead of exemplary damages.[126] Penalties would be paid to the Government, not to the affected party. If this reform is adopted, it would more closely resemble the CHC fine suspension model. This may be a preferable option in this context

[116] Section 78(2AAD)-(2AAF).
[117] W Dennis Keating "Judicial Approaches to Urban Housing Problems - A Study of the Cleveland Housing Court" (1987) 19 Urban Lawyer 345 at 349.
[118] Section 107.
[119] Ministry of Justice *Paying civil enforcement fees?* (2014). A financial assessment hearing, for example, incurs a fee of $130.
[120] Ministry of Justice "Collecting civil debt: information for creditors" (24 May 2018) <www.justice.govt.nz>. The website provides information on how "creditors" can recover "civil debt" via a "civil enforcement process". There are no explanations or further definitions for these terms.
[121] Section 85(1) (emphasis added).
[122] Section 85(2).
[123] Section 109.
[124] Section 45(1A) and Schedule 1A. The Tenancy Tribunal can award exemplary damages if it considers that it is just to do so.
[125] Section 108(2A) and Schedule 1A.
[126] Ministry of Business, Innovation and Employment, above n 3, at 55.

because the tenant is not directly losing out on receiving damages if this enforcement mechanism is used. This is a relatively conservative way for the Tenancy Tribunal to monitor enforcement of their orders without relying on tenants to initiate action in case of non-compliance.

The HCC takes a more 'hands on' and inquisitorial approach to the enforcement of work orders. At the HCC, the judge actively examines and manages litigants in episodic and ongoing hearings.[127] The line between adjudication and enforcement is blurred as the judge monitors the case from initiation until both parties are satisfied that repairs are complete, instead of closing the case as soon as liability is established.[128] Participants do not have to prepare and research their case independently and then partake in a single 'hit-or-miss' hearing. Judges at the HCC find that facts and evidence "unfold on a rolling basis".[129] The judge can unilaterally amend claims to incorporate new legal issues or remove unfounded claims as the issues become clear.[130] Steinberg found that the management of liability and enforcement was an ongoing process whereby a formal adjudication of liability may never be made, nor any formal findings over disputed facts.[131] With "ambiguous directives" often making it unclear if a legal duty has been imposed, or if the judge is only making strong recommendations, the enforcement phase takes a "forward-looking approach".[132] Little time is spent on testing the credibility of the parties or having them proffer documentary evidence.[133]

There would need to be extensive amendments to the RTA to allow the Tenancy Tribunal to adopt this approach. The Tenancy Tribunal promotes legitimacy and accessibility through having access to Tribunal Orders online, having hearings open to the public, and a seldom used – but still available – appeals process. The Law Commission outlined these features as desirable characteristics that any tribunal should normally exhibit.[134] If the Tenancy Tribunal melded adjudication and enforcement to the extent that this is done at the HCC, it would be a serious departure from the desired vision of tribunals in New Zealand. As outlined above, it is unlikely that New Zealand could incorporate an independent housing inspector to the same extent as the HCC, meaning the Tenancy Tribunal would not be able to promote accessibility and legitimacy in this manner. The HCC maintains accuracy of outcomes – and thus, legitimacy – by relying upon its independent housing inspector for all fact-finding and uses this inspector extensively throughout hearings. If the Tenancy Tribunal did not incorporate a housing inspector to the same extent as is done in the HCC, then blurring the lines between establishing liability and enforcing orders would not be desirable for upholding legitimacy or enhancing public perceptions of civil justice and fairness.

However, the Tenancy Tribunal could plausibly adopt episodic hearings without losing the desirable tribunal characteristics outlined by the Law Commission. While it is positive that the Tenancy Tribunal can waive legal formalities and is not bound to the rules of evidence that inform traditional courts, the reality is that some evidence and some lines of argument are more convincing and persuasive than others. As Steinberg suggests, it is not the informality in procedure that makes the HCC so effective, but the formality of *alternative* procedure.[135] Low

[127] Steinberg, above n 1, at 1060.
[128] At 1060.
[129] At 1068.
[130] At 1066.
[131] At 1069.
[132] At 1069.
[133] At 1067.
[134] Law Commission, above n 12, at 5.
[135] Steinberg, above n 1, at 1060.

level courts still need predictable structures, procedures and adjudication in order to function effectively and ensure public perceptions of fairness. 'Informality' should not be taken to mean ad hoc and unprincipled procedures, but rather a tribunal setting in which procedure is geared towards its actual participants (i.e. unrepresented laypeople who are unlikely to have had any previous engagement with legal institutions). Episodic hearings would allow the Adjudicator to take a more inquisitorial role, whilst maintaining the benefits that come from having all relevant evidence and information before them. It also may allow some problems to be resolved without the need for formal orders or engagement with complicated enforcement mechanisms. Alternatively, the Mediator could adopt much of this inquisitorial fact-finding role if their role was to be developed in the way described above.

The Tenancy Tribunal could still maintain a clear distinction between adjudication and enforcement, and still clearly state where liability lies, while conducting episodic hearings. Part of the process could include work orders with a time frame for implementation, so that the parties can check back into the court to ensure these are being complied with. Again, this is similar to the therapeutic jurisprudence criminal model of regularly checking offenders' compliance with their therapeutic programme. Although this would require more time and resources than the current model whereby the order is out of the Tribunal's hands as soon as it is made, I argue that the increased expenditure would be justified. If tenants do not feel like the Tenancy Tribunal can provide them with a practical remedy to their poor housing conditions, then there is a serious impediment to access to civil justice. Furthermore, a tribunal designed to be accessible for participants without legal representation and without any previous contact with the justice system should not resort to the formalities and technicalities of the District Court for enforcement to be effective. Creating a model whereby the Tenancy Tribunal develops its own enforcement mechanisms, or at least oversight, is vital for tenants to feel confident that the Tenancy Tribunal is able to provide them with the results that they are entitled to.

B How Will This Improve the Condition of Housing in New Zealand?

If the Tenancy Tribunal adopts this more inquisitorial and holistic and approach, it is likely to result in the Tenancy Tribunal becoming more effective at upholding tenants' rights and, therefore, better able to ensure tenants' homes are of an adequate standard. A key problem with the current Tenancy Tribunal model is that the adversarial and tenant-initiated nature of the process prevents statutory rights from being translated into usable 'real life' rights. The power imbalance in landlord-tenant relationships makes this process too difficult for tenants to navigate, and the pay-off in damaging the relationship is often not worth the risk.

Research suggests that people litigating in informal tribunals benefit from an inquisitorial approach because of the way many communicate their legal problems. Conley and O'Barr look at how low-level informal courts are ostensibly set up for everyday laypeople to be able to navigate without a lawyer, but in practice often become "state-sponsored collection agencies" dominated by more politically and economically powerful litigants.[136] Conley and O'Barr suggest that the part of the reason why this happens is because laypeople rely on a "relation-oriented" account to convey their legal problem, whilst more powerful litigants use a "rule-oriented" account.[137] Laypeople with minimal experience in a legal setting often rely on social

[136] John M Conley and William M O'Barr *Rules versus relationships* (University of Chicago Press, Chicago, 1990) at 23.
[137] At 80.

norms and a broad sense of fairness and justice to share their concerns of how they have been wronged from a relational perspective. This often conflicts with the law's narrow rule-based approach which persists despite the technical leeway that is given in an informal court.[138] For example, the current Tenancy Tribunal model purports to be guided by "the substantial merits and justice of the case" and not strict legal forms or technicalities,[139] yet simultaneously establishes that parties are entitled to "call evidence, and to examine, cross-examine, and re-examine witnesses".[140] While presented as a right, this creates an expectation that tenants are to confront and challenge their landlord in a similar manner that a lawyer would in any traditional adversarial civil case. Regardless of how much an Adjudicator waives formalities and technicalities, this is a relationally unattractive option for tenants, regardless of whether they have a strong rule-based case. Therefore, so long as the Tenancy Tribunal relies on tenants not only initiating proceedings but also having to form arguments and provide evidence to uphold their own rights, the inference is that "the individual who fails to insist upon her rights in the legal process is herself at fault for the failure of the law to cloak her with its protection".[141]

By having the Mediator and Adjudicator adopt inquisitorial and ongoing roles like those described above, some of the power imbalance present between tenant and landlord may be ameliorated. Even if the tenant presents their problem within a relational and 'non-legal' framework, a more inquisitorial procedure will make it more likely that the Adjudicator will be able to uncover the legal issues underlying this narrative. If an inquisitorial Mediator or Adjudicator can determine the legal issues, thus shaping them into a rule-oriented account, the tenant's relation-oriented narrative can be better preserved. The tenant is more likely to feel comfortable that these impartial officials will take charge and elicit the appropriate information and that this will lead to a just result. Conley and O'Barr suggest that a rule-oriented account will always be advantageous in a legal setting but that this is "an acquired skill which is the property of the literate and educated business and legal class".[142] An inquisitorial approach will bring this advantage to all participants at the Tenancy Tribunal.

The proposed reforms are likely to improve the quality of tenants' homes because tenants will begin to see the Tenancy Tribunal as a realistic option to fix their housing problems whilst preserving the landlord-tenant relationship. If the Tenancy Tribunal takes an active role in dispute resolution from initiation, through to repairs being made, that removes a significant amount of the confrontational aspect from the dispute. Once the tenant initiates contact, official and impartial Mediators and Adjudicators can guide the problem to a resolution. This is likely to encourage tenants to use the Tenancy Tribunal more often. I suggest this will increase the ability of tenants to hold landlords to their obligations to provide safe and healthy housing, leading to a rise in the quality of New Zealand's rental stock.

[138] At 66.
[139] Section 85(2).
[140] Section 93(1).
[141] Bezdek, above n 44, at 567–568.
[142] John M Conley and William M O'Barr, above n 136, at 80.

IV Cut the Tenants a Break – a Socially Responsive Approach to Rental Arrears and Tenancy Terminations

I now turn to reforms that could be made to the Tenancy Tribunal and the RTA regarding rental arrears. These reforms may better address the underlying problems of residential transiency and the resultant social and economic costs. As outlined in the previous section, the RTA has existing provisions to address poor housing conditions. The main problem lies with the capacity for tenants to be able to access these rights at the Tenancy Tribunal. In contrast, the RTA does not contain provisions that explicitly protect tenants against involuntary residential mobility, instead preferring to prioritise the property rights of landlords. Therefore, it has proven more difficult to develop a problem-solving model in response to the social costs of terminations over rental arrears than for poor housing conditions. Whilst posing some potential reforms that would improve the problem-solving nature of the Tenancy Tribunal in response to rental arrears, I will also outline wider policy issues in the private rental market that prevent a more significant solution being found to this problem.

The vast majority of disputes currently brought to the Tenancy Tribunal are brought by landlords against tenants with regards to rental arrears. Approximately 13,500 disputes over rental arrears are brought each year. As outlined in Part II, once three weeks of arrears have accrued, the Tenancy Tribunal *must* terminate the tenancy. These terminations have been linked to significant social costs in areas such as health, education, financial stability and can lead to homelessness.[143] While internationally there are dispute resolution models that focus on solving the problem of housing conditions, it has not been possible to identify any tribunals or courts abroad that are focused on solving the problem of residential transiency.

Bezdek uses the Baltimore rent court to demonstrate how evictions based on rental arrears perpetuate discrimination and oppression of an already marginalised group, with little hope of preventing recurrence of the problem.[144] Compared to New Zealand, the Baltimore rent court is far more problematic. There are very few procedural protections for tenants, with the court being used essentially as a debt collection service for landlords.[145] The rent court exists in a context of strained race relations and large-scale commercial landlords and property managers. In New Zealand, the landlord is often portrayed as an informal, albeit occasionally unprofessional, 'Ma and Pa' figure.[146] However, this downplays the fact that the rental market is still a lucrative source of financial gain for property owners, and landlords are predominantly motivated by commercial gain (as opposed to, for example, the altruism of providing homes to those who are shut out of the home ownership market).[147] Bezdek's overall analysis and conclusions regarding the landlord-tenant power dynamic and societal perceptions of tenants in arrears are still applicable in the New Zealand context. When disputes over rental arrears are before the rent court, it is apparent that to the landlord *and* the judge, "the matter is entirely a matter of commerce, while to the tenant it is a problem of social relations".[148] Again, we can see Conley and O'Barr's rule versus relations-oriented dichotomy play out with the landlord and adjudicator on one side, and the tenant on the other. Landlords take disputes to the rent court, or Tenancy Tribunal, because of the tenant's "failure to have money".[149] This 'failure'

[143] The author discusses this in more depth at pages 8-11.
[144] Bezdek, above n 44.
[145] Bezdek, above n 44.
[146] Bierre, Howden-Chapman and Signal, above n 78, at 34.
[147] At 34.
[148] Bezdek, above n 44, at 586.
[149] At 597.

is related to wider socioeconomic patterns, yet the rent court reflects neoliberal individualism, attributing responsibility to tenants for circumstances often beyond the individual's control.[150]

It is not difficult to recognise the power imbalance and socioeconomic factors influencing disputes over rental arrears at the Tenancy Tribunal. However, due to the highly unregulated and privatised nature of the private rental sector, it is difficult to find a practical solution to this problem within the scope of the Tenancy Tribunal. Rental arrears are caused by a host of deeply-rooted societal problems. Tenancy terminations due to rental arrears create a burden on society through perpetuating poor physical and mental health, financial instability, homelessness and poverty.[151] Academics looking at problems of rent unaffordability, rental arrears and terminations of tenancy often conclude that broad scale social policy reform is necessary to reduce rates of arrears and subsequent terminations.[152] Such change goes beyond amending legal rights and obligations, and how they are enforced, to wider policy issues regarding the supply of affordable housing and wider regulation of the private rental sector. However, some small changes to the RTA could assist in reducing residential transiency while still providing protection for landlords' property rights.

A It's a Start: Minor Reform for Minor Relief

A prerequisite to the Tenancy Tribunal being able to take any type of problem-solving approach to disputes over rental-arrears will require reform to s 55 of the RTA. Currently, subsection (1)(a) requires that the tenancy is terminated upon the accrual of 21 days in arrears. Subsections (1A) and (1B) provide scope for the Tenancy Tribunal to make a conditional order for the non-payment of rent if satisfied that the tenant will be able to repay the arrears within a specified period and it is unlikely the tenant will fall back into arrears. If a conditional order is not complied with, it will automatically become a final termination order.[153] However, the wording of these provisions suggest that a conditional order cannot be made once three weeks of arrears has accrued.[154]

Mandatory termination upon three weeks of missed rent is an unyielding standard when the social and economic costs for the tenant are considered. Minor reform to the RTA could balance the social benefits of keeping people in a tenancy with the landlords' property rights. Instead of being mandatory, s 55 could incorporate a discretionary, if limited, 'grace period' so that tenants can try to salvage their arrears situation where possible. During, or even before this grace period is initiated, the Tenancy Tribunal could initiate a full-scale interagency approach to help tenants find a financial solution.

The Tenancy Tribunal could develop a tenancy support programme that put tenants in touch with governmental and non-governmental community groups to assist with sustaining their tenancy. For example, ordering an appointment with Work and Income ("WINZ") to ensure tenants are receiving everything they are entitled to. WINZ can assist with rental arrears

[150] At 598.
[151] Holl, Dries and Wolf, above n 74, at 533.
[152] See, for example, Bierre, Howden-Chapman and Signal, above n 78, at 34; Hulse and Milligan, above n 75, at 652; Hartman and Robinson, above n 64, at 493; Howden-Chapman, above n 6; Eaqub and Eaqub, above n 30.
[153] Section 55(1B)(b).
[154] Subsection (1) is subject to subsection (2), *not* subject to subsections (1A) or (1B). Subsection (1) clearly states that "the Tribunal shall make an order terminating the tenancy if the Tribunal is satisfied that the rent was, at the date on which the application was filed under section 86, at least 21 days in arrear".

specifically via a Recoverable Assistance Payment or an Advance Payment Benefit.[155] Accommodation Supplements and Temporary Additional Support payments can be available to tenants in the private rental market regardless of whether they are receiving welfare benefits.[156] Accommodation Supplements can be a long-term solution for low-income tenants who are consistently struggling to meet rental costs. Currently, it appears that tenant advocates regularly find that eligible renters are not aware of their entitlement to these payments.[157] The Tenancy Tribunal has no formal relationship with WINZ and initial research suggests that if the possibility of WINZ assistance is raised at all, Adjudicators only suggest that tenants seek assistance.[158] Instead of merely recommending that tenants access WINZ support during the grace period, the Tenancy Tribunal could actively work with WINZ to provide this service to tenants in rental arrears. Although a judicial body, there is nothing to prevent the Tenancy Tribunal from having a memorandum of understanding with WINZ to work with tenants to ensure they are accessing entitlements and supplements. This involvement could range from the Tenancy Tribunal handing out tailored information sheets for how WINZ can help with rental payments, to ensuring a WINZ agent is always available at short notice to be able to provide assistance to the Tenancy Tribunal and tenants. This interagency approach is likely to improve efficiency and lead to more tenant-friendly solutions instead of relying on tenants to self-initiate and self-navigate these services.

Receiving budgeting advice could also help some tenants who are living 'close to the line' rearrange their finances in a way that enables them to create a rent payback plan. Financial factors contributing to the existence of rental arrears may include unemployment, a lack of financial management knowledge and an underuse of rights to subsidies (either through lack of knowledge, feelings of shame and/or a lack of trust in the system).[159] While Bierre and others point out that budgeting advice will never address the wider societal factors that cause debt and poverty, financial management skills may provide some level of relief to tenants threatened with termination upon arrears.[160]

Another potential tool that the Tenancy Tribunal could develop is the 'clean hands' equitable policy that has been used in some housing and rent courts in the United States.[161] Landlords cannot evict[162] tenants if they have outstanding or unresolved code violations. If implemented, this mechanism would work to encourage performance in disputes over housing conditions *and* improve security of tenure for tenants. There is a correlation between poor quality housing and failing to pay rent, as inadequate homes can cost more to heat and lead to serious health problems, all of which incur costs that could have been put towards paying rent.[163] In the United States, this doctrine has been used in conjunction with the "warrant of habitability" which

[155] Ministry of Social Development "Accommodation - Work and Income" <www.workandincome.govt.nz>.
[156] Ministry of Social Development, above n 68, at 8. As at 30 June 2018, 284,668 people were receiving Accommodation Supplements and 58,763 were receiving Temporary Additional Support.
[157] Chisholm, Howden-Chapman and Fougere, above n 46, at 102.
[158] Information provided by Dr Bridgette Toy-Cronin, fieldnotes from Tenancy Tribunal observations, August-September 2018 (on file with author).
[159] Holl, Dries and Wolf, above n 74, at 533.
[160] Bierre, Howden-Chapman and Signal, above n 78, at 29.
[161] Pianka, above n 1, at 47.
[162] Note that eviction in the US is more severe and traumatising than tenancy termination in New Zealand. The Tenancy Tribunal is capable of issuing orders to forcibly remove tenants and their belongings, but this is not common practice. Eviction in the US refers to the process of the court making an order terminating the tenancy *and* the deployment of marshals or sheriffs to forcibly remove tenants from their homes. Unless the tenants have already moved out, all of their belongings will be removed from the premises and left on the sidewalk. See, Hartman and Robinson, above n 64.
[163] Howden-Chapman, above n 6, at 64.

allows tenants to stop paying rent if there are habitability issues with their home and the landlord will not make the necessary repairs.[164] New Zealand does not have a warrant of habitability. The Tenancy Tribunal has a rent deposit scheme (as discussed above) but tenants cannot unilaterally decide to stop paying rent in order to force repairs. Furthermore, the Tenancy Tribunal cannot exercise powers outside of what the enabling statute allows. It is unlikely that the Tenancy Tribunal would be able to deploy this equitable doctrine without legislative reform, especially in cases where the property requiring repairs is not the same as the property upon which the landlord is seeking a termination of the tenancy.

These reforms are likely to help some tenants in arrears to avoid tenancy termination some of the time. Tenants will be put in touch with services such as WINZ or financial coaching that they may not have been aware of or realised they could benefit from before. For some, this may be the difference between being able to repay rent and stay in their home or having to uproot and face the high social and financial costs of involuntary mobility. The support received during this time has the potential to provide long term stability for tenants through financial upskilling or regular benefits. If implemented, the clean hands policy would only help tenants when there are issues with housing habitability *and* arrears. Although, given the links between housing quality and socioeconomic standing, this may occur relatively frequently.

However, there will still be many tenants who will not benefit from this minor relief offered by the Tenancy Tribunal. If tenants are too deep into arrears before the landlord takes the dispute to the Tenancy Tribunal, or if their financial circumstances have become so dire that they cannot continue to afford rent, then termination will be inevitable. Therefore, these reforms will help tenants who are on the brink of 'breaking even' but will not help those in more financially helpless circumstances.[165] Some of the most socioeconomically disadvantaged tenants will be the ones unable to avoid the negative consequences of residential transiency.

B Can the Tenancy Tribunal Respond to the Wider Social Problems of Residential Transiency?

As outlined earlier, residential transiency contributes to a wide array of psychosocial and economic problems that have far-reaching consequences for the individuals experiencing involuntary displacement but also for society generally. In this section I explore whether these Tenancy Tribunal reforms in response to rental arrears could help to alleviate these social problems. In particular, I look at whether this could improve tenants' residential security and stability despite a lack of wider policy reform.

Hulse and Milligan discuss 'security of tenure' as a politico-legal concept with three key definitions: *de jure* security (i.e. how property rights and legal rules let owners use and dispose of their property, enter into leases, etc.); *de facto* security (i.e. the security occupiers have over their use and occupation of a property, including the likelihood of eviction); and, perceptual security (the perception that the occupier will or will not lose their home, regardless of whether

[164] Steinberg, above n 1, at 1059.

[165] However, the interagency approach could still benefits tenants who nevertheless experience terminated tenancies. Community services may be able to step in to provide support for tenants who find themselves without anywhere to stay at short notice. By improving the relationship between WINZ and the Tenancy Tribunal, tenants may be able to access services such as the Emergency Housing Special Needs Grants more quickly and effectively, reducing the stress on tenants and their families. See, Ministry of Social Development, above n 68, at 8.

the threat actually exists).[166] Ability to pay rent throughout the progression of the tenancy is an important part of *de facto* security.[167] If the Tenancy Tribunal could exercise even a limited level of discretion to prevent immediate termination in the case of rental arrears, this could improve both *de facto* and perceptual security. Financial advice and education regarding entitlements to social benefits and subsidies may enable tenancies to continue not only in the short term but also ensure that tenants are able to continue paying rent into the future.

Incorporating a grace period to facilitate budgeting and agency support, and to allow the tenant time to draw on their own support systems, is likely to have benefits beyond reducing residential transiency. This approach may contribute to a shift in the public perception of renting, which may improve tenants' social standing and self-image. Perceptual security is informed by cultural norms regarding renting and the level of control tenants feel they have over life-events that effect security of tenure.[168] Eaqub and Eaqub posit that renting in New Zealand is stigmatised as an inferior second-rate option, going as far as to suggest that some see renters as social failures.[169] By helping tenants avoid tenancy termination, and improve their stability and security of tenure, the Tenancy Tribunal may contribute to a societal improvement in perceptions of renting. Official recognition of the importance of permanency in the home may give tenants confidence that there are structural systems in place to protect their tenancy and help to improve the power and control they have compared to landlords.

By approaching rental arrears disputes with a problem-solving approach, this will go some way to rejecting the dominant narrative of the rental sector as an asset and investment that exists to increase the wealth of property owners, and instead embrace the idea of the rental sector as a source of *homes* for a significant proportion of New Zealanders, whereby livelihoods and community connections can be made.[170] Bezdek found that the most vulnerable tenants in society are so disempowered that they do not "possess the belief that they deserve to be freed of the threat of eviction and homelessness, much less a larger belief in entitlement to the social rights necessary to the exercise of political rights"[171]. By actively working with other agencies and institutions to promote security of tenure where possible, tenants may feel more valued and supported by the wider community and the justice system.

C A Justification for (Very Slightly) Curtailing the Landlord's Right to Terminate

The current approach to the landlords' right to terminate a tenancy due to rental arrears is based on a strict application of private property rights. However, the reforms have the potential to positively impact landlords by allowing more tenants to meet their rent payment obligations when the support services are successful. Despite this, a grace period puts the landlord at risk of the tenant accruing more arrears and still being unable to pay them. It may be too difficult and time-consuming for landlords to recover arrears after a tenancy is terminated. Therefore, initiating this reform runs the risk of negatively impacting landlords. Nevertheless, this slight infringement and potentially increased risk is arguably justified from a problem-solving perspective.

[166] Hulse and Milligan, above n 75, at 640.
[167] At 641.
[168] At 642.
[169] Eaqub and Eaqub, above n 30, at 27.
[170] Hulse and Milligan, above n 75, at 644.
[171] Bezdek, above n 44, at 603.

Unlike some civil law issues, housing, and especially renting, is not a simple arms' length transaction scenario. 'The personal is political' is highly relevant to tenancy issues. Feminist legal theorists such as Angela Harris have explored how feminist notions of 'ethics of care' can be deployed in a wide range of circumstances.[172] Harris calls for recognition that *all* parts of market and state governance are made up of human connections and relationships, and that "a commitment to empathy, nondomination, and caring" should be sought in all of these sectors. Desmond and Tolbert Kimbro found that low-income urban mothers are at particularly high risk of eviction.[173] Low-income women are evicted at higher rates than men, and women and children are increasingly being represented in homeless statistics.[174] The feminist concept that the 'personal is political' can be integrated into areas where gender may not be at the forefront of social forces, but where paternalism and unchecked power imbalances are still operating.[175]

The home is far more than just an economic consideration for the tenant. It provides protection and anchors them to the community that they live in. Arguably, tenants have a personal interest attached to their home that will often outweigh the importance attached, or inconvenience caused, to the landlords purely financial interest.[176] As outlined above, having security and stability in relation to the home is conducive to incorporating security and stability into other aspects of wellbeing including education, employment, health and social life. It is artificial at least, socially harmful at worst, for the Tenancy Tribunal and the RTA more generally to ignore this fact.

Article 25 of the Universal Declaration of Human Rights 1948 (subsequently incorporated into the International Covenant on Economic, Social and Civil Rights) declares that everyone has "the right to a standard of living adequate for the health and well-being of himself and of his family, including… housing".[177] However, how this 'right' to housing exists in practice is much more complicated. Unlike the right to vote, or even a right to basic education, the right to housing cannot be secured with simple legislation and state funding.[178] In New Zealand, the rise of neoliberalism in the 1980s saw a shift away from social democratic concerns (including state provision, or at least investment in, affordable housing) towards an essentially unregulated private rental market.[179] The Tenancy Tribunal will not be able to address these wider policy issues. However, the slight curtailment of the landlord's current absolute right to terminate tenancy upon three weeks of arrears is justified. Occupancy of a rental home is more complex than simply being based on private property rights and an individual contract between landlord and tenant.[180] The accumulation of legislation, regulations and policy all play into the creation and transformation of the landlord-tenant dynamic. Legal frameworks need to be "underpinned by well-resourced and accessible processes … [and] strong information and educational

[172] Angela P Harris "Care and Danger: Feminism and Therapy Culture" in *Special Issue: Feminist Legal Theory* (Emerald Group Publishing Limited, Bingley, UK, 2016) 113 at 123.
[173] Desmond and Tolbert Kimbro, above n 5.
[174] Desmond and Bell, above n 61, at 25–26.
[175] Harris, above n 172, at 132.
[176] Gibbons, above n 82, at 717.
[177] Universal Declaration of Human Rights 1948, art 25; International Convention on Economic, Social and Civil Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 11.
[178] Bo Bengtsson "Housing as a Social Right: Implications for Welfare State Theory" (2001) 24 Scandinavian Political Studies 255 at 256.
[179] Howden-Chapman, above n 6, at 29.
[180] Hulse and Milligan, above n 75, at 640.

activities directed at tenants and landlords".[181] Whilst New Zealand continues to maintain a very limited social housing market and fails to regulate the private rental market in a way that ensures affordable housing for all income levels, creating 'breathing space' for tenants and providing support from other agencies and organisations may go some way to upholding New Zealand's commitment to a right to housing.

[181] At 651.

V Conclusion

Civil justice typically focuses on upholding strict legal rights, not on addressing wider social problems behind disputes. The Tenancy Tribunal is a civil tribunal which is designed to be accessible, cheap and efficient for participants. However, in reality it is dominated by landlords bringing claims against tenants. The Tenancy Tribunal has received limited applications from tenants, suggesting it has not been able to ensure that landlords are upholding their obligation to provide housing to an adequate standard. Regarding landlord-initiated tenancy terminations, the Tenancy Tribunal does not have provisions in place to even consider mitigating the high social costs that arise from residential transiency. This dissertation has proposed a problem-solving approach that the Tenancy Tribunal could take to address the social issues behind tenancy disputes, thereby resulting in more substantively just outcomes for tenants, as opposed to focusing solely on strict legal rights. The reforms are relatively minor and would not completely resolve the social problems identified but would go some way to ensuring that the Tenancy Tribunal is responsive to issues that have widespread costs for all New Zealanders.

By taking a more inquisitorial and proactive approach to disputes over poor housing conditions, the Tenancy Tribunal is likely to become considerably more successful at ensuring tenants' homes are in good condition. Impartial, specialised and well-resourced Mediators and Adjudicators can remove the intimidating adversarial burden off tenants, thus preserving the landlord-tenant relationship and making it more likely that tenants will report problems in the first place. This problem-solving approach could improve tenants' access to justice in practice, mitigate against the power imbalance between landlords and tenants and create significant social benefits through improved housing conditions.

Introducing a problem-solving mechanism to address the problem of rental arrears resulting in tenancy terminations is a more complex issue. While the high social costs of residential transiency are evident, it is difficult to accommodate socially responsive mechanisms alongside landlords' strong property rights in receiving rent. This is an issue that can only be adequately addressed through wider policy reform. Nevertheless, the minor reforms proposed could still go some way to preventing tenancy terminations. Although a grace period slightly infringes on landlords' property rights, it is arguably justified for the Tenancy Tribunal to take this problem-solving approach given the correlations between involuntary residential mobility and poverty and homelessness. These reforms could also create wider psychosocial benefits for tenants by enhancing perceived residential security and may improve tenants' perceptions of legitimacy regarding the Tenancy Tribunal.

Informal tribunals should not act as be a watered down adversarial civil court. Tribunals serve a specific function and exist within a dynamic social context. The private rental sector may operate within an essentially unregulated private market, but the service being offered is one of upmost social importance to those enlisting it. It is also a service that is not voluntarily opted into for the vast majority of tenants who are priced out of the home ownership market in New Zealand. The quality, stability and security of homes has considerable implications for every aspect of the tenant's wellbeing, including community cohesion, education, employment, health and financial stability.

Tenancy law is an example of an area of civil law that does not fit neatly into a neoliberal individualised framework of formal rights and obligations, but it is not the only civil example. Power imbalances and socioeconomic forces are pervasive in all areas of society. This dissertation and its engagement with the Tenancy Tribunal is an example of how civil courts

and tribunals could make minor alterations to achieve social goals without damaging the underlying basis of the civil justice process. This is especially important where there are influential power dynamics at play or in contexts where legal representation is either disallowed or unattainable. Civil courts and tribunals could focus on achieving just ends that reflect the social reality of the disputes brought before them, not simply a mechanistic determination of rights which is dependent on the capacity of the participants to navigate an unfamiliar and at times challenging legal process.

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