Getting the Balance Right: Taking a Capability Approach to Residential Tenancy Reform in New Zealand

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Introduction

Adequate housing is a basic human right.[1] It encompasses more than just a mere place to shelter, but also includes the important social and emotional bonds that are built from 'home'. Private property rights have been well-developed through common law, in part, to protect this right to housing. However, in the sphere of residential tenancies, this protection has never been as strong. This is due to the fact that residential tenancies, which grew out of the common law lease, represent "a division of interests, or a split in ownership, in the property as a whole."[2] As a result, there has always been an inherent conflict of interests between the landlord (with ownership rights) and the tenant (with the right to exclusive possession). This inherent conflict has resulted in a need to satisfy both sides of the proverbial equation through some form of power balance, which is by no means an easy task. The power balance issue has been made more difficult by a paucity of academic literature in this area of the law, as well as a lack of appellate court decisions due to the Tenancy Tribunal.[3] As a result, where the power balance lies has ebbed and flowed over time with changes in political ideologies and policies.

Nevertheless, well-being considerations have consistently played a role in regulating the delicate landlord-tenant relationship since the end of the 19th century. This norm, though never explicitly stated, guided New Zealand towards an exceedingly tenant-protective scheme in the mid-20th century. However, the enactment of the Residential Tenancies Act 1986 (the RTA or the Act) saw the replacement of welfare-oriented policy with a norm of neutrality. This retraction from welfare-oriented policy was due in part to the assumption that, in New Zealand, renting was 'transitory' in nature, and merely a stop on the road to homeownership. Ever since 1986, the norm of neutrality has regulated the landlord-tenant relationship in New Zealand. This norm, which underpins the Act, attempts to give equal rights and responsibilities to both landlords and tenants,[4] and has been a key driver in the creation of the impartial Tenancy Tribunal.[5]

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[1] Universal Declaration of Human Rights UNGA Resolution 217A (III) (10 December 1948), art 25(1).
[2] Susan Bright "Introduction" in Susan Bright (ed) *Landlord and Tenant Law: Past, Present and Future* (Hart Publishing, Oxford, 2006) xii at xiv.
[3] Sarah Bierre, Mark Bennett, Philippa Howden-Chapman "Decent Expectations? The Use and Interpretation of Housing Standards in Tenancy Tribunals in New Zealand" (2014) 26 NZULR 153 at 153.
[4] Residential Tenancies Act 1986, ss 36-49.
[5] Section 85.

However, neutrality has failed to produce satisfactory outcomes. The Ministry of Housing and Urban Development is currently in the planning stages of an overall reform to the Act with the overall objective of "making life better for renters"[6] and revising whether the RTA strikes an appropriate power balance between the interests of landlord and tenant.[7] This gives New Zealand legislators a timely opportunity to revisit the norm of well-being as an alternative norm to neutrality. Revisiting the normative basis underpinning the Act is especially important, given the recent rise in 'generation rent', a social phenomenon which has seen an increasing number of individuals financially unable to enter into the homeownership market. Generation rent is not solely an issue for one particular generation, but a phenomenon that will impact on all demographics of the renting community due to New Zealand's current housing crisis. As a consequence, the private rental sector has seen dramatic growth. Recent statistics show that homeownership rates have plummeted, with over a third of New Zealanders now living in rental accommodation as a result of generation rent.[8] Simultaneously, these statistics show that the average duration of tenancies in New Zealand is continuing to increase, which seriously undermines any policy predicated on renting being merely a 'transitory' state.[9]

Given that rental reform is necessary in light of generation rent, and given that neutrality has failed to settle the power balance question, legislators should use the opportunity presented by the current reform to replace the normative basis of the RTA with a norm of well-being. A norm of well-being is best developed through the capabilities approach, which provides a principled basis for achieving a fairer rebalancing of the landlord-tenant relationship. This is because the capability approach does not necessarily take a pro-tenant stance (like the norm of wellbeing in the mid 20th century did), but instead gives effect to the amendments required for both landlord and tenant to maximise well-being. It is my opinion that this maximisation of well-being provides a fairer rebalancing of the landlord-tenant relationship than an arbitrary 'balancing' of rights and responsibilities does under a norm of neutrality.

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[6] Ministry of Business, Innovation and Employment *Reform of the Residential Tenancies Act 1986: Discussion Document* (August 2018) at 2.
[7] Ministry of Housing and Urban Development "Reform of the Residential Tenancies Act 1986" <www.hud.govt.nz/>
[8] Ministry of Business, Innovation and Employment "Reform of the Residential Tenancies Act 1986" (August 2018) at 1.
[9] At 1.

This leads to my overall argument that the norm of well-being (as given context by the capability approach) should be explicitly acknowledged in residential tenancy law and applied as a guiding principle for current reform. In order to demonstrate my argument, this dissertation is based on three key findings:

1. The norm of well-being should be explicitly acknowledged as it is already inherent in residential tenancy law;
2. The norm of well-being better explains the outcomes of recent reform and trends in residential tenancy law than neutrality does; and
3. The norm of well-being provides a better model for guiding current reform as it creates a fairer rebalancing of the landlord-tenant relationship through welfare-maximisation, rather than a mere 'balancing' of rights and responsibilities.

Solving our current rental issues requires new solutions. Renting needs to be a viable long term option for New Zealanders as we advance towards generation rent, and as such, the normative basis underpinning the RTA needs to be fit for purpose. Instead of attempting to maintain a façade of neutrality, the Act should be based on a norm of well-being (underpinned by the capability approach) as it provides a metric of justice that brings about an increased focus on the welfare of the tenant without having the repercussion of being pro-tenant. In this way, a norm of well-being provides a more robust framework for striking a fairer long term balance between the inherently competing interests of landlord and tenant.

I. Chapter One – The norm of well-being and the capability approach

In order to build my argument, it is necessary to first establish what I mean by the norm of well-being and how this compares to the norm of neutrality that currently underpins the Act. In this Chapter I argue that residential tenancy law includes a norm of well-being that has never been explicitly recognised. In order to develop this norm of well-being as a viable alternative to neutrality, I suggest that the capability approach can be used to give the norm substance, and can also be used to build a well-being-oriented framework for current rental reform.

A. What is the norm of well-being?

The norm of well-being has never been explicitly recognised, but it has a long history in residential tenancy law. Regulation of the landlord and tenant relationship in the late 19th century was largely left to the private market, and little statutory regulation existed until the First World War (1914-1918).[10] This lack of statutory intervention prior to the War inevitably meant that the power balance was weighed in favour of the landlord, due to strong principles of freedom of contract and the benefit of inequality of bargaining power. During the First World War, many commonwealth jurisdictions, including New Zealand, placed regulatory measures on rent increases and terminations to prevent abuses of power by landlords in a period of relative economic poverty.[11] England, Canada, and Australia all followed similar paths towards interventionist legislation.[12] Following the War, subsequent legislation continued to be introduced in New Zealand with the aim of restoring the equality of bargaining power between landlord and tenant.[13] This was generally achieved through controls on freedom of contract, such as the ability of the Rent Appeal Board to set "equitable rent" levels,[14] and restraining the ability for the landlord to exercise freedom of contract in tenancy agreements.

The norm of well-being reached its peak in the early 1980s, at which point New Zealand had a largely protective rental scheme that appeared to take a pro-tenant stance (primarily through

[10] Steven Muthesius *The English Terraced House* (Yale University Press, New Haven, 1982) at 19.
[11] The War Legislation Amendment Act 1916 (NZ).
[12] See the Rents and Mortgage Interest Restriction Act 1915 (UK), and the Fair Rents Act 1916 (NSW). In Canada, rent control was introduced in 1940 by the federal Wartime Prices and Trade Board.
[13] New Zealand had a multitude of tenancy legislation in the first half of the 20th century, including the Fair Rents Act 1936, Fair Rents Amendment Act 1942, Tenancy Act 1948 (as well as some applicable lease provisions in the Property Law Act 1952).
[14] Rent Appeal Act 1973, s 6.

the aforementioned extensive rent control) to the frustration of landlords. Tenancy legislation was also spread over the Property Law Act 1952, Tenancy Act 1955 and Rent Appeal Act 1973, which made the law relatively inaccessible for both parties.[15] This not only caused confusion and frustration, but also resulted in lengthy and expensive dispute resolution processes.[16] Both landlords and tenants were in favour of a new law of residential tenancies being implemented that would be uniform, fair, and that would provide for a quicker dispute resolution process.[17] The frustration with a complicated and apparently biased rental scheme culminated in a call for change, and a pushback against excessive pro-tenant legislation.

This call for change led to the formation of the Property Law and Equity Reform Committee (chaired by Professor Richard J. Sutton) by the Minister of Justice, the Hon Jim McLay, who in 1982 tasked the Committee with undertaking a review of the law relating to residential tenancies.[18] The findings and recommendations contained in that Report were a key influence in forming the basis for the Residential Tenancies Bill 1985. The review portion of the Report found a number of areas of concern in New Zealand tenancy law. On the issue of landlord-tenant relations, the Committee found that tenancies had been viewed as "a "second-best" arrangement, a temporary stopping place before the tenant becomes a home owner", further noting that there was a growing number of tenants who would not own property for a long time, if ever.[19] The Committee noted that this "second-best" approach had resulted in issues of incoherent and inaccessible tenancy laws.

The Committee was also very concerned with the appearance of "pro-tenant" legislation in New Zealand. The risk of pro-tenant legislation, in their eyes, was that it could drive landlords out of the (primarily) private sector[20] if the odds were increasingly stacked against them, noting that private landlords were "people most likely to be deterred from becoming or remaining landlords if the business of letting is unpleasant."[21]

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[15] David Grinlinton *Residential Tenancies: The Law and Practice* (4th ed, LexisNexis, Wellington, 2012) at 1.
[16] Property Law and Equity Reform Committee *Report on Residential Tenancies* (May 1985) at 9.
[17] At 8.
[18] At 1.
[19] At 10.
[20] The last census from 2013 show that over 80% of New Zealand's rental stock is owned by private landlords. See Statistics New Zealand *2013 Census QuickStats About Housing* (2014) at 15.
[21] At 11.

One can glean from reading the Report that the Committee's priority was not on placating either landlords or tenants, but on equalising the position of both parties in order to preserve the private rental sector in the 1980s when the rental market was experiencing significant growth. This legislative pushback against pro-tenant legislation is most notable in their recommendation for the creation of a Tenancy Tribunal to hear disputes, where the Committee stressed the need for the Tribunal to establish themselves as independent, neutral and "impartial servants of the broad common interests of landlords and tenants."[22]

These views of impartiality were subsequently adopted by the drafters of the Residential Tenancies Bill, forming the normative basis for the Act. Introducing the Bill into the House, the Minister of Housing, the Hon Phil Goff, proclaimed that:[23]

> The Bill gives protection to reasonable landlords and tenants against irresponsible or unreasonable behaviour by the other party. As the law leans in favour of neither side in the tenancy relationship it will not find full favour with the more militant landlords or tenants. However, I believe it will be welcomed by the vast, silent majority of landlords and tenants whose attitudes are moderate.

The few appellate decisions in the area of residential tenancies have upheld these norms of neutrality and impartiality to the present day. In the 2008 High Court case of *Ziki Investments (Properties) Ltd v McDonald,* Asher J rejected an earlier proposition in *Anquetil v North Canterbury Nassella Tussock Board* that the Act was designed "substantially to protect tenants"[24] and instead held that it was clear "that the drafters of the Act sought to protect both the landlord and the tenant by fair and readily enforceable rules, and not just the tenant."[25] Asher J's comments were later upheld in the recent 2018 High Court decision of *Parbhu v Want*.[26]

However, the current reform shows that well-being has become a prominent consideration again. This is best demonstrated by contrasting the objectives of the 2010 reform of the Act

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[22] At 22.
[23] (19 September 1985) 466 NZPD 6895 at 6896 (Phil Goff).
[24] *Anquetil v North Canterbury Nassella Tussock Board* HC Christchurch AP93/89, 30 October 1989 at 5.
[25] *Ziki Investments (Properties) Ltd v McDonald* [2008] 3 NZLR 417 (HC) at [53].
[26] *Parbhu v Want* [2018] NZHC 2079 at [31]

with the objectives of the current 2018-2019 reform. The stated aim of the 2010 reform, in "balanc[ing] the business needs of landlords against the social needs of tenants",[27] provides a recent example of adherence to the norm of neutrality. However, in the *Discussion Document* for current reform, the Minister of Housing, the Hon Phil Twyford, has stated that "[t]his targeted reform of the RTA builds on our other initiatives to make life better for renters and to ensure everyone in New Zealand has somewhere they can feel at home."[28] The current reform is not exclusively pro-tenant like the early 1980s rental scheme was, with the Minister has also noting that the aim is to appropriately balance the rights and responsibilities of *both* parties in order to help renters feel at home.[29]

This emphasis on recognising the tenancy as a 'home' while recognising landlord interests is a clear indicator that the current reform is being driven by a welfare-based rhetoric ('making life better for renters'). This marks a significant change from both the original enactment of the RTA ('the law leans in favour of neither side'), and from the stance recently taken in the 2010 reform ('balancing the needs of landlords against the needs of tenants'). As such, the current reform provides a timely opportunity to consider whether the norm of well-being should be revived as a feasible alternative to the norm of neutrality.

B. What is the capability approach?

As the concept of well-being is a relatively amorphous term, it needs to be given context in order to be beneficial. In my opinion, the capabilities approach provides the best possible way of giving context to this norm, as it treats well-being as the 'ends' to achieving justice.[30]

The capability approach is a theoretical framework developed primarily by Amartya Sen and Martha Nussbaum about well-being, development and justice.[31] Rather than being a precise theory of justice, the capability approach is generally used as a conceptual framework from

[27] New Zealand Government "Getting the Balance Right: Te Mahi kia Tika ai te Whãrite" (1 November 2004) at 6.
[28] Ministry of Business, Innovation and Employment, above n 6, at 2.
[29] Ministry of Housing and Urban Development, above n 7.
[30] Ingrid Robeyns "The Capability Approach" (2016) *The Stanford Encyclopedia of Philosophy* Edward N. Zalta (ed) <www.plato.stanford.edu/archives/win2016/entries/capability-approach/> at 2.3
[31] See Amartya Sen "Rights and Capabilities" (1984) Resources, Values and Development 307 and Martha Nussbaum "Nature, Functioning and Capability: Aristotle on Political Distribution" (1987) 6 Oxford Studies in Ancient Philosophy 145.

which normative assessments of well-being can be made.[32] In making these normative assessments, the focus is on the ability of individuals to realise well-being through the opportunities they have actual access to. This makes the approach particularly distinctive from other approaches which focus on economic means to well-being such as income or wealth.[33] The approach is described by Robeyns as having "two core normative claims", namely that:[34]

1. The claim that freedom to achieve well-being is of primary moral importance; and
2. Freedom to achieve well-being is to be understood in terms of people's capabilities, that is, their real opportunities to do and be what they have reason to value.

Sen's conception of the capability approach is premised on core ideas of functionings and capabilities. 'Functionings' is the term given by Sen to the idea of what a person does or is, and is made up of "beings and doings". As an example, a 'being' may be something as basic as *being* well-nourished, while an example of a related 'doing' may be eating food.[35] Beings and doings can cover an incredibly broad range of activities, from basic functionings such as avoiding death to much vaguer concepts such as achieving self-respect and taking part in the community.[36] Alternatively, 'capabilities' is the term used to describe "a person's real freedoms or opportunities to achieve functionings."[37] For every functioning, there is a corresponding capability. For example, while eating would be a functioning, the real opportunity to eat would be the corresponding capability. In essence, functionings describe the *actual* beings and doings of a person, while capabilities describe the *possible* or *potential* beings and doings of a person. Sen argues that the range of functionings that a particular person has can be used to assess their current well-being, and that the range of capabilities that the person has access to can be used as an assessment of that person's potential for well-being.[38] On a group scale, policymakers and lawmakers can theoretically maximise community well-being through maximising the combinations or sets of potential functionings (i.e. capabilities) that are open to the group.[39] This means that analysts can evaluate the well-being of a

[32] Robeyns, above n 30, at 1.
[33] Amartya Sen "Development as Capability Expansion" in Sakiko Fukuda-Parr *Readings in Human Development: Concepts, Measures and Policies for a Development Paradigm* (Oxford University Press, New Delhi, 2003) 41 at 42.
[34] Robeyns, above n 30, at 1.
[35] At 2.1
[36] Sen, above n 33, at 44.
[37] Robeyns, above n 30, at 2.1
[38] Amartya Sen *Commodities and Capabilities* (North Holland, Amsterdam, 1985) at 5.
[39] Robeyns, above n 30, at 2.2

community (such as the rental community) by evaluating the community's functionings against a capability-yardstick.[40]

Because the capability approach is a conceptual framework and not a rigid theory, it has been applied in a number of different ways, predominantly in the assessment of individual well-being; the evaluation and assessment of social arrangements; and the design of policies and proposals about social change in society.[41] These uses show that the capability approach can be applied as an appropriate mechanism for evaluating and assessing residential tenancy law in light of the current reform. In particular, the ability to assess social arrangements under the capability approach means that the capability approach is a useful tool for assessing the power balance of landlord and tenant in New Zealand. This unbiased stance of the capability approach can create a milder form of the norm of well-being that is more durable than the excessively pro-tenant version of the early 1980s. In the rental context, this means that the capability approach does not necessarily take a pro-tenant stance, but instead gives effect to the functionings required for both parties to maximise well-being to the greatest extent possible.

Of course, given the potentially contentious and debatable nature of capabilities, what any one analyst deems a community *should* be capable of achieving is very much open to debate.[42] To continue with the example of food, one may simply argue that in order for society to achieve the well-being of its members, the community must simply have food available to eat. However, another analyst may argue that the capabilities approach actually requires that the community is capable of eating a sufficiently nutritious diet. As such, two different capability theorists may disagree not only on where the base-level of justice should be set, but may also disagree on which functionings are required to achieve this base-level.

As an example of this issue of differing interpretations, Nussbaum's focus is on respecting human dignity in contrast to Sen's focus on enhancing individual freedoms.[43] This slightly different focus manifests itself by requiring a society to achieve *all* fundamental capabilities in order to realise a minimum level of justice, as opposed to Sen's approach, which merely

[40] At 2.2
[41] At 1.
[42] Martha Nussbaum "Capabilities as Fundamental Entitlements: Sen and Social Justice" (2003) 9(2) Feminist Economics 33 at 42.
[43] Thomas Wells "Sen's Capability Approach" (2019) *The Internet Encyclopedia of Philosophy* <www.iep.utm.edu/> at 7.

requires a society to continuously make small, incremental improvements to a community's welfare.[44] Nussbaum argues that there are ten of these essential functions for a well-lived life that should be supported by all democracies:[45]

1. Life
2. Bodily health
3. Bodily integrity
4. Senses, imagination, and thought
5. Emotions
6. Practical reason
7. Affiliations
8. Other species
9. Play
10. Control over one's environment.

Importantly, Nussbaum recognises that some freedoms form part of these essential functions, while others do not. Nussbaum uses the example of the freedom of the rich to make large campaign contributions in the United States to show that not all freedoms form part of the basic set of entitlements that society should commit itself to.[46] Nussbaum's argument illustrates that the capabilities approach does not advocate for making *all* freedoms capable of realisation. Being able to disregard some freedoms under the capability approach allows for compromises to be made between the inherently conflicting interests of landlord and tenant when considering rental law reform, while still being able to achieve the base-level of well-being deemed appropriate by Parliament.

B. Property theory and the capability approach

As rental law is a subset of property law, it is useful to consider the work of Gregory Alexander, who also identifies how the capability approach can be used to give weight to a present but often overlooked norm. Alexander argues that a social-obligation norm exists in property law,

[44] At 7c.
[45] Martha Nussbaum *Creating Capabilities: The Human Development Approach* (Harvard University Press, Cambridge, MA, 2011) at 33-34.
[46] Nussbaum, above n 42, at 45.

drawing on the capability approach to develop the principles underpinning this norm.[47] Alexander's thesis is analogous to my argument, albeit with a slightly different norm, and as such, there is no reason why these same capability-based principles could not apply in the rental context (itself a subset of property law) to develop the basis for a norm of well-being.

Alexander's norm posits that property owners are under obligations to promote capabilities that are essential to 'human flourishing'[48] in communities where members are inherently dependent on each other.[49] For example, given the relative inability of tenants to make choices about housing (when compared to landlords), it is uncontentious that tenants are dependent to some extent on landlords in order to achieve certain aspects of well-being. Correspondingly, landlords are dependent on tenants to realise a return on their investment. Thus, even in the rental context it can be seen that there is an interdependency between landlord and tenants to realise human flourishing, giving rise to Alexander's social-obligation norm. Alexander has developed this idea with Peñalver, using the capability approach to suggest that four functions (in comparison to Nussbaum's ten) are crucial components of human flourishing:[50]

1. *Life,* a good Alexander and Peñalver take to include subsidiary goods such as health and security;
2. *Freedom,* which includes identity and self-knowledge;
3. *Practical reason,* which Aristotle defined as "the capacity of deliberating well about what is good and advantageous for oneself"; and
4. What Nussbaum calls "*affiliation*", a good that encompasses subsidiary goods such as social participation, self-respect and friendship.

These four functions, in Alexander's opinion, provide a principled basis for empowering the state to "compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities."[51] Alexander's social-obligation theory is a useful example of how the boundaries of the capability approach can change when applied to a particular area of law.

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[47] Gregory S. Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 Cornell L. Rev. 745 at 795.
[48] It is important to recognise that Alexander and Peñalver consider the metric of 'human flourishing' to be distinct from 'well-being'. These two terms are used frequently in articles on the capabilities approach. In this dissertation, I am not attempting to amalgamate these two concepts. Instead, I focus on how human flourishing or well-being can be applied to property law concepts.
[49] At 795.
[50] Gregory S. Alexander, Eduardo M. Peñalver "Properties of Community" (2009) 10 Theoretical Inq. L. 127 at 138.
[51] At 148.

It is also useful as a consideration of which functions are crucial in the context of property law (of which residential tenancies are a subset of). By accepting Alexander's theory, then in turn the capability approach can provide a principled basis from which to impose obligations on private property owners (in this context the landlords) in order to achieve a base-level of well-being in the rental community. This in turn provides a basis for shifting away from the norm of 'neutrality' and towards a norm of 'well-being' in the private rental sector.

C. Renting and the capability approach

By drawing on Alexander's approach to developing a social-obligation norm, it is clear that the capability approach could equally provide a mechanism for developing a norm of well-being in the residential tenancy sphere. As residential tenancy law is a subset of property law, it is necessary to tailor the capability approach to residential tenancies as, clearly, not all ten of Nussbaum's functions (or all four of Alexander's) are of equal relevance to others when applied to tenancy issues. As a result, I suggest that, in this context, there are four essential capabilities necessary to realise the well-being of both landlords and tenants in the private rental sector:

1. Life and health – ensuring the safety of rental accommodation in order to prevent avoidable harm to the tenant.
2. Affiliation – protecting the landlord-tenant relationship through an appropriate balancing of landlord and tenant interests.
3. Control over one's environment – creating an environment in which the tenant can achieve a psychological sense of permanency, security and 'home' in the rental property.
4. Freedom and expression – allowing the tenant to live freely within the residential property and not be subject to overarching control and/or inspection.

These four capabilities draw largely on Alexander and Peñalver's set of capabilities, while also recognising the importance of Nussbaum's 'control over one's environment' capability in the rental context, given the conflicting interests between the landlord and tenant.[52] These four essential capabilities, when applied to the rental context, provide a strong foundation for

[52] Carol McNaughton Nicholls "Housing, Homelessness and Capabilities" (2010) 27 Housing, Theory and Society 23 at 36.

residential tenancy reform. Once applied it becomes clear that there are three functionings of tenancy law that are required under my concept of the capabilities approach:

1. Safety (comprising of four components):
    a. Access to housing – adequate supply of rental stock to allow all those in need to find rental accommodation.
    b. Physical – minimum quality standards of the rental property.
    c. Intrusion prevention – The provision of tangible aspects such as smoke alarms and front door locks, as well as the upholding of intangible aspects such as the right to exclusive possession.
    d. Psychological – the ability of the tenant to have a sense of psychological permanency and security in their rental property, which may be achieved through measures such as adequate security of tenure.
2. Fair balance – maximising (to the greatest extent possible) the interests of both landlord and tenant.
3. Equal treatment – freedom from discrimination of both the landlord and tenant communities.

In relation to the 'fair balance' functioning, it is essential to recognise that landlord and tenant interests generally conflict with each other, given that rights to the tenant/landlord usually come at the expense of the landlord/tenant. While landlord-tenant relations are not necessarily a zero-sum game in all circumstances, any rebalancing of the landlord-tenant relationship will often involve a benefit to one party at the detriment of the other (such as with security of tenure). My proposal is that the best way to regulate this relationship is to implement those reforms that will bring about a net positive to the well-being of both landlords and tenants (as opposed to those reforms that will cause a net negative to both), which can be undertaken by weighing up the increased benefit to one party against the increased burden on the other.

In the following paragraphs, I will demonstrate how my four identified capabilities create a framework for the private rental sector.

1. Life and health

Nussbaum's first three essential functions (life, bodily health and bodily integrity) focus on protection of life and the human body. While 'life' focuses on the avoidance of untimely death, bodily health and bodily integrity focuses on meeting human needs. As Nicholls notes, this does not just include the need for food, water, shelter and warmth, but also encapsulates the need for "adequate shelter, nourishment, and the freedom from assault and attack."[53]

In relation to housing, access to safe housing appears to be the most obvious requirement to realise the capability of life and health (apart from the basic requirement that every person has a place of shelter). Safety is a necessary component of avoiding an untimely death, as well as a necessary component of maintaining bodily health and integrity. Furthermore, New Zealand rental properties have been shown to be less 'safe' than owner-occupied properties with Bierre noting:[54]

> Research shows that when compared to ownership, renting a home is more likely to be associated with worse outcomes in observed health and self-reported health, higher mortality rates, excess winter mortality, worse mental-health outcomes and fewer psycho-social benefits from the home.

The statistical evidence linking rental quality standards with health show a clear relationship between the quality of the rental property and the well-being of the tenant, as good health is clearly a component of well-being. 'Safety', however, can be a broader concept than mere health. The ability to live in safe rental accommodation may consist not only of minimum health and safety standards (such as insulation, water-ingress prevention, and heating), but could also be extended to a 'safe' surrounding neighbourhood, as well as a psychological sense of permanency or security. The concept of 'safety' can be thought of as consisting of four different components: (1) access to shelter, (2) health, (3) intrusion prevention, and (4) a psychological sense of security. All four of these components would require different policy reform in order to achieve the overarching functioning of safety.

In terms of the 'access' component, tenants need to be able to access housing. The capability of 'life and health' would thus best be facilitated by a rental market with an adequate supply

[53] At 31.
[54] Bierre, above n 3, at 159.

of rental stock to meet demand. Additionally, minimum required rental quality standards would provide the best way to achieve the 'health' component of safety, with the incorporation of the Residential Tenancies (Healthy Homes Standards) Regulations 2019 into the RTA bringing New Zealand closer to achieving this core capability.[55] Once fully implemented, the Healthy Homes Standards will require rental properties to meet minimum standards of heating, insulation, ventilation, draught-stopping and moisture ingress and drainage.[56] Neutrality does not account for the Healthy Homes Standards, as it disproportionately increases benefits to tenants by significantly increasing the burden to landlords. The imposition of these minimum quality standards thereby shifts the delicate power balance in a way that cannot be explained by neutrality. On the other hand, the Healthy Homes Standards does align with a norm of well-being as minimum quality standards are necessary to meet the 'life and health' capability, and thereby necessary to realise tenant well-being.

In terms of the 'intrusion prevention' component of safety, tenants have the right to exclusive possession of the rental property, and as such, tenants should have both a tangible and intangible sense of being able to exercise this right. In a tangible sense, 'intrusion prevention' may require preventative crime (or disaster) measures to be provided for by the landlord, such as door locks, house alarms, window locks and latches, smoke alarms and fire extinguishers. New Zealand legislators have already taken steps towards this with the compulsory requirement for working smoke alarms in all rental homes under the Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016.[57]

In an 'intangible' sense, the bodily integrity capability could arguably require the Act to protect the tenant's right of exclusion. The tenant's right to exclusive possession is a core concept of the lease from which the residential tenancy is derived.[58] Protecting this right of exclusion has already been met, to some extent, by minimum notice period requirements in the Act for landlord inspections and maintenance (which currently require 48 hours' notice minimum in most instances).[59] This intangible concept of safety relates to the right of privacy, which is recognised under Article 12 of the Universal Declaration of Human Rights (which New

[55] Residential Tenancies Act 1986, s 138B.
[56] Ministry of Housing and Urban Development "Healthy homes standards" <www.hud.govt.nz/>
[57] Section 138A.
[58] *Street v Mountford* [1985] AC 809 at 819
[59] Section 48.

Zealand is a party to).[60] While there is no express right to privacy in our domestic law, New Zealand has developed the tort of invasion of privacy[61], as well as the tort of intrusion into seclusion[62], both of which protect the right to privacy in some circumstances. Minimum notice periods also provide a useful way of being able to partially realise this right in New Zealand domestic rental law.

2. Affiliation

This capability is based on Nussbaum's seventh essential functioning, which is associated with a person's freedom and ability to be in contact, and isolation, with and from other human beings.[63] Nussbaum separates this capability into two components:[64]

(A) Being able to live with and toward others, to recognise and show concern for other humans, to engage in various forms of interaction, to be able to imagine the situation of another.

(B) Having the social bases of self-respect and non-humiliation, being able to be treated as a dignified being whose worth is equal to that of others.

These two components of the 'affiliation' capability provide an interesting observation for residential tenancy reform. To realise these components requires reforming the relationship between landlord and tenant, rather than reforming the characteristics of the rental property itself.

In practice, component (A) could easily manifest itself through protection and preservation of the landlord-tenant relationship, which has been a core focus of rental reform since the 1985 Committee Report itself.[65] In this sense, functioning (A) could be achieved through a fair balancing of the landlord-tenant relationship. The inherent conflict between landlord and tenant means that a fair balancing of the rights and responsibilities of the landlord and tenant is unlikely to ever be exactly neutral and impartial, but the capability approach allows for the maximisation of the well-being of both parties to the greatest extent possible.

[60] UDHR, above n 1, art 12.
[61] *Hosking v Runting* [2005] 1 NZLR (CA).
[62] *C v Holland* [2012] NZHC 2155 (24 August 2012).
[63] Nicholls, above n 52, at 34.
[64] Nussbaum, above n 45, at 34.
[65] Property Law and Equity Reform Committee, above n 16, at 11.

In contrast, component (B), which encompasses the functioning of self-respect and non-humiliation, would require landlords and tenants to treat *each other* with respect and dignity. As Nussbaum expressly states, component (B) entails provisions of non-discrimination.[66] In the rental context, this component has already been substantially realised through the ability of the non-adversarial Tenancy Tribunal to determine disputes on the merits of the case[67], as well as the anti-discrimination provisions included in the Act. Section 12(1) of the RTA states:[68]

12 Discrimination to be unlawful act

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

(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; and

(b) The giving of an instruction or the stating of an intention in contravention of subsection (2).

Section 12 is largely mirrored in s 53 of the Human Rights Act 1993 (HRA), and the effect of these mirror provisions are two-fold. First, the provisions implicitly recognise the diversity of the tenant community in New Zealand, which encompasses students, young professionals, families, elderly, and mentally or physically disadvantaged members of the community.[69] It also includes a wide range of members from different cultural, ethnic, and religious backgrounds. As a recent example, a Queenstown father was turned down for 11 different rental properties due to having a young baby.[70] While the father did not pursue a s 12 RTA claim, this would likely have constituted 'family status' discrimination under s 21(l) of the HRA.[71] Second, it prohibits landlords from treating prospective tenants differently depending on any of the characteristics stated in s 21 of the HRA – which includes sex, marital status, religious belief, ethical belief, colour, race, ethnic origins, disability, age, political opinion, employment status, family status or sexual orientation.[72] The wide ambit of the HRA, which is

[66] Nussbaum, above n 42, at 42.
[67] Residential Tenancies Act 1986, s 85(2).
[68] Section 12(1).
[69] Helena Harbrow "The Dilemma Facing Landlords and Tenants: Enforcing Tenancy Tribunal orders while Upholding Privacy Interests" (2005) 36 VUWLR 581 at 585.
[70] Mountain Scene "Queenstown hospo boss blacklisted from rentals – because they have a baby" *The New Zealand Herald* (online ed, Auckland, 20 September 2019)
[71] Human Rights Act 1993, s 21(l).
[72] Section 21.

incorporated into the anti-discrimination provisions of the RTA, thereby works to protect tenants from discrimination by treating all tenants with equality, thereby improving the ability for tenants to realise self-respect and non-humiliation as required by component (B).

Although s 12 of the RTA may not always be complied with in practice, it is clear from a quick Tenancy Tribunal order search that the Tribunal readily enforces these provisions. For example, in the 2019 decision of *Narayan and Grewal v Bortolazzi*, the landlord told the prospective tenant that only "working people" would be considered as the landlord did not want any issues with the rent. [73] The prospective tenant then lied to the landlord, claiming that she was in employment. The Tribunal held that factoring in the prospective tenant's employment status was unlawfully discriminatory and in breach of s 53 of the HRA, finding that any claim by the landlord based on the tenant's employment status was consequently nullified.[74]

A norm of well-being accounts for the affiliation capability because a key component of well-being is human relationships.[75] Protection of the landlord-tenant relationship is thereby crucial to a concept of well-being. In contrast, a norm of neutrality is based on the principle that equality creates the best possible outcome for regulating the relationship. However, I do not believe that such a simplistic distribution can be made in relation to an area of law that encompasses the basic human right to shelter. Well-being provides a better way to regulate the power balance as it aims to rebalance the landlord-tenant relationship in a way that maximises, to the greatest extent possible, the well-being of both landlord and tenant.

3. Control over one's environment

This third capability is based on Nussbaum's 10th essential function, which is particularly relevant to housing and a psychological sense of security. The fourth component of safety – a sense of security – is best achieved through adequate security of tenure, as the greater the security of tenure, the greater a tenant's sense of control over their home and their ability to stay living in it will be. As Nicholls states:[76]

[73] *Narayan and Grewal v Bortolazzi* [2019] NZTT Auckland 4194762.
[74] At [14].
[75] Dermot Coates, Paul Anand, Michelle Norris "A Capabilities Approach to Housing and Quality of Life: The Evidence from Germany" (2015) 78 Open Discussion Papers in Economics 1 at 7.
[76] Nicholls, above n 52, at 36.

> Nussbaum argues that this 10th component relates to the material sense of control over one's environment that people can have, through their rights to property, to possessions, and to seek and engage in employment in the space they are in. The housing that people can, and do, access – their "home" – is surely central to this. This housing embeds them within a material environment, where what they can be capable of may be realised or not.

A person's house (and home) is not merely a physical space. Assessing residential tenancy reform by considering rental housing as solely a physical entity constrains the application of the capability approach to the tangible aspects of safety – being access, health and the tangible aspects of intrusion prevention. However, the capability approach is much broader than this, and is able to account for the sociocultural and psychological impacts housing can have on the well-being of a person. In this sense, the capabilities approach "provides a nuanced approach for considering the significance of housing as *both* a material space people can inhabit, *and* as a force that can constrain or enable the capability that people have to function and to attain the essence of what is important to all humans."[77]

These social and emotional ties to one's home are crucial factors that need to be considered if legislators are to give effect to the Government's policy intention in current reform to realise the tenancy as a 'home' for the tenant.[78] As it so happens, increasing security of tenure is one of the key proposals for reform currently under consideration by the Government, and is discussed further in Chapter Three. Increasing security of tenure does not align with a norm of neutrality, as like with the Healthy Homes Standards, it disproportionately increases the benefit to the tenant at the expense of the landlord. However, under a well-being-based framework, it can be argued that the current standards of security of tenure are inadequate to give tenants a sense of security in their home, which is required under the 'control over one's environment' capability.

4. Freedom and expression

[77] At 36.
[78] Ministry of Housing and Urban Development, above n 7.

My fourth capability stems from a combination of Nussbaum and Alexander's theses. Five of Nussbaum's essential functions (senses, imagination and thought, emotions, practical reason and play) have comparatively limited application to rental reform in comparison to the others. These essential functions tend to focus on the ability to experience the full range of human senses, emotion and experiences.[79] Alexander similarly describes the freedom capability as "including the freedom to make deliberate choices among alternative life horizons."[80] In essence, these functions all encapsulate what it truly means to be human, and for that very reason, can manifest itself in a wide array of forms. Conceivably this capability can range from the ability to realise narrow freedoms such as the freedom from persecution and invasion of one's home to broader freedoms such as the ability to express oneself through one's lifestyle and the way a person chooses to decorate their home. This is closely related to the concept of autonomy, an idea that Nussbaum upholds through her focus on respecting human dignity.[81]

As Nussbaum has stated, not all freedoms will form part of the essential set of capabilities for a life worthy of human dignity.[82] As a result, the 'freedom and expression' capability can be problematic as it brings into question where the boundaries of the capability approach should lie. Functionings required to realise freedom and expression can only, according to Alexander, meaningfully exist within rich institutional, cultural and social structures.[83] As such, analysts are likely to disagree on which of these wide-ranging freedoms are essential, and which are not. This means that the 'freedom and expression' capability may, outside of these boundary issues, also conflict with the 'affiliation' capability and the fair balancing of landlord-tenant interests. For example, some freedoms of the tenant (such as the ability to make modifications to the rental property) may conflict with the freedoms of the landlord (correspondingly the choice *not* to make modifications to the rental property), and so any additional freedoms should only be realised to the extent they do not undermine the 'affiliation' capability. As a result, the 'freedom and expression' capability may be the most difficult of my four essential capabilities to realise in rental reform.

There is no recent reform to use as an example of providing for the 'freedom and expression' capability, but one objective of the current reform is to give complying tenants greater

[79] Nussbaum, above n 45, at 33-35.
[80] Alexander, above n 47, at 765.
[81] Nussbaum, above n 42, at 40.
[82] At 40.
[83] Alexander, above n 50, at 138.

freedoms over their property.[84] A norm of well-being best accounts for this proposal because the ability to have freedom and choices about where we live and what that looks like are important in giving effect to the concept of 'home' and in our realisation of well-being. However, under a norm of neutrality, any greater controls given to the tenant would need to be 'balanced' out with the controls given to the landlord.

D. Conclusion to Chapter One

A norm of well-being has existed in the residential tenancy sphere from (at least) the start of the 20th century. In response to the excesses of this norm in the early 1980s, there was a political and legislative pushback, resulting in a replacement norm of neutrality. However, legislators never eradicated the norm of well-being entirely, with the current reform being driven by welfare-oriented policy. This leads onto my next argument that the norm of well-being is inherent to residential tenancy law, and should be explicitly acknowledged as such.

[84] Ministry of Business, Innovation and Employment, above n 6, at 2.

II. Chapter Two – The inherent norm of well-being in residential tenancies

One key reason for why the norm of well-being should be explicitly acknowledged in residential tenancy law is because it already exists in this area of the law. In order to demonstrate this, I look at four different factors that show how tenancy law has been shaped by well-being-based considerations:

1. Legal – the residential tenancy has become progressively distanced from traditional property and contract law principles, and has instead become increasingly recognised as analogous to consumer contracts.
2. Sociocultural – there has been increasing recognition by New Zealand legislators to the importance of the tenancy in its role as 'home' for the tenant.
3. Economic – the rise of 'generation rent' has led to a greater focus on rental reform that aims to make renting a viable long term option for individuals, instead of as a transitory state before homeownership.
4. Human rights – The right to adequate shelter is a crucial aspect of well-being, and has been recognised by New Zealand as an important principle in its international obligations.

A. Legal factors

The tenancy is unique from a legal point of view, as the principles underpinning it have shifted from traditional contract/property law principles to an increasing recognition of the Act as consumer protection legislation. A consumer protection view of tenancies naturally aligns itself to welfare-oriented reform and, by extension, a norm of welfare as provided for by the capabilities approach.

Ever since statutory regulation was introduced to regulate the landlord-tenant relationship at the end of the 19th century, the residential tenancy has been much less contractual than other variations of the lease. While the general law of landlord and tenant has been developed from strong contractual principles (modified in light of its proprietary character), most provisions of a tenancy are regulated and/or prescribed by the RTA. To name a few, the RTA has provisions controlling:

- The maximum amount of bonds;[85]
- How often rent can be increased and caps on market rent;[86]
- Rights and obligations of both parties;[87]
- The right of the tenant to vacant possession and quiet enjoyment;[88] and
- The circumstances in which tenancies can be validly terminated.[89]

Moreover, contracting out of the provisions of the Act is prohibited (although the landlord may voluntarily waive any or all of their rights).[90] Where the RTA (or corresponding regulations) does not apply, normal principles of contractual formation and contractual remedies can be exercised.[91] However, this is of little consequence given the aforementioned heavy regulation of tenancy agreements under the Act. Heavy regulation of the tenancy agreement as under the Act is a continuing attempt to account for inequality of bargaining power between landlord and tenant. Likewise, in England, tenancies are heavily modified by statutes – the Housing Act 1988 and the Landlord and Tenant Act 1985.[92] Susan Bright notes that the reduced emphasis of contractual principles is particularly apparent with English tenancies when contrasted against their commercial lease counterparts:[93]

> In the commercial sector, the courts have become comfortable with the idea of respecting the contractual autonomy of the parties; in cases where there is equality of bargaining power, and in a sector in which contracting out is legislatively sanctioned, the parties are given considerable freedom to shape how the occupation is to be classified. Of course it is in the private residential sector, the home territory of *Street v Mountford*, that there is neither the equality of bargaining often met in the commercial sector, nor the trusted landlord of the social rented sector.

[85] Residential Tenancies Act 1986, s 18.
[86] Sections 24-25.
[87] Sections 36-49.
[88] Sections 37-38.
[89] Section 50.
[90] Section 11.
[91] T N Gibbons (ed) *Hinde McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis, Wellington, 2018) at [12.001]
[92] While also regulated primarily through statutory intervention rather than common law developments, the English tenancy is markedly different from the New Zealand version – tenants have much less guaranteed rights, and almost no security of tenure under the Housing Act 1988 (UK).
[93] Bright, above n 2, at xvii.

The practical impact of this approach is that English Courts have tended to take wider considerations into account in tenancy disputes – such as the statutory context, the rental property market, and the relative bargaining strength between the parties.[94] This shift away from strict contract law principles towards these wider considerations in English law is similar to the situation in New Zealand, with an increasingly prescriptive tenancy regime under the Act and the freedom of the Tribunal to make decisions according to the substantial merits and justice of the case.[95]

Alongside diminished contract-law principles, some scholars such as Margaret Radin have also noted that traditional property concepts no longer apply as strongly to residential tenancies as they historically have done.[96] Radin associates property with personhood, and "has argued that a residential tenant has a personhood-based property interest in their tenancy, while the landlord's interest is often more fungible, or replaceable".[97] Landlord and tenant law in the United States underwent a "revolution" in the 1960s to the 1980s, where tenants' rights increased dramatically, while landlords' rights decreased dramatically. Most notably, this revolution manifested itself in the form of rent control legislation, enacted as a response to inflation (rather than social developments).[98] This is similar to the introduction of the New Zealand Rent Appeal Board in 1973 that could set "equitable" rent levels.[99] Almost all of the changes in the so-called United States' "revolution" worked to advantage the tenant at the expense of the landlord[100] and as a result, although speaking in the United States context, Radin argues that the traditional concept of property as a bundle of rights is substantially different in the residential tenancies context, noting that:[101]

> It is widely said that the law of residential tenancy has undergone a revolution. The ordinary common-law property scheme of landlord and tenant was caveat tenant, and the scheme largely prevailed as little as

[94] At xvi.
[95] Residential Tenancies Act 1986, s 85(2).
[96] Margaret Jean Radin "Property and Personhood" (1982) 34 Stan L Rev 957 at 99w.
[97] Thomas Gibbons "The Tenancy Tribunal: Tensions of Jurisdiction, Coherence and Economics" (2012) 12(4) Otago Law Review 703 at 713.
[98] Edward H. Rabin "Revolution in Residential Landlord-Tenant Law: Causes and Consequences" (1984) 69(2) Cornell Law Review 517 at 520.
[99] Rent Appeal Act 1973, s 6.
[100] For a good discussion on the United States rental "revolution", see Edward H. Rabin "Revolution in Residential Landlord-Tenant Law: Causes and Consequences" (1984) 69(2) Cornell Law Review 517 or Peter Dreier "The Status of Tenants in the United States" (1982) 30(2) Social Problems 179.
[101] Margaret Jean Radin *Reinterpreting Property* (University of Chicago Press, Chicago, 1993) at 172-173.

> thirty years ago. Then came the revolution… *It is obvious that the landlords have lost a lot of the "sticks" in their "bundle" and the tenants have gained a lot in theirs.* (Emphasis added).

With the similar trajectory of New Zealand towards increasing tenant protection, it is possible that (over time) there will be a similar shift away from the protection of the private property rights of the landlord as ostensibly protected by the norm of neutrality. As can be seen, traditional concepts of property and contract have been significantly eroded when it comes to residential tenancy law. Given the recent statistics and growing demand for rental properties in New Zealand, it is seldom likely that tenants will have equality of bargaining power, and given the trend towards increasing regulation of the landlord-tenant relationship, it seems likely that contract and property principles will continue to play a diminished role in regulating this area of the law. Indeed, Burn notes this shift, stating that the policy in favour of tenant protection has generally outweighed freedom of contract and that "it is highly unlikely that landlord and tenant will ever be restored to their nineteenth-century freedom of contract."[102]

This lends support to my argument that the capabilities approach, and the norm of welfare it can underpin, has a useful role in this context. The capabilities approach is not concerned with upholding outmoded property and contract law principles. As a result it can support the modern trend in tenancy law to focus on the interests of the tenant (in light of the special characteristics of that type of individual). It also allows policy makers to give effect to the further trend of extending to tenancies some of the protections given to consumer contracts (without requiring the tenancy to explicitly be recognised as a form of consumer contract).

Recently, there has been discussion that the RTA is consumer protection legislation. Winkelmann J stated in the 2016 decision of *Holler v Osaki* that the RTA was consumer protection legislation.[103] Other academics have also observed this trend: Gibbons describes that "[t]he law of residential tenancies can…be seen to involve a degree of social or consumer protection of tenants"[104] and Sarah Bierre noted that "[t]he Act essentially takes a 'consumer protection' approach to regulating relations between who have capital to buy house as an

[102] E.H. Burn, John Cartwright, G.C. Cheshire *Cheshire and Burn's Modern Law of Real Property* (18th ed, Oxford University Press, Oxford, 2011) at 336.
[103] *Holler v Osaki* [2016] NZCA 130 at [20] per Winkelmann J.
[104] Gibbons, above n 91, at [12.001].

investment, on one side, and a variety of others – including those who have very little – who seek a home on the other."[105]

While the residential tenancy could theoretically be caught by the consumer rules in the Consumer Guarantees Act 1993 and the Fair Trading Act 1986, neither Act provides a complete solution to the impending problem of generation rent. However, it does leave open the possibility of applying the protectionist nature of consumer legislation to residential tenancies. Residential tenancies are similar to consumer goods as they are essentially a service provided by a person in trade (the landlord) to a person for domestic or residential use (the tenant). In this way, tenancies can be analogised to consumer contracts, which may explain why New Zealand judges and academics have recognised the RTA as consumer protectionist in nature.

This recognition of the RTA as consumer protection legislation also explains the recent trend to give tenants the same protections as those available to consumers – such as minimum quality standards and protections against misleading conduct or fraudulent representations.[106] These protections afforded to consumers align with the norm of well-being as minimum quality standards would be required by the 'life and health' capability, while freedom from exploitation would be required by the 'affiliation' capability. Following from this, the recognition of the RTA as consumer protection legislation also evidences the recognition of well-being considerations in residential tenancy reform. This norm can be seen in the enactment of the Healthy Homes Standards, which essentially takes a consumer focus by requiring minimum standards of the product or service (being the rental property) in order to be let out. Indeed, the entire 'safety' functioning naturally fits with the general law surrounding consumer contracts, with their increased protections on the consumer and increased requirements on the service provider.

Crucially, however, while a capability framework would account for increased consumer-like protection of the tenant, the capabilities approach is unbiased when it comes to tenants and landlords and allows for their interests to be balanced. This means it is not necessary to adopt an explicitly tenant-centric normative value (which would create significant issues for

[105] Bierre, above n 3, at 153.
[106] Minimum quality standards are protected in Part 1 of the Consumer Guarantees Act 1993, while protection against misleading conduct is incorporated in Part 1 of the Fair Trading Act 1986.

upholding the rights of the landlord). In this sense, consumerist protection of the tenant would not be seen as "pro-tenant", but instead would be seen as essential for the tenant to realise the 'life and health' capability.

B. Sociocultural factors

A norm of well-being is also inherent in residential tenancy law as the tenancy itself represents the 'home' for the tenant, a concept that would clearly be important in any assessment of well-being. Not only is the tenancy important in providing shelter and security, but it is also often emotionally significant in its role as home to the occupier.[107] This social concept of the home is of increasing significance in the New Zealand private rental sector as the number of households living in rental accommodation continues to increase (as well as the average duration of tenancies), alongside the number of individuals for whom homeownership is increasingly out of reach. Susan Bright discusses the uniqueness of the tenancy in this regard, noting:[108]

> For the residential tenant, the property is "home". More than a simple roof over the head it is the place around which personal and social lives are built and a person can find his place in the wider community. Not only is a move time consuming and expensive, but it can lead to the break-up of those very important social and community bonds, a factor important not only to the individual and his family but also to wider society, as is evident from the problems associated with social exclusion.

Indeed, the importance of these social and community bonds are evident in recent tenancy reforms. In the third reading of the Residential Tenancies Amendment Bill 2016 (which had the effect of incorporating the Healthy Homes Standards into the Act), the Minister for Building and Housing, the Hon Dr Nick Smith, emphasised that the Bill would "make for warmer, safer, and drier homes for tens of thousands of New Zealand families."[109] It is also clear from the stated aims of the current reform (as discussed in Chapter One) that the Government has geared reform at making sure everyone has "somewhere they can feel at

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[107] Susan Bright, Geoff Gilbert (ed) *Landlord and Tenant Law: The Nature of Tenancies* (Clarendon Press, Oxford, 1995) at 71.
[108] Susan Bright *Landlord and Tenant Law in Context* (Hart Publishing, Oxford, 2007) at 591.
[109] (31 May 2016) 714 NZPD 11513 at 11513.

home."[110] This shows that sociocultural elements of well-being are playing a role in current residential tenancy reform, which provides greater weight to my argument that we should explicitly acknowledge this norm in current rental reform.

Not only is there greater recognition of the rental as the home for the tenant, but there is also greater recognition of the landlord's role in providing the home. In the 1985 Property Law and Equity Reform Committee Report, the Committee noted that there were two alternative views of the landlord in New Zealand society:[111]

> On one view, a landlord is the owner of a valuable asset who is choosing, on his or her own terms, to allow a tenant the use of it. On another, the landlord is in business to provide an essential consumer commodity, and is thus subject to legislative control to ensure consumers are treated fairly and without exploitation. Both views are, up to a point, correct and even-handed legislation should balance the two.

The earlier classification appears to place emphasis on contractual principles such as freedom of contract, while the latter view appears to take a consumerist approach. This disagreement as to the appropriate role of the landlord was a "fundamental problem"[112] in the eyes of the Committee, and reflects the inherent tension in landlord/tenant relations in the private rental sector. However, with the trend towards recognising the RTA as consumer-protection legislation, it appears that New Zealand has swung the pendulum back towards the consumerist ideal of the landlord. This is not only evidenced through recent amendments to the RTA, but also through current reform and parliamentary discussion on this body of law.

The norm of well-being recognises the importance of the 'home' and can clarify the role the landlord plays in providing it by enabling the psychological component of 'safety' that is crucial to give effect to this concept of home. Applying a norm of well-being under a capability framework provides an additional benefit as the approach is not as static a concept as neutrality inevitably is. The capability approach is flexible enough to evolve with changing sociocultural concepts of the rental property in the future. As society's views of welfare changes, a capabilities-based framework can rebalance landlord-tenant interests to evolve alongside it.

[110] Ministry of Business, Innovation and Employment, above n 6, at 2.
[111] Property Law and Equity Reform Committee, above n 16, at 13.
[112] At 13.

This has already been shown with the Government's commitments in current reform to increase security of tenure to 90 days' in all circumstances which, as noted in Chapter One, is difficult to reconcile with concepts of neutrality.

C. Economic factors

The revitalisation of the norm of well-being in recent reform has also been due, in part, to the rise of 'generation rent', and its corresponding impact on rental sector growth in New Zealand. Generation rent refers to the relative inability of those born after (roughly) 1980 to buy a house, or those who have given up on the dream of homeownership.[113] This phenomenon isn't restricted to one particular generation, but may equally apply to other groups who are also locked out of homeownership. The rise of generation rent as a social phenomenon is not unique to New Zealand but is also occurring in many other developed countries, such as the United Kingdom, Australia and the United States, to name but a few.[114] Economists Shamubeel and Selena Eaqub describe the social phenomenon and its impact on the New Zealand housing mix as follows:[115]

> Owning one's own home has been a rite of passage for generations of New Zealanders. Home ownership has long offered financial security and played a central role in our national identity. But growing numbers of New Zealanders, especially the younger generations, find themselves excluded from the dream of home ownership and consigned to a second-rate existence as renters.

This statement clearly shows a value judgment by the Eaqub's that renting in New Zealand *is* 'second-rate', a sentiment that was shared by the Property Law and Equity Committee back in 1985. Indeed, Shamubeel and Selena Eaqub argue in their book *Generation Rent: Rethinking New Zealand's Priorities* that one of the primary changes that New Zealand lawmakers should be making is to fix the rental market to make it a viable long term option.[116]

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[113] Shamubeel Eaqub, Selena Eaqub *Generation Rent: Rethinking New Zealand's Priorities* (BWB Texts, Wellington, 2015) at 13.
[114] At 22.
[115] At 7.
[116] At 105.

As an example, Irish and Scottish rental laws have undergone reform in response to the rapid rental market growth due to generation rent.[117] The outcome of this reform was to introduce new types of tenancies with greater security of tenure. In Ireland, the 'Part 4' tenancy (any tenancy occupied continuously for six months) introduced in 2004 automatically gives tenants durational protection for three and a half more years, with narrow grounds for the landlord to terminate the tenancy in this period.[118] In Scotland, the new 'Private Residential Tenancy' introduced in 2016 is indefinite in duration and can only be terminated by an eviction order from the First-Tier Tribunal unless the tenant has previously consented to cancellation.[119] Both the Irish and Scottish models show that countries with similar legislative history to New Zealand have reformed their rental laws to increase security of tenure in light of the issues associated with generation rent and in order to make renting a viable long term option.[120]

As such, the rise of 'generation rent' and its impact on the rental sector is likely to be a key reason for why New Zealand law has progressed closer towards consumer protection legislation. Similarly in the United Kingdom, economists Ronald and Kadi have described how the generation rent phenomenon has led to the "emerging role of the private rental sector for property-based welfare strategies",[121] which shows that a norm of well-being is becoming more acknowledged in this area of the law. Reforming the RTA by using well-being as the appropriate metric of justice provides a framework for how legislators can actually 'fix' the rental market in practice. The capabilities approach, with its broad focus on human well-being, provides a better model for renting than neutrality as it is able to treat tenancies as a "first-rate" option or viable long term position for individuals. The approach can achieve this because it focuses on what is needed for *all* individuals to achieve the designated base-level of well-being, regardless of their living situation. As a result, a capability-based framework may provide a better mechanism for successfully retracting from the societal view of renting as a temporary stop on the road to homeownership.

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[117] Mark Bennett "Security of Tenure for Generation Rent: Irish and Scottish Approaches" (2016) 47 VUWLR 363 at 366.
[118] Residential Tenancies Act 2004 (Ireland), s 34.
[119] Private Housing (Tenancies) (Scotland) Act 2016, s 51.
[120] Bennett, above n 117, at 384.
[121] Richard Ronald, Justin Kadi "The Revival of Private Landlord's in Britain's Post-Homeownership Society" (2018) 23(6) New Political Economy 786 at 790.

D. Human rights factors

This last factor recognises the role tenancies play in relation to New Zealand's international human rights obligations. This factor does not necessarily reveal the inherent norm of well-being, but instead reveals New Zealand's increasing concern over well-being-related rights such as the right to adequate shelter. This right is encapsulated in Article 25(1) of the Universal Declaration of Human Rights 1948 (UDHR), of which New Zealand is a party to.[122]

Other rights are also relevant to the right to adequate housing, such as Article 12 of the UDHR (the right to be protected from interference with privacy, family, home or correspondence)[123], and Article 11 of the ICESCR (the right to an adequate standard of living, including adequate housing).[124] The commitment by New Zealand on the global stage to these housing rights reflect the importance New Zealand has placed on protectionist housing policy, of which renting is a subset. This in turn shows a willingness of New Zealand legislators to consider the 'adequacy' of housing, which is a component of the norm of well-being (as per the 'life and health' capability). One might expect that these international human rights will filter down into New Zealand's domestic rental law, as fundamental aspects of the right to adequate shelter, including adequate security of tenure, apply equally to homeowners and tenants alike.[125] Furthermore, not only is the right to adequate shelter broad enough to encompass tenancy issues, it is also crucial in realising other human rights:[126]

> The right to housing is both instrumental in and inherent to the realisation of other human rights. For example, adequate housing can be a precondition for the realisation of the right to health, the right to education and the right to work. Equally, undermining the right to housing, for example by a forced eviction, may have an immediate impact on the right to education and the right to work.

[122] UDHR, above n 1, art 25(1).
[123] Art 112.
[124] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976), art 11.
[125] Natalie Baird "Housing in Post-Quake Canterbury: Human Rights Fault Lines" (2017) 15 N.Z.J. Pub. & Int'l L. 195 at 197.
[126] At 200.

These other human rights, especially the right to health, clearly link into the 'life and health' capability, and it is clear that human rights considerations are instrumental in giving practical effect to a norm of well-being. Additionally, the right to education and the right to work form part of the full range of human experiences contemplated by the 'freedom and expression' capability. It is clear from the commentary surrounding the right to adequate housing that it envisages and encompasses more than a mere place to shelter.[127] Indeed, there are many components to the right to housing, including security of tenure, affordability, habitability, accessibility, locality and cultural adequacy.[128] The capabilities approach accounts for the right to adequate shelter as it is able to recognise a house as more than a physical space, and can help to provide tenants with both tangible aspects of adequate shelter (through minimum required quality standards) and the intangible aspects (through an increased security of tenure). The norm of well-being (as given context by the capability approach) thereby provides a better model than neutrality for recognising the international right to adequate housing, as 'adequacy' of rental stock is clearly contemplated and required under the 'safety' functioning of the capability framework. In contrast, a norm of neutrality would require the implementation of adequate housing standards to be matched by the implementation of some equal benefit to the landlord.

E. Conclusion to Chapter Two

The norm of well-being has been relegated to the background since the enactment of the RTA in 1986. However, it has always been an inherent concept in residential tenancy law. If New Zealand takes these four discussed characteristics of the tenancy seriously – legal, sociocultural, economic and human rights related – it brings into question why neutrality remains the guiding principle underpinning residential tenancy law in current reform. Given the tendency of the residential tenancy to align itself to well-being, legislators should explicitly acknowledge the existence of this norm in the RTA. This leads onto my next argument that the norm of well-being better accounts for what has happened with recent reform, and that it can provide a better model for current reform considerations than neutrality can.

[127] At 196-197.
[128] Jessie Hohmann *The Right to Housing: Law, Concepts, Possibilities* (Hart, Oxford, 2013) at 20.

III. Chapter Three – Implications for residential tenancy reform

The norm of wellbeing should also be explicitly adopted in New Zealand law as not only does the capability approach provide a principled way of increasing the well-being of both landlord and tenant (which is critically important with the rise of generation rent), but it equally provides a principled basis to explain the changes that have happened already with recent reform, which do not appear to be recognised.

A. The objectives of current reform

Targeted reform is currently underway to support the Government's goal of making life better for renters.[129] Numerous changes have already been completed to amend the RTA in order to remove certain obligations on the tenant that are now seen as unreasonable. This includes the Residential Tenancies (Prohibiting Letting Fees) Amendment Act 2018, which has prohibited the ability of letting agents to charge tenants a letting fee,[130] the Residential Tenancies Amendment Act 2019, which marked a retraction from the ratio in *Holler v Osaki*, and the Residential Tenancies (Healthy Homes Standards) Regulations 2019, which will (once fully implemented) impose requirements for minimum quality standards in rental properties, including standards for heating, insulation, ventilation, moisture ingress and drainage, and draught-stopping.[131]

Aside from these completed amendments, the Ministry of Housing is also in the planning stage of an overall reform of the RTA. Submissions for this general reform closed in November 2018, so it is unclear as of yet what this reform will entail. However, the overarching objective is to make life better for renters, so it can be assumed that reform will be at least focused on increasing the well-being of tenants. This is evidenced by the stated aim of the current reform of the Act, which marks a significant change from the focus on neutrality in the 2010 reform:[132]

1. To improve security and stability for tenants while maintaining adequate protection of landlords' interests;

[129] Ministry of Housing and Urban Development, above n 7.
[130] Residential Tenancies Act 1986, s 17.
[131] Ministry of Housing and Urban Development, above n 56.
[132] New Zealand Government, above n 27, at 7.

2. To ensure the appropriate balancing of the rights and responsibilities of tenants and landlords to promote good faith tenancy relationships and help renters feel more at home;
3. To modernise the legislation so it can respond to changing trends in the rental market; and
4. To improve quality standards of boarding houses and the accountability of boarding house operators.

Significantly, there also seems to be recognition of the need to assess whether the norm of neutrality underpinning the RTA is still appropriate today, with the Minister of Housing noting that the RTA was "designed around the assumption that renting is a short term arrangement for people without children, and renters will move frequently rather than set down roots in their community."[133] It is interesting to note that the Act was designed on this assumption, even though the Property Law and Equity Reform Committee pointed out the issue of treating tenancies as "second-best" back in 1985.[134] These inaccurate short term assumptions are even more out of touch with the reality of renting in modern-day New Zealand with the rise of generation rent.

The four stated objectives of the current reform, when taken in the context of New Zealand's rapidly expanding private rental sector, show that the Government's focus has shifted from neutrality to a welfare-oriented policy. However, the Government remains fixated on maintaining the current norm of neutrality. For example, in the listed objectives for reform, it is noted that the reform focuses on "improving the security and stability of tenure for tenants *while maintaining adequate protection of landlords' interests*"[135]. However, there are no suggestions for how landlord interests are to be maintained at the same time as promoting tenant rights. Welfare-oriented reform may be appropriate in light of the current housing issues New Zealand is facing, but it ought to be recognised that it sits at odds with the metrics and principles currently underlying the design of the RTA. Given that reform is necessary and given that neutrality has never produced a satisfactory outcome, legislators should use the opportunity presented by the current reform to replace the normative framework of the Act, with a metric that actually supports (rather than hinders) welfare-oriented reform.

[133] Ministry of Business, Innovation and Employment, above n 6, at 2.
[134] Property Law and Equity Reform Committee, above n 16, at 10.
[135] Ministry of Business, Innovation and Employment, above n 6, at 2.

B. Completed areas of reform

To reiterate my proposed capability framework, it is my opinion that residential tenancy law should incorporate the following functions:

1. Safety:
    a. Access to housing.
    b. Health: minimum quality standards.
    c. Intrusion prevention: locks and alarms, minimum notice periods for inspection.
    d. A sense of security: increased security of tenure, greater control over the rental property.
2. Fair balance: a fair balancing of landlord-tenant rights and a balance which protects and preserves the relationship.
3. Equal treatment: equality and non-discrimination of tenants (and also landlords).

As it currently stands, completed amendments to the Act have already partially achieved these required functionings. Minimum quality standards, which are a vital component of the 'health and life' capability, have begun to be rolled out this year.[136] Once fully implemented, the Healthy Homes Regulations should achieve the 'health' component of the safety function. Likewise, recent smoke alarm regulations and existing limited rights of entry of the landlord have shifted the power balance closer to achieving the 'intrusion prevention' component. Anti-discrimination provisions have existed in the Act since its inception (with slight modifications over time), so the equal treatment function also appears to be met.

Additionally, the enactment of the Residential Tenancies Amendment Act 2019 on 27 August 2019 provides a useful illustration of how recent reform has rebalanced the landlord-tenant relationship in a way that naturally aligns with a capability-based framework. The 2019 Amendment Act came about as a response to the decision in *Holler v Osaki* that tenants can take advantage of the landlord's insurance, notwithstanding their own liability for careless damage.[137] Prior to the decision in *Holler v Osaki*, tenants *were* liable to the landlord for their

[136] The Residential Tenancies (Healthy Homes Standards) Regulations 2019 came into force recently on 1 July 2019.
[137] *Holler v Osaki* [2016] NZCA 130.

negligent actions. This was particularly apparent in the 2002 decision of *Harrison v Shields*.[138] A Dunedin student (who did not carry private insurance) caused negligent damage to the flat. The District Court held that the flatmates were liable for the student's negligence, and the landlord's insurer was awarded $80,000 against the tenants. Judge MacAskill made obiter comments on the apparently unjust result, commenting that most tenants would merely assume that if the landlord had insurance, they would not be at risk.[139] Due to cases like *Harrison v Shields*, there were many proposals in 2008 to extend the lessee exoneration provisions in the Property Law Act 2007 to residential tenants, but these were ultimately rejected.[140] This history laid the foundations for the contentious series of decisions in *Holler v Osaki* between 2012-2016.

[138] *Harrison v Shields* DC Dunedin NP435/00, 25 September 2002.
[139] At [42]-[43].
[140] Mark Bennett "Problems in Residential Tenancy Law Revealed by *Holler v Osaki*" (2017) 48 VUWLR 497 at 502.

Case study: *Holler v Osaki* [2016] NZCA 130

Facts: Mr Holler entered into a tenancy agreement with Mr Osaki, who carelessly left a pot of oil unattended on high heat. Fire broke out and caused substantial damage to the house.

Legal issue: Whether a tenant was liable to the landlord for negligent or careless damage, in circumstances where the landlord had insurance.

This issue arose as a result of unclear interaction between the RTA and the Property Law Act 2007 (PLA). Subsections 268-269 of the PLA contained provisions which exonerated lessees for negligent damage if the lessor had insurance (which Mr Holler did). However, s 142 of the RTA appeared to prevent the application of the exoneration provisions to residential tenancies:

142 Effect of Property Law Act 2007

(1) Nothing in Part 4 of the Property Law Act 2007 applies to a tenancy to which this Act applies.

(2) However, the Tribunal, in exercising its jurisdiction in accordance with s 85 of this Act, may look to Part 4 of the Property Law Act 2007 *as a source of the general principles of law* relating to a matter provided for in that Part (which relates to leases of land).

(Emphasis added)

The question for the Courts was whether the Tenancy Tribunal was required to apply the exoneration provisions of the PLA in light of s 142(2) of the RTA. This case went through various courts (the Tenancy Tribunal, District Court and High Court) before ending up in the Court of Appeal.

Held: The Court of Appeal held that the exoneration provisions in the PLA did apply to residential tenancies, which ultimately meant that tenants were free from liability for negligent or careless damage in circumstances where the landlord carried insurance.

The outcome of the Court of Appeal decision has had numerous implications. First, as Grinlinton notes, the Court of Appeal decision "altered the delicate balance in the landlord/tenant relationship and specifically the ability of landlords to enforce basic obligations of tenants to take care of premises".[141] Second, the pragmatic outcome of this case was to

[141] David Grinlinton "The boundaries between residential tenancies and commercial leases" [2017] NZLJ 4 at 7.

disincentivise tenants from carrying home and contents insurance by reserving the effect of cases like *Harrison v Shields*. Additionally, under *Holler v Osaki,* tenants who did carry insurance would not be required to claim in cases of negligent damage.

Third, the decision created a massive outcry from landlords, property managers and politicians about the seemingly unfair shift in the power balance between landlord and tenant (despite the obiter comments in *Harrison* to the contrary). This outcry led to the Residential Tenancies Amendment Act 2019, which came into force recently on 27 August 2019. This Amendment Act has repealed s 142(2) and renamed the section to "Non-application of Part 4 of Property Law Act 2007", making a clear statement of retraction from *Holler v Osaki*. It has also substantively amended the law of tenant liability for careless damage. The general principle remains that tenants are free from liability for situations falling outside of intentional or careless damage (such as fair wear or tear).[142] However, under the new law, where tenants carelessly cause damage to the rental property, they are now liable for the cost of damage up to four weeks' rent, or the insurance excess, whichever is lower.[143]

The retraction from the ratio in *Holler v Osaki* shows an attempt by Parliament to restore a fair balance to landlord-tenant interests by shifting the responsibility for negligent damage. The Amendment Act gives tenants more liability than they previously had under the ratio in *Holler v Osaki,* yet it limits this liability to a relatively low level (only four week's rent or the excess; presumably to avoid bankrupting unsuspecting tenants like those in *Harrison v Shields*). The reason for this has been made clear with the Government stating that the new damage liability rules in the Amendment Act "strike a balance between incentivising tenants to take a high degree of care of rental properties and not exposing them to high cost and risk."[144] This rebalancing of the liability for careless damage (up to a point) is best accounted for by the capability approach. The capability approach shifts the balance in the landlord-tenant relationship to the point where the welfare of both parties is enabled to the greatest possible extent. It would be hard to argue that freedom from liability for careless/negligent damage is necessary to enable tenant well-being. At the same time, making tenants' liable for careless damage (and intentional damage) *is* likely to be necessary to realise the well-being of the

[142] Residential Tenancies Act 1986, s 49A.
[143] Section 49B.
[144] Ministry of Housing and Urban Development "Residential Tenancies Amendment Bill (No. 2)" <www.hud.govt.nz/>

landlord. Additionally, putting a cap on liability (four weeks' rent or the landlord's insurance excess) is consistent with the 'control over one's environment' capability, as potential liability for exorbitant costs of repair may put tenants in an economically unstable and vulnerable position. Conversely, it cannot be easily accounted for under the neutrality approach because a norm of neutrality would arguably require tenants to take full responsibility for careless damage, in order to provide an adequate balance to the landlord's obligation to keep and maintain the premises in a reasonable state of repair.[145]

C. Some proposals for reform

As shown above, the current version of the Act already supports (to some extent) a norm of welfare. What now must be considered is how the suggested areas for current reform are accounted for by a norm of welfare. To do this, I have picked three proposals – (1) increasing security of tenure, (2) giving tenants a right of minor modification and (3) greater enforcement provisions.

1. Increased security of tenure

One key proposal for reform is to increase security of tenure for tenants. Under the current provisions of the Act, required termination notice periods are dependent on whether the tenancy is periodic or fixed. Under a fixed tenancy (any tenancy for a fixed-term, except those of not more than 90 days' duration which are dealt with separately under s 7)[146], termination may only take place on expiry of the agreed term. There are a few narrow exceptions to this, where a fixed-tenancy may be terminated with shorter notice periods in narrow circumstances, such as where the residential premises are unlawful residential premises (properties that the Tribunal has determined cannot lawfully be occupied for residential purposes)[147],[148] where a mortgagee takes possession[149] or where the premises are destroyed and so seriously damaged as to be uninhabitable.[150]

[145] Residential Tenancies Act 1986, ss 45(1)(a)-(b).
[146] Sections 2, 7.
[147] Section 78A.
[148] Section 56A(1).
[149] Sections 58(1)(d)-(da).
[150] Sections 59 and 59A.

In contrast, periodic tenancies provide significantly less security of tenure. The current provisions for termination of a periodic tenancy is that a landlord must give at least 90-days' notice[151] prior to terminating a tenancy for any reason, except in three circumstances, which only require 42-days' notice:[152]

(a) Where the landlord requires the rental property as the principal place of residence for themselves or for any member of his family;
(b) Where the landlord has clearly stated in the tenancy agreement that they have acquired the rental for customary use by the landlord or for occupation by any of the landlord's employees, and the landlord requires the premises for that purpose; or
(c) Where the landlord has entered into an unconditional agreement for sale of the rental property, and needs to give the purchaser vacant possession.

As can be seen, the Act provides much stronger security of tenure provisions for fixed-term tenancies (except in the narrow circumstances where it becomes necessary for the tenant to be evacuated quickly for their own safety and well-being). The differential treatment for fixed-term tenancies reflects the principle of freedom of contract. However, in my opinion the termination provisions for periodic tenancies are clearly inadequate. Extending the minimum required notice period for periodic tenancy termination from 42 days' to 90 days' in all circumstances (at the very least) is necessary to implement the safety functioning, as the impact of the termination on the landlord is substantially less than the impact termination has on the tenant. To make a generalised example, if a landlord terminates a tenant so that the landlord can sell the property (thereby invoking the 42 day notice period), the landlord *may* suffer economic loss (from loss of rental income), whereas the types of loss a tenant may suffer are far greater in scope. The tenant in comparison may not only suffer economic loss (from relocation expenses), but may additionally suffer psychological/social loss (from losing their 'home'), as well as a quasi-geographic loss (from having to move locations). In addition, the tenant's place of work and education may be impacted, and children may be required to move schools.

As a result, a capabilities-based framework would require greater security of tenure than provided under the current Act. In terms of periodic tenancies, the Government appears to have

[151] Section 51(d).
[152] Sections 51(a)-(c)

also recognised the inadequacy of 42 days' termination notice, having already committed under the current reform to:[153]

- Removing the ability for landlords to end periodic agreements for any reason and without needing to tell the tenant why, and
- Generally extending the notice periods landlords must give tenants under a periodic agreement from 42 to 90 days.

Under these committed changes, landlords "will still be able to end tenancies where tenants are not meeting their obligations and in other specific situations".[154] These "specific situations" may be similar to the exceptions for fixed-term tenancy termination, which require a quick termination turnaround in the case of unlawful premises, mortgagee sales, and uninhabitable premises.[155] Because these types of circumstances require the tenant to evacuate quickly (for their own safety), it is arguably justifiable that security of tenure is so severely limited.

Outside of these periodic tenancy proposals, some suggestions for reform of fixed-term tenancies are:[156]

- Providing tenants with a right to extend their fixed-term tenancy agreement;
- Specifying a minimum length for fixed-term agreements;
- Making all tenancies open-ended and only able to be terminated by landlords when certain criteria apply.

Under fixed-term tenancy agreements, the landlord does not have to give any reasons for non-renewal of the term.[157] As a result, these fixed-term tenancy proposals are designed to prevent landlords simply switching tenancy agreements from periodic to fixed-term as a result of the Government's commitment to increased security of tenure in periodic tenancies. The combination of both the periodic and fixed-term proposals will thereby result in increased security of tenure for both classes of tenants.

[153] Ministry of Business, Innovation and Employment *Discussion Document Summary: Let's Discuss New Zealand's Renting Rules* (August 2018) at 2.
[154] At 2.
[155] Residential Tenancies Act 1986, s 50(1).
[156] Ministry of Business, Innovation and Employment, above n 153, at 3.
[157] Residential Tenancies Act 1986, s 60A.

Both the periodic and fixed-term tenancy proposals thus engage the 'control over one's environment' capability and subsequently the psychological component of the 'safety' function, as increasing security of tenure recognises the difference in losses between landlord and tenant, and also increases the ability of the tenant to build a sense of permanency, security and 'home' in the rental property. An adequate level of security of tenure is necessary to give effect to tenants' psychological sense of safety and is in line with the Government's increasing recognition of the rental property as 'home' for the tenants. In addition, by maintaining the ability of landlords to terminate with short notice in certain circumstances, the proposed amendments will maintain a fair balance between landlord and tenant interests. As noted back in the 1985 Parliamentary Debate, "[a]chieving the real balance is to recognise that there is some inconvenience to the landlord in his income and investment, but major suffering is caused to the tenant who has to uproot his whole life at a time when rental accommodation is short and difficult to obtain."[158] This sentiment rings as true in 2019 in the midst of New Zealand's current housing crisis.

Clearly, increasing security of tenure comes at the expense of the landlord, so the proposed changes will likely not be welcomed by landlord groups. However, the increase in 'benefit' to the tenant by removing the four 42 days' circumstances outweighs the increase in 'burden' (or lack of ability to terminate) of the landlord, given the difference in losses of the landlord and tenant arising from termination. Thus, it is clear that a capability framework would advocate for an increase in security of tenure, and would suggest implementation of these proposals. Of course, there may be a limit in which the capability approach would no longer advocate for increased security of tenure – for example, if what was proposed was 180 days' notice instead of 90 days' notice. It is difficult to make a concrete estimation of when this limit would be triggered under such a conceptual framework, but the limit would mark a point at which the benefit to the tenant no longer outweighed the burden to the landlord.

2. Modifications

A second suggested proposal for current reform is to give tenants who are meeting their obligations more control over the rental property by granting tenants the right to make specified

[158] (19 September 1985) 466 NZPD 6896 at 6906 citing Ollie Newland in the *Auckland Star* (original article unable to be located).

modifications.[159] Under this proposal, landlords will have 21 days to consider a request, after which they are deemed to have agreed to minor modifications.[160] What these 'specified modifications' will entail is unclear, but will likely include such modest activities as hanging paintings on the wall. There are also proposals to narrow the circumstances in which a landlord can legitimately decline a request to keep a pet.[161]

These modification proposals engage both the 'control over one's environment' and the 'freedom and expression' capabilities by increasing the choice tenants have over their home. However, it may come into conflict with the 'affiliation' capability by bringing into question whether these modification rights would create an unfair balance in landlord-tenant relations. As Nussbaum recognised, some freedoms involve basic social entitlements, and others do not.[162] Similarly here, some modifications may be necessary to give effect to a norm of well-being, while others may result in an unfair balancing of the landlord-tenant relationship. In this sense, some modifications may burden the landlord *more* than they benefit the tenant.

Giving tenants a right to make minor modifications may thus require a rebalancing of tenant and landlord responsibilities to give tenants greater control over their home. While the capability approach is well-suited to welfare-oriented policy, it is not necessarily pro-tenant. What must be taken into account is whether these modification rights are necessary to achieve well-being of the rental community. This depends on how broad Parliament wants to draw the functioning assessment when assessed against the backdrop of an incredibly diverse rental community. In contrast to the proposals to increase security of tenure (which arguably benefit the entire tenant community), some modification proposals may not be as all-encompassing. There are many wide-ranging activities that *may* bring tenant's greater well-being, such as the realisation of well-being from the freedom to keep a pet in rental accommodation or the freedom to hang a painting on the wall. However, these freedoms are not as easily applicable to the whole tenant community as other capabilities, such as increased security of tenure and required minimum housing standards. It would be virtually impossible to reform the RTA in a way that accounts for every tenant's (or landlord's) subjective assessment of essential

[159] Ministry of Business, Innovation and Employment, above n 153, at 5.
[160] At 5.
[161] At 6.
[162] Nussbaum, above n 42, at 44.

capabilities, as while the capability approach accounts for human (and thereby tenant) diversity, it also recognises the importance of maintaining of a fair power balance.

By taking the norm of welfare into consideration, it is clear that only some modification proposals would be consistent with a capability-based framework, while others may conflict too much with the 'affiliation' capability.[163] For example, a truncated right to hang pictures may be appropriate (or perhaps an obligation of the landlord to provide a reasonable amount of spots for hanging art), but it seems unlikely that being able to paint the walls would be deemed a necessary freedom to realise the 'control over one's environment' and 'freedom and expression' capabilities. The issue of keeping pets is again more complicated and several other factors may need to be taken into account (for example, the size, odour or the shedding of the pet, and the available outdoor space of the rental property). Thus, rejecting (at least some) of these modification proposals may be consistent with the capability approach, but an express list of the minor modifications Parliament is proposing to introduce is needed in order to make an accurate assessment.

3. Enforcement

This third and final proposal for current reform looks at increasing the accountability of landlords and tenants for their non-compliance with the provisions of the Act. Landlords and tenants alike both complain about the lack of a punitive or retributive response that the Act provides when the other party has wilfully been in breach of their obligations. As a result, proposals for current reform include:[164]

- Providing those in charge of enforcing the law with the ability to enter into enforceable undertakings with a landlord;
- Giving the Tenancy Tribunal the ability to issue improvement notices, issue infringement notices, audit a landlord or property manager; and
- Allowing a landlord or tenant to take a single case in respect of multiple breaches of the Act.

[163] At 41.
[164] Ministry of Business, Innovation and Employment, above n 153, at 9.

As with the modifications proposals, the enforcement proposals engage the 'affiliation' capability, and correspondingly, the 'fair balance' function. The 'affiliation' capability, aimed at protecting the landlord-tenant relationship, means that there arguably should be harsher penalties or enforcement mechanisms for when landlords and tenants wilfully or negligently fail to meet their obligations. Greater enforcement mechanisms not only benefit *all* of the landlord/tenant community, but may also be important as a way to realise other essential capabilities. For example, if a landlord failed to get the rental property up to the standards required under the Healthy Homes Regulations, the tenant would be less likely to realise their 'life and health' capability. However, better enforcement mechanisms would correspondingly increase the likelihood with which the landlord and the rental property are compliant with the Act. As such, enforcement provisions provide not only a proactive mechanism for incentivising compliance with the Act, but also a reactive response for the situations where the Act is not complied with. The proposals around increasing enforcement could therefore act as a safeguard for ensuring tenants and/or landlords have the capacity to realise their own well-being. It may also serve to strengthen the relationship between landlord and tenant through incentivising compliance, which is consistent with the 'affiliation' capability.

Given the current dissatisfaction with existing enforcement mechanisms, it is clear that a capabilities-based framework would support the implementation of some (if not all) of these enforcement proposals. Again, there would be some limit to this, where excessive regulation begins to detract from the freedom and expression of both parties.

D. Conclusion to Chapter Three

This Chapter has attempted to demonstrate the practical implications of adopting a capability approach to reform, and what provisions the Act may need to implement in order to adequately deal with generation rent and an ever-growing number of renters in New Zealand society. Not only is the current Act already partially consistent with a capability framework (thus making the shift from a norm of neutrality to one of welfare easier), but a welfare-oriented approach based on a capability framework will lead to greater net-positive outcomes for both landlords and tenants.

Conclusion

New Zealand has traditionally been a nation of homeowners, but this ideal is becoming increasingly disconnected from the reality we are facing. As a result, the Residential Tenancies Act 1986 is long overdue for root and branch reform. The current reform provides a timely opportunity to revise the power balance between landlord and tenant. I have argued that the norm of neutrality is no longer fit for purpose, if ever true. A focus on neutrality may prevent current reform from achieving the best possible outcomes for the New Zealand rental community, as in retaining this norm, there is a fundamental mismatch between what the Government wishes to achieve on one hand (welfare), and the mechanism by which to achieve it on the other hand (neutrality).

What better accounts for residential tenancies is the norm of well-being, which the current Act is not premised on, but indeed is already partially consistent with. Any determination of where the power balance should lie will always be a difficult task given the inherent conflict between landlord and tenant interests, but the capability approach provides a principled approach to striking an appropriate balance. Additionally, the capability approach gives substance to a milder version of the excessive pro-tenant norm of wellbeing of the early 1980s. This norm inherently exists in the modern tenancy, which is recognised as analogous to consumer contracts, and with increasing recognition paid by legislators to the concept of the 'home' and international rights to adequate shelter. These trends towards welfare-oriented reform are also exacerbated by the rise of generation rent, which marks a turning point in New Zealand towards renting as a viable long term option for individuals. As a result, our rental laws should be premised on principles that can reflect these trends, as well as inevitable future trends in tenancy law, which the capability approach is able to do.

With any proposed normative theory comes inevitable discourse on how strictly it should be applied. The incredible breadth allowed by Sen and Nussbaum's concept of this approach means that there are many different ways the capability approach could be interpreted in this context. However, in my opinion, the capability framework creates four key capabilities – (1) life and health, (2) affiliation, (3) control over one's environment and (4) freedom and expression. The ability to realise these four capabilities reflect the importance of the home to individuals. Where we live (our homes) form a fundamental part of our identity, and shape who

we are. The ‘home’ is not only a physical place from which we sleep, eat, and live, but it is also forms the base from where we live our lives. Indeed, the ‘home’ has strong ties to overall quality of life, and if Parliament wants to adapt to the changing times, renting has to be seen as more than a merely transitory state. It is only once we have replaced the 33-year-old norm of neutrality in favour of a norm of well-being that we can truly say we have got the balance right.

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