

AN EXERCISE OF GOVERNMENT POWER: HNZ AND METHAMPHETAMINE TESTING

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LIST OF ABBREVIATIONS

HNZ	Housing New Zealand
HRTMA	Housing Restructuring and Tenancy Matters Act 1992
ICESCR	International Covenant on Economic, Social and Cultural Rights
MBIE	Ministry of Business, Innovation and Employment
MOH	Ministry of Health
MSD	Ministry of Social Development
RTA	Residential Tenancies Act 1986
RTAB	Residential Tenancies Amendment Bill (No. 2) 2017
SHRA	Social Housing Reform (Housing Restructuring and Tenancy Matters Act Amendment) 2013

INTRODUCTION

“...Housing New Zealand has made a mess of its meth testing...Because there are no baseline tests Housing New Zealand has evicted tenants on the basis of meth residue in the house with no idea who might have consumed the P or when...”¹

Housing New Zealand (HNZ) and methamphetamine contamination of state houses has featured, with increasing prevalence, in media headlines over the past year.² Among the headlines are the examples of government power in action; the stories about evicted HNZ tenants. These stories tend to follow the same pattern. HNZ tests one of its (tenanted) properties for methamphetamine contamination. A positive result is returned, indicating methamphetamine has been used or manufactured in the property. As a result, the tenant is evicted, and often suspended from receiving further social housing for at least a year.³ Usually, no test has been undertaken prior to the tenant moving into the property, and thus HNZ collects alternative information to “prove” it was the tenant that caused the contamination (and thus giving HNZ a reason to suspend the tenant). The same stories are not arising in relation to landlords and tenants operating in the private sector.

Such a scenario (the HNZ and methamphetamine testing problem) is clearly concerning. It leaves members of society unable to receive state housing, potentially without any fault of their own. Yet, the HNZ and methamphetamine testing problem is emblematic of a wider issue – the exercise the government power.

Thus, this dissertation aims to determine the circumstances that have allowed government power to be exercised in this way, and the potential consequences. To do this, it will identify the problems in the legislative framework, comprising of the Housing Restructuring and Tenancy Matters Act 1992 (HRTMA) and Residential Tenancies Act 1986 (RTA), which has allowed the HNZ and methamphetamine testing problem to arise. It will examine the “mess”¹ itself, demonstrating the consequences of a government agency (HNZ) acting without clear limits to its powers. Further, it will identify the broader issues that are showcased and generated when a government agency lacks clear limits to its powers.

During the course of writing this dissertation, the Government introduced the Residential Tenancies Amendment Bill (No. 2) 2017 (RTAB).⁴ This Bill, if enacted, will solve some, but not all, of the issues

¹ Phil Twyford “Phil Twyford: Housing New Zealand breaking bad” (22 November 2016) Stuff <<http://www.stuff.co.nz/national/politics/opinion/86233216/phil-twyford-housing-new-zealand-breaking-bad>>.

² For example, see: Baz Macdonald “Meth testing: \$52m on an irrational fear” (2 October 2017) Newsroom <https://www.newsroom.co.nz/2017/10/01/50790/meth-testing-52m-on-an-irrational-fear>>; Maria Slade “The great meth testing ‘scam’: Are Kiwis wasting thousands of dollars?” (28 September 2017) NZ Herald <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11927457>; Benedict Collins “Housing NZ ignored warnings over meth evictions” (28 October 2016) Radio NZ <<http://www.radionz.co.nz/news/political/316591/housing-nz-ignored-warnings-over-meth-evictions>>.

³ For example, see: Lisa Owen “Woman evicted after meth test demands answers from Housing NZ” (18 April 2017) Newshub <<http://www.newshub.co.nz/home/new-zealand/2017/04/woman-evicted-after-meth-bust-demands-answers-from-housing-nz.html>>.

⁴ Residential Tenancies Amendment Bill (No. 2) 2017 (258-1).

raised in the HNZ and methamphetamine testing problem. Thus, portions of this dissertation will concentrate on the potential effects of the RTAB.

This dissertation comprises of three chapters. Chapter One will examine the legislative framework governing HNZ in its dual role of social housing provider and landlord. The HRTMA governs HNZ as a social housing provider. In its role as a landlord, however, HNZ is governed by the RTA. The legislative provisions, in the RTA, relevant to methamphetamine testing by landlords (whether state or private) are also outlined. Attention will be given to the various methamphetamine contamination guidelines that have been produced over the past seven years. It will become clear from Chapter One that the legislative framework governing HNZ is unclear and complicated.

Chapter Two delves into the HNZ and methamphetamine testing problem. This chapter will provide an example of the potential result of an unclear legislative framework. Specifically, three issues are arising. First, HNZ is entering properties to test for methamphetamine contamination. Chapter Two will attempt to identify the authority that allows HNZ to do so. Second, following a positive test result, HNZ are evicting tenants. Thus, the RTA sections being utilised by HNZ to evict tenants will be discussed. Third, HNZ are collecting additional evidence to “prove” it was a particular tenant that caused the contamination. Therefore, Chapter Two will provide examples of the type of evidence being used, and attempt to identify the authority that allows HNZ to collect evidence. The potential effect of the RTAB (if enacted) on these issues will also be examined.

Chapter Three identifies broader issues that are highlighted by the HNZ and methamphetamine testing problem. Whether HNZ is acting ultra vires its statutory powers will be considered. The difficulty in answering this question serves to demonstrate the inefficiencies in the social housing system. Further, the need for legislative amendment, through the RTAB, also highlights issues in the present system. Chapter Three will then identify the human rights implications generated by the RTAB and the current system. Finally, Chapter Three considers whether separate schemes for the private and public sector should exist.

CHAPTER I: THE LEGISLATIVE FRAMEWORK

A. Introduction

In order to provide context for the issue of HNZ and methamphetamine testing, this Chapter will outline the legislative framework governing HNZ, as well as the legislation relating to methamphetamine testing of residential rental properties. A brief outline will be provided of HNZ's various "roles". However, the primary focus of the chapter is the HRTMA and the RTA. These statutes govern HNZ's relationship with its tenants, and outline HNZ's powers as a social housing provider and a landlord. It will become apparent that the lack of "fit" between the HRTMA and RTA makes it difficult to determine the extent and scope of HNZ's powers in relation to methamphetamine testing of its properties. Thus, it is this legislative framework that effectively allows the HNZ and methamphetamine problem to arise.

B. HNZ

HNZ is governed by various statutes, each of which give HNZ a "role". Firstly, HNZ is a statutory corporation, established under the Housing Corporation Act 1974 to "administer the Crown's housing operations."⁵ Secondly, HNZ is a Crown Agent under the Crown Entities Act 2004.⁶ This means HNZ must give effect to government policy when directed to by the Minister of Social Housing and the Minister Responsible for HNZ.⁷ These roles are not of significance to this dissertation, other than to highlight that HNZ is a Crown Agent, and therefore part of the public sector, subject to direction from the Government. Whether HNZ should be subject to a different scheme because it is part of the public sector is considered in Chapter Three.¹⁸¹ Thirdly, HNZ is a social housing provider, governed by the Housing Restructuring and Tenancy Matters Act 1992 (HRTMA). And finally, as a landlord, HNZ is subject to the Residential Tenancies Act 1986 (RTA). HNZ provides a total of 66,332 properties for lease, making it the largest social housing provider and the largest landlord in New Zealand.⁸ It is these two roles, social housing provider and landlord, and the respective legislation, which are of particular importance to this dissertation.

C. Social Housing

The HRTMA is the primary legislation governing social housing in New Zealand, and thus governs HNZ's role as social housing provider. The HRTMA, and New Zealand's social housing scheme along with it, undertook significant changes in 2013. The Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Act 2013 (SHRA) reformed New Zealand's social housing scheme. It established a multiple provider social housing market, with social housing providers other than HNZ becoming subject to the HRTMA.⁹ As a result, social housing under the HRTMA is defined as HNZ housing and community housing.¹⁰ Community housing is defined by s 2 of HRTMA as premises that are let or to be let by or on behalf of a registered community housing provider for occupation by any

⁵ Housing Corporation Act 1974, s 1A.

⁶ Crown Entities Act 2004, Schedule 1.

⁷ Crown Entities Act 2004, s 7(1)(a); Housing Corporation Act, s 20.

⁸ Ministry of Social Development *Social Housing Quarterly Report* (June 2017) at 3.

⁹ Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Act 2013, s 70.

¹⁰ Housing Restructuring and Tenancy Matters Act 1992, s 2.

person as a place of residence.¹¹ HNZ housing is defined as premises (whether owned by the Crown, HNZ, or any other person) let or to be let by or on behalf of HNZ for occupation by any person as a place of residence.¹² However, this definition of social housing is not replicated in the RTA, demonstrating a distinct lack of cohesion across the legislative framework governing social housing.⁴⁴

D. Social Housing Eligibility

The SHRA also moved oversight of eligibility for social housing from HNZ to the Ministry of Social Development (MSD). Thus, MSD is responsible for determining eligibility for social housing, with HNZ providing the properties as a social housing provider under the HRTMA, and acting as landlord. However, HNZ retains discretion with regard to the allocation of particular property.

1. Initial Assessment of Eligibility

The process of applying for social housing begins with an application to MSD. Sections 117 and 118 of the HRTMA allow the Agency (which, in this instance, is MSD) to determine and review the housing eligibility and housing needs of tenants.¹³ Reviews under s 117 must follow the Direction on Eligibility of the joint Ministers (Minister of Finance, Minister of Housing, and Minister for Social Housing) given under s 102.¹⁴

The Direction on Eligibility outlines the eligibility requirements for receiving social housing. Firstly, a person must meet age and residency qualifications.¹⁵ Generally, a person must be 18 years old to be able to receive social housing. However, a person may be deemed eligible if aged 16 or 17 and in a civil union or marriage.¹⁶ Those aged 16 or 17 and single or in a de facto relationship must obtain approval from the Tenancy Tribunal or a District Court (under the Minors Contracts Act 1969) in order to enter into a tenancy agreement in respect of particular social housing.¹⁷ A person must ordinarily be resident in New Zealand, and be a New Zealand citizen or have been a permanent resident for at least two years.¹⁸ Secondly, a person must meet certain thresholds relating to income and assets.¹⁹ The thresholds are variable and dependant on whether a person is single, married, or has children. Finally, a person must have a “persistent housing need” in order to be eligible. Persistent housing need is defined as one that is serious, or severe and needing to be addressed immediately.²⁰ In determining whether a person has a serious or severe housing need regard is had to the following factors; affordability, adequacy, suitability, accessibility, and sustainability.²¹

¹¹ Housing Restructuring and Tenancy Matters Act, s 2.

¹² Housing Restructuring and Tenancy Matters Act, s 2.

¹³ Housing Restructuring and Tenancy Matters Act, s 117.

¹⁴ Housing Restructuring and Tenancy Matters Act, s 102.

¹⁵ “Ministerial Direction on Eligibility for Social Housing” (14 April 2014) 41 *New Zealand Gazette* 1125 at 1205.

¹⁶ At 1205.

¹⁷ At 1205.

¹⁸ At 1205.

¹⁹ At 1205.

²⁰ At 1205.

²¹ At 1205.

MSD retains a level of discretion with regard to the eligibility criteria. If a person does not meet the income and asset thresholds, but does meet the housing need requirements, they may still be deemed eligible for social housing.²²

Those deemed eligible for social housing, by MSD, are placed on the Housing Register.²³ Once HNZ has a property suitable for a person on the Housing Register, HNZ will notify the person and MSD. However, s 75 of the HRTMA provides that there is no obligation on HNZ to provide any or a particular property to a tenant who has been referred or allocated to HNZ by MSD.²⁴

2. Continued Eligibility

For a person to remain eligible for social housing they must continue to meet the residency requirements, as well as income and asset thresholds, set out in the Direction for Eligibility.²⁵ A person's housing need will also need to be serious or severe.²⁶ Such assessment is carried out by MSD.

Further, under s 75 of the HRTMA, HNZ may also review the eligibility of a tenant to continue to be allocated, assigned, or let particular HNZ housing.²⁷ Thus, whilst the overall determination of eligibility is vested with MSD, HNZ retain the ability to review a person's placement in a particular house. Such reviews are limited by a tenant's rights under the RTA, and HNZ would still have to act in accordance with notice periods, and general landlord responsibilities.²⁸ Section 75 of the HRTMA will become important in determining the scope of HNZ's powers throughout this dissertation.

E. HNZ's Investigative Powers

Under ss 77-80 of the HRTMA, HNZ is granted powers to investigate, ask questions, seek information and require information in certain circumstances.²⁹ Not all of the investigative powers are directly relevant to the case study of HNZ and methamphetamine testing. However, they are outlined to demonstrate HNZ's varying powers under the HRTMA.

Section 77 allows HNZ to investigate the circumstances of an applicant for, or a recipient of, a financial product. "Financial products" include loans or grants administered by HNZ.³⁰ Income-related rent is excluded.³¹ Schemes such as the Tenant Home Ownership programme (aimed at aiding HNZ tenants to purchase the HNZ properties they were renting) are covered by this definition.³²

Under s 78, for the purpose of conducting an investigation under s 77, HNZ may ask the applicant or recipient of a financial product, or their spouse/partner, "any relevant questions it thinks fit".³³ HNZ

²² At 1205.

²³ Ministry of Social Development "Social Housing Register" <<http://housing.msd.govt.nz/information-for-housing-providers/register/index.html>>.

²⁴ Housing Restructuring and Tenancy Matters Act, s 76.

²⁵ "Ministerial Direction on Continued Eligibility for Social Housing" (19 June 2014) 65 *New Zealand Gazette* 1779 at 1864.

²⁶ At 1864.

²⁷ Housing Restructuring and Tenancy Matters Act, s 75(1)(b).

²⁸ Housing Restructuring and Tenancy Matters Act, s 75(2).

²⁹ Housing Restructuring and Tenancy Matters Act, ss 77-80.

³⁰ Housing Restructuring and Tenancy Matters Act, s 71.

³¹ Housing Restructuring and Tenancy Matters Act, s 71.

³² Housing New Zealand *Financial Products Quarterly Report* (31 March 2017).

³³ Housing Restructuring and Tenancy Matters Act, s 78(1)(a).

also has the power to ask a person subject to a s 77 investigation to verify, by statutory declaration, any answers to questions or any information previously given to HNZ by themselves or their spouse/partner.³⁴ If a person refuses to answer questions or verify information, or is giving misleading or false answers, then HNZ may assess the eligibility of an applicant for financial product on its own knowledge of the situation, or may refuse the person a financial product.³⁵

Section 79 extends the powers under s 78, and allows HNZ to ask any person to: answer questions, permit HNZ to inspect documents, and/or give HNZ a copy of any document. Not only do these powers relate to investigations under s 77, but also to reviews of placement in particular HNZ housing under s 75. As outlined above, a s 75 review allows HNZ to review the eligibility of a tenant to be, or continue to be, allocated, assigned or let particular HNZ housing.²⁷ This section further allows HNZ to allocate a prospective tenant to a particular property, or require a tenant to transfer to different HNZ housing.³⁶ Therefore, HNZ, when allocating or reviewing a tenant's placement in a particular house, is able to request that any person answer questions or present documents for inspection.³⁷ The phrase "any person" gives HNZ wide ambit to approach people to ask them questions about a HNZ tenant. Thus, HNZ could presumably approach the neighbours to ask questions. This power is pivotal. Depending on the interpretation taken of s 75, HNZ may be able to use this power to collect information on a tenant's potential drug use.⁸² This will be discussed in more detail in Chapter Two.¹⁵⁴

In certain situations, HNZ has the ability to require information for certain purposes.³⁸ Situations where HNZ may require information are for the purposes of a s 77 investigation, for the purposes of determining fraud or the committing of an offence under the HRTMA, or for the purpose of determining whether a person has refused or been misleading when answering a question in relation to a s 77 investigation.³⁹ Excluded from this section is any mention of s 75. Thus, whilst HNZ may ask any person to answer questions for the purpose of review of allocation under that section, it cannot require information.

If HNZ is requiring information under s 80, they must comply with a Code of Conduct issued under s 86. HNZ must follow the processes outlined in the Code when requiring information. Specifically there are particular steps to be followed prior to giving a notice, in the giving of a notice and in enforcing compliance.⁴⁰ The current Code of Conduct was issued under s 65A, which is now repealed, but remains in place under s 86(6) of the HRTMA.⁴¹

However, the Code of Conduct is not mentioned in s 79. Thus if HNZ seeks information for the purpose of a review under s 75, HNZ does not have to comply with the Code of Conduct, and does not have to follow a particular process. Certainly, a person does not have to comply with a s 79 request for information.⁴² However, there no procedural limits or designated processes that HNZ must follow

³⁴ Housing Restructuring and Tenancy Matters Act, s 78(1)(b).

³⁵ Housing Restructuring and Tenancy Matters Act, s 78(2)-(3).

³⁶ Housing Restructuring and Tenancy Matters Act, s 75(1).

³⁷ Housing Restructuring and Tenancy Matters Act, s 79(1).

³⁸ Housing Restructuring and Tenancy Matters Act, s 80.

³⁹ Housing Restructuring and Tenancy Matters Act, s 80(1).

⁴⁰ Code of Conduct Issued Under Section 65A for Obtaining Information Under Section 59A of the Housing Restructuring and Tenancy Matters Act 1992 2014, cls 4, 5, 8.

⁴¹ Code of Conduct Issued Under Section 65A for Obtaining Information Under Section 59A of the Housing Restructuring and Tenancy Matters Act 1992; Housing Restructuring and Tenancy Matters Act, s 86(6).

⁴² Housing Restructuring and Tenancy Matters Act, s 79(2).

when seeking information under s 79. Thus, HNZ (or an employee of) could seemingly approach any person asking for information about a tenant of HNZ as formally or informally as they wish.

F. The Residential Tenancies Act and Social Housing

Whilst the HRTMA governs HNZ as a social housing provider, the RTA governs HNZ in its capacity as a landlord. There is no clear “fit” between the HRTMA and the RTA. This makes the legislative framework governing HNZ complicated and difficult to navigate.

1. Social Housing Exemption

The RTA generally applies to all residential tenancies, except as specifically exempted.⁴³ Of relevance to this dissertation is the exemption outlined in s 5(s), which contains the only mention of “social housing” in the RTA.

For the purposes of s 5, social housing is defined as housing for persons on low incomes, persons with special needs, or persons whose disabilities means that they need support or supervision in their housing.⁴⁴ This definition differs from the definition of social housing provided under the HRTMA.¹⁰ The differing definitions are symptomatic of the lack of “fit” between the HRTMA and the RTA.

The tenancy agreement would be excluded from the jurisdiction of the RTA where the tenancy agreement has genuinely been entered into in order to enable a tenant (the sub-landlord) to sublet the premises in order to provide social housing.⁴⁵ Express provision must also be made that the sub-landlord will not be personally occupying the premises, nor using such an agreement to evade the Act.⁴⁶ Under this subsection, the agreement excluded is the one between the head landlord and the head tenant (or sub-landlord). Any agreement between the sub-landlord and sub tenant is still covered by the RTA.

Occasionally HNZ will lease properties in order to meet demand for suitable houses in certain areas.⁴⁷ In this instance, the contract between HNZ and the landlord from which HNZ is leasing will be excluded. The contract between HNZ and the social housing tenant remains covered by the RTA. Therefore, the RTA still applies to HNZ and the tenants of the 61612 properties HNZ controls as landlord.⁴⁸

2. Differing Responsibility for Social Housing Providers

Largely, there is no greater responsibility placed upon providers of social housing under the RTA. One exception to this is with respect to insulation. Under the Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016 there is a requirement that certain insulation have been installed by the

⁴³ Residential Tenancies Act 1986, s 4.

⁴⁴ Residential Tenancies Act, s 5(2).

⁴⁵ Residential Tenancies Act, s 5(s)(i).

⁴⁶ Residential Tenancies Act, s 5(s)(ii)-(iii).

⁴⁷ Housing New Zealand “Leasing My House Through Housing New Zealand” (8 February 2017) <www.hnz.co.nz/working-with-us/leasing-my-house-through-housing-new-zealand/>.

⁴⁸ Ministry of Social Development *Social Housing Quarterly Report*, above n 8, at 3.

1st July 2016 in income-related rent tenancies.⁴⁹ For all other tenancies, the requirements have to be fulfilled by the 1st July 2019.

The definition of social housing in s 5 is not re-iterated in relation to insulation. The use of the phrase “income-related tenancy” rather than “social housing” adds further complication to the legislative scheme. Even within the RTA, the definition of social housing is inconsistent. Income related tenancy is defined under s 2 of the RTA as a tenancy to which ss 72(1) or 92(1) if the HRTMA applies.⁵⁰ Section 72(1) of the HRTMA applies to HNZ housing and a tenant if MSD have notified HNZ of the income-related rent calculated for the tenant.⁵¹ So clearly, there is some reference to the HRTMA in the RTA, but it is unclear how the definitions and statutes are supposed to work together.

G. Conducting Methamphetamine Testing

Currently, there is no legislation or case law specifically relating to the legality or ability of private landlords to test their properties for methamphetamine, and evict tenants when there are positive test results.

Tenancy Services (a department of the Ministry of Business, Innovation and Employment (MBIE) that provides advice and guidance on tenancy related matters) have indicated that if a landlord was to rent out a property contaminated by methamphetamine, they may be in breach of their obligations under the RTA.⁵² Specifically landlords would breach s 45 of the RTA (“(1) the landlord shall – (a) provide the premises in a reasonable state of cleanliness...”) were they to let a property contaminated with methamphetamine.

Certainly, if a landlord has an un-tenanted property, they would be able to conduct methamphetamine testing on the property. Logically, this would be best practice, and would counteract the need for the use of additional evidence to indicate a particular tenant was responsible for the contamination.

Before signing a new lease, Tenancy Services has suggested placing a clause in the tenancy agreement in order to allow the landlord to test the premises.⁵³ The sample clause provided by Tenancy Services would allow for the landlord to conduct methamphetamine testing as part of the property inspection.⁵⁴ This clause indicates that a baseline test needs to have been performed prior to the commencement of the tenancy; with the tenant acknowledging the results of this test.⁵⁵ Further, the suggested clause states that the “landlord reserves the right to claim any costs connected with the manufacture or use of methamphetamine at the premises via a Tenancy Tribunal application.” However, no methamphetamine testing clause has been brought before the Tenancy Tribunal or any Court; so whether such a clause would be enforceable against the tenant remains questionable. It is

⁴⁹ Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016, Explanatory Note and r 3.

⁵⁰ Residential Tenancies Act, s 2.

⁵¹ Housing Restructuring and Tenancy Matters Act, s 72(1).

⁵² Ministry of Business, Innovation and Employment “Renting a property affected by methamphetamine (‘P’)” Tenancy Services <<https://www.tenancy.govt.nz/starting-a-tenancy/renting-affected-properties/renting-a-property-affected-by-methamphetamine-p/>>; New Zealand Government “Tenancy Services” (31 October 2016) <<https://www.govt.nz/organisations/tenancy-services/>>.

⁵³ Ministry of Business, Innovation and Employment “Renting a property affected by methamphetamine (‘P’)”, above n 52.

⁵⁴ Ministry of Business, Innovation and Employment “Renting a property affected by methamphetamine (‘P’)”.

⁵⁵ Ministry of Business, Innovation and Employment “Renting a property affected by methamphetamine (‘P’)”.

important to note that these Tenancy Services guidelines deem it essential for the landlord to conduct baseline tests if any clause (on the basis of a positive test result) is to be enforceable.⁵⁶

If there is a residential tenancy agreement in place (and no clause that would assumingly allow the landlord to conduct tests), there are barriers that limit the landlord's ability to conduct methamphetamine testing of the premises. As a starting point, the landlord is advised to seek the tenant's permission.⁵⁷ If the tenant gives permission, then only the premises can be tested (and not the tenant's personal belongings).⁵⁸ However, there are clearly problems if no test has been performed prior to the commencement of the tenancy with respect to proving it was a certain tenant that caused the damage. This is where alternative evidence is used to suggest or determine that a tenant has been responsible for methamphetamine contamination. The collection and use of additional evidence is discussed in more detail in Chapter Two.¹⁴⁷ If the tenant does not agree, then the landlord may be in breach of the tenant's right to quiet enjoyment under s 45 of the RTA if they test the premises.⁵⁹

If tests are carried out, and methamphetamine is deemed to be present, then ss 51, 59 and 59A of the RTA may be used to terminate the tenancy. Under s 51, a landlord is able to issue a 90 day notice to terminate the tenancy.⁶⁰ No reason needs to be given for issuing such a notice. Section 59 applies if the premises are destroyed, or so seriously damaged as to become uninhabitable, and the damage has occurred *otherwise* than by a breach of the tenancy agreement.⁶¹ Section 59A applies to situations where the damage is *due to* a breach of the tenancy agreement, and the premises are destroyed or uninhabitable.⁶² The party responsible for the damage is not able to give notice under s 59A.⁶³

H. Residential Tenancies Amendment Bill (No. 2) 2017

The Residential Tenancies Amendment Bill (No. 2) 2017 (RTAB) will make changes to the RTA with regard to a landlord's ability to test premises for methamphetamine contamination, and terminate a tenancy due to a positive test result.

Section 45 of the RTA will be amended so that landlords must not provide premises if they know that tests have found the premises to be contaminated, and no decontamination process has been conducted.⁶⁴ If enacted, these amendments will also allow landlords to enter the premises in order to conduct tests for methamphetamine.⁶⁵

⁵⁶ Ministry of Business, Innovation and Employment "Renting a property affected by methamphetamine ('P')".

⁵⁷ Ministry of Business, Innovation and Employment "Renting a property affected by methamphetamine ('P')".

⁵⁸ Ministry of Business, Innovation and Employment "Renting a property affected by methamphetamine ('P')".

⁵⁹ Ministry of Business, Innovation and Employment "Renting a property affected by methamphetamine ('P')".

⁶⁰ Residential Tenancies Act, s 51.

⁶¹ Residential Tenancies Act, s 59.

⁶² Residential Tenancies Act, s 59A.

⁶³ Residential Tenancies Act, s 59A(3).

⁶⁴ Residential Tenancies Amendment Bill (No. 2), cl 26.

⁶⁵ Residential Tenancies Amendment Bill (No. 2), cl 27.

A section allowing termination of a tenancy agreement in cases of methamphetamine will be inserted into the RTA.⁶⁶ The tenant will be able to give notice of two days to end the tenancy, and the landlord seven days. If the tenant is deemed to not be responsible for the contamination, the rent shall abate.⁶⁷

As the RTAB does not impose an obligation on the landlord to perform tests prior to the commencement of the tenancy, in its current form, it is likely to create issues around proving a particular tenant responsible for the contamination. Proving a tenant responsible will still be relevant if the landlord wishes to continue to collect rent, or collect decontamination costs from tenant.

I. Standards and Guidelines for Testing

The RTAB will allow for regulations to be made in order for standards to be set with regard to testing and decontamination of methamphetamine. Until this happens, any guidelines or standards are of advisory status only, and not legally binding.

The first guidelines that have been taken into account by the Tenancy Tribunal are the 2010 Ministry of Health (MOH) “Guidelines for the Remediation of Clandestine Methamphetamine”. Under these guidelines a result exceeding 0.5 micrograms per 100 cm² would require remediation.⁶⁸

In 2016, the MOH issued its “Review of Remediation Standards for Clandestine Methamphetamine Laboratory Sites” which recommended the following thresholds for remediation:⁶⁹

- 0.5 micrograms per 100cm² for houses where methamphetamine has been manufactured
- 1.5 micrograms per 100cm² for carpeted houses where drugs have been used
- 2 micrograms per 100cm² for uncarpeted houses where the drug has only been used.

In some instances the Tribunal have applied the 2010 guidelines, the 2016 guidelines, or both.⁷⁰ In *Forkert v Lodge City Rentals*, the Tribunal found the 2010 MOH guidelines and the review were of “primary importance to its decision.”⁷¹ This has not been such an issue in HNZ cases, as HNZ adopted the 2016 guidelines upon their release, and have tended to bring cases before the Tribunal where there have been results above the 2016 revised thresholds.⁷² One exception to this is *Housing New Zealand v Glozier* where the Tribunal declined HNZ’s application for decontamination costs, as a test, taken in September 2016, had shown that the contamination level was below the 2 micrograms per 100cm² for an uncarpeted home.⁷³ A test taken in January 2016 (prior to the 2016 MOH revision) had shown results that breached the 2010 guidelines, but also above the revised guidelines.⁷⁴ This perhaps indicates why HNZ chose to pursue the application despite the second test results falling below the

⁶⁶ Residential Tenancies Amendment Bill (No. 2), cl 30.

⁶⁷ Residential Tenancies Amendment Bill (No. 2), cl 30.

⁶⁸ Lisa Gerrard “Methamphetamine and Residential Property: Legal Considerations” (speech presented to New Zealand Law Society Property – Methamphetamine Issues Seminar, July 2017) 1 at 8.

⁶⁹ At 9.

⁷⁰ At 9.

⁷¹ *Forket v Lodge City Rentals Limited as agent for FG and SE Curry* [2016] NZTT Hamilton 4047777 at [26].

⁷² Housing New Zealand “Ministry of Health announces recommended methamphetamine contamination guidelines” (27 October 2016) <<http://www.hnzc.co.nz/news/latest-news/ministry-of-health-announces-recommended-methamphetamine-contamination-guidelines/>>.

⁷³ *Housing New Zealand v Glozier* [2017] NZTT Auckland 4047444 at [5].

⁷⁴ At [5].

revised guidelines. It is also noted by the adjudicator as interesting that the level of contamination had fallen from January to September, especially as the tenant continued to live in the property until August 2016.⁷⁵ This perhaps demonstrates the problem with an unregulated testing industry more than anything else. Two different companies produced different results, potentially indicating the method of testing was not consistent across the tests conducted.

In June 2017 MBIE announced the New Zealand Standard 8510 Testing and Decontamination of Methamphetamine Contaminated Properties which sets out a two level approach to determining unsafe levels of contamination:⁷⁶

- 1.5 micrograms per 100cm² for 'high use' areas (being areas that are easily accessed and regularly used)
- 3.8 micrograms per 100cm² for 'limited use' areas (being areas that are only likely to be accessed by adults for a short duration of time, including crawl spaces and wall cavities)

HNZ adopted this standard on the 29th June 2017, and will assumingly apply this standard when deciding to terminate a tenancy.⁷⁷

J. Conclusion

This chapter demonstrates the complexity of the legislation framework involved in the HNZ and methamphetamine testing problem. Having a dual role of social housing provider and landlord means HNZ is subject to the HRTMA and the RTA. Yet, there is no clear "fit" between these statutes, with no consistency in defining social housing. Chapter Two will build on this legislative framework, demonstrating how the complicated legislative framework has generated the HNZ and methamphetamine problem.

⁷⁵ At [5].

⁷⁶ Gerrard, above n 68, at 9.

⁷⁷ Housing New Zealand "MBIE announces New Zealand methamphetamine standard" (29 June 2017) <<http://www.hnzc.co.nz/news/latest-news/mbie-announces-new-zealand-standard/>>.

CHAPTER II: HNZ AND METHAMPHETAMINE TESTING

A. Introduction

This chapter contextualises the legislative framework outlined in Chapter One, with a focus on HNZ's methamphetamine testing of its properties. It demonstrates an exercise of government power, through a Crown Agency, which stems from an unclear legislative framework, and the problems that arise as a consequence. Firstly, this chapter focuses on the source of HNZ's power or authority to enter premises to conduct these tests. Secondly, it examines the three sections of the RTA that HNZ is using to terminate tenancies (due to methamphetamine contamination). Thirdly, it will examine HNZ's collection of additional evidence, which is then used to "prove" a tenant was responsible for the contamination.

B. The Authority to Conduct Methamphetamine Testing

As outlined in Chapter One of this dissertation, Tenancy Services advises that landlords should not enter properties to perform methamphetamine tests without the express permission of tenants.⁵⁹ HNZ's stated policy, given in response to a request under the Official Information Act 1982, is that HNZ requires the consent of the tenant before a test is conducted.⁷⁸ If the tenant refuses HNZ access to the property for the purpose of conducting a methamphetamine test, HNZ "may apply to the Tenancy Tribunal for an access order."⁷⁹ It is not clear that this procedure is being followed in every instance. There are many examples of HNZ and their tenants appearing before the Tenancy Tribunal after HNZ has conducted a methamphetamine test, where it is not apparent how HNZ has gained access to the property to conduct the test. For example, in *Housing New Zealand v Hill* and *Housing New Zealand Corporation v Prast and Teamo* it is not apparent the authority under which HNZ were purporting to act, when they entered the property for the purpose of conducting a methamphetamine test.⁸⁰ Thus, the aim of this section is to explore the range of possible ways in which HNZ has the authority to enter its properties to conduct methamphetamine tests.

1. Section 75 Reviews

As the RTA does not (at least explicitly) allow landlords to enter properties in order to conduct methamphetamine tests, HNZ may be relying on s 75 of the HRTMA.

The addition of s 75 to the HRTMA, under the SHRA, extended the ability to review tenancies to all HNZ tenancies.⁸¹ The intended purpose of this particular amendment was to enable HNZ to review social housing tenancies to ensure tenants were matched to housing appropriate to their particular needs.⁸² Parliamentary debate during the process of enacting the SHRA supports this interpretation. Melissa Lee MP, of the National Party, stated the SHRA was designed to ensure that the housing

⁷⁸ Use/contamination of properties (Obtained under Official Information Act 1982 Request to Rachel Kelly, Government Relations Manager, Housing New Zealand) – attached at Appendix.

⁷⁹ Use/contamination of properties (Obtained under Official Information Act 1982 Request to Rachel Kelly, Government Relations Manager, Housing New Zealand).

⁸⁰ *Housing New Zealand v Hill* [2017] NZTT Whangarei 4067276; *Housing New Zealand Corporation v Prast and Teamo* [2016] NZTT Auckland 4005855.

⁸¹ Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Act, s 12.

⁸² (16 May 2013) 690 NZPD 10017 at 10100 and 10105.

provided is the “right size, in the right place, in the right condition for those who need it most.”⁸³ Reviews under the new s 75, therefore, can be interpreted as focusing on the whether the size, location, and condition of the house matched the needs of the particular tenant. On that basis, conducting a methamphetamine test does not appear to fall within the intended scope of this section.

The wording of s 75 supports this purposive approach to the legislation. Under s 75(1)(a), HNZ may allocate a prospective tenant to particular HNZ housing. HNZ may also review “the eligibility of a tenant to be or continue to be allocated, assigned, or let particular HNZ housing.”⁸⁴ The use of the word “particular” indicates s 75 reviews are not aimed at assessing the character of a particular tenant or what they are doing in a HNZ property. Rather, the focus is on whether the tenant’s needs would be better served in another property. This is supported further by subsection (c) which allows HNZ to require a tenant to transfer to a different HNZ property, that property being “appropriate for the tenant’s housing needs.”⁸⁵ This suggests that s 75 is not to be used to determine general eligibility. Otherwise, there would appear to be no need for MSD to have taken over the role of determining eligibility, and reviewing general eligibility (these powers being transferred from HNZ to MSD under SHRA).

At the time of enacting the SHRA there was some concern from the Opposition that the concept of reviewable tenancies, introduced by s 75, would allow HNZ to terminate tenancies and restrict people’s access to continued social housing.⁸⁶ However, the focus of the section does appear to be on particular housing needs as opposed to general eligibility for social housing. This is especially so as MSD is responsible for determining general eligibility and continued eligibility for social housing.¹³

2. Tenant’s Permission

In some instances it is clear that HNZ has asked the tenant’s permission to conduct methamphetamine testing. In *Housing New Zealand v van Hout* the stated facts indicate that HNZ called Ms van Hout in order to advise her that they wished to carry out methamphetamine testing on the property in which she resided.⁸⁷ However, what is not clear is what would happen if a tenant refused permission to HNZ. Further, it is also not clear whether tenants feel obligated to allow HNZ to test.

3. Tenancy Tribunal Order

The Tenancy Tribunal has held that whilst a landlord does not have an absolute right to test for methamphetamine, there may be circumstances in which testing is considered reasonable.⁸⁸ The Tribunal appears to be concerned with balancing a landlord’s right to inspect the premises and obligations to ensure that the premises are safe to live in against the tenant’s right to quiet enjoyment of the premises.⁸⁹ Thus, a landlord is able to test for methamphetamine if they can prove on the evidence that testing is reasonable in the circumstances.⁹⁰

⁸³ At 10105.

⁸⁴ Housing Restructuring and Tenancy Matters Act, s 75(1)(b).

⁸⁵ Housing Restructuring and Tenancy Matters Act, s 75(1)(c).

⁸⁶ (16 May 2013) 690 NZPD, above n 81, at 10100, 10104.

⁸⁷ *Housing New Zealand v van Hout* [2016] NZTT Poirua 15/00905/PO at [6].

⁸⁸ *Housing New Zealand v Farnell* [2017] NZTT Palmerston North 4081479 at [6]; *Housing New Zealand v Giles* [2014] NZTT Auckland 14/02230/HE at [7].

⁸⁹ *Giles*, above n 88 at [6].

⁹⁰ *Farnell*, above n 88, at [6].

In *Housing New Zealand v Giles* a small quantity of methamphetamine was found by the Police in a bedroom in the premises.⁹¹ The Police also identified a man “well known in methamphetamine circles” as being connected to the property.⁹² This evidence was considered sufficient to make HNZ’s request for an order reasonable.

In contrast, in *Housing New Zealand v Farnell* an order was not granted. A previous test had been conducted at the property at the tenant’s request.⁹³ The test showed the property was contaminated, but below MOH guideline levels.⁹⁴ In the application to the Tribunal, HNZ were seeking to test the property again, as people who were known to be methamphetamine users were visiting the property.⁹⁵ These visitors had been tenants in other HNZ properties that had tested positive for methamphetamine use.⁹⁶ The Tenancy Tribunal considered this evidence unpersuasive and vague stating; “the tenant had asked for the property to be tested earlier, and there is no evidence to show that the person he had concerns about continued to visit.”⁹⁷ Further, HNZ did not identify the visitor in question, nor did they provide reports to show that properties the visitor had previously occupied had been contaminated.⁹⁸

Applying the “reasonable in the circumstances” test may explain why the Tenancy Tribunal does not take issue with the fact that HNZ has entered the property to conduct methamphetamine tests when the issue of evicting a tenant comes before the Tribunal. For instance, in *HNZ v Walker* a police search of the property in December 2016 revealed evidence of drug use, residence at the property of known methamphetamine users and photographic evidence of methamphetamine paraphernalia.⁹⁹ HNZ claimed this evidence made it reasonable for the landlord to test the property for contamination.¹⁰⁰ No order was applied for beforehand, but there seems to be an implication that if HNZ knows they have evidence that the Tribunal is likely to deem sufficient to evict a tenant (as long as there is a positive test reading above the guidelines), then they can proceed with the test. Clearly, there are issues if this is the approach being taken. HNZ would be the collector and evaluator of evidence. Surely, the Tenancy Tribunal should be responsible for the evaluation of evidence.

4. Conducting Tests - Post Amendment

The RTAB addresses the disparity in how HNZ is gaining access to properties to test for methamphetamine.¹⁰¹ Clause 27 will amend s 48 of the RTA to allow a landlord to enter the property for the purpose of testing for the presence of methamphetamine, or taking samples for such testing. Testing will need to occur between the hours of 8am and 7pm.¹⁰² The tenant will need to be given notice of between 48 hours¹⁰³ and 14 days.

⁹¹ *Giles*, above n 88, at [8].

⁹² At [8].

⁹³ *Farnell*, above n 88, at [4].

⁹⁴ At [4].

⁹⁵ At [4]-[5].

⁹⁶ At [5].

⁹⁷ At [6].

⁹⁸ At [6].

⁹⁹ *Housing New Zealand Corporation v Walker* [2017] NZTT Auckland 4079014 at [5].

¹⁰⁰ At [5].

¹⁰¹ Residential Tenancies Amendment Bill (No. 2).

¹⁰² Residential Tenancies Amendment Bill (No. 2), cl 27.

¹⁰³ Residential Tenancies Amendment Bill (No. 2), cl 27.

The perceived need for this amendment potentially indicates that, should HNZ not be granted permission, HNZ is acting ultra vires any statutory power when entering the property to conduct methamphetamine testing. Although the RTAB itself certainly does not attest to this, it does raise the question of whether HNZ has been acting within their statutory powers as a landlord under the RTA and a social housing provider under the HRTMA. There is, at least, the appearance that in some instances HNZ has not been granted permission or a Tenancy Tribunal order. Thus, the RTAB could be viewed as a way of solving this issue, and making it easier for HNZ to gain access to properties. Broader issues related to the RTAB will be discussed in Chapter Three.¹⁶⁷

C. Ending the Tenancy due to Methamphetamine Contamination

As outlined in Chapter One, if HNZ wishes to end a tenancy due to a positive methamphetamine test there are three options available under the RTA. A landlord may issue a s 51 “90 day notice”.¹⁰⁴ Alternatively, a landlord may use ss 59 or 59A to terminate the tenancy in seven days.¹⁰⁵

1. Section 51 – “90 day notice”

Under s 51 of the RTA, a landlord is able to end a periodic tenancy by giving a minimum period of notice of 90 days. Fixed term tenancies cannot be ended using a 90 day notice. HNZ has stated that it has issued 136 s 51 notices to tenants since 2014/2015.¹⁰⁶ HNZ has not, however, provided the number of notices given under ss 59 and 59A.

Ninety days could be viewed as a long period of time if a landlord were seriously concerned about the damage that had been occurring to the property. However, there does not need to be any reason stated for terminating the tenancy when giving a s 51 notice. Using s 51 may be an easier option for a landlord who is having difficulty gaining the tenant’s consent to the property, and does not have sufficient evidence for a Tenancy Tribunal order. As long as the giving of a s 51 “90 day notice” is not a retaliatory move (in response to an exercise of rights by the tenant), there is little recourse for contesting a s 51 notice.¹⁰⁷

Perhaps then, inferences can be drawn from HNZ’s use of s 51. The use of s 51 circumnavigates the need to prove a tenant was responsible for the contamination (as under s 59A).⁵² Further, if the contamination did not reach a relevant threshold for unsafe contamination, HNZ could utilise s 51 to terminate the tenancy.

2. Section 59

In using s 59 to terminate a tenancy, HNZ is not placing blame on tenants for the contamination. Section 59 is used when there is damage that renders the property uninhabitable, other than due to a breach of the tenancy agreement.¹⁰⁸ However, if the tenants are not to blame for the contamination, then logically HNZ would be breaching their obligations by not providing a reasonably clean property

¹⁰⁴ Residential Tenancies Act, s 51.

¹⁰⁵ Residential Tenancies Act, ss 59, 59A.

¹⁰⁶ The number of tenants evicted/tenancies terminated due to positive methamphetamine tests (Obtained under Official Information Act 1982 to Rachel Kelly, Government Relations Manager, Housing New Zealand) – attached at Appendix.

¹⁰⁷ Residential Tenancies Act, s 54.

¹⁰⁸ Residential Tenancies Act, s 59.

under s 45 of the RTA.¹⁰⁹ This issue does not appear to have been raised by any HNZ tenant, or by the Tenancy Tribunal. In turn, this demonstrates the inefficacy of s59. It allows a tenant to be evicted, through no fault of their own, without recognising the landlord has potentially breached their obligations.

When s 59 is used and the matter appears before the Tenancy Tribunal, rather than ending the tenancy and granting possession to the landlord, the Tribunal will sometimes rule that HNZ should accommodate the tenant elsewhere until the property is cleaned.¹¹⁰ An example of this can be found in *Kemp and Kemp v Housing New Zealand*.¹¹¹ In October 2015, an unsuccessful application for an order to terminate the tenancy was made by HNZ under s 59A.¹¹² HNZ followed this decision by applying for an order to terminate the tenancy under s 59 on the grounds that the premises were uninhabitable.¹¹³ However, as the premises could be returned to habitability through decontamination, the Tenancy Tribunal found there were no grounds for termination.¹¹⁴ In the period between November 2015 and July 2016 the Kemps were living in a motel, expecting to move back into the property once decontamination had occurred. Instead, HNZ went on to issue another seven day notice in July 2016 (assumably under s 59, although this is not stated) and the property was demolished in August 2016.¹¹⁵ Although the legality of issuing the July 2016 notice was not directly raised before the Tribunal, the adjudicator did find the issuing of the termination notice “puzzling”.¹¹⁶ The adjudicator commented that it was unclear whether HNZ had legal grounds to issue the July 2016 notice, as there was no evidence to suggest the premises were uninhabitable at the time.¹¹⁷ Whilst HNZ claimed that the decontamination had been unsuccessful, they presented no evidence with regards to the initial decontamination, the results of testing post decontamination attempts, or the anticipated costs of further decontamination.¹¹⁸

Kemp and Kemp, aside from highlighting some questionable behaviour on HNZ’s behalf, demonstrates the inefficacy of s 59. The tenants were not considered to be responsible for the contamination. However, the tenants still found themselves removed from their home with no chance of re-entering. Although the tenants were not able to re-enter because of actions taken by HNZ, the short notice period involved in terminating a tenancy under s 59 (or s 59A) exacerbates the issue. A tenant only has seven days (the landlord being able to give a seven day notice under s 59) to bring the matter before the Tenancy Tribunal, should they wish to dispute the issuing of a notice, before their tenancy is considered terminated. For the Kemps, the property was demolished before they appeared at the Tenancy Tribunal. And when the issue did appear before the Tenancy Tribunal, there was a distinct lack of evidence supporting the termination of the tenancy. Section 59 may appear the “easier”

¹⁰⁹ Residential Tenancies Act, s 45.

¹¹⁰ Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Protection of tenants and landlords from the effects of methamphetamine contamination* (10 November 2016).

¹¹¹ *Kemp and Kemp v Housing New Zealand* [2016] NZTT Whangarei 4048597.

¹¹² At [2].

¹¹³ At [2].

¹¹⁴ At [2].

¹¹⁵ At [2].

¹¹⁶ At [5].

¹¹⁷ At [6].

¹¹⁸ At [6].

option, as opposed to s 59A, as no blame needs to be placed on tenant. However, it still allows a landlord to terminate a tenancy in a short period of time.

3. Section 59A

The use of s 59A, by a landlord, necessarily means the tenant has been in breach of the tenancy agreement. Per s 59A(3), it is only the party not in breach that may give notice to terminate the tenancy.¹¹⁹

Using s 59A gives HNZ a reason to suspend a tenant under their Encouraging Good Neighbour Behaviour Policy.¹²⁰ This Policy stipulates that HNZ has the ability to suspend people who behave in antisocial ways and disrupt communities.¹²¹ Particularly, the Policy states that tenants will be suspended should they substantially damage a state house or use a state house as a base for criminal activities.¹²² Suspension periods begin on the date the tenancy is terminated and last up to a year.¹²³ During this time the person suspended is not eligible to apply for a state house.¹²⁴ Once the suspension is over, the suspended person will be able to apply for state housing, but they will have to engage with the MSD eligibility process again. Should they receive a state house; their tenancy will be regularly reviewed by HNZ.¹²⁵ HNZ have suspended 910 individuals from applying for a HNZ property; 363 of whom were suspended in relation to methamphetamine.¹²⁶

In order for a landlord to validly issue a s 59A notice to terminate the tenancy, they must show: (a) the damage resulted from a breach of the tenancy agreement; and (b) the premises were destroyed or so seriously damaged as to be uninhabitable.¹²⁷

(a) Damage as a result of breaching the tenancy agreement

The onus is upon the landlord to show, on the balance of probabilities, the tenant breached the tenancy agreement and therefore caused the damage. In the context of methamphetamine testing, the tenant may be in breach of the tenancy agreement by not failing to meet one of a tenant's various responsibilities under s 40 of the RTA.¹²⁸ Firstly, methamphetamine contamination caused by the tenant may be a breach of s 40(1)(c) - keeping the premises reasonably clean and reasonably tidy. Secondly, tenants may also be in breach by either intentionally or carelessly damaging or permitting any other person to damage the premises under s 40(2)(a). Thirdly, under s 40(2)(b) tenants may be in breach by using or permitting the premises to be used for an unlawful purpose. In most instances the Tribunal will not clearly state which of these subsections have been breached. Rather the decision

¹¹⁹ Residential Tenancies Act, s 59A(3).

¹²⁰ Housing New Zealand "Suspending tenants from Housing New Zealand Houses" (17 May 2016) <<https://www.hnzc.co.nz/assets/Uploads/Suspending-Tenants.pdf>>.

¹²¹ Housing New Zealand "Suspending tenants from Housing New Zealand Houses".

¹²² Housing New Zealand "Suspending tenants from Housing New Zealand Houses".

¹²³ Housing New Zealand "Suspending tenants from Housing New Zealand Houses".

¹²⁴ Housing New Zealand "Suspending tenants from Housing New Zealand Houses".

¹²⁵ Housing New Zealand "Suspending tenants from Housing New Zealand Houses".

¹²⁶ The number of Housing New Zealand tenants suspended from receiving state housing, and how many of these are in relation to methamphetamine (Obtained under Official Information Request 1982 request to Rachel Kelly, Government Relations Manager, Housing New Zealand) – attached at Appendix.

¹²⁷ *Goode Leith Realty Ltd t/a Ray White Allens v Lorriane Thomas* [2017] NZTT Whangarei 4076052 at [8]; *Housing New Zealand v Woods* [2017] NZTT Lower Hutt 4083932.

¹²⁸ Residential Tenancies Act, s 40.

will state that the tenant has been found to have caused the contamination, and is therefore in breach of the tenancy agreement and/or the RTA. Due to the lack of explicit use of sections in some Tribunal Orders, some decisions that do not directly involve s 59A (but do still involve s 40), as well as decisions involving private landlords will be reviewed. This will demonstrate the complexity involved in terminating a tenancy under the current RTA scheme.

(i) *Keeping the premises reasonably clean (s 40(1)(c))*

In *Riverlands Real Estate Limited MREINZ Harcourts Agent for Ron Goodwin v Nuku* the Tribunal held that any level of contamination “must result in the premises being unclean” under s 40(1)(c) of the RTA.¹²⁹ Whilst the Tribunal may hold that any level of contamination breaches the RTA under s 40(1)(c), it may not be a breach that renders the premises uninhabitable (therefore failing the second part of the test in s 59A). The various contamination guidelines, outlined in Chapter One, are being understood by the Tribunal as indicating safe occupancy.⁶⁸

It appears arguments around s 40(1)(c) are more likely to arise in instances where the landlord is seeking to claim the cost of decontaminating the property. In *Bolitho Property Management v Bloomfield* methamphetamine tests were undertaken prior and subsequent to the tenancy.¹³⁰ The level of methamphetamine increased, but not above the level of the MOH guidelines. However, the tenant was still found to be liable for the cleaning the property. The adjudicator compared the situation to cleaning cigarette smoke from the premises; whilst there is no health risk to the occupants the property is still considered unclean.¹³¹

As HNZ “adopt” guidelines, it is perhaps unlikely that they would issue a s 59A order if the results of any test were below the level of the guideline they have adopted.¹³²

(ii) *Damage to the property (s 40(2)(a))*

Section 40(2)(a) of the RTA provides that the tenant shall not damage the property, nor permit any other person to damage the property.¹³³ In contrast to the approach in s 40(1)(c), in order for premises to be considered “damaged” under s 40(2)(a), the level of contamination must be above the guideline threshold. In *Nuku* the highest contamination was 0.39 micrograms (below the MOH threshold for liability), and therefore there was no breach of s 40(2)(a).¹³⁴ In *Housing New Zealand v Taylor*, the Tribunal found that as the results were above the MOH guideline levels, the property was damaged.¹³⁵ Thus, the tenant was found liable for the costs incurred by the landlord in decontaminating the property.

Section 40(4) states that where any damage occurs, other than fair wear and tear, it shall be for the tenant to prove that the damage did not occur in circumstances constituting a breach of subsection

¹²⁹ *Riverlands Real Estate Limited MREINZ Harcourts Agent for Ron Goodwin v Nuku* [2016] NZTT Huntly 15/02826/HN at [18].

¹³⁰ *Bolitho Property Management Ltd v Bloomfield* [2017] NZTT Nelson 4083990 at [5].

¹³¹ At [9].

¹³² Housing New Zealand “Ministry of Health announces recommended methamphetamine contamination guidelines”, above n 72.

¹³³ Residential Tenancies Act, s 40(2)(a).

¹³⁴ *Nuku*, above n 129, at [14]-[16].

¹³⁵ *Housing New Zealand v Taylor* [2016] NZTT Palmerston North 4029353 at [5].

(2)(a).¹³⁶ Thus, there is an inherent imbalance when s 40(2)(a) is deemed to be the section breached for the purposes of s 59A. The tenant has to prove they did not cause the contamination; which is incredibly difficult without a baseline test.

(iii) *Unlawful purpose (s 40(2)(b))*

In *Housing New Zealand v Hill* the tenant was found to be in breach of the tenancy agreement and the RTA due to there being illegal activity at the property.¹³⁷ The Tribunal are presumably meaning unlawful purpose, as illegal activity is not mentioned in the RTA. In this instance the police had executed a search warrant of the property. Methamphetamine was found during this search in a bedroom occupied by a guest of the tenant. Testing was carried out by HNZ subsequent to the police search. At the time of the Tribunal hearing the tenant's guest was facing drug charges related to this search. Although the tenant was not herself charged in relation to the drugs, the evidence shows the person, who was charged, was presumably living at the property by the tenant's consent.¹³⁸ Thus, Hill was liable for that person's breach of the RTA.

Following the release of updated MOH recommended guidelines in October 2016 HNZ stated the guidelines "are not linked in any way as to any actions we have taken against our tenants."¹³⁹ Instead, HNZ indicated that ending a tenancy in relation to methamphetamine was because consuming or manufacturing methamphetamine is "an illegal activity and a clear and direct breach of their tenancy agreement."¹⁴⁰ This suggests that HNZ are considering the breach of the tenancy agreement to be related to s 40(2)(b) when they issue a s 59A notice, or request the Tribunal to enforce such a notice.

However, as outlined above, there are instances where the Tribunal has examined HNZ cases in relation to damage under s 40(2)(a). The Encouraging Good Neighbour Behaviour Policy also states that a tenant can be suspended for substantially damaging a property or for conducting illegal activity at the property; so a breach under s 40(2)(a) or (b) could support the need to suspend a tenant.

(b) Premises destroyed or so seriously damaged as to make them uninhabitable

Section 59A is usually considered in the context of total destruction of the premises, or damage to a large part of the premises.¹⁴¹ The guidelines used by the Tribunal are taken as indicating levels that make it safe to occupy the premises.¹⁴² In *Housing New Zealand v Hill* results of swabs indicated contamination in the kitchen, bathroom and two bedrooms, which would add to the argument that damage has occurred to a large part of the premises. Further, in *Housing New Zealand v Teepa* eight of twelve swabs revealed contamination higher than the MOH guidelines, with contamination in the lounge, kitchen hallway and bedroom.¹⁴³ However, sometimes it is not clear from Tribunal decisions how many rooms have been contaminated. For example, in *Housing New Zealand v Prast and Teamo*,

¹³⁶ *van Hout*, above n 87, at [10].

¹³⁷ *Hill*, above n 80, at [6].

¹³⁸ At [4].

¹³⁹ Housing New Zealand "Ministry of Health announces recommended methamphetamine contamination guidelines", above n 72.

¹⁴⁰ Housing New Zealand "Ministry of Health announces recommended methamphetamine contamination guidelines".

¹⁴¹ *Lorriane Thomas*, above n 127, at [16].

¹⁴² *Hill*, above n 80 at [2]; *Prast and Teamo*, above n 80, at [4]; *Woods*, above n 127, at [11].

¹⁴³ *Housing New Zealand v Teepa* [2015] NZTT Manukau 15/04385/MK at [3].

it is stated that “results showed very high methamphetamine readings,” but does not state how many swabs were taken, or how many rooms were contaminated.¹⁴⁴ This indicates that as long as there is a positive test above guidelines levels somewhere in the house, this will mean the entire property is unsafe to occupy.

4. *Ending the Tenancy - Post Amendment*

The RTAB will explicitly allow tenancies to be terminated on the grounds of a positive methamphetamine test. Tests will have to be carried out in accordance with any regulations made under the RTA. Unlike s 59A, s 59B will not have underlying need for one party to take responsibility in order for the section to be utilised to terminate the tenancy. The new s 59B will allow either the landlord or the tenant to terminate the tenancy.¹⁴⁵ The landlord must give notice of at least seven days, whilst the tenant must give notice of at least two days.¹⁴⁶

D. Collection of Additional Evidence and Investigative Powers

In the absence of tests performed at the start or prior to the tenancy commencing (baseline tests), HNZ produces evidence in addition to the positive test result (additional evidence) to indicate it was the particular tenant that caused the contamination. This evidence is used both in relation to applications for Orders to conduct methamphetamine tests, the validation of s 59A termination notices, and when seeking decontamination costs.

1. *The Additional Evidence*

Several Tenancy Tribunal decisions give an indication of the type of evidence being presented by HNZ, to “prove” a particular tenant is responsible for the contamination, in the absence of baseline tests.

In *Housing New Zealand v Hill*, an e-mail from the police confirming the search and seizure of methamphetamine equipment was deemed enough to terminate the tenancy.¹⁴⁷ Ms Hill herself was not charged in relation to the search of the property.¹⁴⁸ However, a person living with her was charged, and the adjudicator stated that person was “presumably there with Ms Hill’s consent”.¹⁴⁹

The decision in *Housing New Zealand v van Hout* states HNZ undertook drug testing as a result of observing drug paraphernalia and cannabis present during a routine property inspection.¹⁵⁰ It is not stated whether the drug paraphernalia was considered to be related to methamphetamine use. HNZ also stated that on 3 August 2015 when van Hout was called in order to arrange the time to conduct the testing, she advised HNZ that her ex-partner had smoked methamphetamine at the property. Ms van Hout disputed this version of the conversation, stating she told HNZ that she was aware the ex-partner smoked but had never seen him do so at the property, although she could “not say much for the boarders.”¹⁵¹ The Tribunal found that her use of cannabis did not mean Ms van Hout had used methamphetamine at the property. However, it was considered that the evidence suggested that she,

¹⁴⁴ *Prast and Teamo*, above n 80, at [4].

¹⁴⁵ Residential Tenancies Act Amendment Bill (No. 2), cl 30.

¹⁴⁶ Residential Tenancies Act Amendment Bill (No. 2), cl 30.

¹⁴⁷ *Hill*, above n 80, at [4].

¹⁴⁸ At [4].

¹⁴⁹ At [4].

¹⁵⁰ *van Hout*, above n 87, at [5].

¹⁵¹ At [7].

by smoking cannabis, was giving her visitors implied permission to use drugs at the premises. Thus, van Hout's cannabis use, along with her perceived lack of oversight in relation to her visitors, was considered sufficient evidence to find that the contamination occurred whilst van Hout was occupying the premises. The Tribunal also stated that as the tenancy had been in place since 2011, this supported a finding that the contamination occurred during the tenancy.

A combination of police intelligence, complaints from neighbours and behaviours at the premises "at all hours of the night" prompted HNZ to have the property tested in *Housing New Zealand Corporation v Prast and Teamo*.¹⁵² It is also noted that file notes from at least 2005 indicate concerns from the police and others as to possible methamphetamine use at the property.¹⁵³ While it is not clear whether the "file notes" are from HNZ files, or are police files, the additional mention of police intelligence as a reason for HNZ testing suggests they were HNZ files. The evidence of behaviours at the premises and complaints from neighbours is vague. This evidence does not prima facie indicate that methamphetamine was being used at the property. In this instance, a s 59A order had been issued and the tenants had vacated. Thus, rather than seeking possession of the property, HNZ were appearing before the tribunal to seek \$18,803 in testing and decontamination costs. The tenants did not appear, but the tribunal ruled that it was more likely than not that the contamination occurred during the tenancy. As a result, the tenants were liable for the reasonable costs of decontamination, and the amounts sought were reasonable.

2. *The Collection of Additional Evidence*

The collection of this additional evidence is also a key issue. There is no authority or power under the RTA that allows landlords to collect such evidence. Thus, if HNZ is to have the authority to collect evidence on their tenants, it must stem from the HRTMA. If such a power is available for HNZ, the result is that HNZ and HNZ tenants are subject to a different scheme than private landlords and tenants. Whether there is a need for HNZ and private landlords to operate under separate schemes is considered in Chapter Three.

As outlined in Chapter One, HNZ have certain investigative powers under the HRTMA.²⁹ Of particular importance are the powers relating to s 75 reviews (under the HRTMA). It may be that HNZ are using these investigative powers to collect evidence that can then be used to suggest that a tenant is responsible for any methamphetamine testing.

As previously outlined, s 75 of the HRTMA allows reviews that relate to a person's suitability for a specific property.⁸² Therefore, the investigative powers under s 79 of the HRTMA, outlined in Chapter One,³⁷ should only be used to determine whether a person is suitable for a particular house, when these powers are being used in relation to s 75 review. The powers conferred on HNZ by s 79 are wide. In determining whether a person is suitable for a particular house HNZ can request any person to answer questions.¹⁵⁴ Further, HNZ are able to request any person allow HNZ to inspect any written information, or provide a copy of such written information (or a printout of any information stored digitally). If HNZ were acting in relation to a s 75 review to collect methamphetamine testing (putting aside that this seems beyond the ambit of s 75), then they would have the ability to ask anyone any

¹⁵² *Prast and Teamo*, above n 80, at [3].

¹⁵³ At [3].

¹⁵⁴ Housing Restructuring and Tenancy Matters Act, s 79.

question. A person does not have to comply with a request, but if HNZ were to approach their tenants, it may be that tenants feel obligated to provide information.

As there is such a lack of clarity surrounding the issue, it is difficult to determine how HNZ are collecting the evidence or under what authority they purport to be acting when they do collect evidence. If the information is being collected under s 79 in relation to a s 75 review, this appears to be outside the intended ambit of s 75. However, if the information is being provided to HNZ without prompting it is unclear whether HNZ are investigating the authenticity of any complaint. The Tribunal largely accepts the additional evidence without writing any detailed description or analysis of the evidence. This makes it difficult to determine the both how the evidence has been collected, and the quality of the evidence.

3. *Collecting Evidence - Post Amendment*

Assuming the RTAB passes through Parliament, there will still be no onus on a landlord to perform a baseline test. Whilst the landlord will be able to end the tenancy without a baseline test (the section not containing an overarching element of fault as in s 59A), issues relating to the use of additional evidence may remain. If the landlord wishes to continue to collect rent from the tenant, they would need to show the tenant was responsible for the damage; as the rent abates only if the tenant is not responsible.¹⁵⁵ As HNZ tends to have periodic or longer-term tenancies, it is likely that the issue of not having a baseline test will continue to arise. Further, the decisions of *Glozier* and *Prast and Teamo* perhaps suggest that HNZ will want to recover decontamination costs in some instances. Without a baseline test, HNZ will likely continue to use additional evidence in order to show that it was that tenant that caused the contamination.

E. Conclusion

The above outlines the legal process behind HNZ evicting a tenant due to there being methamphetamine contamination of the property. There is a significant lack of clarity surrounding HNZ's actions. Where the tenant's permission has not been sought or given, and no Tenancy Tribunal Order requested, the authority under which HNZ purports to act is never clear. If a positive test result is returned, HNZ then relies on one of three sections under the RTA to evict the tenant. Upon eviction, tenants are able to be suspended under the Encouraging Good Neighbour Behaviour Policy. Should HNZ be relying on s 59A, they often rely on additional evidence to indicate a tenant was responsible (also supporting a need to suspend the tenant from receiving social housing). Again, there is a lack of clarity surrounding how HNZ is collecting this evidence, and under what authority it purports to act. Whilst the RTAB "solves", in some respects, the issues of entering the property, and ending the tenancy; it does not require a landlord to perform a baseline test. Thus, the collection and use of other evidence to place blame on a particular tenant is likely to continue. Potentially, this will mean that additional evidence will still be used to justify suspending a person from being able to receive state housing.¹²⁰ Overall, the issues identified and issues analysed in this chapter showcase the consequences and confusion that can arise from having an unclear legislative framework.

¹⁵⁵ Residential Tenancies Act Amendment Bill (No. 2), cl 30.

CHAPTER III: BROADER ISSUES

A. Introduction

This chapter identifies the broader issues in, and stemming from, the social housing system governed by the HRTMA and RTA, that are showcased by the HNZ and methamphetamine testing problem. It will consider whether HNZ is acting ultra vires its statutory powers, and in doing so demonstrate the broader issues arising from an unclear legislative framework. Specifically, it will examine the difficulty in determining whether HNZ has been acting ultra vires when the legislative framework is unclear and there is a lack of clarity surrounding HNZ's actions. The need for a legislative amendment also identifies issues with the status quo. This chapter then identifies human rights implications that will potentially arise should the RTAB be enacted. Finally, this chapter considers the issue of there being separate schemes for the public and private sector.

B. Is HNZ Acting Ultra Vires its Statutory Powers?

The answer to the question "is HNZ acting ultra vires its statutory powers?" is not a simple one. Whether an agency is acting ultra vires their statutory power is inextricably linked to how the relevant legislation outlines that power. Further, answering the question is hindered by to the lack of clarity surrounding HNZ's actions and the Tenancy Tribunal's jurisdiction.

1. A Complicated Legislative Framework

The entry point for this dissertation was the legislative framework governing New Zealand's social housing scheme and this was outlined in Chapter One. By now, it should be apparent that the legislative framework is complicated and lacks clarity. This non-cohesive framework has significantly contributed to allowing the issues outlined in Chapter Two to arise. Further, it makes it difficult to determine whether HNZ is acting ultra vires its statutory powers.

Two statutes govern HNZ. The HRTMA governs HNZ as a social housing provider, whilst the RTA governs HNZ as a landlord. There is some cross-referencing between the two statutes. For example, insulation requirements in the RTA refer to the HRTMA.⁴⁹ Importantly, s 75 of the HRTMA references the RTA; stating that a review, with regard to placement in HNZ housing, under s 75 does not affect the rights of a tenant or landlord under the RTA.²⁸

Yet, s 75 also states that "nothing in [s 75] limits or affects HNZ's powers or functions under [the HRTMA] or any other Act."¹⁵⁶ This means it is unclear whether the HRTMA or the RTA would take priority and signals the potential for conflict. Further, there are differing definitions of social housing across the legislation, demonstrating a distinct lack of cohesion. The HRTMA defines social housing as HNZ housing or community housing. In contrast, the RTA defines social housing, in one instance, as housing for persons on low incomes, with special needs, or whose disabilities mean they require support in their housing.¹⁵⁷ In another instance, the RTA refers to income-related housing tenancies, which are defined by the HRTMA.¹⁵⁸

¹⁵⁶ Housing Restructuring and Tenancy Matters Act, s 75(2)(c).

¹⁵⁷ Residential Tenancies Act, s 5(2).

¹⁵⁸ Residential Tenancies Act, s 2.

Thus, it is not clear how the HRTMA and RTA “fit” together. The statutes are generally aimed at different areas. The HRTMA allows the Crown to acquire shares in a company, and vest land, assets and liabilities in that same company, and provides for matters related to such actions.¹⁵⁹ Further the HRTMA “provide[s]... income-related rents, information matching, and other tenancy matters.”¹⁶⁰ In contrast, the RTA defines the rights and obligations of landlords and tenants of residential properties, and establishes the Tenancy Tribunal.¹⁶¹ Yet, the references to each other suggest they were always expected to work in unison with regard to HNZ and HNZ properties. This unison is not achieved, however, when the relationship between the two statutes is not clearly defined.

As a result of the relationship between the RTA and the HRTMA not being clearly defined, it is not clear whether HNZ’s powers under the HRTMA can be used to in relation to the RTA. Again, s 75 of the HRTMA is symptomatic of this lack of clarity. Only after careful statutory analysis does it appear that s 75 does not allow HNZ to collect information related to RTA matters. However, the ability to interpret s 75 as allowing HNZ to review a tenant’s eligibility more generally is perhaps still open if less emphasis is placed on the word “particular”.¹⁶²

Aside from generating the HNZ and methamphetamine problem, other issues stem from an unclear legislative framework. It becomes difficult to review or challenge decisions when it is unclear under what authority HNZ is purporting to act. If HNZ is acting under the RTA to enter properties for the purpose of conducting methamphetamine tests, then the Tenancy Tribunal has jurisdiction.¹⁶³ If, however, HNZ is acting under the HRTMA (using s 75), then this would be outside the Tenancy Tribunal’s jurisdiction. Appealing decisions under the HRTMA is complicated, and depends on the substance of the decision, and whether HNZ or MSD were involved. For instance, if a decision has been made by MSD, the HRTMA provides an appeal process under ss 132-135.¹⁶⁴ However, as this process relates to decisions made by MSD, it would potentially not cover a decision made by HNZ under s 75. If a tenant of HNZ wished to dispute a decision under s 75 it appears they would have to make a complaint directly to HNZ.¹⁶⁵

2. *The Lack of Clarity Surrounding HNZ’s Actions*

The lack of clarity surrounding HNZ’s actions is a factor in determining whether HNZ has acted ultra vires their statutory powers. As outlined in Chapter Two, in many instances it is unclear how HNZ are gaining access to properties, or collecting evidence. There is a number of ways in which HNZ *could* be acting, but it is never clear how it is actually acting.

Nevertheless, assuming the conclusions regarding s 75 made in Chapter Two are correct, then HNZ would be acting ultra vires their statutory powers under the HRTMA.⁸² Further, if Tenancy Services advice regarding entering properties to conduct tests is followed,⁵⁹ and HNZ is not being granted

¹⁵⁹ Housing Restructuring and Tenancy Matters Act, long title.

¹⁶⁰ Housing Restructuring and Tenancy Matters Act, long title.

¹⁶¹ Housing Restructuring and Tenancy Matters Act, long title.

¹⁶² Housing Restructuring and Tenancy Matters Act, s 75.

¹⁶³ Residential Tenancies Act, s 77.

¹⁶⁴ Housing Restructuring and Tenancy Matters Act, ss 132-135.

¹⁶⁵ Housing New Zealand “How are we doing?” (April 2012)
<<https://www.hnzc.co.nz/assets/Uploads/Feedback.pdf>>.

permission to enter properties in all instances, then HNZ is also acting ultra vires their powers as a landlord.

3. The Tenancy Tribunal's role

The Tenancy Tribunal, as the primary body overseeing disputes related to the RTA, is somewhat contributing to the problems that have arisen due to the legislative framework and the lack of clarity surrounding HNZ's actions. The Tribunal is the body that ought to be able to intervene if HNZ is acting ultra vires. Yet, they are not, and this is exacerbating the problem.

If a Government agency is acting ultra vires (or appearing to act ultra vires), then tribunals and courts have the ability to review this behaviour. Yet, when a Tribunal has been given only limited jurisdiction, this poses problems. The Tenancy Tribunal has jurisdiction over matters relating to residential tenancies.¹⁶⁶ The Tribunal is unable to hear or analyse matters relating to the HRTMA; doing so would be outside their narrow and explicit jurisdiction. If HNZ are using HRTMA powers in relation to the RTA, the Tribunal is unable, and unwilling to look into such a matter. For there to be analysis of HNZ's use of their HRTMA powers, the matter would need to be examined under judicial review in the High Court.

4. The Need for Legislative Amendment

The RTAB appears, at first glance, to solve many of the issues that have arisen due to an unclear legislative framework.¹⁶⁷ Landlords would have the authority, under the new legislation, to enter premises to test for methamphetamine. Further, there will be a section aimed at allowing a tenancy to be terminated due to a positive methamphetamine test.

However, as identified previously, there are still issues with regard to baseline testing and the use of additional evidence to "prove" it was the particular tenant that caused the contamination.¹⁵⁵ The RTAB does not make baseline testing compulsory. Thus, if a landlord wants to continue to collect rent or recover damages from a tenant, they would need to present additional evidence indicating it was that tenant who was responsible.

The need for a legislative amendment can perhaps be interpreted as demonstrating that HNZ has been acting in way that is at best questionable, and at worst ultra vires, any statutory powers granted. Private landlords are unlikely to use the new sections due to the expense involved with methamphetamine testing and decontamination.¹⁶⁸ HNZ, however, spent \$51.9million in the 2016/2017 financial year on decontamination.¹⁶⁹ Further, once a Local Council has been notified that a property is potentially or actually contaminated with methamphetamine, a notation will be placed on the property file that will show up if a Land Information Memorandum is compiled on the

¹⁶⁶ Residential Tenancies Act, s 77(1).

¹⁶⁷ Residential Tenancies Amendment Bill (No. 2).

¹⁶⁸ The cheapest option being a basic screening test for 1-3 rooms, at a cost of \$189. For examples of companies that conduct methamphetamine testing, and the cost of their services see: NZ Meth Testing "Our Services" <<http://www.nzmethtesting.co.nz/>>; Meth Solutions "Meth Test Pricing Options" <<http://www.methsolutions.co.nz/order-a-test-report/meth-test-pricing-options/>>.

¹⁶⁹ Katrina Williams "Big spike in bill for ridding state houses of meth in just one year" (24 August 2017) <<https://www.stuff.co.nz/national/crime/95996525/big-spike-in-bill-for-ridding-state-houses-of-meth-in-just-one-year>>.

property.¹⁷⁰ This also demonstrates that a private landlord is less likely to test their properties on a regular basis. A reported positive test result will affect the reputation of their property. Thus, the amendments can be seen to be directed at HNZ; providing further indication that the status quo was unsatisfactory and HNZ was potentially acting ultra vires. The RTA Amendment is not currently drafted to be retrospective in the sense that it identifies a problem, perpetuates to fix it, and allows the previous actions/decisions to remain. But if the actions being taken by HNZ were legitimate, there would be no need to for a legislative amendment. Specifically, if the use of ss 59 and 59A, to terminate the tenancy on the basis of a positive methamphetamine test, was legitimate then there would seemingly be no need to insert a new section into the RTA.

C. Human Rights Implications

During the Select Committee stage of enacting the RTAB (which, for clarity, is still not enacted at the time of writing this paper), the Human Rights Commission raised concerns around the human rights implications of the Bill. The raising of these issues also serves to demonstrate human rights implications raised by the current use of ss 59 and 59A of the RTA.

The RTAB will provide landlords with the power to terminate a tenancy irrespective of whether the tenant is at fault, or contributed to methamphetamine contamination.¹⁷¹ There are no due process requirements for termination on the basis of methamphetamine contamination.¹⁷² Further, that tenant will have only seven days to vacate the premises, irrespective of whether or not they caused the contamination. These provisions raise issues in relation to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although the ICESCR is not part of New Zealand's domestic legislation, New Zealand is a signatory party and ratified the ICESCR in 1978.¹⁷³ The Legislation Design and Advisory Committee Guidelines, which outline the "best practice" for drafting legislation, state new legislation must not be inconsistent with existing international obligations.¹⁷⁴ The ICESCR provides that "...all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction."¹⁷⁵ Thus, as seven days is a very short period of time to seek a review of the decision, or find alternative accommodation, such a provision is a breach of the right to security of tenure under the ICESCR.¹⁷⁶ This may lead to outcomes that are potentially unjust, subjecting tenants, irrespective of their fault or contribution, to considerable hardship.¹⁷⁷ MSD works with tenants to find private housing, if they are no longer eligible for social housing under a Continued Eligibility review.¹⁷⁸ However, such help is potentially less likely to available if a person has been

¹⁷⁰ Raaj Govinda "Local Council Obligations" (speech presented to New Zealand Law Society Property – Methamphetamine Issues Seminar, July 2017) 27 at 27.

¹⁷¹ Human Rights Commission "Submission to the Local Government and Environment Committee on the Residential Tenancies Amendment Bill (No. 2)" at [28].

¹⁷² At [30].

¹⁷³ Ministry of Justice "International Covenant on Social, Economic and Cultural Rights" (September 2017) <<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/international-covenant-on-economic-social-and-cultural-rights/>>.

¹⁷⁴ Legislation Design and Advisory Committee *Guidelines on Process and Content of Legislation* (2014).

¹⁷⁵ Human Rights Commission, above n 171, at [29].

¹⁷⁶ At [30].

¹⁷⁷ At [31].

¹⁷⁸ Housing New Zealand "Questions and answers: If I'm not able to stay in a state house, what happens?" (8 February 2017) <<https://www.hnzc.co.nz/for-our-tenants-and-their-communities/our-tenants/tenancy-reviews-for-social-housing-tenants/questions-and-answers/#if-lm-not-able>>.

evicted due to methamphetamine and consequently suspended from being able to receive social housing (under the Encouraging Good Neighbour Behaviour Policy).¹²⁰ As the new section will not place blame on the tenant, and allows the tenancy to be terminated solely due to a positive result, there is no real recourse to appeal a decision. It would seem unlikely that the Tenancy Tribunal would reinstate a tenancy agreement when Parliament has specifically legislated on the issue.

The Human Rights Commission also noted that tenants risk being evicted for the actions of others over which they have little or no control, including family members and abusive partners.¹⁷⁹ Again, there would seem to be little recourse for appealing such a decision. The focus of the RTAB is to allow tenancies to be terminated on the basis of methamphetamine contamination. Under the section, it does not matter who caused the contamination. This can also be considered a breach of the right of security of tenure under the ICESCR.

The raising of these issues also highlights the human rights implications present in the current system. Both ss 59 and 59A allow the landlord to give only a seven day notice. Further, as seen in the decisions of *Housing New Zealand v Hill*¹³⁷ and *Housing New Zealand v van Hout*,¹⁵⁰ tenants have been held by the Tenancy Tribunal as responsible for the actions of people they allow into their property. HNZ has suspended 363 individuals in relation to methamphetamine, stating “it is important to note that multiple household members from the same tenancy can be suspended.”¹⁸⁰ Thus, presumably, some of the 363 people have been suspended due to the actions of others.

D. Separate Schemes for the Public and Private Sector

1. The Rule of Law and Legal Inequalities

An aspect of the rule of law is that the law applies to everyone, and everyone is equal before the law.¹⁸¹ Actors within the public sector, including HNZ, are also subject to the rule of law.¹⁸² Whether actors in and subject to the public and private sphere are being treated equally comes into question in this dissertation. The analysis undertaken throughout this dissertation suggests different schemes potentially apply to private landlords and HNZ. As a result, social housing tenants are potentially being treated differently to those tenants renting privately. If this is so, there is a breach of the rule of law.

Whilst under the rule of law everyone is to be equal before the law, there are legal inequalities generated by legislation.¹⁸³ Welfare beneficiaries are one clear example.¹⁸⁴ Legislation deems certain members of society eligible for receiving help from the state; treating some people differently to others. The point of a legal inequality, however, is that it is created by legislation. In the status quo, HNZ are being treated differently (and thus the rule of law is not being upheld). However, there is no *legal* inequality, as Parliament has not clearly legislated to allow HNZ more powers than a private

¹⁷⁹ Human Rights Commission, above n 171, at [32].

¹⁸⁰ The number of tenants evicted/tenancies terminated due to positive methamphetamine tests (Obtained under Official Information Act 1982 request to Rachel Kelly, Government Relations Manager, Housing New Zealand) – attached at Appendix.

¹⁸¹ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 171.

¹⁸² Richard Shaw “The Public Sector” in Janine Hayward (ed) *New Zealand Government and Politics* (6th ed, Oxford University Press, Victoria, 2015) 177 at 180.

¹⁸³ Philip A Joseph, above n 181, at 171.

¹⁸⁴ At 171.

landlord. Thus, for different schemes for the public and private sector exist legitimately exist, they need to be clearly outlined by Parliament through clear legislation.

2. The Need for Separate schemes

Separate schemes for the public and private sectors could legitimately exist if Parliament was to enact legislation. A question remains, however, regarding whether separate schemes are needed for HNZ and private landlords, and thus their respective tenants. First, separate schemes may be needed to allow HNZ to carry out its dual function of landlord and social housing provider. Secondly, separate schemes may be needed as social housing tenants should be subject to a different standard or scheme to private renters. In this section it is assumed that the separate schemes would be a clarification of the current unclear situation; HNZ could use HRTMA investigative powers to affect procedures under the RTA.

Arguably, there should be separate schemes as HNZ is not just a landlord; it is also a social housing provider, making it different to a private landlord. For example, HNZ has the ability to provide financial products to their tenants. Private landlords do not offer a system of loans and grants to their tenants. However, such a difference between HNZ and a private landlord does not necessarily mean HNZ should be operating under a different system with regard to their powers as a landlord. The granting of a loan to a social housing tenant does not cross-over to HNZ's obligations and responsibilities as a landlord under the RTA.

This leads on to whether social housing tenants and private tenants should be subject to a different scheme or standard. Social housing tenants are already subject to continued reviews of their eligibility for social housing by MSD.¹⁵ They may be asked to move by HNZ (under s 75 of the HRTMA) if it is deemed that the house they are living in does not suit their needs. Social housing tenants can also be suspended from being able to receive social housing for a year, at the discretion of HNZ.¹²⁰ These actions are not available to private landlords. Subjecting HNZ tenants to further investigation procedures about their possible drug use therefore moves into the realm of deciding whether a person has a character "worthy" of receiving social housing. A procedure such as this needs to be carefully defined, and the evidence collected carefully weighed. If HNZ is able to use HRTMA to collect evidence about their tenants, there needs to be an independent authority that is able to review these decisions (as identified in this chapter, the Tenancy Tribunal is not currently able to).

E. Conclusion

Taking a broader perspective on the case study of HNZ and methamphetamine reveals many issues. A complicated and unclear legislative framework, aside from being an issue in itself, generates further issues. HNZ is potentially acting ultra vires their powers, but it is difficult to determine against the background of the legislative framework, and the lack of clarity surrounding HNZ's actions. The Tenancy Tribunal, many due to their limited role, are not aiding in clearing up the issue of whether HNZ is acting ultra vires their powers. The need for a legislative amendment demonstrates that the Government recognises issues in the current system. Human rights issues are raised both in the current situation, and not solved by the proposed legislative amendment. Lastly, separate schemes for HNZ and the private sector should exist only where the schemes have been carefully defined and outlined in legislation.

CONCLUSION

The HNZ and methamphetamine testing problem demonstrates the potential consequence of an exercise of government power, when that power has been conferred through an unclear legislative framework. Whilst analysing the complicated legislative framework, it is easy to forget that people are being adversely affected by the actions of HNZ. The actions of HNZ result in the eviction of tenants on the grounds of damage caused methamphetamine contamination, or illegal activity at the property; for which the tenant may or may not have been responsible. Thus, the HNZ and methamphetamine problem serves as an example, if not a warning, of the need for clear legislation when powers are being granted to public actors.

The complicated legislative framework governing HNZ (namely the HRTMA and the RTA) does not explicitly allow HNZ to test their properties for methamphetamine contamination, evict tenants due to positive results, or collect additional evidence. Rather, it is the lack of clarity in the framework that allows the HNZ and methamphetamine problem to occur.

Throughout the HNZ and methamphetamine testing problem there is a common theme. It is unclear whether HNZ is purporting to act under the HRTMA or the RTA. This, along with the unclear legislative framework, makes it extremely difficult to determine whether HNZ is acting ultra vires its statutory powers.

The RTAB, if enacted, will solve some of the issues generated by the current legislation. Any landlord (HNZ or private) will be able to enter properties to conduct methamphetamine tests. Further, there will be legislation explicitly allowing for the termination of a tenancy on the basis of the property being contaminated with methamphetamine. Yet, the need for this legislation can be interpreted as recognition by Government that the current system is not working, and is potentially indication that HNZ has been ultra vires their powers.

The possible enactment of the RTAB has also raised concerns over human rights implications. New Zealand has recognised, through signing and ratifying an international covenant (the ICESCR), the right for people to have security of tenure. Once enacted, the RTAB will allow evictions within a short time period, meaning tenants potentially face eviction through no fault of their own, and with no real chance of successfully appealing a termination notice. Examining the potential human rights implications of the RTAB also highlights those that arise in relation to the status quo.

The rule of law prescribes that everyone should be treated equally. Yet, under the current system, HNZ tenants are not being treated in the same way as private tenants. If Parliament were to clearly outline different schemes that were to be applied to the private and public sector, they would be creating a legitimate legal inequality. However, the need for Parliament to create different schemes with respect to social housing providers and the private sector remains questionable.

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Raaj Govinda “Local Council Obligations” (speech presented to New Zealand Law Society Property – Methamphetamine Issues Seminar, July 2017) 27.

APPENDIX: OFFICIAL INFORMATION ACT 1982 REQUEST TO HNZ



National Office Wellington
80 Boulcott Street
PO Box 2628, Wellington 6140

FREEPHONE 0800 801 601
www.hnzc.co.nz

28 AUG 2017

Katherine Lee
Katherine.lee@hotmail.co.nz

Dear Ms Lee

Thank you for your email of 25 July 2017 in which you request information in regards to methamphetamine contamination in Housing New Zealand properties. I apologise for the delay in replying. Answers to your questions are provided below.

The number of tenants evicted/tenancies terminated due to positive methamphetamine tests

Housing New Zealand issued 136 90 day notices relating to methamphetamine contamination since 2014/15. Prior to that year a record of the number of notices issued for methamphetamine was not kept. Please note that the issuing of a 90 day notice does not always result in the tenancy being ended.

Housing New Zealand has pursued 24 bailiff evictions in relation to these tenancies. An eviction occurs where a court bailiff is authorised to obtain possession of a property after a tenancy has been ended by the Tenancy Tribunal, the landlord has an order for possession of the property and the tenant has not vacated it.

The number of Housing New Zealand tenants suspended from receiving state housing, and how many of these are in relation to methamphetamine

Housing New Zealand has suspended 910 individuals from applying for a Housing New Zealand home for one year. Of these, 363 individuals were suspended in relation to methamphetamine. It is important to note that multiple household members from the same tenancy can be suspended.

Use/contamination of properties - the process HNZ undertakes in order to choose which properties to test for methamphetamine contamination - the process HNZ follows when conducting a methamphetamine test on one of its tenanted properties (i.e. does the tenant's permission need to be sought under HNZ policy?) - the Encouraging Good Neighbour Behaviour Policy - Housing New Zealand's standard tenancy agreement.

Housing New Zealand has a comprehensive policy and procedures¹ designed to safeguard our tenants, workers and other persons who may occupy, maintain, visit or otherwise come into contact with properties we manage where:

- there is a risk from exposure to methamphetamine contamination

¹ The policy and procedures are currently being updated to reflect the recently released New Zealand Standard, NZS 8510:2017.

- there are safety and security issues connected to work in and around those properties.

A test for methamphetamine contamination will be undertaken on:

- any tenanted or vacant property where Housing New Zealand has reasonable grounds for suspecting methamphetamine contamination
- any vacant property where we have reasonable grounds to suspect the incoming tenant has a drug history.

Reasonable grounds to suspect contamination can arise in a number of situations, including where:

- a tenant has admitted using methamphetamine at the property
- a neighbour reports someone using or manufacturing methamphetamine at the property
- a tenancy manager discovers drug-related items during a property visit or inspection.

Housing New Zealand will:

- discuss with the tenant the suspicion of potential methamphetamine contamination at the property which could impact their health
- inform the tenant we want to test the property to confirm if there is methamphetamine contamination.

A test for methamphetamine is not considered an 'inspection' under Residential Tenancies Act 1986. This means that the tenant must consent to give access to enable a test. If the tenant refuses Housing New Zealand access to test the property, we may apply to the Tenancy Tribunal for an access order.

Yours sincerely



Rachel Kelly
Manager Government Relations