

# SECURITY OF TENURE FOR GENERATION RENT: IRISH AND SCOTTISH APPROACHES

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*As fewer people are able to make the transition into home ownership, more New Zealand households do not have adequate security of tenure due to the lack of durational protections in the Residential Tenancies Act 1986. This article shows that Ireland and Scotland are comparable jurisdictions that have moved to regimes providing durational protections to residential tenants, allowing them to choose to remain in their home for a specified number of years or indefinitely, subject to a limited set of grounds for which the landlord may terminate the tenancy. We should consider these examples and take steps to provide greater durational protections, so that more New Zealanders may have homes that provide them with stable foundations on which they may build their lives.*

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## **I INTRODUCTION**

Housing is a basic human need, with most people hoping to make their dwelling a home: a stable and secure place where we can shelter from the outside world, interact with family and friends, and engage in private life. To be an adequate home, a dwelling must have a location and physical structure that is conducive to our comfort, and we must be able to feel secure in our connection to the house. Both of these requirements are found in less abundance in rental housing, even though they have been recognised to some degree in New Zealand's residential tenancy legislation – the Residential Tenancies Act 1986.<sup>1</sup>

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<sup>1</sup> Adequate physical structure is necessary through the requirement that houses are in a reasonable state of repair and conform with other housing quality standards: Residential Tenancies Act 1986, s 45. Security of tenure is provided by the procedures for terminating tenancies and the notice periods for landlords terminating a periodic tenancy: see Residential Tenancies Act 1986, ss 50–66. See also David Grinlinton *Residential Tenancies: The Law and Practice* (4th ed, LexisNexis NZ, Wellington, 2012) at ch 5.

Recently there has been much attention paid to the deficient physical quality of our rental housing,<sup>2</sup> which the Government has moved to remedy by requiring minimum levels of insulation and mandatory smoke alarms.<sup>3</sup> In contrast, while security of tenure has sometimes existed to a greater extent in New Zealand than at present,<sup>4</sup> there has been little legal movement on this issue in recent years. This is despite some concern raised in the New Zealand media about "generation rent",<sup>5</sup> the international social phenomenon where fewer households are able to make the traditional transition from renting to homeownership at the stage in life when people usually "settled down".<sup>6</sup> This article considers the concept of security of tenure and the ways in which different jurisdictions manifest that concept in law, and then examines how recent legal changes to increase security of tenure in Ireland and Scotland may provide a model for the further protection of security of tenure in New Zealand.

## II GENERATION RENT

In New Zealand, as elsewhere, the generation rent phenomenon is mainly driven by the high price of real estate, especially in Auckland, which has resumed its steep increases after a lull during the credit crunch.<sup>7</sup> The Productivity Commission's *Housing Affordability* report,<sup>8</sup> completed in 2012, observed that the ratio of average house prices to incomes has almost doubled (from around 3 to around 6) since 2000, which has led to:<sup>9</sup>

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- 2 See Economic and Development Review Committee *OECD Economic Surveys: New Zealand* (OECD, June 2015) at 130–131. For a discussion of the legal standards for housing quality, see Sarah Bierre, Mark Bennett and Philippa Howden-Chapman "Decent Expectations? The Use and Interpretation of Housing Standards in Tenancy Tribunals in New Zealand" (2014) 26 NZULR 153.
  - 3 "Changes to Residential Tenancies Act" (9 July 2015) Ministry of Business, Innovation and Employment <[www.mbie.govt.nz](http://www.mbie.govt.nz)>; and Residential Tenancies Amendment Act 2016.
  - 4 Tenancy Act 1955, ss 35–43. See also Grinlinton, above n 1, at 1–3.
  - 5 Kate Newton "Pressure builds to give renters more rights" (5 July 2015) Radio New Zealand <[www.radionz.co.nz](http://www.radionz.co.nz)>.
  - 6 For an analysis of the Generation Rent phenomenon in England, see PWC *UK Economic Outlook July 2015* (July 2015).
  - 7 Shamubeel Eaqub and Selena Eaqub *Generation Rent: Rethinking New Zealand's Priorities* (Bridget Williams Books, Wellington, 2015) at 5–6 and ch 2. See also Department of the Prime Minister and Cabinet *Final Report of the House Prices Unit: House Price Increases and Housing in New Zealand* (March 2008).
  - 8 New Zealand Productivity Commission *Housing Affordability Inquiry* (March 2012).
  - 9 At 39 and 41. Recent statistical analysis shows that the number of households renting has increased 25 per cent over the last 10 years, compared with a four per cent increase in owner-occupation: Greg Ninness "Numbers of households renting up 25% in last 10 years, while owner-occupiers up just 4.2%" (7 April 2016) [interest.co.nz](http://www.interest.co.nz) <[www.interest.co.nz](http://www.interest.co.nz)>.

... a distinct change in the function of the rental market. Up until the mid-1980s, when home ownership peaked, rental accommodation traditionally acted as a "stepping stone" on the way to a preferable owner-occupied mode of housing.

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[L]arge increases in the number of rental households and the average duration of rental tenure require the rental market to perform in a way that it has not done previously – that is, provide secure, long term, quality, rental housing on a much larger scale than in the past.

The generation rent phenomenon has also been analysed recently by economists Shamubeel and Selena Eaquad in their compelling book *Generation Rent: Rethinking New Zealand's Priorities*.<sup>10</sup> They argue that the shifts in house prices described above will lead to a situation in which most New Zealanders will be able to purchase their home only if aided by inherited wealth, rather than by means of their income.<sup>11</sup> In addition to examining this issue of wealth inequality, they argue that living in the private rented sector (PRS) should no longer be seen as a "second rate" option.<sup>12</sup> To this end, they hold up Germany and Switzerland<sup>13</sup> as countries in which the PRS provides security and stability to renters,<sup>14</sup> with the choice of staying in a tenancy indefinitely or choosing to leave, except where the landlord has a legitimate reason from a short list of grounds to terminate the tenancy.<sup>15</sup> At present in New Zealand, unless the tenancy is of a fixed term, the landlord may terminate the tenancy for no reason, on giving the required notice.<sup>16</sup>

Germany and Switzerland provide good examples of greater security of tenure for private renters that we can judge our own laws against to determine which model is more appropriate for our society's circumstances. However, this article presents some further models of more secure tenure, drawing attention to recent legislative reforms to increase security of tenure in Scotland and

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10 Eaquad and Eaquad, above n 7.

11 At 2 and 78–79.

12 At 2–3.

13 Note that Switzerland's formal legal framework might not provide for more security and stability than New Zealand's, because even where there is an indefinite tenancy this can be terminated simply by giving the required notice, with limited restrictions on bad faith termination: see Anna Wehrmüller *National Report for Switzerland* (TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, Universität Bremen, 2014) at 126 and 132–133.

14 At 9–10 and 54.

15 At 56. For a more detailed discussion of the German residential tenancy laws see Julia Cornelius and Joanna Rzeznik *National Report for Germany* (TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, Universität Bremen, 2014).

16 Residential Tenancies Act 1986, s 51. See *Winther v Housing Corporation of New Zealand* [2010] NZCA 601, [2011] 1 NZLR 825 at [3].

Ireland. Beyond simply multiplying the subject matter for comparative analysis, it is argued that Ireland and Scotland are more important examples than the continental European jurisdictions. This is because the Swiss and German housing markets are quite dissimilar to New Zealand's, being characterised by large rental sectors (around half of households) and relatively tenure neutral housing policies.<sup>17</sup>

In contrast, Ireland and Scotland are jurisdictions that have traditionally been closer to New Zealand's current regime: housing policy has fostered a preference for homeownership and consequently the private rental sector has been seen as a temporary and residual part of the housing market for most of the population.<sup>18</sup> A major difference is that investment in social and local authority housing has been greater in Scotland and Ireland than in New Zealand, meaning that the PRS has in the 20th century made up a smaller proportion of their housing stocks,<sup>19</sup> and has consequently been of importance to even less of the population than in New Zealand. Yet in both jurisdictions the PRS has recently been expanding, reaching levels similar to that found here.

This increase may be attributed to a number of factors. In the 1990s, tax measures were introduced in Ireland to make investing in the PRS more attractive.<sup>20</sup> A boom in construction saw a third of Ireland's housing stock being built between 1996 and 2006 – an increase in supply in response to attractive returns on property investment and easy credit that contributed to an eventual housing price crash in 2009.<sup>21</sup> A similar pattern of buy-to-let mortgage lending existed in Scotland, but at a lower level.<sup>22</sup> On the demand side, despite continuing preferences for homeownership,

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17 For Germany, see Cornelius and Rzeznik, above n 15 at 7–18. For Switzerland, see Wehrmüller, above n 13 at 8–21. For an analysis see Jim Kemeny *From Public Housing to the Social Market: Rental Policy Strategies in Comparative Perspective* (Routledge, London, 1995); and Peter A Kemp and Stefan Kofner "Contrasting Varieties of Private Renting: England and Germany" (2010) 10 *International Journal of Housing Policy* 379.

18 For Scotland see Kim McKee and Jennifer Hoolachan *Housing Generation Rent: What are the Challenges for Housing Policy in Scotland?* (Centre for Housing Research, University of St Andrews, June 2015); Sue Clegg and others *Housing Aspirations* (Scottish Government Social Research, 2007) at [4.3]; *Housing Aspirations, Needs and Demands in the light of the Credit Crunch* (Scottish Government Communities Analytical Services, July 2010); and Review Group on the Private Rented Sector Tenancy Regime *Report of the Review of the Private Rented Sector Tenancy Regime* (May 2014) at 4. For Ireland see Yvonne Galligan "The Private Rented Sector" in Michelle Norris and Declan Redmond (eds) *Housing Contemporary Ireland: Policy, Society and Shelter* (Springer, Dordrecht, 2007) 100; and Mark Jordan *National Report for Republic of Ireland* (TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, Universität Bremen, 2014) at 19.

19 Jordan, above n 18, at 9.

20 Galligan, above n 18, at 107–108; and National Economic & Social Development Office *Homeownership and Rental: What Road is Ireland On?* (December 2014) at 39.

21 Galligan, above n 18, at 108; and Jordan, above n 18, at 11 and 28.

22 Review Group on the Private Rented Sector Tenancy Regime, above n 18, at 2.

rising house prices before the credit crisis and restrictions on lending after it have limited the ability of many first-time-buyers to access owner-occupation,<sup>23</sup> so that more people now regard renting as the "new normal".<sup>24</sup> Renting has also become more expensive in Ireland and Scotland. In Ireland, rents have risen at around 10 per cent per annum since 2012;<sup>25</sup> in Scotland rents went up around 10 per cent in total from 2010 to 2014.<sup>26</sup> This further exacerbates the problems faced by renters.

Another reason that New Zealand policy-makers should have a special interest in the Irish and Scottish models is that they are jurisdictions that, prior to their reforms, had very similar legal regulation of the PRS in terms of tenure security, following the English approach that gives little protection to the duration of tenancies.<sup>27</sup> This shows us that other jurisdictions with similar underlying social structures and legal regulation of the PRS are able to shift to provide better security of tenure to meet the desires of individuals for greater housing stability. This desire is evident in housing research and surveys examining New Zealand and other similar jurisdictions: the lack of security of tenure is consistently identified as an important problem by renters, and as a key reason that they seek to move into owner-occupation, with many renters expressing a desire to have the choice to stay in their home for a number of years, if not indefinitely.<sup>28</sup>

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23 Kim McKee, Tom Moore and Joe Crawford *Understanding the Housing Aspirations of People in Scotland: People, Communities and Places* (Scottish Government Social Research, September 2015) at 9–10.

24 At 15–16.

25 Department of Housing, Planning, Community and Local Government *Stabilising Rents, Boosting Supply* (November 2015) at 6.

26 Kate Berry and Anouk Berthier *SPICe Briefing: Private Rents* (Scottish Parliament Information Centre, October 2015) at 12.

27 Dave Cowan and Emma Laurie *England and Wales* (European University Institute Department of Law) at 8–9. See further discussion below at III:C.

28 DTZ Research *Housing Tenure Aspirations and Attainment in New Zealand* (Centre for Housing Research Aotearoa New Zealand and Building Research, July 2005); and Susan Flint-Hartle and Jeffrey Stangl *Understanding Housing Decisions in the New Zealand Residential Property Market* (Westpac–Massey University Fin-Ed Centre, December 2004) at 7. Not building equity through mortgage payments, missing out on capital gains, rent increases and landlord interference are the other important reasons. For Australia see Kate Whelan *Online survey of Victorian Private Market Renters: 2015* (Tenants Union of Victoria, May 2015) at 30–38. For England see Robbie de Santos *A better deal: Towards more stable private renting* (Shelter, September 2012) at 6–7. For Ireland see DKM Economic Consultants *Future of the Private Rented Sector Final Report* (The Housing Agency, October 2014) at 23–24. For Scotland see McKee, Moore and Crawford, above n 23, at 21 and 33–34; and Review Group on the Private Rented Sector Tenancy Regime, above n 18, at 8.

### III SECURITY OF TENURE: POLICY AND LAW

#### A The Idea of Security of Tenure

At its widest, security of tenure is the right to choose to stay – not to be forced to move – from one's home.<sup>29</sup> Security of tenure in the PRS is an issue because the tenant's occupation of the dwelling is necessarily impermanent: the tenant does not have the security of an owner, who has the right to occupy the dwelling indefinitely.<sup>30</sup> Yet, the measure of security that a PRS tenant has sits on a wide spectrum: very little under periodic tenancies,<sup>31</sup> or extremely secure under some jurisdictions' residential tenancy laws, which give the tenant the right to remain indefinitely except under a limited set of legitimate reasons for landlord termination.

Why is the level of tenure security in the PRS important? It might seem self-evident that tenants benefit from being afforded increased choice in whether they will remain in their home, and the aforementioned research surveys confirm that renters desire this.<sup>32</sup> There is a large body of literature analysing the benefits of security of tenure in the PRS.<sup>33</sup> Professor Florence Wagman Roisman has provided a powerful summary of this literature in an article that advocates for greater protections for security of tenure in the United States,<sup>34</sup> noting negative effects of housing instability on psychological health, community connections, schooling, and household finances.<sup>35</sup> Professor Susan Bright's text on English landlord and tenant law focusses more on psychological and social impacts of insecurity.<sup>36</sup>

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29 Geoffrey Payne and Alain Durand-Lasserve *Holding on: Security of Tenure – Types, Policies, Practices and Challenges* (Office of the UN High Commissioner of Human Rights, 2012) at 8.

30 Save for example in the case of state appropriation through the Public Works Act 1981 or Local Government Act 2002, s 189, or a charging order or sale order under High Court Rules, Part 17.

31 George Hinde and others *Principles of Real Property Law* (2nd ed, LexisNexis NZ, Wellington, 2014) at 566–567.

32 See the studies cited above n 28.

33 For a discussion of this literature see Kath Hulse and Vivienne Milligan "Secure Occupancy: A New Framework for Analysing Security in Rental Housing" (2014) 29 *Housing Studies* 638; and Kath Hulse, Vivienne Milligan and Hazel Easthope *Secure Occupancy in Rental Housing: Conceptual Foundations and Comparative Perspectives*, (Australian Housing and Urban Research Institute, July 2011).

34 Florence Wagman Roisman "The Right to Remain: Common Law Protections for Security of Tenure" (2007–2008) 86 *NCL Rev* 817.

35 At 820–829. See also the recent overview of residential mobility's effect on health: Tim Morris, David Manley and Clive E Sabel "Residential mobility: Towards progress in mobility health research" *Progress in Human Geography* (online ed, 19 May 2016).

36 Susan Bright *Landlord and Tenant Law in Context* (Hart, Oxford, 2007) at 591.

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

Bright also observes that research has identified that security, continuity, control and freedom, are all crucial to feeling at home and that these could be achieved to a greater extent through changes to residential rental laws.<sup>37</sup>

However, it is clear that regulating security of tenure requires a balancing act between tenant and landlord interests.<sup>38</sup> As Professor Bright argues:<sup>39</sup>

Achieving an appropriate balance is not easy. What is "appropriate" raises big questions about policy and justice. Striking an appropriate balance is not only about fairness as between the parties but also about the promotion of the wider public interest.

There is also the economic consideration of incentives for people to invest in the PRS, with a common response to proposals for increased security being that it will lower investment – although evidence for this is not strong.<sup>40</sup>

### ***B Legal Manifestation of Secure Tenure***

Security of tenure is usually not a legal rule or principle arguable in court. While the housing policy literature identifies a number of elements making up security of tenure – including affordability, the culture of renting, and the tenant's subjective perceptions of security<sup>41</sup> – the formal legal protection of the tenant's right to remain in a dwelling is a key aspect. It is commonly observed that security of tenure is effectively a requirement for tenants being able to vindicate their other rights, as without it there is always a danger that a tenant's complaint or legal action will lead to the landlord terminating the tenancy.<sup>42</sup>

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37 At 592.

38 Christoph U Schmid *General Report* (TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, Universität Bremen, 2014) at 10.

39 Susan Bright "Introduction" in Susan Bright (ed) *Landlord and Tenant law: Past, Present and Future* (Hart, Oxford, 2006) i at xv.

40 See Christine Whitehead and others *The Private Rented Sector in the New Century: A Comparative Approach* (Cambridge Centre for Housing and Planning Research, September 2012) at 33–34.

41 See Hulse and Milligan, above n 33; and Hulse, Milligan and Easthope, above n 33.

42 Galligan, above n 18, at 110; David Cowan *Housing Law and Policy* (Cambridge University Press, Cambridge, 2011) at 313; Áine Ryall *EUI Tenancy Law Project: Ireland* (European University Institute Department of Law, October 2003) at 23; Review Group on the Private Rented Sector Tenancy Regime,

These protections of a tenant's right to remain take many forms. In most jurisdictions, there are procedural protections that prevent a landlord from retaking possession from the tenant without their consent or some kind of judicial order.<sup>43</sup> Similarly, even where a tenancy is only periodic, there are usually requirements for a landlord to provide notice of termination – ordinarily between one and three months, but sometimes up to half a year.<sup>44</sup> These relatively minor protections exist in New Zealand, but we do not have the protections that sit at the other end of the tenure security spectrum: durational protections and limits on the grounds for termination of tenancies.

Durational protections provide a tenant with a specified minimum time during which they know that their tenancy cannot be terminated by the landlord without reason. Notice periods are effectively a lesser version of this, and duration may also be protected by tenants bargaining for a long-term tenancy. However specific durational protections provide legal minima beyond what a tenant may bargain for, usually of between three and five years. In some jurisdictions, there is no specified duration. Instead, residential tenancies are understood to be indefinite, until the tenant chooses to leave or the landlord provides notice to terminate based on a specified list of legitimate reasons or grounds.<sup>45</sup> Such grounds also exist under regimes where durational protections are for a shorter period. It is evident that the landlord's grounds for termination threaten the concept that the tenant should be able to choose to stay in their home for a guaranteed minimum duration – this is one part of the aforementioned balancing act.

Where durational protections are in place, rent regulation that limits increases in the rent during a tenancy, so that only market prices may be charged, is usually seen as a necessary complement. Such rent regulation exists in New Zealand, where a tenant may make an application to the Tenancy Tribunal if they believe their rent exceeds the market rent.<sup>46</sup> Without this, durational protections may be subverted by the landlord raising the rent to a level that makes the tenant's continuation of the tenancy uneconomic – resulting in what might be termed a "constructive" termination of the tenancy.<sup>47</sup>

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above n 18, at 8–9; and Debbie Crew *The Tenant's Dilemma: Warning, Your Home is at Risk if You Dare Complain* (Citizens Advice Bureau, June 2007).

43 For example the Residential Tenancies Act 1986, s 63.

44 Section 51.

45 See Whitehead and others, above n 40, at 54.

46 Section 25.

47 Victoria State Government *Security of Tenure – Issues Paper Residential Tenancies Act Review: Fairer, Safer Housing* (November 2015) at 18.



### *C European and "Anglo-American" Security of Tenure*

In general, European jurisdictions' provisions for security of tenure for PRS tenants are much more generous than those found in the Anglo-American world.<sup>48</sup> These European protections provide tenants with the choice to live in the house for multiple years or indefinitely, except where a limited ground for termination by the landlord is available (for example, where a landlord wishes to live in the property or conduct major renovations).<sup>49</sup> Their existence is often explained by reference to housing shortages after the World Wars leading to a protective, collectivist outlook on housing in general.<sup>50</sup> Partly because of such protections, private renting is generally not seen as an inferior tenure to state housing or owner-occupation.<sup>51</sup>

The less secure PRS tenure found in Anglo-American countries derives historically from general English property and contract law, which provided tenants with possession of the land alongside any particular rights that they had bargained for.<sup>52</sup> While English law did provide a high degree of durational protection and rent control under Assured Tenancies (ATs) created in the First World War,<sup>53</sup> these restrictions, alongside incentives for homeownership and the massive building of local authority housing, saw the PRS go from around 90 per cent of households to less than 10 per cent.<sup>54</sup> The PRS came to be seen as an inferior tenure to be avoided or used temporarily.<sup>55</sup> However, in the 1980s the Thatcher Government deregulated rent for new tenancies and created a new short-term tenancy – the Assured Short Tenancy (AST) – which permitted landlords to grant tenancies that

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48 Schmid, above n 38, at 35. There are a number of studies of European residential tenancy laws: see the EUI Project on Tenancy Law; the EU-funded TENLAW Project at the University of Bremen; and Whitehead and others, above n 40.

49 See Whitehead and others, above n 40, at 32.

50 Schmid, above n 38, at 6–9.

51 Kemp and Kofner, above n 17, at 388.

52 For a discussion of the history of residential tenancy law, including the shift in the 20th century to government regulation to protect tenants see Mary Ann Glendon "The Transformation of American Landlord-Tenant Law" (1982) 23 BC L Rev 503; and Charles Donahue Jr "Change in the American Law of Landlord and Tenant" (1974) 37 MLR 242.

53 Rent Act 1977 (UK), ss 98–107; Bright, above n 36, at 185; Cowan, above n 42, at 11; and James C Smith "The Dynamics of Landlord-Tenant Law and Residential Finance: The Comparative Economics of Home Ownership" (1993) 44 Wash U J Urb & Contemp L 3 at 16–18.

54 Kemp and Kofner, above n 17, at 379.

55 Peter Kemp "Private Renting in England" (1998) 13 Neth J of Housing and the Built Environment 233 at 235; Smith, above n 53 at 32–36; Peter Orji and Peter Sparkes "National Report for England and Wales" (TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, Universität Bremen, 2014) at 52–54.

allowed them to gain possession of the property simply by giving notice of repossession to the tenant, after an initial fixed period (minimum six months) had expired.<sup>56</sup>

The effect of this change was marked. The ease with which ASTs allowed the landlord to retake possession meant that such short tenancies became almost universal in the PRS; one study observes that the tenure security protections found in ATs are "largely irrelevant in the private sector since private landlords invariably grant assured shortholds".<sup>57</sup> Surveys have shown that ASTs made up 87 per cent of PRS tenancies, with another 10 per cent of PRS tenancies (for example, residential occupation of business premises or homes on agricultural land, employee and student accommodation, premises shared with the landlord) being excluded from the Housing Act 1988.<sup>58</sup> Professor Bright argues that the effect of the introduction of the AST has been considerable, helping to increase the supply of PRS housing, but only at the cost of having "removed the hope of long term secure housing in the private sector for many households" which "given the difficulties in accessing secure social housing ... has considerable social impact".<sup>59</sup>

The English model thus does not require any durational protection beyond notice periods for termination or whatever duration that the tenant may secure through bargaining with their landlord (though such bargaining seems to be uncommon). It is established in a number of countries influenced by English law and politics, including New Zealand, Australia, Canada, and the United States. (Exceptions, with durational protections and limited termination grounds, are found in Ontario and Berkeley, California.)<sup>60</sup> However, in two other countries that have historically been influenced or controlled by English housing policy – Ireland and Scotland – there have recently been shifts in security of tenure that provide possible models for enhancing security of tenure in New Zealand.

### ***D Security of Tenure under the Residential Tenancies Act 1986***

In order to compare the Irish and Scottish regimes with our own, it is necessary to set out the provisions for security of tenure in New Zealand. Although tenants may not be dispossessed without an order from the Tenancy Tribunal,<sup>61</sup> there is no specified durational protection guaranteed by the

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56 Cowan, above n 42, at 280; Bright, above n 36, at 203; Housing Act 1988 (UK), s 21; and Martin Davey "Legislation: The Housing Act 1988" (1989) 52 MLR 661.

57 Orji and Sparkes, above n 55, at 94.

58 Bright, above n 36, at 188. See Housing Act 1988, Sch 1.

59 At 637.

60 For Berkeley California see "Rent Stabilization Board: Evictions" City of Berkeley <[www.ci.berkeley.ca.us](http://www.ci.berkeley.ca.us)>. For Ontario see "Landlord and Tenant Board" Social Justice Tribunals Ontario <[www.sjto.gov.on.ca](http://www.sjto.gov.on.ca)>.

61 Residential Tenancies Act 1986, s 63.

Residential Tenancies Act 1986. Tenants may bargain for a fixed term tenancy, usually granted for one year, or they will have a periodic tenancy under which the landlord must provide them with at least 90 days' notice that the tenancy will be terminated.<sup>62</sup> The notice period is reduced to 42 days if there is one of the following reasons for termination: (i) the landlord wishes to use the property as their primary residence for them or a family member; (ii) the property is customarily used to house the employees of the landlord, this is stated in the tenancy agreement, and the landlord requires the property for such purposes; (iii) the owner is required, under an unconditional sale agreement, to give the purchaser of the property vacant possession.<sup>63</sup> If the reason is a breach of the tenant's obligations, the tenancy may be terminated by the Tribunal without notice (if there is long rent arrears, substantial damage or threats of it, or violence or threats of violence related to the tenancy, or a tenant's breach of an obligation that is incapable of being remedied)<sup>64</sup> or after only 14 days (for other breaches capable of being remedied).<sup>65</sup> In the case of service tenancies and student accommodation, the notice period is 14 days if the tenant no longer holds the service or student status.<sup>66</sup>

#### **IV IRELAND**

##### **A *The Context of the Irish reforms***

Although some Irish commentators have looked to New Zealand's residential tenancy law in the past,<sup>67</sup> it is now instructive for us to look to Ireland, which moved in 2004 from a broadly English approach towards the European model in response to their generation rent's search for security.<sup>68</sup> Previously, there was little security of tenure in the PRS with respect to periodic tenancies: a minimum notice period of 28 days was only enacted in 1992.<sup>69</sup> The harsh rent control system brought in during the First World War<sup>70</sup> was reformed in the 1980s, after it had been declared

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62 Sections 50 and 51.

63 Section 51.

64 Sections 55 and 56.

65 Section 56.

66 Sections 53 and 54.

67 Yvonne Galligan, J Finnerty and P Burke *The Private Residential Sector Abroad* (Government of Ireland, March 2000).

68 See Aoife Valentine "Generation Rent: 'It's totally out of your control'" *The Irish Times* (online ed, Dublin, 16 November 2015).

69 Housing (Miscellaneous Provisions) Act 1992 (Ireland), s 16; Michelle Norris "Path Dependence and Critical Junctures in Irish Rental Policy: From Dualist to Unitary Rental Markets?" (2014) 29 *Housing Studies* 616 at 631; and Ryall, above n 42, at 9.

70 Norris, above n 69, at 625–626; Galligan, above n 18, at 107; and Jordan, above n 18, at 84.

unconstitutional in 1982.<sup>71</sup> After subsidies for owner-occupation were removed in the 1990s, more people moved into the PRS and concerns about security and housing conditions became more pressing.<sup>72</sup>

The legal regulation of the Irish PRS underwent a fundamental reshaping with the passage of the Residential Tenancies Act 2004. The Act was introduced after a Commission on the Private Residential Rental Sector,<sup>73</sup> comprised of various experts and representatives from housing pressure groups, had reported in 2000 with proposals for radical changes to residential tenancy law.<sup>74</sup> In addition to a perceived problem of rapidly rising rents due to competition from people who could not afford to buy,<sup>75</sup> the relative lack of security of tenure in the PRS in comparison to owner-occupation and social renting had been of concern to commentators and pressure groups for a number of years,<sup>76</sup> and was the subject of the Commission's key recommendation for legal change.<sup>77</sup> The Irish Property Owners' Association argued that this would restrict freedom of contract and the landlord's property rights, was not desired by tenants, and would reduce investment in the PRS.<sup>78</sup> The Commission's response was to point to the landlord's ability to give notice to terminate in the first six months, the exhaustive grounds for repossession, and the ability of tenants to terminate their tenancy; it also doubted the effect on investment.<sup>79</sup> Both the number of PRS households and their proportionate share of the Irish housing stock have doubled since the 2004 reforms, and analysts point to fiscal incentives as driving the changes in investment.<sup>80</sup>

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71 *Blake v The Attorney General* [1982] IR 117 (HC). See Michelle Norris and Nessa Winston *Housing Policy Review 1990-2002* (Stationery Office, 2004); and Ryall, above n 42, at 69.

72 Norris, above n 69, at 626–632; and Galligan, above n 18, at 107.

73 Galligan, above n 18, at 113.

74 Department of the Environment and Local Government *Report of the Commission on the Private Rented Residential Sector* (Stationery Office, July 2000).

75 Galligan, above n 18, at 110–112.

76 Galligan, above n 18, at 109–110; Ryall, above n 42, at 10–11; and Lancelot O'Brien and Brian Dillon *Private Rented: the Forgotten Sector of Irish Housing* (Threshold Research Committee, Dublin, May 1982).

77 Department of the Environment and Local Government, above n 74, at ch 8.

78 At ch 8 and 16–18.

79 At ch 8 and 18–19.

80 Norris, above n 69, at 616.

## ***B The Legal Content of the 2004 Reforms***

The Residential Tenancies Act 2004 applies to all residential tenancies of separate dwellings, regardless of when they were concluded (except for certain exclusions),<sup>81</sup> and parties cannot contract out of its key provisions.<sup>82</sup> It makes registration of landlords mandatory.<sup>83</sup> Rent control is also provided for: rents must not exceed market levels,<sup>84</sup> and must not be increased more frequently than once every 24 months<sup>85</sup> (this was recently increased from once every 12 months, as a temporary response to steeply increasing rents).<sup>86</sup>

However, the most important change to the law applicable to the PRS in the 2004 reforms was in relation to security of tenure. Traditional remedies of forfeiture and re-entry do not apply under the Act.<sup>87</sup> Most importantly, a relatively secure tenancy was created – the "*Part 4* tenancy".<sup>88</sup> These arise where a person has been occupying a house under a tenancy (whether periodic or fixed term) continuously for six months and the landlord has not before the expiry of that period given notice to terminate.<sup>89</sup> Such a tenancy is given duration protection: the *Part 4* tenancy continues for another three and a half years.<sup>90</sup> During this time, the tenancy may only be terminated by the landlord if one of the prescribed grounds for termination exists,<sup>91</sup> with the landlord being required to give notice and the grounds for termination.<sup>92</sup> The fact that concluding the common 12 month fixed tenancy would lead to a *Part 4* tenancy did not seem, at least in 2006, to have deterred landlords from such fixed terms.<sup>93</sup>

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81 Residential Tenancies Act 2004 (Ireland), s 3. The exclusions include business lettings, rent-controlled and social lettings, holiday lettings and situations where the landlord is also resident. See Áine Ryall "Residential Tenancies Act 2004: Review and Assessment" (2006) 6 *Judicial Studies Institute Journal* 60 at 66.

82 Residential Tenancies Act 2004 (Ireland), s 18(1). See also Ryall, above n 81, at 68.

83 Residential Tenancies Act 2004 (Ireland), pt 7.

84 Sections 19 and 24.

85 Section 20.

86 Residential Tenancies (Amendment) Act 2015 (Ireland), s 25.

87 Residential Tenancies Act 2004 (Ireland), ss 58 and 59. See also Ryall, above n 81, at 75.

88 Residential Tenancies Act 2004 (Ireland), pt 4.

89 Section 28.

90 Section 28(2).

91 Section 34.

92 Section 34(1)(a).

93 Ryall, above n 81, at 74.

If a *Part 4* tenancy continues beyond four years without any notice of termination being served before the expiry date, a further *Part 4* tenancy comes into being, providing another four year secure tenancy.<sup>94</sup> However, the landlord again has six months in which they may terminate this tenancy, by giving 112 days' notice.<sup>95</sup> If they do not, the further *Part 4* tenancy will continue and after another four years the process will repeat itself.<sup>96</sup> There is also a right of succession on the death of the tenant, if the tenant's spouse, cohabitant, child or parent was living with the tenant in the property and they elect in writing to become a tenant.<sup>97</sup> This security of tenure is allied with the tenant's ability to choose to terminate the tenancy by giving notice of termination to the landlord.<sup>98</sup>

This enhanced duration protection for the tenant is balanced against the landlord's grounds for early termination.<sup>99</sup> The five grounds are:<sup>100</sup>

- the tenant failing to comply with tenancy obligations (but they must be notified of breach and given time to remedy it);
- the dwelling is no longer suitable for the accommodation needs of the tenant and persons residing with them;
- the landlord intends to sell their interest in the property, for full consideration, within three months;
- the landlord requires the property for their own or a member of their family's occupation;
- the landlord intends to substantially refurbish or renovate the dwelling in a way that requires the dwelling to be vacated; and
- the landlord intends to change the use of the dwelling.

The notice period required for termination depends on how long the tenancy has been in existence, increasing in increments from 28 days if the tenancy is less than six months old through to 112 days if more than four years,<sup>101</sup> and by a 2015 amendment extending to up to 224 days after eight years of tenancy.<sup>102</sup> The same increasing notice period also applies to tenants terminating the tenancy, but in fewer days, from 28 if the tenancy is less than six months old to 56 days after two

94 Residential Tenancies Act 2004 (Ireland), s 41.

95 Section 42.

96 Sections 43 and 45.

97 Section 39.

98 Section 36. The notice periods range from 28 days if notice is given less than six months from the beginning of the tenancy, up to 56 days if the duration of the tenancy has been two years or more.

99 See Jordan, above n 18, at 161–163

100 Residential Tenancies Act 2004 (Ireland), s 34.

101 Section 66.

102 Section 31.

years.<sup>103</sup> Where one party has breached their obligations, the notice is 28 days.<sup>104</sup> The notice period is seven days where the breach is the tenant's anti-social behaviour or threatening the fabric of the dwelling, or where the landlord's behaviour poses an imminent danger of death or serious injury.<sup>105</sup>

Procedural protections include that a tenant may dispute the validity of a notice of termination.<sup>106</sup> Further, if a tenant has vacated their dwelling according to a landlord's notice to terminate the tenancy on specified grounds, and the events found in the ground specified in the termination notice do not come to pass, then the tenant may make a complaint that they have been unjustly deprived of possession of the dwelling.<sup>107</sup> Damages for the deprivation of possession and/or the resumption of the claimant's possession may be ordered.<sup>108</sup>

The Irish reforms thus provided a much higher degree of security of tenure than had previously existed – a shift towards the European approach. Tenants have some durational protection for their tenancy, subject to the landlord grounds for eviction. There is no evidence of the effectiveness of this balance – for example, analysing to what degree the grounds mean that tenants still find themselves insecure in their tenancy. Anecdotally, in 2016 there were a number of media stories about hedge funds buying up distressed mortgages and evicting tenants,<sup>109</sup> leading to calls to protect sitting tenants from being evicted simply due to a property being sold. The Irish housing pressure group Threshold has argued in a 2016 submission that the existing durational protections are insufficient, that an indefinite duration should be introduced and that the sale ground for termination should be altered.<sup>110</sup> The Irish Government is also considering the introduction of non-market rent controls.<sup>111</sup> The trend seems to be towards more protective regulation of security of tenure for generation rent. Even if such further developments do not occur, it is interesting to consider how this trend is currently being replicated in Scotland, another jurisdiction whose legal regulation of the PRS has previously followed the Anglo-American model.

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103 Section 66.

104 Sections 67 and 68.

105 Sections 67 and 68.

106 Section 78(1)(g).

107 Section 56.

108 Section 56(3).

109 Peter Flanagan "When vulture funds swoop, the homes of tenants become assets for sale" *Irish Independent* (online ed, Dublin, 19 March 2016); and Noel Baker "Call to strengthen legislation as 47,000 Irish homes owned by vulture funds" *Irish Examiner* (online ed, Blackpool, 26 August 2016).

110 Threshold "Pre-Budget Submission to the Department of Housing, Planning and Local Government" (September 2016) at 8.

111 Eoin English "Strategy to provide rent certainty 'ready within months'" *Irish Examiner* (online ed, Blackpool, 8 October 2016).

## V SCOTLAND

### A Context of the Scottish Reforms

The Scottish legislature has recently passed the Private Housing (Tenancies) (Scotland) Act 2016,<sup>112</sup> which fundamentally alters its private residential tenancy law in response to its own generation rent phenomenon noted above.<sup>113</sup> The changes will take effect when the Act enters into force by regulation,<sup>114</sup> scheduled for late 2017. The current law of the PRS is essentially the same as the English dualistic system described above, as prior to housing being devolved to the Scottish government in the late 1990s,<sup>115</sup> the Westminster government controlled Scottish housing policy.<sup>116</sup> Changes mirroring the English reforms were effected by the Housing (Scotland) Acts 1987 and 1988,<sup>117</sup> which deregulated private renting in Scotland in terms of rents and security of tenure.<sup>118</sup> While Assured Tenancies (ATs) of unlimited duration could still be created, these were optional and Short Assured Tenancies (SATs) were created that lasted for a minimum of six months, but after that could be terminated by giving notice.<sup>119</sup> The default in Scotland is still the AT, so a landlord must give notice to create a SAT.<sup>120</sup> Indeed, it had been assumed that most landlords would provide ATs.<sup>121</sup> However, landlords came to view the requirement of proving a ground for repossession under the AT to require lengthy and costly procedures and overwhelmingly preferred to conclude

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112 Private Housing (Tenancies) (Scotland) Act 2016.

113 On generation rent in Scotland see McKee and Hoolachan, above n 18; McKee, Moore and Crawford, above n 23, at 20; Scottish Government *A Place to Stay, A Place to Call Home: A Strategy for the Private Rented Sector in Scotland* (May 2013) at 8; and Scottish Government *Second Consultation on a New Tenancy for the Private Sector* (March 2015) at 13 [*Second Consultation*]. Social tenancies (local authority, registered social, and co-operative housing association landlords) are excluded: see Private Housing (Tenancies) (Scotland) Act 2016, sch 1, cl 14.

114 Private Housing (Tenancies) (Scotland) Act 2016, s 79.

115 Jordan, above n 19, at 10 and 102.

116 At 102.

117 At 105–107.

118 Nick Bailey "Deregulated Private Renting: A Decade of Change in Scotland" (1999) 14 *Neth J of Housing and the Built Environment* 363 at 366–367.

119 Jordan, above n 19, at 106–107.

120 At 107.

121 Review Group on the Private Rented Sector Tenancy Regime, above n 18, at 5.



SATs:<sup>122</sup> the Scottish Government has estimated that around 96 per cent of private residential tenancies are SATs.<sup>123</sup>

Since devolution, the Scottish government has been very active in housing policy, in ways that are in tension with the English approach.<sup>124</sup> These reforms are based on two consultations<sup>125</sup> on proposals for changes to PRS law developed during a review of the PRS,<sup>126</sup> after the government indicated major changes in this area in a 2013 strategy document.<sup>127</sup>

The key change the Act introduces is the creation of a new private residential tenancy to replace the dualistic AT/SAT regime.<sup>128</sup> This shift to a unitary private residential tenancy (PRT) was recommended in the report of the Private Rented Sector Tenancy Review Group.<sup>129</sup> This would replace the complexity and ambiguity of the present regime.<sup>130</sup> While the Review Group did not specify any minimum term for this new PRT, the government decided to implement an open-ended tenancy.<sup>131</sup> The Policy Memorandum on the Bill states:<sup>132</sup>

Improving security of tenure for tenants is a key aim of the new tenancy and the Scottish Government considers that tenants should only be asked to leave their homes for a good reason. ... [T]enants should also feel secure in their homes and be able to assert their rights without feeling that doing so may lead to them being asked to leave their home.

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122 At 5–6.

123 Jordan, above n 19, at 107; and Scottish Government *Review of the Private Rented Sector* (March 2009) at [4.56].

124 Jordan, above n 19, at 58–62.

125 Scottish Government *Consultation on a New Tenancy for the Private Sector* (October 2014); and Scottish Government *Second Consultation*, above n 113.

126 Review Group on the Private Rented Sector Tenancy Regime, above n 18.

127 Scottish Government *A Place to Stay, A Place to Call Home*, above n 113.

128 See generally on the proposed legislative reforms Kate Berry and Sarah Harvie-Clark *SPICE Briefing: Private Housing (Tenancies) (Scotland) Bill* (Scottish Parliament Information Centre, October 2015).

129 Review Group on the Private Rented Sector Tenancy Regime, above n 18.

130 Scottish Parliamentary Corporate Body *Private Housing (Tenancies) (Scotland) Bill: Policy Memorandum* (October 2015) at 3.

131 Scottish Government *Second Consultation*, above n 113.

132 Scottish Parliamentary Corporate Body, above n 130, at 5–6.

The indefinite term and the requirement for grounds for termination were framed in the proposals as eliminating the "no fault" ground for terminating a tenancy,<sup>133</sup> although as detailed below there are a number of grounds for termination that do not relate to tenant default.

### ***B The Private Housing (Tenancies) (Scotland) Act 2016***

The new PRT is similar to the existing AT in that it is indefinite in duration and may be terminated by the landlord only on specified grounds. Part 5 of the Act contains the provisions concerning security of tenure, providing a code regulating how tenancies may be terminated.<sup>134</sup> A tenant may terminate the tenancy simply by giving notice 28 days (or a shorter agreed-upon minimum notice period) prior to the date of termination.<sup>135</sup> A landlord may terminate the tenancy if the tenant consents and ceases to occupy the property,<sup>136</sup> but otherwise the landlord must apply for an eviction order from the First-Tier Tribunal, which can only grant the order if one of the eviction grounds applies.<sup>137</sup> In order for the Tribunal to be able to consider the landlord's application, it must be accompanied with a copy of the notice to leave provided to the tenant.<sup>138</sup> The Tribunal may not consider whether a particular eviction ground applies unless it is specified on the aforementioned notice, unless the Tribunal gives permission to include a non-notified ground.<sup>139</sup> In addition, the landlord may not make an application for an eviction order without giving the local authority in whose area the property is situated notice of their intention to do so.<sup>140</sup>

Originally, it was proposed that tenancies would have an initial period similar to the existing six months under SATs in which the tenant could not terminate the tenancy, and the landlord could only terminate it on a much more limited set of grounds: the intent to sell, tenant's breach of obligations, rent arrears, criminal conviction, or anti-social behaviour.<sup>141</sup> However, this limitation on the use of most grounds was eliminated when the initial six month period was removed from the legislation due to concerns for the mobility of tenants fleeing domestic abuse.<sup>142</sup> (This perhaps may have been

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133 Scottish Government *Second Consultation*, above n 113, at 14; Scottish Parliamentary Corporate Body, above n 130, at 5.

134 Private Housing (Tenancies) (Scotland) Act 2016, s 44.

135 Sections 48 and 49.

136 Section 50.

137 Section 51.

138 Section 52(3).

139 Section 52(5).

140 Section 56.

141 Private Housing (Tenancies) (Scotland) Bill, cls 43, 44 and 51.

142 See the discussion in Kate Berry and Sarah Harvie-Clark *SPICe Briefing: Private Housing (Tenancies) (Scotland) Bill: Stage 3* (Scottish Parliament Information Centre, March 2016) at 4 and 8–9; and the

avoided by including an exceptional circumstances clause for the fixed term.) Nevertheless, the idea that even specified grounds should not be able to be used for some period of time is a useful one that should be deployed more widely: the decision to offer a house up as a home for another person should limit one's ability to sell it or otherwise change its economic use for a period of time.<sup>143</sup>

Rent increases are permitted once every 12 months,<sup>144</sup> after the landlord has given the tenant three months' notice of the increase.<sup>145</sup> The tenant has the power to refer the proposed rent increase to a rent officer,<sup>146</sup> who must ensure it is set at the market rate.<sup>147</sup> This review is appealable to the Tribunal.<sup>148</sup> In addition, "rent pressure zones" may be identified, within which rent increases during a tenancies will be further controlled by reference to consumer price index increases (and also taking into account any improvements beyond repair, maintenance and decoration).<sup>149</sup> While these measures have been criticised for not controlling the initial setting of rent and being too permissive,<sup>150</sup> they serve the purpose of safeguarding durational protections from non-market rent rises. Further, the limits they set – particularly those in rent pressure zones – are characterised by some as an inefficient interference with the market-based allocation of housing.<sup>151</sup>

To mitigate fears landlords had concerning their inability to remove tenants who are not living up to their part of the tenancy agreement, or their lack of control over their property, the Scottish Government increased the number of grounds for termination from eight to 16, and therefore argued that the Bill provides robust protection for landlords to recover possession.<sup>152</sup> However, during the passage of the legislation through the Scottish Parliament, more of the grounds were made

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Scottish Parliamentary debates in the Official Reports: Meeting of the Parliament (17 March 2016) at 79–80.

143 This is to a greater degree the case in Germany: see the discussion relating to n 166.

144 Private Housing (Tenancies) (Scotland) Act 2016, s 19.

145 Section 22.

146 Section 24

147 Sections 25–27 and 32.

148 Sections 28–30.

149 Sections 35–41.

150 See "Will the Private Tenancies Bill tackle affordability?" (10 March 2016) <[www.livingrent.org](http://www.livingrent.org)>.

151 See Michael Ball *The UK private rented sector as a source of affordable accommodation* (Joseph Rowntree Foundation, 2010) at 15–21; and Kath Scanlon and Christine Whitehead *Rent stabilisation: Principles and international experience – A report for the London Borough of Camden* (London School of Economics, 2014).

152 Scottish Parliamentary Corporate Body, above n 130, at 10; and Scottish Government *Second Consultation*, above n 113, at 15.

discretionary, rather than leading to a mandatory eviction.<sup>153</sup> Discretionary grounds are those where the Tribunal is not required to issue an eviction order despite the circumstances of the ground being present, and instead may issue an order if it considers it reasonable to do so in the circumstances.<sup>154</sup>

Eighteen grounds are specified in sch 3 to the Act,<sup>155</sup> which is many more than in Ireland. They include grounds relating to the landlord's management of the property: the landlord's intention to sell within three months; a lender with security requires vacant possession to sell; the landlord intends refurbishment necessitating disruptive works; the landlord or close family member intends to live in property as their only or principal home (for family members, this is discretionary); and the landlord intends to use the property for non-residential purposes. There are also grounds relating to the discontinuance of holding the status of the tenant as a student, employee (partially discretionary),<sup>156</sup> person receiving supported accommodation (discretionary), or religious worker for the landlord.<sup>157</sup>

Other grounds relate to the tenant's conduct: not occupying the property as their principal home; breaching an obligation of the tenancy agreement (discretionary); or being continuously in rent arrears for three or more consecutive months (discretionary if rent arrears are less than one month's rent);<sup>158</sup> having a criminal conviction punishable by imprisonment that was committed through the use or in the locality of the dwelling; anti-social behaviour warranting eviction (discretionary); and associating with a person who has a relevant conviction or has engaged in anti-social behaviour (discretionary). Other grounds – all discretionary – relate to legal impediments to the tenancy continuing: the landlord is not registered with the local authority as a landlord; the house is in multiple occupation without the relevant license; and an overcrowding statutory notice has been served on the landlord.

As in Ireland, there are generous notice periods where the landlord exercises their power to terminate: if the tenant has been entitled to occupy the property for not more than six months, the notice period would be 28 days; if more than six months, it would be 84 days (12 weeks).<sup>159</sup> Where the ground for termination relates to anti-social behaviour, criminal conviction, breach of the

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153 See Berry and Harvie-Clark, above n 142.

154 See for example Private Housing (Tenancies) (Scotland) Act 2016, sch 3, Ground 5.

155 Private Housing (Tenancies) (Scotland) Act 2016, sch 3.

156 The ground is mandatory for the first 12 months after the employment is terminated, and after that it is discretionary.

157 But only if the house was previously being used to house a religious worker.

158 However, if on the day that the Tribunal considers the application for an eviction order the tenant is still in arrears of one month's rent or more, the Tribunal must make the eviction order.

159 Private Housing (Tenancies) (Scotland) Act 2016, s 54.

tenancy agreement or tenant non-occupation, the 28 day notice period applies regardless of how long the tenant has lived in the house.<sup>160</sup>

Other protections for security of tenure also exist: the PRT does not necessarily end on the tenant's death,<sup>161</sup> as the tenant's partner, family member or carer may have an entitlement to continue the tenancy.<sup>162</sup> If the First-Tier Tribunal or the tenant are misled by the former landlord into terminating the tenancy, the landlord may be required to pay up to six months' rent to the applicant.<sup>163</sup>

Overall, the Scottish proposal provides something extra for both tenant and landlord, compared to the Irish regime. To the tenant, it provides an indefinite duration protection, but this must be weighed against the more expansive list of grounds for termination provided to the landlord. When the reform proposals were initially consulted on, there were further protections for tenants. For example, where the ground was intended sale or refurbishment, there were situations in which the landlord would be required to offer the tenant a new tenancy.<sup>164</sup> The grounds relating to the landlord or family moving into the house, and the landlord using the house for non-residential purposes, provided that the landlord would pay reasonable moving costs to the tenant.<sup>165</sup> The removal of these protections shows the desire to find the right balance between the tenant's and landlord's rights and obligations.

Looking at the additional grounds, those relating to anti-social behaviour, harassment or criminal conviction, allow a landlord to remove a tenant for these undesirable behaviours. The religious, student, and employee grounds exclude kinds of tenancy that are also excluded elsewhere, and which the tenant knows about when they enter into the tenancy. Overall these grounds do not seem to be unreasonable derogations from tenure security, at least compared to the more limited set found in Ireland: these additional grounds seem less significant than the common grounds. However, the grounds that pertain to the landlord's status may be seen as penalising the tenant for landlord default. A better solution to landlord default may be to allow the tenancy to continue, but to effectively replace the landlord with another manager.

Finally, as in Ireland, Scotland's reforms do not provide an adequate security for the tenant, as the landlord may change their plans for the property at any time and may only need to give 28 days

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160 Section 54.

161 Section 65.

162 Sections 67-69.

163 Sections 57-59. This was increased from three months in the earlier versions of the Bill: see Private Housing (Tenancies) (Scotland) Bill 2015 (79), cls 47-49.

164 Berry and Harvie Clark, above n 128, at 25.

165 At 25.

or slightly longer notice to the tenant. This undermines the idea that tenants should have a stable home. The decision by the landlord to treat a dwelling as a financial asset, and to allow another person to treat it as their home, is a serious one, and should have the consequence that the tenant's interest in their home is placed higher than the landlord's interest in changing their mind about the use of a financial asset. Where unforeseen circumstances of the landlord would cause them hardship if the tenant was allowed to remain, it would be justified to end the tenancy. Otherwise there should be an initial period in which the tenant is secure and the tenancy cannot be terminated by the landlord.<sup>166</sup>

## VI CONCLUSION

Generation rent is a phenomenon that creates a number of problems for those who cannot access homeownership as they could in the past. Economic inequalities due to being unable to participate in tax-free capital gains weigh heavily as a long-term financial effect.<sup>167</sup> However, the solution to these problems of generation rent should be put in place alongside measures that make renting in the PRS an attractive option. Recalibrating our regime for security of tenure is one of the most important measures that could be taken, as it responds to a key problem identified by PRS renters, as well as being justifiable as what is needed if a house is to truly be considered a home. The importance of the Irish and Scottish reforms are three-fold. They show that it is not just Continental European countries that are willing to regulate the PRS tenancy in order to provide tenants with secure tenure. They provide possible models for what greater durational protections might look like. And from the Irish regime, having been in place for over 10 years, we see that such reforms need not shrink the PRS,<sup>168</sup> or prevent new institutional investment.<sup>169</sup> However, neither the Irish or Scottish regimes for security of tenure provide a simple model for New Zealand, as there are features of both that undermine the security that renters deserve and need in order to make their house a home. We should consider these examples, debate their merits and demerits, and take steps to provide greater durational protections, so that more New Zealanders may have homes that provide them with stable foundations on which they may build their lives.

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<sup>166</sup> A situation close to this position exists in Germany: §§ 566 and 574 BGB. See Cornelius and Rzeznik, above n 15, at 124, 167 and 170.

<sup>167</sup> Eaquib and Eaquib, above n 7, at ch 3.

<sup>168</sup> The PRS has grown since the 2004 change: Jordan, above n 18, at 19–20; Norris, above n 69, at 616.

<sup>169</sup> Fiona Reddan "Meet the landlords buying in bulk and changing the market" *Irish Times* (online ed, Dublin, 3 March 2016).