

SUSTAINING TENANCIES OR SWIFT EVICTIONS: RENT ARREARS IN THE TENANCY TRIBUNAL

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There is a contradiction at the centre of tenancy practice and policy. On the one hand is the goal of sustaining tenancies to prevent homelessness and, on the other, a tribunal system for resolving tenancy disputes which is founded on achieving a "swift eviction". We analyse observations of tribunal hearings and mediations along with a sample of written orders. We ask whether the goal of sustaining tenancies can be achieved in a legislative framework originally intended to achieve swift eviction. We find that mediation creates space for determining a plan to pay off arrears but with little assurance the payments are accurate and realistic. Tribunal hearings for rent arrears allow limited discretion for continuing the tenancy, but even this discretion is restricted in practice. We conclude that there is a need to shift from "swift eviction" to recognising rent arrears as a consequence of poverty – one that requires support and intervention. While legislative change would support this shift, there is scope for significant improvement via process changes that borrow from the problem-solving approach of Te Ao Mārama.

I INTRODUCTION

When someone falls behind in their rent payments, should they be swiftly removed from the tenancy to protect the landlord's property rights? Or should every effort be made to maintain the tenancy? At present, the law favours the first approach, but it is widely recognised – particularly in the environment of a housing crisis – that there are significant benefits to society if tenancies are sustained. The Sustaining Tenancies programme reflects this view and aims to prevent homelessness.¹ In this article, we examine how the legislative framework and the practice of implementing that framework balance the goals of protecting landlords' property rights and sustaining tenancies. Could

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1 Ministry of Housing and Urban Development "Sustaining Tenancies" (3 June 2021) <www.hud.govt.nz>.

more be done to realise the benefits of the policy goal of sustaining tenancies? Would this require an ideological shift to recognise the importance of "home", or can improvements be made within the current ideological framework?

A Why Sustain Tenancies?

Internationally, there has been mounting evidence about the costs of eviction. Eviction is most often the result of an inability pay rent² – a consequence of poverty that has repercussions for health, wellbeing and childhood development.³ The effects of an eviction for a tenant can be a long period of unsettled, insecure and sub-standard housing, if not homelessness.⁴ While an evicted household may eventually find an affordable home, in the process they incur debt, moving costs and further housing hardship. A record of eviction may also make securing a new tenancy difficult, meaning tenants must "trade-down" to housing that is in poor condition or in a less advantaged neighbourhood.⁵ Eviction is also a burden carried by the most vulnerable in society. In the United States, it is more likely to be experienced by single mothers on a low income who cannot pay the rent,⁶ and by people suffering from substance abuse and physical and mental health problems,⁷ with the presence of children being a greater risk factor than gender or race.⁸ International policy trends have been to invest in sustaining tenancies to prevent homelessness, for the benefit of tenants and society.⁹

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- 2 Matthew Desmond and Monica Bell "Housing, Poverty, and the Law" (2015) 11 *Annu Rev Law Soc Sci* 15.
 - 3 Jack Tsai and Minda Huang "Systematic review of psychosocial factors associated with evictions" (2019) 27 *Health Soc Care Community* e1; Jack Tsai and others "Longitudinal study of the housing and mental health outcomes of tenants appearing in eviction court" (2020) 56 *Soc Psychiatry Psychiatr Epidemiol* 1679; and Hugo Vásquez-Vera and others "The threat of home eviction and its effects on health through the equity lens: A systematic review" (2017) 175 *Soc Sci Med* 199.
 - 4 Marieke Holl, Linda van den Dries and Judith RLM Wolf "Interventions to prevent tenant evictions: a systematic review" (2016) 24 *Health Soc Care Community* 532; and Tsai and others, above n 3.
 - 5 Matthew Desmond and Tracey Shollenberger "Forced Displacement From Rental Housing: Prevalence and Neighborhood Consequences" (2015) 52 *Demography* 1751.
 - 6 Matthew Desmond and Carl Gershenson "Who gets evicted? Assessing individual, neighborhood, and network factors" (2017) 62 *Soc Sci Res* 362.
 - 7 Tsai and Huang, above n 3.
 - 8 Corey Hazekamp and others "Eviction and Pediatric Health Outcomes in Chicago" (2020) 45 *J Community Health* 891.
 - 9 Northern Ireland Housing Executive "Homelessness Strategy for Northern Ireland 2017-2022" (2017) <www.nihe.gov.uk>; and Hal Pawson, Emma Davidson and Gina Netto *Evaluation of Homelessness Prevention Activities in Scotland* (Scottish Executive Social Research, 2007). See also European Consensus Conference on Homelessness "Policy Recommendations of the Jury" (2011) <www.feantsa.org>.

This trend is now being followed in New Zealand. The Sustaining Tenancies programme has been trialled since 2017 and recently expanded to support a limited number of households in social and private rental housing whose tenancies are at risk.¹⁰ This is in recognition of the international evidence and the growing body of evidence in Aotearoa New Zealand that eviction costs our society. It is estimated a person made homeless will cost the New Zealand government \$65,000 a year.¹¹ The emergency housing spend increased from \$9.3 million in 2016 to \$147.1 million in 2019¹² – a significant financial cost. While there is limited evidence about who experiences eviction, emerging research suggests that eviction is experienced disproportionately by indigenous Māori and LGBT communities.¹³

Given the costs of tenancies being ended, we ask: to what extent does the legislation, and the practice of enforcing that legislation, support the goal of sustaining tenancies where a tenancy is at risk because of arrears? We take a critical approach and consider residential housing as a political-economic problem where the state has allocated powers and immunities to individuals.¹⁴ Our task in analysing both the doctrine and practice is to consider questions of distribution, power and consent.¹⁵

We follow this critique with recommendations for a remodelled system for dealing with rent arrears that shifts the focus from eviction to one that ensures that, wherever possible, the tenant is supported to retain their tenancy and can access support for rent payments and arrears. Our key claim is that if the goal of sustainable tenancies is to be realised, then practice and legislation need to support this. We need to shift from "swift eviction" to recognising rent arrears as a consequence of poverty – one that requires support and intervention.

10 Ministry of Housing and Urban Development "Sustaining Tenancies expands to help 4,650 households" (18 September 2020) <www.hud.govt.nz>.

11 Forrester Partners *Phase 4: Final Design Report of the Sustaining Tenancies Services* (Ministry of Housing and Urban Development, 24 January 2020) at 13.

12 At 4.

13 Ethan Te Ora "'Not heterosexual' renters twice as likely to have tenancies ended, says new research" *Stuff* (online ed, New Zealand, 5 March 2021), quoting new research by Lucy Telfar-Barnard.

14 Barbara Bezdek "Silence in the court: participation and subordination of poor tenants' voices in legal process" (1992) 20 *Hofstra L Rev* 533; Sarah Buhler and Rachel Tang "Navigating Power and Claiming Justice: Tenant Experiences at Saskatchewan's Housing Law Tribunal" (2019) 36 *Windsor YB Access Just* 210; and Michael Byrne "Towards a Political Economy of the Private Rental Sector" (2020) 7 *CHA* 103.

15 Byrne, above n 14; and David Madden and Peter Marcuse *In Defense of Housing: The Politics of Crisis* (Verso, London, 2016).

B New Zealand's Framework for Tenants in Arrears

Often, tenants in rent arrears will terminate a tenancy before any action by their landlord or formal process is undertaken.¹⁶ This is known as an "eviction by anticipation".¹⁷ Where this does not occur and the landlord wishes to end a tenancy due to rent arrears, the procedure is governed by the Residential Tenancies Act 1986 (RTA). The property owner or manager can make an application to the Tenancy Tribunal to have the matter heard.¹⁸ This procedure was established in 1986 with the intent that it would be informal and ensure a "swift eviction procedure [that] will give landlords much greater protection from the loss of rent or from damage than [was] available" under previous legislation.¹⁹ The focus was on speed and fairness for the "moderate" tenant and landlord.²⁰ There was little discussion of the "power asymmetry"²¹ characterising the relationship between tenant and landlord.²²

The procedure is usually in two parts: mediation and a Tenancy Tribunal hearing. Most cases are initially directed to mediation – usually conducted by phone – where the mediator's role is to "bring the parties to the dispute to an agreed settlement".²³ Where mediation fails, the dispute proceeds to the Tenancy Tribunal, presided over by a legally qualified adjudicator, without lawyers present and usually conducted in person. Orders made in mediation or by Tribunal adjudicators are sealed and are enforceable through the District Court process.²⁴

This "two tier system to deal with disputes" was introduced with the intention that mediation "would ensure that, in cases where difficulties had arisen through misunderstanding or uncertainty

16 Chester Hartman and David Robinson "Evictions: The Hidden Housing Problem" (2003) 14 Housing Policy Debate 461.

17 Andrew Beer and others *Evictions and housing management: AHURI Final Report No 94* (Australian Housing and Urban Research Institute Ltd, Melbourne, June 2006) at 7.

18 Residential Tenancies Act 1986 [RTA], s 77. The Tenancy Tribunal holds jurisdiction to hear all RTA disputes.

19 (19 September 1985) 466 NZPD 6899.

20 At 6896.

21 Michael Byrne and Rachel McArdle "Secure occupancy, power and the landlord-tenant relation: a qualitative exploration of the Irish private rental sector" (2022) 37 Housing Studies 1 at 126.

22 Elinor Chisholm, Philippa Howden-Chapman and Geoff Fougere "Tenants' Responses to Substandard Housing: Hidden and Invisible Power and the Failure of Rental Housing Regulation" (2020) 37 Hous Theory Soc 139.

23 RTA, s 88(1).

24 Section 107(1).

about legal rights, an agreed solution would be sought in the first instance".²⁵ Mediation is now being used much more broadly than this. Almost all cases are referred to mediation, including rent arrears cases where there is no misunderstanding or uncertainty, only an unwillingness or inability to pay the rent. The mediations in this context are used to reach an agreement on a payment plan and an attached consequence clause if the tenant fails to make the payments. Mediations are heard on a confidential basis and orders are not published.

If a case is not resolved at mediation or goes directly to the Tribunal, there is a public hearing and the order will be published with the parties' names. The publishing of tenant names enables landlord organisations to create "avoid lists" – what Desmond and Bell have called the "violence of record keeping".²⁶ Tenant advocacy groups have had some success with changing the law. From February 2021, the Tribunal has had greater powers to suppress party names, although it is questionable whether this will assist tenants in arrears.²⁷

Applications to the Tribunal are decided in accordance with s 55 of the RTA, which sets out the obligation to pay rent in return for the use of a property. The rights and obligations in the RTA have evolved from principles of contract and property to include "consumer protection" features such as minimum condition standards and protections of security of tenure. The Court of Appeal has described the RTA as "consumer protection legislation".²⁸ This treats the tenant as the customer and the landlord as the business owner. As one adjudicator expressed: "a landlord operates a business. Business involves risk. Businesses can insure against risk".²⁹

The positioning of a tenancy as a business transaction is in contrast to how a tenant might experience a tenancy as "home". Property law is a site of tension,³⁰ where the value afforded to property as a means of profit and accumulation conflicts with the tenant's use of the property as a home.³¹ Home, most often associated with a house, can be seen as "a secure base to which [a person]

25 Property Law and Equity Reform Committee *Report on Residential Tenancies* (Wellington, May 1985) at [18].

26 Desmond and Bell, above n 2, at 17; and Allyson E Gold "No home for justice: how eviction perpetuates health inequity among low-income and minority tenants" (2016) 24 *Geo J on Poverty L & Pol'y* 59.

27 Section 95A of the RTA now allows the Tribunal to remove names and identifying details from published Tenancy Tribunal decisions if a party who has applied for a suppression order is wholly or substantially successful, or if this is in the interests of the parties and the public. Due to the mandatory nature of the provisions where a tenant is 21 days or more in arrears (discussed further below), it is unlikely that the tenant could be considered to have had a "success or partial success", even if a conditional order is made. This provision therefore has limited applicability to protecting the identity of tenants in arrears cases.

28 *Holler v Osaki* [2016] NZCA 130, [2016] 2 NZLR 811 at [20].

29 *Kapoor v Queenstown Real Estate 1998 Ltd* [2020] NZTT Queenstown 4262854.

30 Lorna Fox O'Mahony "The meaning of home: from theory to practice" (2013) 5 *Int J Law Built Environ* 156.

31 Byrne, above n 14; Madden and Marcuse, above n 15.

can return if in trouble or fatigued",³² "a familiar, if not comfortable space where particular activities and relationships are lived",³³ and has associated benefits for mental health and wellbeing.³⁴ In the United Kingdom, legal experts have argued for greater recognition of home in property law, observing that the concept is "not unworkable, but rather undeveloped" within the law's general commoditising framework.³⁵ Bright has argued that "personal home stories" – the importance of "this home for this person" – should be heard and given legal credence in termination proceedings.³⁶ In New Zealand, however, the RTA provides very little scope for this.

On the landlord's application, the Tribunal "shall" terminate the tenancy if it is satisfied that the rent was 21 days in arrears on the date of application.³⁷ This limits the inquiry to a very simple factual determination and it positions the tenancy as a business transaction.

While this subsection is expressed in mandatory terms, it is subject to the qualification that the Tribunal "may refuse to make an order" under s 55(1) if the rent arrears have been remedied, the landlord is compensated for their loss and it is unlikely that the tenant will be in rent arrears again.³⁸ There is also provision to make a conditional rather than final termination order where the Tribunal is satisfied that the tenant will pay the arrears within a time specified by the Tribunal and is unlikely to commit a further breach.³⁹ This was introduced in 1996 to mitigate some of the harsh effects of the "swift eviction" provisions of the original 1986 legislation. Member of Parliament Murray McCully commented during the second reading that "some landlords will have concerns about this provision", but it was introduced to "add a degree of desirable flexibility to the application of the law in this area".⁴⁰ He trusted "the adjudicators who are enforcing it will ensure that it operates fairly".

32 Rosemary Hiscock and others "Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure" (2001) 18 *Hous Theory Soc* 50 at 50.

33 Shelley Mallett "Understanding Home: A Critical Review of the Literature" (2004) 52 *Sociol Rev* 62 at 63.

34 Ann Dupuis and David C Thorns "Home, Home Ownership and the Search for Ontological Security" (1998) 46 *Sociol Rev* 24; and Hiscock and others, above n 32.

35 Lorna Fox "The Idea of Home in Law" (2005) 2 *Home Cultures* 25 at 25.

36 Susan Bright "Dispossession for Arrears: The Weight of Home" in Lorna Fox O'Mahony and James A Sweeney (eds) *The Idea of Home in Law: Displacement and Dispossession* (Ashgate, Farnham, 2016) at 13.

37 RTA, s 55(1).

38 Section 55(2).

39 Section 55(1A). Section 55 was amended in February 2021, removing the possibility of a conditional order where the tenant has been in arrears on three separate occasions within the previous 90 days: Residential Tenancies Amendment Act 2020, s 36. This is a three-strikes provision which further fetters the discretion of the Tribunal to take into account the circumstances of a breach.

40 (10 October 1995) 551 NZPD (Residential Tenancies Amendment Bill – Second Reading, Murray McCully).

The inquiry under ss 55(1A) and 55(2) into whether it is "likely that the tenant will commit any further breach" alleviates the purely transactional nature of the tenancy. It leaves some room for considering why the tenant has fallen into debt and whether they might be able to pay the arrears. This test has some relevance to the "financial story"⁴¹ described by Susan Bright in relation to the use of discretion by judges in the United Kingdom. This provides some scope for sustaining the tenancy if the tenant can show an ability to pay. It does not, however, provide any space for a consideration of the tenancy as a home – the meaning of the house and the connection to the community that house has created – to be given legal weight.

These broader concerns can, however, come in where an application is made under s 56, the provision for the termination of a tenancy where the rental arrears are less than 21 days in arrears at the time of filing the application. The landlord can apply under s 56 for an order to terminate the tenancy where there is any breach of the lease provisions, including those relating to the payment of rent. Where an application is made under this provision, the Tribunal "may make an order terminating the tenancy if the Tribunal is satisfied" that there is unpaid rent, that the landlord served a notice giving the tenant 14 days to remedy the breach (ie, pay the rental arrears), that the tenant did not do so within the 14 days, and that "the breach is of such a nature or of such an extent that it would be inequitable to refuse to make an order terminating the tenancy".⁴² As s 56 invites an inquiry into whether it is equitable to terminate the tenancy, this part of the statute opens a broad range of considerations that could be considered – both financial stories and home stories.

A further door is opened for consideration of the tenant's situation and connection to the home, although perhaps only ajar. Section 85 provides for how the jurisdiction of the Tribunal is to be exercised "in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants". The Tribunal is also directed in s 85(2) to:

... determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

This section leaves space for consideration of the circumstances of the tenant, including their financial situation, reason for arrears, ability to repay and any other health or home information that may be relevant to the case. While there is some room within the statute to allow for consideration of the tenant's circumstances – opening some limited space for supporting the policy priority of sustaining tenancies – the question we now explore is to what extent this is realised in practice.

41 Bright, above n 36.

42 RTA, s 56(1).

II METHODOLOGY

As we were interested in how the statutory powers operated in practice, we collected two sets of data: Tribunal orders drawn from the Ministry of Justice database, and observations of mediations and Tribunal hearings. Analysing the orders allows us to identify patterns across the country and draw inferences that can be generalised. The observations provide context and a snapshot of practice that is not necessarily apparent in the orders. Ethics approval was obtained from the University of Otago Human Ethics Committee for both aspects of the research.

A Tenancy Tribunal Database

We have used the Ministry of Justice online database of Tenancy Tribunal orders, which holds Tribunal orders for three years. Not all orders are published online – in 2018, 13,797 of the 18,530 cases heard in total were online (about 75 per cent).⁴³ It is searchable by text (with Boolean logic), date, address and name of tenant and landlord. We examined a week of cases (4–8 December 2017) chosen using a random number generator for the year, month and week. During this week 352 orders were published online from around the country. We expect decision-making in the sampled time period was representative of practice in the Tribunal. An examination of the number of orders published online between 2017 and 2020 shows a slight decrease in orders published each December and a peak in May/June. This assumption is supported by the results of the longer time period studied in the observations of Tribunal hearings and mediations, which raised similar issues to the December 2017 orders. There are likely to be variations depending on the adjudicator and tribunal; however, these were not examined here. Each case was allocated an eight-digit unique identifier and we have used this case number to refer to cases in this article.

B Observations

We have drawn on fieldnotes made of 40 telephone mediations and 31 proceedings observed at three Tenancy Tribunal locations in New Zealand. These observations were made between July 2018 and October 2019. Mediations lasted an average of 23 minutes (range 0:06–0:50). Mediations were only observed where both parties gave consent. Hearings lasted an average of 37 minutes (range 0:06–2:06). Further data were gathered about the hearings: observations of interactions between landlord and tenant in the waiting rooms before and after the hearings, and any previous or subsequent orders for the tenancy published on the Ministry of Justice database.

C Analysis

All applications for the termination of a tenancy were downloaded and coded in the qualitative software programme, NVivo. Using content analysis we classified cases into pre-determined categories: whether the tenant appeared at the hearing; the reason for the termination application; and

43 Catherine Harris "Renters put Tenancy Tribunal's operations in the spotlight" *Stuff* (online ed, Wellington, 26 August 2018).

factors cited as reasons for the decision made, especially where the termination application was dismissed or a conditional order was granted. The fieldnotes from the observations were also coded in NVivo using codes derived from the literature and from the notes themselves.

III MEDIATION

Most applications – at least initially – go to mediation. In 2017, 16,155 applications for termination or possession were mediated, mostly by phone.⁴⁴ As mediation orders are confidential, we could not use orders to carry out the same form of analysis on outcomes as we did for Tribunal cases. We do, however, have the outcomes of the 40 mediations observed, which were all mediations for rent arrears.⁴⁵ The most common outcome (n=20, 50 per cent) was that the parties would reach agreement about a payment plan and then the agreement would contain a "termination clause", which said that if any of the payments were late, the landlord would be able to terminate the tenancy.

Usually, the agreements had a two-day grace period in case there was a banking error, although landlords did not always agree to this. Once an agreement was reached, there was no need for any further legal process if it was breached. This is because the mediation order is sealed by the Tribunal and becomes enforceable. As one mediator explained to the tenant: "There are two working days' grace if you miss a payment but then the tenancy would end and the bailiffs would come around for the extra money". This is equivalent to a conditional termination under s 55(1A).

The second most common approach (n=11, 27 per cent) was to agree to a payment plan with a clause providing that if the agreement was breached, rather than termination, the full amount of arrears would again become immediately due (as it was before the agreement of the payment plan). This was termed a "monetary clause" in the mediations. A monetary clause would allow the landlord to use bailiffs or debt collectors to recover the arrears, or to seek an attachment order, but the tenancy would continue.⁴⁶ In the remaining mediations (n=9, 23 per cent), the mediation did not result in a resolution. Most were adjourned to seek further information, and others ended because no agreement was reached and therefore proceeded to the Tribunal.

Note that the focus of the discussion was on arriving at a payment plan. It allowed very little room for consideration of the tenancy as a home – the meaning of the home to the tenant and their

44 Allan Galloway "Number of termination and possession orders, DIOA 2021-0452" (25 September 2020) (obtained under Official Information Act 1982 request to the Ministry of Business, Innovation and Employment).

45 We note that the mediation service mediates a much broader range of tenancy matters than those involving rental arrears. Comments in this article are only about mediation in relation to rental arrears.

46 An attachment order is a means of having a portion of the tenant's income directed to the landlord to meet the debt and is available pursuant to s 88(8)(b) of the RTA.

connections to the community – to be taken into account. Ideas about home were occasionally raised by tenants during discussion of their rent arrears, such as in these examples:

- Mediator: Do you want to stay in the house?
 Tenant: I do want to because I've done a lot of work to improve it and it is my home. (TM9)
- Tenant: My daughter and I can't afford to lose this home.
 Mediator: The house is really important to you. (TM4)

Note that in both these examples, the tenant uses the term "home" but the mediator uses "house". In one instance a landlord framed the tenancy in terms of a home, explaining that they did not want a termination clause as "I'd rather not put someone out of their home, so honestly I'd rather leave the termination clause if we can and trust on good faith" (TM22). The mediator responded to this by praising the landlord and calling them "a very rare person".

We only observed one example of a mediator invoking the idea of home and that was as a rhetorical device to reinforce the consequences of failing to pay the arrears at the agreed time:

- Mediator: Let me explain that a little more. You have to pay the \$1,122 on Friday and if you don't pay it all by the Monday then [property manager] can terminate your tenancy and then you'd lose your home. (TM35)

While invoking the idea of home or telling home stories was unusual, the mediations created space for telling financial stories about the reasons why payments had not been made and what repayment was now possible. It allowed the landlord and tenant to come to a payment plan and therefore an opportunity to continue the tenancy, supporting the policy goal of sustaining tenancies to avoid homelessness. While this is a positive aspect of mediations for arrears, it was apparent in observing the mediations that there were impediments to using mediation to further the goal of sustainable tenancies. First, it was sometimes difficult for tenants to understand how much rent they needed to pay and when. Second, it was often unclear whether the tenant had sufficient income to meet the ongoing rental payments or whether the property had become unaffordable for the tenant. These impediments – discussed in turn – potentially undermine mediation supporting a sustainable tenancy.

A Understanding the Rent Record

There were many instances where it became apparent that the tenant did not understand how the rent payments were calculated. Rent in advance caused a great deal of confusion. In other instances, it was a more fundamental misunderstanding about what was owed and when. For example, in TM27 the tenant offered a complicated explanation of how she and her husband managed the rent payments. She explained she was paid every fortnight, but her husband every week, and they varied their rent contributions week to week depending on whose pay week it was. Neither the mediator or the landlord seemed to follow the explanation and both tried to explain the rent to the tenant. Eventually it became apparent she did not know what her weekly rent was:

- Tenant: So, I've got it wrong?
- Landlord: Yes.
- Mediator: Well, I wouldn't say it is wrong. You are trying to budget and do your best but it needs to be different. ... Do you know how the rent works?
- Tenant: Well, I do now. So, it sounds really dumb, but how much do I owe every fortnight? I know it sounds really dumb but I've got some personal stuff and I just can't figure it out.

Many tenants understood their obligations but were less certain about the amount of arrears owed. This was sometimes because of the telephone format, meaning there was no way to have the tenant, landlord and mediator look at the same rent record, and discuss and check it together. Tenants were also limited in their ability to question the rent record because of the power imbalance. In one mediation (TM20), the landlord had completed the application poorly and it was not clear how much rent was owed. The tenant was, however, very keen to placate the landlord, as the tenant was concerned that going to the Tribunal would affect his visa to be in New Zealand.⁴⁷ There was a long exchange between the mediator and the landlord clarifying the amount owed and different figures were discussed. In the end the tenant joined the conversation, saying: "whatever [landlord] is saying is right, whatever figure he is saying is correct. He has always supported me I would like to thank you [landlord]". These observations suggested that in some instances tenants were agreeing to repayments that may not have had a proper basis.

B Tenant's Ability to Pay

It was common in the mediations observed that the tenant would agree to a payment plan, in addition to the rent, to pay off the arrears. Even where it seemed accurate records had been kept and the tenant understood and agreed to the arrears, it was not always clear the tenant was able to meet the suggested repayment schedule. Mediators were consistently careful in checking with the tenants that they could make the repayments. While some tenants stated confidently that they could make the suggested repayments, others gave more ambiguous answers:

- Mediator: Is this sustainable because it's really important we don't set the bar too high because the landlord is saying that if you miss a payment they can end the tenancy. So I guess I want to check that this is absolutely doable.
- Tenant: I guess I have to.

The tenant's ability to make repayments of arrears was often dependent on support through Work and Income New Zealand (WINZ). Information about the level of support that WINZ could offer was not usually available in the mediation. Ensuring a suggested payment plan was realistic depended on the amount of support available through WINZ, but WINZ would not determine what support was available until they had confirmation of the amount of the arrears. In some cases, the mediation was

47 The mediator assured him it would not affect his visa but he did not accept this reassurance.

adjourned so that the tenant could talk to WINZ first and/or the mediator wrote a letter for the tenant to take to the appointment confirming the amount that was due. Mediators were aware of how they could make this more persuasive for WINZ. For example, one mediator suggested: "I could write a letter saying if he doesn't pay this amount then he is in danger of losing his tenancy" (TM11). That path was chosen and the mediation deferred until WINZ confirmed the level of support available. Similarly, in TM21 the dispute was over water arrears of \$283, the rental arrears having been paid before the mediation was convened. The tenant explained her financial situation during the mediation, saying that once all the payments were deducted from her benefit (for rent and the arrears) she was receiving \$40 per week to live on. The property manager wanted to receive \$40 per week to pay off the water rates:

Mediator: I'm not comfortable writing that up if you've got nothing to live on. What have you been doing for food?
 Tenant: I'm going to WINZ for food grants.
 Mediator: (starts pressing the point, explaining to the tenant she needs enough money for food).
 Tenant: Yeah I know that.

The mediator resolved the situation by writing a report so the tenant could go to WINZ and test whether they would be willing to pay the water rates before the tenant entered into an agreement. The tenant accepted this suggestion and said: "I'll call and see if I can get an emergency appointment".

In some instances, however, the agreement was entered into during mediation without the benefit of an appointment at WINZ first. For example, in TM18 the tenant was confident that WINZ would make a lump sum payment to cover the arrears. This was a confidence the mediator did not share, saying doubtfully: "It is unusual for WINZ to agree to a lump sum". The mediation concluded with an agreement that unless the arrears were paid in full six days after the scheduled appointment with WINZ, the tenancy would terminate. The mediator advised the tenant: "When you take it to WINZ make sure that you point out to them that unless it is paid then the tenancy will terminate".

As the example of the tenant who only had \$40 per week to live on illustrates, the mediations often led to the tenant disclosing a lot of detail about their financial situation and having this subject to advice and discussion from the mediator and the property owner or manager. This was also apparent in the mediation discussed above, where the tenant was confused about how much she owed each week:

Owner: There seems to be half missing. It might be best if just one of you deals with the rent. You can budget how you want but it might be better and then you could pay every fortnight. (TM27)

It is not clear whether these efforts to advise the tenant are helpful in sustaining the tenancy. There are no data available about how many payment plans made in mediations are successfully carried out, so it is unclear the extent to which tenants are making agreements in mediations that they go on to

honour. If no agreement is reached, however, the matter proceeds to the Tenancy Tribunal and is determined in accordance with ss 55 or 56 of the RTA.

IV TRIBUNAL HEARINGS

As many Tribunal hearing orders are published online, we were able to analyse these as well as using data from the observations to examine practices around rent arrears in the Tribunal. In the first quarter of 2020, around 85 per cent of cases were brought by landlords, with 68 per cent concerning rent arrears (n=4,948) and 46 per cent for termination or possession (n=3,357).⁴⁸ In the week of December analysed, there were 352 cases heard in the Tribunal nationwide. Of those, 70 per cent concerned rent arrears (n=246). Where an immediate termination was granted, 91 per cent (n=96) of the applications were for rent arrears. Not all the landlords were seeking termination; 140 tenancies (40 per cent of cases) had ended prior to the hearing date through an earlier termination order or notice given by the landlord or tenant. Of the hearings where the tenancies were still on foot, 105 tenancies were terminated unconditionally (30 per cent of cases) and a further 27 (8 per cent of cases) were terminated conditionally. The amount owing in rent arrears for terminated tenancies ranged from \$33 to \$12,000 with a median of \$2,177. This was equivalent to around five weeks of the median New Zealand rent of \$415 in December 2017.⁴⁹

Most cases were decided under s 55, the section that applies when the rent is at least 21 days in arrears at the date the landlord applies to the Tribunal. We therefore consider cases decided under that provision first and then turn to those decided under s 56, the equitable test for cases where there are less than 21 days of arrears.

A Satisfying s 55(1A) in the Tenancy Tribunal

As we have discussed, s 55(1A) allows the Tribunal to make a conditional termination, equivalent to a mediation agreement with a termination clause. Termination remains mandatory, but it can at least be termination on conditions which, if fulfilled, mean the tenancy can continue. This leaves room for financial stories to be introduced. Given the statutory wording, it is unsurprising that we did not find any evidence of the importance of home justifying a tenancy being sustained. There were no references to "home" as a justification in either the observations or the cases for the week 4–8 December 2017.⁵⁰

48 Tenancy Services "Dispute Resolution Statistics 2020, Q1" (28 September 2020) Ministry of Business, Innovation and Employment <www.tenancy.govt.nz>.

49 Interest.co.nz "Median Rents" (2021) <www.interest.co.nz>.

50 We did check cases outside this week and found some limited references to "home" in arrears cases, but only as a reason to extend the time until the tenant had to vacate. See for example *BCRE Ltd v Ngaia* [2020] NZTT Pukekohe 4225435.

There is no binding authority on the interpretation of s 55(1A). Our analysis suggests that the efficacy of this section is limited by practice in the Tribunal where it is either unaddressed or the Tribunal requires the presence of the tenant at the hearing and detailed evidence before it is utilised. In some cases, the Tribunal also requires the consent of the landlord to the order. We address in turn these practices in the interpretation of s 55(1A).

1 Section 55(1A) not mentioned

We found that it was common practice in the Tribunal for adjudicators to refer to the mandatory provision, s 55(1)(a), and make no mention of s 55(1A). This was common in the orders analysed. The following wording was found in 684 cases (as at 28 September 2020) on the Tribunal database:

Where a landlord applies to terminate for breach, and rent is at least 21 days in arrears on the hearing date, the Tribunal must terminate the tenancy. ... Rent is at least 21 days in arrears at the hearing date. The tenancy is terminated.

This treatment of s 55(1A) was also apparent in the observations. For example, in TT2 (a very short hearing of seven minutes), the adjudicator checked the rent payments, the date of application, confirmed with the landlord the amount per week and then said: "If it is 21 days in arrears then the Tribunal must terminate the tenancy". The landlord (unsurprisingly) agreed and confirmed there were outstanding arrears, and that the tenant had phoned the landlord, but no payment had been received. There was no consideration or mention of factors that might be relevant to s 55(1A).

Given s 55(1A) provides the only discretion available to try to sustain the tenancy, it is noteworthy that the opportunity is often not taken up. The reason for this seems to lie in the practice that has evolved in the Tribunal where discretion is only exercised in the presence of the tenant and/or with the landlord's consent.

2 Requiring the presence of the tenant

Our analysis of the orders suggested that the attendance of the tenant was an important and perhaps essential pre-condition to the granting of a conditional order under s 55(1A). In all of the instances in the Tenancy Tribunal where a conditional order was made under s 55(1A) in the December cases (n=27), the tenant and landlord attended (n=8, 30 per cent), or both were recorded as having consented to the order made to pay back rent (n=19, 70 per cent) without elaboration on attendance. The rate of stated tenant appearance was higher in conditional order cases (30 per cent) than those where the tenancy was immediately terminated (12 per cent). The tenant was absent from termination hearings in 50 of the 105 cases (48 per cent) where attendance was noted.⁵¹ No information on attendance was given in the remaining cases.

⁵¹ 60 per cent of cases noted whether the tenant attended or not.

The idea that the tenant must be present for a conditional order to be made likely arises from the evidence needed to satisfy s 55(1A). The Tribunal must be satisfied that the tenant can pay the arrears and is "unlikely" to fall into arrears again. It is not, however, a requirement of the statute that the tenant give this evidence. This evidence could be produced in documents by the landlord, for example, in the form of a rent record showing repayments. We only found one instance where a conditional order was made without the tenant present, or without notice in the order that the tenant had communicated with the Tribunal, despite being absent. In that case it was recorded that some of the arrears had been paid at the time of the hearing and the landlord was "prepared to give [the tenant] an opportunity to continue in the tenancy provided the rent is paid as set out [in the order]".⁵²

More commonly, it seems that the difficulty of reaching the evidentiary threshold without the tenant present to narrate their financial circumstances has evolved into a shared norm that the tenant must appear if a conditional order is to be made. We found evidence that this practice was maintained even if there was evidence that the tenant may have been able to repay arrears, as this order illustrates:⁵³

Rent was at least 21 days in arrears on the date the application was filed; therefore I must terminate the tenancy. That is the case even though the tenant has reduced the amount of arrears since the application was filed. Because she did not attend the hearing, I could not consider whether to make a conditional termination order.

This practice of requiring the tenant to attend was also apparent in the observations. In one case (TT4), the landlord requested a conditional termination, stating that the tenant had been paying the rent since the application was filed but the landlord wanted a payment plan put in place to ensure the arrears were met. The tenant was absent. Despite the landlord's request, the adjudicator said: "without him here, I wouldn't do a conditional termination", only an unconditional termination.

Another possibility as to why this practice has evolved is the meaning that adjudicators attach to a tenant's attendance. In interviews with judges conducting possession cases in England, Bright and Whitehouse found that judges thought tenants were missing their hearing for various reasons including "burying their head in the sand", apathy and finding no point in appearing.⁵⁴ If the adjudicators read non-appearance in this way, they may consider that a conditional order is pointless as the tenant is unwilling to make the effort required.

52 *Gaffaney v Cavell-Stephens* [2017] NZTT Christchurch 4109955.

53 *Lodge City Rentals Ltd v Belling* [2017] NZTT Hamilton 4110125.

54 Susan Bright and Lisa Whitehouse *Information, Advice & Representation in Housing Possession Cases* (Oxford Legal Studies Research Paper No 25/2014, 25 April 2014) at 47.

3 Evidence required

The statute requires evidence of how tenants would pay the arrears and proof that they would be unlikely to fall back into arrears. In practical terms, this may be difficult evidence for tenants to produce because of unstable personal circumstances. The observations were replete with stories of financial change: children going to stay with other whānau and benefit changes; jobs lost; relationships broken; illness; and theft. Tenants who did appear and presented evidence provided a variety of explanations as to how they could raise the funds needed. As an issue of poverty and hardship, non-payment of rent could only be solved by finding money through external support, the sale of possessions or by cutting other costs. Evidence presented included prior payments,⁵⁵ the sale of a car,⁵⁶ financial help from family, or support or correction of a payment error from WINZ.⁵⁷

Even if this evidence can be presented, it might not convince the adjudicator. One of the orders we reviewed detailed a tenancy where \$1,750 was owed in arrears. Initially their case was adjourned before a rehearing a month later. The level of rent arrears owed and the financial circumstances of the tenants in this case meant the adjudicator, though expressing concern and considering s 55(1A), declined to make a conditional order:

[The tenants] said that it really was a financial issue. [Tenant 1] was in the process of changing from StudyLink to Jobseeker's benefit and she had not received any income. [Tenant 2] said there was no [work] to be had for him ... Their power was about to be cut off and they couldn't be confident that they would be able to make current payments of rent. I have given serious consideration as to whether the tenancy is terminated prior to or after Christmas. Given the arrears are high and the tenants are not confident of being able to pay current rent for the next few weeks I have no option but to terminate the tenancy prior to Christmas.⁵⁸

The tenants were evicted because they did not have enough money to pay rent or power and had not yet resolved the issues around their benefit payments. The level of arrears – deemed "high" by the adjudicator – falls below the average amount of rent owed. It would also be covered by the rent arrears assistance of \$2,000 introduced in 2019 and available from WINZ – a payment of last resort which

55 *Housing New Zealand Corporation v Samiu* [2017] NZTT Hamilton 4112446; *Eves Realty Ltd v Boyd* [2017] NZTT Tauranga 4112624; and *ETB Realty Ltd v Hawkins* [2017] NZTT Rotorua 4110670.

56 *ETB Realty Ltd v Hawkins*, above n 55.

57 *Eves Realty Ltd v Boyd*, above n 55.

58 *Syndicate 27 Ltd v Winterburn* [2017] NZTT Whanganui 4107564.

would likely be justified in this situation.⁵⁹ Given enough information and support, there is an indication the tenants may have been able to make rent payments and settle their arrears.

4 *Consent of the landlord*

Another common treatment of s 55(1A) was that adjudicators deferred to the landlord and treated s 55(1A) as if it were an agreement that had to be reached with the consent of the landlord. At a practical level, this avoided the need for evidence of the tenant's ability to repay the arrears as long as there was consent to the conditional order.

In some cases, however, the convenience of seeking consent to a conditional order seemed to have morphed into *needing* the landlord to consent to a conditional order. This is despite the wording of s 55(1A) referring to the decision resting with "the Tribunal". For example:

Adjudicator: (to the landlord) In your application you've said that you are open to a conditional clause.
 Landlord: Yes. The tenant has been good for 4 years. I'm a bit disappointed we've had to come here.
 Adjudicator: Can I just explain to Miss [Tenant] what a conditional agreement is?
 Landlord: Sure.
 Adjudicator: [begins explanation]. (TT16)

The adjudicator shows deference to the landlord not only in suggesting that the landlord must be "open" to a conditional order, but also in suggesting it is an "agreement" rather than an "order" and asking for permission from the landlord to explain what it means to the tenant. The tenant is positioned as a "disappointment" and one who needs educating about what a conditional agreement means. The tendency to treat s 55(1A) as available only with the consent of the landlord was also apparent in the orders reviewed, where conditional terminations were expressed in terms of the landlord's "choice": the landlord "chose to allow the tenant ...",⁶⁰ "did not wish to consider a conditional termination" (tenants attended),⁶¹ or "was prepared to consider a conditional termination" (both parties attended).⁶²

The practice of requiring a landlord to consent to a conditional order redistributes power from the adjudicator to the landlord. The tenant must convince the landlord – not the Tribunal – of their ability

59 Ministry of Social Development "Request for information on how much rent has been unpaid due to the COVID crisis and how much money has been paid out for rental arrears assistance for March and June 2020" (23 July 2020) <www.msd.govt.nz>.

60 *The Trubeno Family Trust v Mikaere* [2017] NZTT Manukau 4109353.

61 *Lake Residential Ltd v Hitchcock* [2019] NZTT Palmerston North 4173376.

62 *Wanganui Real Estate Ltd v Browne* [2019] NZTT Whanganui 4172070.

to meet the terms of s 55(1A). Cowan and Hitchings have referred to this simplification and rulemaking as "rubber stamping" – a means of making decision-making easier and faster.⁶³

It is of course possible that in seeking the consent of the landlord, adjudicators are trying to build consensus and harmony between tenant and landlord. As the landlord and tenant will have an ongoing relationship if the tenancy continues, a decision built on a consensus might be helpful. However, the law vests the discretion in the adjudicator. It is a further impediment on its efficacy in supporting the policy goal of sustaining the tenancy if it is property owners or managers – who may not share the goal of sustaining the tenancy – who are given the power to decide whether a conditional order is made.

B Test for Inequity: Section 56

Very few cases are heard under s 56, the provision for termination on equitable grounds where less than 21 days of arrears are owed. In the December week analysed, 13 cases were applications under this provision. These relied on a tenant proving it would be inequitable for the tenancy to be terminated, inviting a personal home or financial story. In one of the 13 cases, some history of the tenant's situation was given, including their transition into full-time employment which had provided more certainty for their income. By the time of the hearing, the tenants were ahead in their rent payments.⁶⁴

Today the tenants have paid \$1275.00 into the landlord's account. There are no arrears owing and the rent is \$559.00 in advance. The tenants have taken full-time employment, rather than relying on being self-employed. This will provide a more certain income and the ability to pay the rent as it falls due. The application for termination and rent arrears is therefore dismissed. However, it is noted that if the landlord has to serve 14-day notices for rent arrears in the future, the tenants should not expect the same generosity from the Tribunal.

The judgment has elements of paternalism in its reference to the generosity of the Tribunal. This is known as "patter", "a routine description of this outcome which might or might not have a moral sting, and which might be described as a practice of speaking power".⁶⁵ Indeed, rather than "generosity", the decision could be characterised as an appropriate conclusion to reach under an equitable test. Equally, if the landlord served notice regarding rent arrears in the future, the same equitable test should be applied to the circumstances that pertain at that later date, perhaps with the same result.

The number of days of arrears was relevant to the exercise of the discretion under s 56. In the cases reviewed, one to one-and-a-half week's rent was considered too insignificant to warrant the

63 Dave Cowan and Emma Hitchings "'Pretty boring stuff': District judges and housing possession proceedings" (2007) 16 Soc Leg Stud 363.

64 *Tandem Property Management Ltd v Atkinson* [2017] NZTT North Shore 4109184.

65 Cowan and Hitchings, above n 63, at 376.

termination of a tenancy if there had been no evidence of other tenancy breaches.⁶⁶ However, a conditional order could be made if there were low arrears but with a history of missed rent payments.⁶⁷ Where arrears were approaching 21 days (which would trigger s 55), the adjudicators were more willing to exercise the s 56 jurisdiction to terminate the tenancy. For example:⁶⁸

It would be inequitable to refuse to terminate the tenancy. The rent has been in arrears since August. The level of arrears was fractionally below 21 days when the application was filed and is at a similar level at the hearing date. Payments are erratic and the tenants are not communicating with the landlord. They have not attended the hearing to explain the reasons for the arrears, how they intend to pay the debt, and why the tenancy should not end.

As with s 55(1A), attendance was not only construed as important for ensuring the evidentiary basis for decisions, but was also interpreted as a willingness to address unpaid rent and an opportunity to make a case for the continuation of the tenancy. In this case, the tenant's non-attendance signalled to the adjudicator that the tenant was unengaged and unlikely to repay the rent, especially as no payments had been made.

The Tribunal system is designed to determine and enforce the obligation of the tenant to pay rent and the landlord to provide a commodity. While there is some room to take into account the tenant's financial circumstances and provide a "last chance" to sustain the tenancy, the way in which this is operationalised means it has limited utility in supporting the policy goal of sustainable tenancies.

V DISCUSSION

It is apparent that mediation practice and the statutory scheme applied in the Tribunal when considering rent arrears allow no weight to be given to the idea of "home". Allowing space for this recognition of home would require a fundamental shift in our legislation and for that to translate into practice. There is, however, some scope within the current statutory scheme to sustain a home for a tenant by way of the tenant telling financial stories – stories that demonstrate the tenant is able to pay off arrears and maintain ongoing payments. The scope is limited, but our analysis highlights that even within this limited space there are further barriers being applied in practice. We discuss these before turning to a proposed solution – moving towards a problem-solving model for the Tribunal.

In both the mediations and Tribunal hearings, there was evidence that more needed to be done to understand the financial position of the tenant. If sustaining a tenancy to prevent homelessness is a goal, then it is important that the tenant understands their obligations and has the assistance they need to plan to meet those obligations. It is also important for the tenant to know if they cannot meet the

66 *Housing New Zealand Corp v Regan* [2017] NZTT New Plymouth 4111716; and *Russell Hardie Ltd v O'Reilly* [2017] NZTT Rotorua 4111209.

67 *Barfoot & Thompson Ltd v Su* [2020] NZTT Manukau 4228542.

68 *Housing New Zealand Corp v Ripikoi* [2017] NZTT Hamilton 4110572.

rent payments and need to relocate urgently instead. In the Tribunal context, this information was needed to operationalise s 55(1A) and to provide evidence that the statutory test was met. This information often depends on WINZ, but as there is no connection between WINZ and the Tribunal, matters either needed to be adjourned or orders made without that information available.

In the absence of information about the tenant's financial position, mediations sometimes contained detailed discussion of the tenant's financial position and the life circumstances that had led them to be in arrears. To some extent this type of discussion may be useful for sustaining the tenancy, particularly if the property owner or manager is more willing to reach an agreement if they understand the tenant's circumstances. On the other hand, poverty is a source of social stigma, and revealing the extent of a tenant's financial struggle to the property owner or manager can be a source of shame.⁶⁹ Attention therefore needs to be paid to whether there are process improvements that could protect tenants' mana while still providing the information needed to reach a resolution.

In the Tribunal setting, the absence of detailed information about the tenant's financial position (and therefore evidence to satisfy s 55(1A)) meant deferring to the property owner or manager to agree to a repayment schedule. The State has allocated that power to the adjudicator, not the property owner or manager, but if it is to be operationalised, then adjudicators need a reliable source of evidence.

It is important that the tenant's absence from Tribunal hearings is not a deciding factor in whether or not s 55(1A) can be used. There was some evidence in the orders and observations that tenants' attendance at Tribunal hearings carried meaning for adjudicators. Attendance signalled qualities of a "good" or "worthy" tenant, one who is ready to engage and take responsibility for keeping the tenancy on foot.⁷⁰ The reasons that a tenant does not appear in the Tribunal may be complex and not necessarily attributable to individual behaviour.⁷¹ Tenants are more likely to be members of "socially subordinated groups".⁷² Their absence might be the result of being unable to get time off work or to find childcare, functional illiteracy, or poor health. Their non-appearance may not say anything about their interest in and ability to sustain the tenancy. Alternatively, non-attendance may be a statement about the system: a conscious decision to walk away from a situation where they do not think they can alter the outcome.⁷³ Requiring a tenant's presence for a conditional order to be considered

69 Tracy Shildrick *Poverty Propaganda: Exploring the Myths* (1st ed, Bristol University Press, Bristol, 2018) at 114–118.

70 Cowan and Hitchings, above n 63.

71 Bezdek, above n 14, cautions against theorising absence as based solely on personal fault or decision and instead argues that we must examine the structural contributions to exclusion.

72 At 534.

73 Judy Nixon and Caroline Hunter "It Was Humiliating Actually. I Wouldn't Go Again': Rent Arrears and Possession Proceedings in the County Court" (1996) 11 *Neth J of Housing and the Built Environment* 421.

therefore limits the efficacy of s 55(1A). Process adjustments may be needed to encourage and enable tenant participation in the Tribunal.

A Towards a Solution

Based on this analysis, we suggest that changes in the Tribunal system are in order. In particular, the emphasis needs to shift from swift eviction to protect property rights, to a problem-solving approach with the aim of sustaining tenancies where possible. There are, of course, cases where eviction to avoid further debt is necessary and the best action. However, there are many instances where the right support, financial assistance and information may have enabled a tenant to remain in their home, mitigated the effects of eviction and avoided further financial costs to the landlord and the emergency and social housing budget. The mediation and tribunal system provides an opportunity for intervention because it is a place where some of the most vulnerable and disadvantaged experience a time of housing crisis.⁷⁴ Looking at process changes in the system can therefore avoid downstream costs.

We consider that process change could align with the District Court initiative, Te Ao Mārama. This is an initiative that shifts the focus of the District Court's work to problem-solving,⁷⁵ drawing on the traditions of therapeutic jurisprudence.⁷⁶ While the Tenancy Tribunal is a stand-alone tribunal,⁷⁷ its procedure is closely linked to that of the District Court,⁷⁸ and there is nothing preventing the Tenancy Tribunal from following the District Court's lead. A problem-solving approach has been explored internationally for housing disputes and is a model that could be considered for New Zealand.⁷⁹

Key to this shift in focus would be creating process changes to allow for the gathering of evidence before a mediation or hearing. Once an application is made to the Tribunal for termination for rental arrears, the tenant could be referred to a debt management service. There has been very little research

74 Tsai and others, above n 3.

75 Heemi Taumaunu, Chief Judge of the District Court of New Zealand "Mai te pō ki te ao mārama: Calls for transformative change and the District Court response" (Norris Ward McKinnon Annual Lecture 2020, University of Waikato Faculty of Law, Hamilton, 11 November 2020).

76 Olivia Klinkum "Taking New Zealand's specialist criminal courts 'to scale' for better criminal justice outcomes" (2019) 2 NZCLR 1.

77 RTA, s 67. This is in contrast to the Disputes Tribunal, which is part of the District Court: Disputes Tribunal Act 1988, s 4(1).

78 Registrars of the District Court are registrars of the Tribunal (RTA, s 72); the Tribunal has jurisdiction to make an attachment order under the District Court Act 2016 (RTA, s 77(2)(pa)); possession orders must be filed in the District Court (s 106); all other orders made are deemed to be orders of the District Court (s 107); and appeals are to the District Court (s 117).

79 Milly Davies "Mi Casa es Tu Casa: Exploring a Problem-Solving Approach to Landlord-Tenant Disputes at the Tenancy Tribunal" (LLB (Hons) Dissertation, University of Otago, 2018).

on the effectiveness of interventions, though a systematic literature review found promising work involving debt management advice where the advice looked at the complexity of the causes of tenant evictions due to rent arrears.⁸⁰ A debt management service could help tenants to understand their rental payments, make decisions about whether their rent is affordable and decide how much they can pay per week to clear current arrears and avoid future arrears.

A debt management service that tenants could access before a mediation or hearing would protect tenants from the shame of discussing their financial and personal situations with the owner of the house. A mediator would not need to question the tenant in the caring – but potentially undermining – way that sometimes occurs in rental arrears mediations. This would be consistent with the policy turn in mediation towards "mana-enhancing dispute resolution".⁸¹ In the adjudication context, it would provide the adjudicators with the information they need to exercise the discretion in s 55(1A), as the debt management service could produce a statement that confirms the tenant's ability to pay. This would then be evidence the adjudicator could rely on without having to defer to the owner or property manager for agreement.

A further process change could be creating better links between WINZ and the Tribunal. There were delays and difficulties in not knowing what support WINZ could offer. It also put a burden on the tenant not only to attend a Tribunal mediation or hearing, but also to book and attend a WINZ appointment and then return with evidence to the Tribunal. As we have discussed, the reasons people do not attend the Tribunal are complex and the same issues apply to attending WINZ appointments. With Kāinga Ora (for social housing) or Inland Revenue Department (for Working for Families issues) the coordination is even more complex. A better interface between the organisations would be important in sustaining tenancies. This could be achieved in different ways. For example, a process for sharing information about arrears claimed in the Tribunal with WINZ, with the tenant's permission, could be established. Alternatively, services could be co-located – as has been suggested in the new Tauranga courthouse⁸² – to lower the burden on tenants.

It may be that the most practical way of achieving these changes – inter-agency links and debt management – would be to create a referral mechanism from the Tribunal process to the Sustaining Tenancies programme.⁸³ This programme funds community-based providers to provide practical

80 Holl, van den Dries and Wolf, above n 4.

81 Government Centre for Dispute Resolution "Who we are" (17 December 2020) Ministry of Business, Innovation and Employment <www.mbie.govt.nz>.

82 Hon Andrew Little "Courthouse redesign a model for the future" (19 December 2019) Beehive.govt.nz <www.beehive.govt.nz>.

83 This programme is yet to be evaluated and is currently funded to support 1,550 tenancies a year. This proposal is contingent on a positive evaluation and an expansion in the number of tenants it would be funded to assist.

support to tenants at risk of eviction to stay in their homes.⁸⁴ Tenants are referred to the programme from any of a number of sources and the provider conducts an assessment and develops a "whānau-led goal plan".⁸⁵ The level of service varies with the needs of the tenants.⁸⁶ This would enable the provider to create the links between WINZ and any other agencies required, and to arrange debt management advice. Money from unclaimed bonds, which totalled \$47 million in January 2021,⁸⁷ could be used to fund expansion. If a more flexible problem-solving process were created for the Tribunal, a step could be created in that process for referral to the Sustaining Tenancies programme.

Another potential benefit of a referral system to the Sustaining Tenancies programme would be the possibility that the service provider could support and/or represent the tenant at mediations and hearings. Presently, property managers routinely act on behalf of property owners,⁸⁸ but it is very unusual for tenants to have an equivalent representative.⁸⁹ This creates a power imbalance (in addition to that already inherent in the landlord-tenant relationship) as the property manager has repeat-player experience in the Tribunal.⁹⁰ As the Sustaining Tenancies provider would be fully apprised of the tenant's circumstances and would have worked with them to develop a whānau-led plan, they would be well positioned to provide this advocacy where the tenant wanted this. Enabling this would require a statutory amendment, but we suggest this would support the goal of sustaining tenancies, as well as ensuring fairness between the parties.

Creating processes to gather information would mean that both mediators and adjudicators would have sufficient information before them to determine whether a tenancy was sustainable, without requiring either the presence of the tenant at a tribunal hearing, or detailed discussion of the tenant's financial and life circumstances in a mediation. This would continue to protect property owners' rights but also achieve the social goal of sustaining tenancies.

VI CONCLUSION

Our study of the function of the legislation and the Tribunal system suggests that there are layers of technical obstacles and constraints on mediation and adjudication, coupled with tenant disengagement, which enable the eviction of tenants for rent arrears. These act to create a "systematic

84 Forrester Partners, above n 11.

85 At 40.

86 At 42–48.

87 Geraden Cann "Government pockets \$37 million in unclaimed tenancy bonds" *Stuff* (online ed, New Zealand, 9 January 2021).

88 This is possible because "landlord" is defined in the RTA as including "an agent of a landlord": RTA, s 2.

89 Representation of tenants is only allowed in very limited circumstances: s 93.

90 Marc Galanter "Why the 'haves' come out ahead: speculations on the limits of legal change" (1974) 9 *Law & Soc Rev* 95.

exclusion [of tenants] from meaningful participation in the operation of the law".⁹¹ The operation of the Tribunal and mediation system inadequately deals with tenants who are in rent arrears. Mediation is hindered by lack of access to reliable rent records and by tenants' (and sometimes landlords') limited financial literacy. There are also aspects of mediation which infringe on tenants' privacy. Tribunal adjudicators are constrained by the statute, which has as its underlying goal a swift eviction where there are rent arrears. There is some limited flexibility to order a conditional termination and sustain the tenancy, but in practice the subsection has limited efficacy.

Our analysis has been that financial stories can be given credence within the legislative framework as it stands (although this is not always done well in practice), as it fits well with the idea of property as a means of profit. Our suggestions are aimed at giving further weight to financial considerations for tenants, as this addresses the immediate dysfunction of the system, creating a fairer and more socially orientated legal process for people in housing crisis. If implemented, this will contribute to creating a more consistent and sympathetic way of dealing with rent arrears in the short term.

The ambitious and radical long-term goal is to redesign our housing and legal systems so that when considering whether or not to end a tenancy, a house is recognised as a home, and greater importance is given to sustaining a tenancy. Such a reading is not available under the present legislative framework and, even in the mediation context, there is very little room created for home considerations to feature. The statute and Tribunal practice focus on tenancy as a consumer transaction, providing shelter as a means to generate profit.⁹² An ideological shift would need to occur if the idea of "home" were to be given validity and worth in eviction hearings.

91 Bezdek, above n 14, at 537.

92 Madden and Marcuse, above n 15.