Not fit for purpose?

An Evaluation of the Private Rented Sector (PRS) housing System in England and a Comparison with the German Private Rental system.

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Abstract

Not fit for purpose? An evaluation of the private rented sector (PRS) housing system in England and a comparison with the German private rental system.

This study seeks to evaluate the PRS in England to determine whether, in its current form, it is fit for purpose. The study establishes a set of criteria against which fitness will be measured, which are;

- That it offers a reasonable level of security.
- That is offers accommodation of a reasonable standard and condition.
- That it offers affordable accommodation, is a key part of the housing market and is a mainstream housing option.

As part of this evaluation this study looks at the legislative and regulatory framework underpinning the PRS as well as how the PRS functions in practice. A holistic approach is taken, with consideration of the security in PRS accommodation, rent regulation and affordability and issues relating to property condition and their management.

The study identifies inherent weaknesses in the current system, which have come about as a result the lack of strong regulatory control and piecemeal reform. It identifies the inbuilt insecurity of tenure in most PRS tenancies as an all-pervading issue, impacting on tenants' security as well as their ability to enforce and enjoy their other rights and makes recommendations to reform the tenancy structure, strengthen control over housing costs and consolidate and strengthen the regulations relating to property condition in the PRS.

The thesis includes a comparative element. The private rented sector in Germany was selected as a comparator because of the positive reputation that sector enjoys. This study looks at the legislation and regulation of PRS accommodation in Germany and considers whether lessons can be learnt from the way the sector functions there. There are also comparisons made to other jurisdictions, with both the Welsh and Scottish models considered. Recommendations for reform are made with these comparisons in mind.

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Contents

Abstract……..2

Acknowledgements……..3

Table of Legislation……..14

Table of Cases……16

Thesis

1. Chapter 1- Introduction……18

1.1- The Purpose of the Project……18

1.1.1- Why Does Housing Matter?.....18

1.1.2- Why Review the Private Rented Sector (PRS)?.....19

1.1.2.1- The PRS in Practice……19

1.1.2.2- What is the Purpose of the PRS?.....21

1.1.2.3- Is the PRS Unfit for its Purpose?.....21

1.1.2.4- How Can Regulation Affect Fitness?.....24

1.1.3- Significance of the Research……..24

1.1.3.1- The Scope of the Research……26

1.1.4- Research Objectives……27

1.1.4.1- Research Questions……27

1.1.5- Conclusion……28

1.2- The Research Framework……30

1.2.1- Analytical Framework……30

1.2.1.1- Evaluation Criteria……33

1.2.2- Conclusion- Framework……34

1.3- Previous Work in This Field……...34

1.3.1- Literature Overview……34

1.3.2- Conclusion……49

1.4- Conclusion……49

2. Chapter Two- Methodology……51

2.1- Theory……..51

2.1.1- Theory of Housing……..……..51

2.1.2- Theoretical Framework- Security of Tenure.……59

2.1.3- Theoretical Framework- Methodology……..61

2.2- Methodology……..63

2.2.1- Use of Mixed Methods…….……63

2.2.2- Using Comparative Research.……64

2.2.3- Qualitative Research Methods Employed; The Case Studies……65

2.2.3.1- Case Study Approach- Selection……66

2.3- Fieldwork Design……72

2.3.1- Qualitative Data Gathering……72

2.3.2- Questionnaire Design……..73

2.3.3- Sample Selection……74

2.4- Conclusion……..75

3. Chapter Three- Housing Policy and the Private Rented Sector in England……76

3.1- Why Policy Matters……..76

3.2- Housing Policy- Historical Context 1915-1979……77

3.3- Housing Policy 1979- Present……80

3.4- Policy in the Present Day……83

3.4.1- The Aims of the Current Policy……..86

3.4.2- Are these Aims Comprehensive and Justified?.....88

3.4.3- How does Housing Policy Impact on the Performance of the Sector?.....89

3.5- Conclusion……90

4. Chapter Four- English Private Rented Sector Tenancy Law- Development and Context……91

4.1- The Terminology of English Housing Law……..91

4.2- The Development of Private Tenancy Law…….93

4.3- The Relevant Law……95

4.4- The Law in Practice……97

4.4.1- Tenure……..……..97

4.4.2- Security……98

4.4.3- Rent……105

4.4.4- Conditions in Private Rented Housing……111

4.5- Recent Changes……113

4.5.1- Retaliatory Evictions……113

4.5.2- The s.21 Procedure……..116

4.5.3- Licensing……117

4.5.4- Deposits……..119

4.5.5- Homelessness……121

4.6- Conclusion……123

5. Chapter Five- The Private Rented Sector in England- The Problem Areas……..125

5.1- Introduction……125

5.2- Problems in The PRS in Practice……..126

5.2.1- Tenure and Security…….....126

5.2.2- Rent……129

5.2.3- Disrepair and Remedies……..132

5.2.4- Conclusion……..138

5.3- Factors which Influence How the PRS Operates in Practice……139

5.3.1- Lack of Cohesive Regulation or Reform……140

5.3.2- Lack of Focus for the PRS……143

5.3.3- Lack of Political Involvement as Tenants……146

5.3.4- Lack of Funding…….....148

5.4- Conclusion……155

6. Chapter Six- English PRS Areas for Development- Evidence from the Case Study Data…… 158

6.1-Intorduction……..158

6.2- Security……158

6.2.1- Case Study Data on Security in the PRS……159

6.2.2- Evaluation of the Case Study Data on Security in the PRS…167

6.2.3- Security- Conclusions……..170

6.3- Rent……175

6.3.1- Case Study Data on Rent……176

6.3.2- Evaluation of the Case Study Date on Rent in the PRS…185

6.3.3- Rent- Conclusions……..193

6.4- Condition……..194

6.4.1- Case Study Data on Condition……194

6.4.2- Evaluation of the Case Study Date on Condition in the PRS…201

6.4.3- Condition- Conclusions……204

6.5- Conclusion……204

7. Chapter Seven- Learning from Other Jurisdictions: German Private Rented Sector Tenancy Law- Development, Policy and Context ……207

7.1- Introduction……207

7.2- Policy Objectives……208

7.2.1- Factors which Influence Policy……208

7.2.1.1- The Hierarchy of German Law……208

7.2.1.2- Historical Factors……209

7.2.1.3- Political Factors……210

7.2.1.4- Economic Factors……211

7.2.2- Housing Policy……213

7.3- The Development of Private Tenancy Law in Germany..215

7.4- The Relevant Law……217

7.5- The Law in Practice……220

7.5.1- Tenure……221

7.5.2- Security……..223

7.5.3- Rent and Tenancy Costs……228

7.5.4- Conditions in Private Rented Housing……..235

7.6- Evaluation of German Tenancy Law……236

7.7- Conclusion……240

8. Chapter Eight- Lessons from Other UK Jurisdictions: Wales and Scotland…….242

8.1- Introduction……242

8.2- Wales……...242

8.2.1- Licensing……..243

8.2.2- Tenure Reform……244

8.2.2.1- Security of Tenure…….245

8.2.3- Conclusions……245

8.3- Scotland……246

8.3.1- Tenure……246

8.3.2- Security……..247

8.3.3- Rent Reform and Tenancy Management……252

8.3.4- Conclusions……254

8.4- Conclusion……254

9. Chapter Nine- Recommendations for Reform……255

9.1- Introduction……255

9.2- Putting Reform on the Agenda……255

9.2.1- Taking a Holistic Approach to Reform……256

9.2.2- Embedding Tenant Involvement in the PRS…….259

9.2.3- Landlord Engagement and Regulation……260

9.3- Tenancy Structure- Security……263

9.3.1- Reforming the Tenancy Structure……263

9.3.1.1- Termination by the Landlord……266

9.3.1.2- The Possession Process……273

9.3.1.3- Termination by the Tenant……..275

9.3.2- The Impact on Fitness for Purpose……..275

9.4- Rent and Tenancy Costs……276

9.4.1- Upfront Costs……277

9.4.2- Initial Rent……277

9.4.3- Rent Increases……280

9.4.4- The Impact on Fitness for Purpose……..281

9.5- PRS Property Condition……282

9.5.1- Consolidating the Existing Law……282

9.5.2- Enforcement of Breaches- Local Authority……286

9.5.3- Enforcement of Breaches- Tenants……..288

9.5.4- The Impact on Fitness for Purpose……..289

9.6- Conclusion…….290

Appendices

One- Qualitative Research Coding……293

Two- Qualitative Research Questionnaires…….....294

Three- Qualitative Research- Participant Information Sheet……...310

Bibliography…….314

Table of Legislation

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Statutes/Regulations

- The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015
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- County Court Act 1984
- Defective Premises Act 1972
- Deregulation Act 2015
- The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015
- Environmental Protection Act 1990
- European Convention on Human Rights/ EU treaties
- Equality Act 2010
- Family Law Act 1996
- Homes (Fitness for Human Habitation) Act 2018
- Housing Act 1930
- Housing Act 1954
- Housing Act 1969
- Housing Act 1980
- Housing Act 1988
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- Localism Act 2011

- Private Housing (Tenancies) (Scotland) Act 2016
- Protection from Eviction Act 1964
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- Public Health Act 1848
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- Rent and Mortgage Interest (War Restrictions) Act 1915
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- Burrow v Brent LBC [1996] 1 WLR 1448 (HL)
- Commission EC v Greece (Border Regions) 1989 ECR 1461 ECJ
- Elitestone Limited v Morris and Another [1997] 2 ALL ER 513
- Fleet Mortgage and Investment Co Limited v Lower Maisonette and Another [1972] 1 WLR 765
- Gillow v UK (1986) 11 EHRR 335
- Hammersmith and Fulham LBC v Monk [1992] 1 AC 478 (HL)
- Hill v Rochard [1993] 1 WLR 479, CA
- Horsford Investments Limited v Lambert [1976] Ch 39, 52
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- Stirling v Leadenhall Residential 2 Ltd [2001] EWCA Civ 1011
- *Street v Mountford* [1985] UKHL 4
- Westminster City Council Appellants v Clarke Respondent [1992] 2 AC 288

Chapter 1- Introduction

1.1 The Purpose of the Project

1.1.1-Why Does Housing Matter?

Housing is a basic human need and is central to people in their daily lives.[1] It is widely accepted, both in legal and non-legal discourse, that people need suitable and stable accommodation to aid their personal development, sense of security and general well-being.[2] A lack of housing, or a lack of adequate housing, can lead to a breakdown in normal social behaviours and practices; homelessness, for example, is often linked to a chaotic and irregular lifestyle including substance misuse issues, criminal behaviour and anti-social behaviour.[3] Housing is an issue that effects everyone indiscriminately and one in which all sectors of society have a stake.

The importance of this issue is recognised by the prominent place afforded to it in Government policy. Recognising the vital role that housing plays, the Government manages the system through a series of statutory controls and regulations. Housing policy has regularly featured highly in political campaigns and becomes a key issue during election periods. Many hours of political time are dedicated to outlining, explaining and in some cases justifying, a party's particular housing policy. For example, in the run up to their 2017 election campaign the Conservative Government released an entire white paper directed at housing policy[4] and the Labour Party dedicated a full chapter of their own manifesto to housing.[5]

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[1] Bramley, G, Munro, M and Pawson, H, *Key Issues in Housing- Policies and Markets in 21st Century Britain,* (Hal Pawson 2004), pg 136.

[2] See, for example, the discussion in the White Paper *Quality and Choice; A Decent Home for All-* (HMSO 2000)

[3] Pleace, N and Bretherton, J, *Crisis Skylight: Final Report of the University of York Evaluation*, (2017), pg 9-10,

[4] DCLG- *White Paper- Fixing our Broken Housing Market,* (HMSO 2017)

[5] *For the Many, Not the Few,* (Labour Party 2017)

In addition to its central role in politics, housing has also developed its own discourse in the field of academia. It is an inter-disciplinary topic encompassing subjects that include law, the social sciences, politics and resource management and the body of literature on housing is vast. These works seek to understand housing need, analyse Government policy and find solutions to problems identified within the housing system in England.

In England there are generally considered to be three broad housing tenures: owner occupation, social renting and private renting. It is the latter which is the focus of this study.

In the year 1900 Britain was a society of private renters[6] with 90% of the population living in what we would now recognise as privately rented accommodation. However, this picture has now changed dramatically. The popularity of private rented accommodation declined throughout the Twentieth Century as owner occupation and social renting rates increased and the private rented sector (PRS) became marginalised.[7] The reputation of private renting followed a similar trajectory and it came by many to be seen as a last resort to be accessed only by those who could not afford to buy and who, for whatever reason, could not access social accommodation. Although there has been some evidence of revival in recent years these problems persist, but in spite of this successive Governments have been keen to point out that private renting has a vital role to play in the housing market as a whole. What this role is and whether the sector can fulfil it is not clear.

1.1.2-Why Review the Private Rented Sector (PRS)?

1.1.2.1-The PRS in Practice

The long-term decline in the PRS in the Twentieth Century is well documented, but in recent years there has been some reversal of that

[6] Mullins, D and Murrie, A, *Housing Policy in the UK* (Palgrave Macmillan 2006) pg 112

[7] Lowe S, *Housing Policy Analysis- British Housing in Cultural and Comparative Context,* (Palgrave Macmillan 2004) pg 218

downwards trend. The number of households accessing PRS sector accommodation is increasing. In 2015/2016 20% of households in England were in private tenancies, 36% of those households were families with children.[8] A 2021 report stated that 4.4 million households rent in the PRS,[9] roughly 19%[10] of all households. Several factors have contributed to this expansion in the sector, including economic factors that have made it more difficult for people to become property owners and Government spending cuts that have affected the availability of social rented housing.[11] Given these constraints the PRS is an essential part of the housing market,[12] but despite this the sector still has its critics. PRS accommodation is seen as "inherently inferior"[13] and it has been argued that the sector is "not fit for purpose", largely as a result of the ineffective regulatory framework within which is operates.[14]

This study reviews the PRS within the context of that existing framework in order to draw conclusions about whether this system is in fact fit for purpose in its current form.

[8] DCLG- *English Housing Survey; Headline Report 2015-2016* (2016)- 4.5 million households, 20% of the total households in England, were reported to be in PRS accommodation

[9] National Audit Office, *Regulation of Private Renting* (Department of Levelling Up, Housing and Communities 2021) pg 4

[10] National Audit Office, *Regulation of Private Renting* (Department of Levelling Up, Housing and Communities 2021) pg 43

[11] Rugg and Rhodes, "The Private Rented Sector: Its Contributions and Potential" [2008] www.york.ac.uk/media/chpp/documents/2008/prsreview.web.pdf

[12] Scanlon K and Kochen B (Eds), *Towards a Sustainable Private Rented Sector- The Lessons from Other Countries,* (2011 LSE)

[13] Williams, P (Ed), *Directions in Housing Policy: Towards Sustainable Housing Policies* (Paul Chapman Publishing 1997) pg 16

[14] Cowan, D, *Housing Law and Policy,* (Cambridge University Press 2011) pg 75

1.1.2.2- What is the Purpose of the PRS?

There is now some consensus that the PRS serves a vital purpose within the housing market.[15]

The overarching purpose of the PRS is to provide adequate accommodation for those households who need or choose to access private rented housing. However, the more specific policy objectives commonly assigned to the sector are; to provide a flexible tenure choice that allows for social and economic mobility; to provide adequate accommodation for new households and households in transition; to provide accommodation for tenants at specific stages of their life course, i.e. for students or young professionals; and to provide longer term accommodation for those households who do not wish to or cannot afford to buy their homes.[16]

Using these objectives as a starting point, this study uses a detailed set of criteria to evaluate the sector; this is discussed in detail at section 1.2.1.1 below.

1.1.2.3- Is the PRS Unfit for its Purpose?

The Conservative Government which came to power in 1979 and remained there for almost 20 years favoured policies of privatisation, and the changes they introduced under the Housing Act 1988 saw rapid de-regulation in the PRS and the promotion of free market principles. Since that time successive Governments have preferred to follow this path of minimal intervention, instead taking on the role of the enabler, allowing the PRS to govern itself within a free market with limited regulatory input.[17] However there have long been many faults with PRS

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[15] Crook, T, *Transforming Private Landlords- Housing, Markets and Public Policy,* (Wiley-Blackwell 2011) pg 187; Malpass, P and Rowlands, R, *Housing Markets and Policy,* (Ebooks corporation 2009) pg 135; Bright, S, *Landlord and Tenant Law in Context* (Hart Publishing 2007) pg 179

[16] Lowe and Hughes, *The Private Rented Sector in a New Century: Revival or False Dawn,* (Policy Press 2002)

[17] Bramley, G, Munro, M and Pawson, H, *Key Issues in Housing- Policies and Markets in 21st Century Britain,* (Hal Pawson 2004)

accommodation and the recent increase in demand for PRS housing by an ever-wider range of tenants only seeks to highlight those further.

Some of the more prominent issues with the PRS include:

- Rents are unpredictable and initial rents are not subject to any formal restrictions. A landlord and tenant are free to strike their own bargain at the beginning of the contract under free market principles, but evidence suggests that there is little actual negotiation on this issue and landlords advertise properties at a set rent, which they expect to achieve.[18] The assumption is that the normal market forces of supply and demand will balance out any inequalities in the bargaining positions and result in a fair deal for all, but there is no guarantee that this will be the case when one or both of the parties have an incomplete knowledge of the sector, particularly if the tenants are young, elderly or vulnerable. Affordability remains a big issue for many households trying to enter the PRS. Rent increases are regulated which affords existing tenants some protection, but affordability at the outset can be problematic and it is not always possible for tenants to challenge or resist rent increases during the tenancy because of the insecure nature of private renting (see below).
- Coupled with the affordability issues set out above is the fact that financial assistance with rents in the PRS is limited, as Local Housing Allowance (LHA) is based on household size and local market rents and not on the actual rent being charged on the property or the individual circumstances of the household.
- The standard of accommodation in the PRS can be poor, particularly for those renting at the lower end of the market.[19] There is little incentive for landlords to carry out repairs as the

[18] Lowe and Hughes, *The Private Rented Sector in a New Century: Revival or False Dawn,* (Policy Press 2002)

[19] Lowe S, *Housing Policy Analysis- British Housing in Cultural and Comparative Context* (Palgrave Macmillan 2004) pg 237; Morgan, J, *Aspects of Housing Law* (Routledge 2007) pg 84

standard of accommodation rarely impacts on the return they receive.[20]

- The dominant tenure in the PRS, assured shorthold tenancies, offer limited security. Although some praise the flexibility these tenures offer to the housing market and the security they afford to landlords, thereby encouraging them to let properties in the private sector, it is "abnormal" for a PRS tenant to enjoy security in their home through, for example, a long fixed term AST.[21] Tenants can face eviction even when they have upheld the terms of their agreement and the risk of retaliatory eviction for tenants who try to enforce their rights under the tenancy contract remains real, despite recent attempts to restrict this (see section 4.5.1, below).
- Those regulations which are in place concerning the PRS are poorly enforced by local authorities, to whom enforcement and regulatory powers are most commonly devolved, often following the Central Government policy of minimal intervention. "Local Law" prevails where local authorities have discretion regarding enforcement and budgetary restraints often dictate what a local authority can do. [22] The lack of public funding for legal advice, impacting on a tenant's ability to enforce what rights they do have, and courts offering assistance only after lengthy proceedings where they are often fettered by pro-landlord legislation, also impact negatively on many tenants' experiences of the sector. Some academics have described the PRS as "amateurish"[23] and the lack of professionalism also impacts on its fitness.

[20] Crook in Lowe and Hughes, *The Private Rented Sector in a New Century: Revival or False Dawn* (Policy Press 2002)

[21] Sparkes, P, *A New Landlord and Tenant* (Hart Publishing 2001) pg 5

[22] Blandy in Cowan, D and Marsh, A (Eds), *Two Steps Forward: Housing Policy into the Next Millennium,* (Policy Press 2001)

[23] Cowan, D, *Housing Law and Policy,* (Cambridge University Press 2011) pg 53

1.1.2.4 How can Regulation affect Fitness?

Historically the home was considered "sacrosanct"[24] and tenants' rights were given precedence over landlords' property rights in most aspects of housing law. This was reflected in the Rent Acts (culminating in the Rent Act 1977) which conferred security of tenure and rent control through the fair rent system on PRS tenants. All of this changed in 1988 when the Housing Act of that year introduced sweeping changes that tipped the balance of power in favour of landlords. This remains the case to this day. The law has to play the role of mediator between the property rights of the landlord and the rights of the tenant,[25] but the current system arguably gets that balance wrong. The balance can only be addressed effectively by changes to the regulatory regime that underpins the PRS.

The right to adequate housing that politicians are quick to promote rarely correlates with actual enforceable legal rights in practice.[26] This makes the PRS an unattractive prospect to many households seeking accommodation, yet more households are accessing this sector, often through lack of choice. There is an argument that the sector, in its current format, is not fit for purpose and that regulatory reform is needed to address this problem. What the purpose of the PRS is, or should be, and how its fitness to fulfil that purpose can be evaluated, are issues that are addressed in this thesis.

1.1.3 Significance of the Research

Housing policy continues to be high on the political and academic agenda. The Government recognises the need for private housing, particularly for those who need to be economically and socially mobile or who are experiencing changes in their life cycle and need an interim housing tenure to meet that need. They are confident that, with a little more focused, local level regulation and improved management, PRS accommodation can be utilised to fill the gap in the housing market for

[24] Lowe and Hughes, *The Private Rented Sector in a New Century: Revival or False Dawn,* (Policy Press 2002)

[25] Bright, S, *Landlord and Tenant Law in Context* (Hart Publishing 2007) pg 153

[26] Bright, S, *Landlord and Tenant Law in Context* (Hart Publishing 2007) Pg 296

those specific households. However critics believe that PRS housing is not a positive option and that people access this simply because they have "no choice but to live with the insecurity and expense of private housing".[27] The sector is often considered in a negative light; as the lowest rung on the property ladder.[28] If the PRS is ever going to be looked at as a reasonable and attractive housing option rather than a default tenure, then something will need to be done to address the issues within this sector and to enhance its reputation.

In 2013 the Government set out its intentions to review the PRS and announced some initiatives aimed at promoting the sector, including offering financial assistance to prospective new landlords to encourage private lets, but rejected proposals made to review the regulation of the sector stating that this was likely to cause uncertainty and discourage investment.[29] These proposals do not go far enough to address the current issues with the PRS.

This study aims to analyse the sector, to assess whether it is fit for purpose and, where defects are identified, to evaluate what would be needed to address those issues, with particular regard to regulation. This is important in the current climate as the PRS needs to be able to meet the demands being placed upon it. There is a conflict in the discourse as to what is needed to achieve this; this study seeks to find answers to this debate.

In addition to its significance within the housing sector in England and the discussions concerning this, this study also has a wider significance. Tenancy and private law in continental Europe is also under the microscope with comparative works being carried out by European scholars with a view to harmonising European law.[30] The trend in this European housing research is to promote a single European landlord

[27] Campbell Robb, former CEO of housing and homelessness charity Shelter in BBC, "More Private than social tenants in England" (2014) <http://bbc.co.uk/news/business-20157841> accessed on 15 March 2015

[28] Morgan, J, *Aspects of Housing Law* (Routledge 2007) pg 94

[29] DCLG- *The Government Response to the Communities and Local Government Select Committee Report; The Private Rented Sector, (2013)*

[30] See for example the studies by Tenlaw (http://www.tenlaw.unipbremen.de/)

and tenant law that draws heavily on the German model. The civil law of Germany provides an exemplar due to its clear, logical and accessible legal codes which give some clarity to what is a complex area, allowing both landlords and tenants to understand their rights and responsibilities and emphasising the need to devolve power to regional (rather than national) decision making and regulatory bodies. It is important for English policy makers and academics alike to understand the implications of this European research, what impact such harmonisation could have and what lessons may be drawn from it for consideration in the context of the English housing market and future policy development.

This research project includes a comparative study, reviewing the PRS in England but looking also at the sector in Germany. Other jurisdictions will also be considered, but Germany will be the primary comparator because of the primacy it has in European discourse on housing law. A comparative review is advantageous not only because of the trend of European scholarship to favour the German approach, but also because the PRS in Germany is thriving. Private rented housing has a long-established place in German housing structures and it is the tenure of choice for the majority of German households, making it something of an anomaly in Europe.[31]

As well as seeking to find answers to the issues raised with the PRS in England in light of its increasingly central role, this study will also evaluate the system in Germany to see whether there are lessons that England can take from the German system to improve the sector here.

1.1.3.1 The Scope of the Research

This research intends to evaluate the current framework for PRS housing in England. The study may make some reference to other housing tenures in England, including owner occupied accommodation

[31] Jones in Jones, C, White, M and Dunse, N (Eds), *Challenges of the Housing Economy- An International Perspective* (Wiley-Blackwell 2012)

and social housing, and to historical policy for background purposes but is not intended to provide any in-depth analysis of these areas.

The study will focus on the current PRS framework in England and, in the comparative chapter, in Germany. Some comparison is made with other jurisdictions both inside and outside of Europe, but there will be no in-depth evaluation of other systems.

Although there are several areas of housing covered by the PRS, this study focusses primarily on the lower end of the PRS market and on security of tenure within that sector, though other tenancy rights will also be considered. There is no set definition of the lower end of the PRS market, but this study uses the definition discussion by Rugg and Wallace in their 2021 Report "Property supply to the lower end of the English private rented sector".[32] Whilst recognising that there are several factors that could be considered when determining what the lower end of the market should mean, they focus on economic factors, looking at the income of tenants in this sector, the level of rent and the households in the PRS who are in poverty.[33] These are most likely to have limited choice when seeking accommodation and are therefore more likely to be adversely affected by unfit regulation.

1.1.4-Research Objectives

This study aims to evaluate the ability of the PRS, in its current form to meet the objectives assigned to it as set out in section 1.1.2.2 above, with a view to making proposals for reform.

1.1.4. 1- Research Questions

In order to meet the objectives set out above this research will look at three specific research questions and will evaluate the PRS in light of those questions, taking into account the social and political context in which the system operates.

[32] University of York, Centre for Housing Policy, Chapter 2.

[33] Ibid, Chapter 2, Pg 30.

The research questions are:

1.

1.1 - What are the policy objectives that underpin the PRS In England?

1.2 - What are the legal principles that underpin the PRS in England?

1.3 - Are these objectives currently being met?

2.

2.1- What are the policy objectives that underpin the PRS in Germany?

2.2- What are the legal principles that underpin the PRS in Germany?

2.3- In what respect are these objectives similar to or different from the objectives of the PRS in England?

3.

- Are there any lessons that can be taken from the German model to help the PRS in England fulfil its objectives more successfully?

4.

- What changes should be introduced to the PRS in England to make it more fit for purpose.

1.1.5 Conclusion

With a vital role to play in people's everyday lives and a key position in political and academic discourse, housing is an area that is ripe for review. Within the housing market the PRS is perhaps the most problematic. With a poor reputation but an increasingly central role in

housing an ever-wider range of households it is more important than ever that the PRS is fit for purpose.

However, there are many issues evident in the PRS, largely as a result of the changes brought about by the Housing Act 1988. Those problems include unregulated rents, limited financial assistance for tenants, poor housing conditions, weak tenancy security and limited enforcement of standards by local authority actors.

Despite acknowledging the role of the PRS in the housing market, the Government has repeatedly denied the need for any type of regulatory reform and believe that encouraging good practice is enough to drive up standards in the sector. However, this approach is unsatisfactory. It is arguable that there is a correlation between regulation and fitness and that further intervention is needed if the sector is to improve.

This study seeks to evaluate whether the sector can be considered fit for purpose in its current form or, where reform is needed, to explore what manner those reforms should take.

This work is timely given both the increasing reliance placed on the PRS in England and the calls for the harmonisation of private tenancy law in Europe. The fact that these harmonisation movements favour the German model gives a comparative study between England and German further significance as it allows the opportunity to evaluate the merits of borrowing laws and practice from that jurisdiction to improve the system in England.

This review therefore takes the form of a comparative study aimed at addressing the specific research questions as set out above. The methodology of the work is set out below, followed by a brief discussion of where this study sits within the existing body of work in this area.

1.2- The Research Framework

Having set out the purpose of the project and the research questions this seeks to address, it is next necessary to confirm what this study seeks to measure or evaluate by answering those research questions.

In order to evaluate whether the PRS is fit for purpose- the overarching objective of this work- it is first necessary to determine what the purpose of the PRS actually is, or should be, so that there is something against which to measure its performance. There are several ways that purpose can be determined, but in this instance this study will focus on the objectives attributed to the sector by the Government in official publications and policy statements and on the demands being placed upon the sector in practice.

After outlining those objectives and demands this section will go on construct a framework for analysis, i.e., a list of factors against which the success of the sector will be measured.

1.2.1- Analytical Framework

Government Rhetoric

The political discourse around the PRS helps to reveal how the Government see the PRS and its role in the broader housing market.

In their 1970 publication *A Fair Deal for Housing* the Conservative Government set out their intention to ensure that every family had access to a decent home at a price within their means. The focus was largely on housing supply and access to funding for home buyers, but they also stated that they intended to urgently review the PRS to ensure that these aims were achieved. The subsequent review focused on rents and affordability and led to the “fair rent” system being introduced, acknowledging the need for Government intervention in tenancy contracts to ensure that decent homes were affordable for would be tenants.

By the 1980s the attitude of the Government was beginning to change. In a 1987 white paper, *Housing; The Government’s Proposals,* the Conservatives, blaming the earlier, interventionist legislation for the withdrawal of landlords from the sector, stated a commitment to de-regulation to stimulate a revival in a declining PRS. No longer did the

Government promote the PRS as an important part of the housing market as a whole; instead they favoured owner occupation even more strongly than before and viewed the PRS as a means of housing only those who did not want to or could not afford to buy. It was promoted as beneficial to the young and the mobile and praised as a flexible option which could swiftly meet local needs and ensure mobility for that section of the labour force which required it. They did state that it was necessary to give tenants' "reasonable security", but that meant reasonable within this objective as a transition tenure. This paper preceded the Housing Act 1988 which introduced the new regime for the PRS and which removed many of the protections previously enjoyed by private sector tenants.

This view of the PRS has been maintained by successive Governments since that time, with the same or similar language being employed when describing the PRS. A Labour Green paper in 2000, for example, promoted the PRS for those who could not afford to buy or did not wish to do so, for the young and mobile and for the benefit of the labour market, and for allowing flexibility and speedy access. Although through time changes to the PRS "target group" have been acknowledged, for example in the 1995 white paper the Conservative Government said that the sector was now having to house people facing a change in their domestic arrangements and should be able to accommodate anyone who preferred to rent, the evidence from the majority of Government publications shows that the PRS is still seen as an add on, there to catch all of those not met by the main tenures of ownership and social housing.

In their 2017 election manifesto Labour appeared to shift their position, vowing to end insecurity in PRS housing, control rent and introduce new consumer protections for renters.[34] However they did not provide details of the policies they intended to employ to achieve these goals and as they have remained in opposition Government there has been no opportunity for them to do so.

The Conservatives, on the other hand, maintained their stance that the PRS could be efficient without any substantial reform of the law. Instead they focused on ways to stimulate supply and enable local agencies to take greater control of the housing market. Although they acknowledged that rents were rising, often putting safe, secure property out of the

[34] *For the Many, Not the Few,* (Labour Party 2017) pg 62

reach of many,[35] there was no real commitment to making substantial changes in the PRS regime. Instead particular problem areas were singled out and change promised, for example banning letting agents' fees and including decency standards in regulations for new build properties.[36]

As a matter of policy, the Government still consider the PRS to be of benefit because of its flexibility, speedy access, aid to worker mobility and its ability to act as a transitional tenure- there to house those who don't want to or cannot buy, in particular young professionals leaving home for the first time and students. Despite recent changes in the market and indications that the key political parties are aware of its importance, there is no consistent commitment towards reform.

Demand

Political rhetoric aside, the PRS has to function in practice and the demands placed upon it also affect what it needs to achieve to be considered fit for purpose. When this is taken into account it is clear that it is no longer a marginal part of the housing market meant only for a limited proportion of households and that the framework in which it operates, which is based on those assumptions, are outdated.

The PRS now makes up 20% of the housing market; it has accounted for a larger percentage of the total than the social rented sector since 2011 and this upwards trend continues. Social renting, at least that provided by local authorities directly, is declining, in part a result of the Government's policy of withdrawing from the provision of housing. This means that the PRS is increasingly being called upon to alleviate housing need and a more diverse range of household types are coming to rely on private rented accommodation. With these different households come different needs.

Not everyone housed in the PRS is looking for short term, flexible accommodation and many, including families with children, crave security. Although there is no consensus as to what level of security this should be, the Government has recognised that private renting needs to be seen as a mainstream housing option, and an attractive alternative to owner occupation. However to date they have held firm to the view that

[35] DCLG- *White Paper- Fixing our Broken Housing Market,* (HMSO 2017) pg 10

[36] DCLG- *White Paper- Fixing our Broken Housing Market,* (HMSO 2017) pg 62

regulatory change is not needed to achieve this.[37] This study seeks to evaluate whether the sector, in its current form, can actually achieve these objectives, or if further intervention is needed.

1.2.1.1- Evaluation Criteria

In order to carry out this evaluation, it is first necessary to create a set of criteria against which the PRS can be measured in its current form. Although there is no definitive statement about the "purpose" of the PRS, these criteria have been created by drawing inferences from the Government rhetoric around the sector and on the demands being placed upon it as set out above.

The criteria are:

- **That it offers a reasonable level of security.**

  This study will consider what security is offered to private tenants under the current regime and what that security status means in practice. There is no definition of what is a "reasonable" level of security for private tenants and this study will seek to draw conclusions about what security is needed to facilitate an effective PRS. Tenants cannot enforce their rights or hold landlords to account for breaches in their legal obligations if their tenure is so insecure that doing so could lead to their eviction.

- **That it offers accommodation of a decent standard and condition.**

  This study will consider whether the regulations in place to enforce decency standards in private accommodation are effective in practice, considering the nature of private tenancies and the regulations applicable to them.

- **That it offers affordable accommodation, is a key part of the housing market and is a mainstream housing option.**

  This study will look closely at affordability, both at the outset of the tenancy and in relation to ongoing rental obligations to assess

[37] There is some evidence that this position may be changing with the Renters (Reform) Bill, introduced to Parliament in May 2023. This is currently on its second reading in the House of Commons. The implications of this Bill are discussed further below.

whether households really are able to afford private rented accommodation or whether this provides a barrier to access.

Whether the PRS forms a key part of the housing market and is a mainstream housing option can be assessed by considering factors such as the reasons that people access this sector, the ability of the sector to house any person at a reasonable notice, the ability of the sector to meet local needs and the ability of the sector to offer the flexibility and mobility that tenants need.

1.2.2- Conclusion- Framework

This section has set out criteria against which the fitness of the PRS will be measured in this study, which has been developed using the rhetoric around the sector and the demands being place upon it. The methodology used to carry out this evaluation is set out in detail in Chapter Two. Briefly the analysis will be completed using data from three case study areas, gathered through existing quantitative data and qualitative data generated from questionnaires. This will be used to test the fitness, or otherwise, of the current regulatory framework for the PRS against the criteria set out above.

Now that the research design has been set out, this chapter will go on to briefly consider the existing work in the field and where this work will fit into this body of literature.

1.3- Previous Work in this Field

1.3.1- Literature overview

This study will employ mixed methodologies in order to evaluate the fitness of the PRS, including using doctrinal research that draws on existing literature on the subject. Analysis of the existing sources will be incorporated into the later chapters in the thesis, but this section provides an overview of the existing literature in the field, and who is producing that literature, to demonstrate where this study will fit within that body of work.

This overview will focus on literature relating to the sector in England, which is the main focus of this work. The study will also explore the PRS in Germany as a comparator so works concerning this sector will also be considered, though to a lesser extent.

Legislation

England

The legal provisions governing landlord and tenant relations in England are spread over several pieces of legislation spanning many years, but the key legislation in this area includes the Housing Acts of 1988, 1996 and 2004 which cover the different types of tenure, rules regarding tenancy termination and deposits, the Tenant Fees Act 2019 which places restrictions on fees that can be charged at the outset of a tenancy, the Protection from Eviction Act 1977 which concerns residential occupiers' security rights, the Landlord and Tenant Act 1985 and The Home (Fitness for Human) Habitation Act 2018 which sets out some of the main repairing obligations covering private tenancies, the Deregulation Act 2015 which introduced amendments to the possession procedure for private tenants and the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 dealing with energy efficiency requirements.

Other legislation will also be considered in more general terms, including benefit legislation and some historical provisions including the Rent and Mortgage Interest (War Restrictions) Act 1915.

Germany

Unlike England, Germany is a civil law country. This means that its laws are codified and are designed to be easily accessible to all. The Grundgesetz, the basic law, sets out the principles underpinning the German legal system and the light in which the more specific provisions found elsewhere should be read and interpreted, therefore this document is relevant despite itself not dealing with tenancy law. Tenancy law is dealt with primarily in the Bürgerliches Gesetzbuch

(BGB), the Civil Code.[38] There are also individual statues which set out some of the detail of the law, which will also be considered.[39]

Government Publications

Government publications are also useful documents as they can be read alongside the enacted legislation to shed light on policy decisions and justifications.

England

The main Government publications come in the form of Green and White papers. Although these documents are, by definition, partial, they help to reveal a party's position on housing and often reveal the aims behind policies.

Some of the recent key publications include;

- *Housing White Paper-The Government's Proposals, 1987.* This White Paper preceded the implementation of the Housing Act 1988 and set out the justification for the Conservative Government's decision to withdraw almost completely from regulation in the PRS.[40]

[38] Sections 535- 597 deal with leases covering general provisions for leases (535-555), maintenance and modernisation (555a-555f) , rent (556-561) , security (562-562d) , changes to parties to a lease (563-567) termination (568-576b), special features of residential leases (577-577a) then rules relating to special kinds of leases including leases of other things (578-580a), usufructuary leases (581-584b) and farm leases (585-597).

[39] For example individual laws deal with social security entitlement for housing costs (Wohngeldsgesetz, 2008), the provision of social housing (Wohnraumförderungsgesetz 2011), tenancy reform (Mietrechtsreformgesetz 2001, 2013) and the regulation of heating costs (Verordnung über Heizlostenabreachnung 2009), housing costs (Verordnung über wohnunswirtschftliche Berechnungen 1990) and estate agents (Gesetz zur Regelung der wohnungsvermittlung 2015). Regulation from other areas of law can also have a bearing on tenancy law, for example the economic criminal law (Wirtschaftsstrafgesetz, last amended in 2017) makes it an offence for a landlord to charge excessive rents and can be used to challenge unfair terms relating to rent. Wohngeldsgesetz, 2008

[40] HMSO, Housing White Paper- The Government's Proposals (1987)

- The Conservative party has continued in this view in subsequent publications including Papers in 2009[41] and 2013.[42] Most recently in their 2017 publication on Housing,[43] the Conservative Government stated that they wanted to make "a fairer deal for renters"[44] and promised to consult on the proposal of regulating letting agents' fees but they did not consider it necessary to deal with affordability by addressing rent levels, as they felt that their policy on investment in the housing sector would ensure that in the long run rents were affordable. A House of Commons Publication from 2017, also focused on supply in the sector and how to stimulate this further.[45] Their 2022 White paper again focused on promoting home ownership, but did also state that a review would be undertaken to manage standards in the PRS.[46]
- The Labour Government had followed their rivals in acknowledging the value of the sector but declining to recommend reform,[47] until, in their 2017 election manifesto appeared to shift their position, vowing to end insecurity in PRS housing, control rent and introduce new consumer protections for renters.[48]

Germany

A 2013 publication from Germany, a paper issued by the coalition Government of the CDU, CSU and SPD[49] set out their plans for the

[41] Conservative party- *Policy Green Paper No 10- Strong Foundations- Building Homes and Communities* (2009)

[42] DCLG- The Government Response to the Communities and Local Government Select Committee Report; The Private Rented Sector, (2013)

[43] DCLG- White Paper- Fixing our Broken Housing Market (2017)

[44] DCLG- White Paper- Fixing our Broken Housing Market (2017) pg 61

[45] Bates, Alex, Building the New Private Rented Sector; Issues and Prospects (England), (2017 Briefing Paper- No 07094- House of Commons Library)

[46] HMSO, *White Paper- Levelling Up (2022)*

[47] See, for example, DETR, *Quality and Choice: A Decent Home for All. The Housing Green Paper, (2000)*

[48] *For the Many, Not the Few* (Labour Party 2017)

[49] Deutschlands zukunft gestalten, *Koalitionsvertrag zwischen CDU, CSU und SPD* (2013)

future of Germany and included a discussion on making affordable housing accessible, limiting rising rents and focusing wohngeld to meet housing need. The paper was fairly generic and did not specify the methods to be employed to meet those needs but the fact that the discussion is tenure neutral is revealing of attitudes towards renting here. The intention of addressing housing need using whatever means necessary, i.e., through rented accommodation, is something which the Government in England have been unwilling to consider.

Case law

Case decisions also form a vital part of the literature in this field. They demonstrate how the law is being interpreted and applied in practice and the binding decisions made by some judges allow the law to evolve.

England

In England case law forms part of the national jurisprudence and the existence of judicial precedents mean that case decisions can be directly applicable as binding law.

Key cases include *Street v Mountford*[50] in which the courts provided a definition of a tenancy, *Spencer v Taylor*,[51] which limited the ability of the law to protect tenants by removing some of the strict procedural requirements that had been imposed upon landlords seeking possession of their tenants' homes, *McDonald v McDonald*,[52] a case in which the Supreme Court considered the applicability of human rights legislation and proportionality defences to possession claims against private tenants and *Edwards v Kumarasamy*,[53] a case heard in the Supreme

[50] Street v Mountford [1985] 2 WLR 877

[51] Spencer v Taylor [2013] EWCA Civ 1600

[52] McDonald v McDonald [2016] UKSC 28

[53] Edwards v Kumarasamy [2016] UKSC 40

Court in 2016 which considered repairing obligations in private tenancies, specifically in flats.

Germany

The German system is different to that in England, in that there is no formal system of binding case precedents and each decision is made on its own merits. This does not mean that case decisions are never relevant, but case law plays a much less important role in the German system and there are no particular key cases to take into account here.

Academic texts and articles

England

There is a wealth of existing academic literature in this field and the key sources are discussed below.

One of the prominent names in this field is the academic Susan Bright. Her works include textbooks and articles on landlord and tenant law generally and on specific aspects of housing.[54] Her view is that tenants do not have enough protection under the current laws to make the PRS an attractive and stable option for many households, but she balances this against concerns that increased regulation could damage the sector as landlords may withdraw from it.

Similar concerns about the lack of effective regulation are explored by Caroline Hunter.[55] Her works comment on the precariousness and

[54] For example, Bright, S, *Landlord and Tenant in Context*, (Hart Publishing 2007) and Bright, S *Landlord and Tenant; Past, Present and Future*, (Hart Publishing 2006)

[55] Hunter, C, "The Future of the Private Rented Sector" [2014] Journal of Housing Law 17:4; Hunter, C, "The Private Rented Sector in England: How to appear to do something while doing nothing" [2014] Journal of Housing Law 17:1; Carr, H., Edgeworth, B., & Hunter, C, "Introducing Precarisation: Contemporary Understandings of Law and the Insecure Home" in H. Carr, B. Edgeworth & C. Hunter (Eds.). Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times (Hart Publishing 2018)

insecurity people face in their homes as a result of deregulation and the need for intervention at a regulatory level to address these issues.

Christine Whitehead is another key name in this field. Her works share the view that the laws need to be refined to make private accommodation accessible as a suitable tenure choice, but raise concerns that too much regulation could force the sector into decline.[56] Whitehead tends to favour a change of attitude rather than legal reform.

Martin Partington, takes a different view. He and his co-authors in their Law Commission review, Renting Homes,[57] sought to evaluate the effectiveness of the PRS and made recommendations for reform. They took a consumerist view of housing law[58] and recommended some reforms intended to simplify the law and make it more accessible. Their proposals fell short of recommending wholescale reform; instead they advocated a middle way of mixing some regulation with educational improvements to promote professionalism among landlords.

Another housing academic, Tim Moore, published a work in 2017[59] looking at the different policy responses of the Governments in the UK towards the PRS. This concluded that in Scotland, Wales and Northern Ireland the regimes are moving increasingly towards the stance of Western Europe where regulation is more prominent, whilst in England regulation is still not favoured.

Peter Kemp's work is also relevant here, including his 2015 article looking at the impact of the global financial crisis on the PRS.[60] He points out that what the PRS provides, which can be seen as flexibility for some tenants, such as students who need to remain mobile, can be

[56] Monk, S and Whitehead, C (Ed), *Making Housing More Affordable- The Role of Intermediate Tenures,* (Wiley Blackwell 2010)

[57] Law Commission, *Renting Homes, (Law Commission* 2006)

[58] Law Commission, *Renting Homes, (Law Commission,* 2006); Partington, M, "Taking Renting Seriously: Reflections on the Law Commission's Housing Reform Proposals" [2008] Common Law World Review 37, pg 227

[59] Moore, T," The Convergence, Divergence and Changing Geography of Regulation in the UK's Private Rented Sector" [2017] International Journal of Housing Policy 17:3, 144-456

[60] Kemp, P, "Private Renting after the Global Financial Crisis" [2015] Housing Studies 30;4, pg 601-620

viewed as insecurity for others, including families with young children seeking a long term home.[61] This attitude is key to the work here, which seeks to evaluate whether the laws, which largely date back almost 30 years, are still effective in the present day.

This work will also draw upon the writings of David Cowan, who goes further in his criticism of the current structure and regulation of sector. In his many works on private housing law, which include Housing Law and Policy, 2011,[62] he has stated that housing legislation is a mess and has called for clarity, favouring a sector with more clearly defined rules and regulations.[63]

This view is shared by others, such as the economist Tony Crook, writing from a non-legal perspective, who has concluded that favouring a market-based PRS is not always the best option.[64]

Works will also be considered that approach the subject from a socio-legal point of view including texts about housing policy and housing law in context[65] and from other disciplinary viewpoints including economics, sociology and politics.[66] Other key academics whose work will also be

[61] Kemp, P, "Private Renting after the Global Financial Crisis" [2015] Housing Studies 30;4, pg 617

[62] Cowan D, *Housing Law and Policy,* (Cambridge University Press 2011)

[63] Cowan D, *Housing Law and Policy,* (Cambridge University Press 2011) pg 72 – he points to the fact that tenants have too few rights and that at present the sector could not be considered to offer suitable longer-term housing for an increasing population of private renters.

[64] Crook T, *Transforming Private Landlords- Housing, Markets and Public Policy,* (Wiley-Blackwell 2011) pg 187

[65] See, for example, Mullins, D and Murrie, A, *Housing Policy in the UK* (Palgrave Macmillan 2006); Williams, P (Ed), *Directions in Housing Policy: Towards Sustainable Housing Policies* (Paul Chapman Publishing 1997)

[66] See, for example, Kemeny, J, *Housing and Social Theory* (Routledge 1992); Kemeny, J, *The Myth of Home Ownership- Private Versus Public Choices in Housing Tenure,* (Routledge 1981); Crook, T, *Transforming Private Landlords- Housing, Markets and Public Policy,* (Wiley-Blackwell 2011); Malpass, P and Rowlands, R, *Housing Markets and Policy,* (Ebooks Corporation 2009); Evans, A, *Economics, Real Estate and the Supply of Land,* (Blackwells 2004), Honore, T, *The Quest for Security; Employees, Tenants, Wives*, (Hamlyn Trust, 1982).

considered include Jill Morgan,[67] Peter Williams,[68] Jim Kemeny,[69] Christopher Rodgers[70] and Peter Sparks[71].

Germany

Axel Börsch-Supan is one academic writing on German private tenancy law whose work will be considered here. In a 2009 article he carried out a comparison between the housing markets in Germany, the US and Japan.[72] This work provides analysis of the system itself, including information on the demographics of tenants and tenure choice in Germany and also discusses why comparative housing research is both useful and valid.

Stefan Kofner specialises in German housing law and has been an academic in this field since 1997. His works, relevant here, include a book about the PRS in Germany,[73] as well as articles about the housing system in general.[74]

[67] See Morgan, J, in Lowe and Hughes (Eds) *The Private Rented Sector in a New Century: Revival or False Dawn,* (Policy Press 2002); Morgan, J, *Aspects of Housing Law* (Routledge 2007)

[68] Williams, P (Ed), *Directions in Housing Policy: Towards Sustainable Housing Policies* (Paul Chapman Publishing 1997)

[69] Examples of Kemeny's work include Kemeny, J, "Corporatism and housing regimes" [2006] Housing, Theory and Society, 23:1; Kemeny, J, *The Myth of Home Ownership- Private Versus Public Choices in Housing Tenure,* (Routledge 1981); Kemeny, J, *Housing and Social Theory* (Routledge 1992): Kemeny, J, *From Public Housing to the Social Market* (Routledge 1994)

[70] Rodgers, C, *Housing Law; Residential Security and Enfranchisement,* (Butterworths 2002); Rodgers, C, *Housing, The New Law; A Guide to the Housing Act 1988* (Butterworths 1989)

[71] Sparkes, P, *A New Landlord and Tenant* (Hart Publishing 2001)

[72] Borsch-Supan, A, Heiss, F and Seko, M, "Housing Demand in Germany and Japan" [2001] Journal of Housing Economics 10, pg 229-252

[73] Kofner, S, *The Private Rental Sector in Germany,* (Amazon.co.uk Ltd, Marston Gate 2014)

[74] Kofner, S, "The German Housing System; Fundamentally Resilient?" [2014] J Hous and the Built Envir 29, pg 255-275; Kofner, S, *Housing Market and Housing Policy in Germany,* (2011) Presentation slideshow

Thomas Knorr-Siedow writes more widely including pieces on social housing in Germany.[75] Although not specifically about the PRS, this piece is still useful as the differences between the social/private divide in Germany and England directly impact on the way the PRS works in each jurisdiction. Similar German market social rented sector reviews by Volker Dorn[76] and Joachim Kirchner[77] will be considered for the same reasons.

Writing on German housing law from an economic perspective, the works of Michael Voigtländer, will also be considered here. Although these works do not focus specifically on the PRS they do touch on issues that affect this indirectly.[78]

Reports by Non-Governmental Organisations and Other Bodies- including Academic Research in this field

England

As well as academic texts, this thesis will also draw on reports about the PRS. These reports are often conducted by academic researchers, but have been included here based on their commissioning body.

[75] Droste, C and Knorr- Siedow, T, "Social Housing in Germany" in Scanlon, K, Whitehead, C and Fernandez- Arrigiota, M, Social Housing in Europe, (John Wiley and Sons Limited 2014) and Fernandez- Arrigiota, M, *Social Housing in Europe* (1st Edn John Wiley and Sons Limited 2014)

[76] Dorn, V, "Changes in the Social Rented Sector in Germany" [1997] Housing Studies 12, pg 4

[77] Kirchner, J, "The Declining Social Rented Sector in Germany" [2007] The International Journal of Housing Policy 7:1, pg 85--101

[78] Voigtlander, M, "Why is the German Homeownership Rate so Low?" [2009] Housing Studies 24, pg 355-372; Voigtlander, M, "The Stability of the German Housing Market" [2014] J Housing and the Built Enviro 29, pg 583-594

These reports tend to be commissioned by voluntary sector agencies such as Shelter[79] and Citizens Advice.[80]. Although these agencies are tenant-orientated, and this subjectivity will be taken into account in the evaluation, the data generated from these studies, both statistical and narrative, can be useful in evaluating how the PRS works in practice.

Reports focusing on landlords and housing sector supply will also be used and can act as a counter to this more partial pro-tenant view.[81] Although these studies do not directly address the issues which this study seeks to evaluate, i.e. whether the PRS in its current form is fit for purpose, they provide data about landlords, the demographic of this group and about the supply and availability of rental properties, factors which cannot be ignored in assessing whether reform is needed.

In addition to these more partial reports, more holistic PRS reports will also be considered. For example the 2019 review of regulation in the PRS by Marsh and Gibb,[82] 2017 report by Moore and Dunning,[83] 2012 review of the sector by Neale and Nevett,[84] the 2008 review by Rugg

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[79] For example, Smith, Albanese and Truder, A Roof Over my Head: The Final Report of the Sustain Project, (http://england.shelter.org.uk/__data/assets/pdf_file/0005/760514/6424_Sustain_Final_Report_for_web.pdf 2014); Gousey, Can't Complain: Why Poor Conditions Prevail in Private Rented Homes, (<http://england.shelter.org.uk/__data/assets/pdf_file/0006/892482/6430_04_9_Million_Renters_Policy_Report_Proof_10_opt.pdf > 2014); De Santos, A Better Deal: Towards more Stable Private Renting, (<http://england.shelter.org.uk/__data/assets/pdf_file/0009/587178/A_better_deal_report.pdf> 2012)

[80] Lane and Rodrigues, "Renting Uncovered- Evaluating Consumer Protections in the Private Rented Sector" (Citizens Advice 2015)

[81] See, for example, Barker, Barker Review of Housing Supply (ODPM 2004); Lord, Lloyd and Barnes, "Understanding Landlords: A Study of Private Landlords in the UK using the Wealth and Assets Survey" (<http://strategicsociety.org.uk/wp-content/uploads/2013/07/Lord-C-Lloyd-J-and-Barnes-M-2013-Understanding-Landlords.pdf >2013) (The Strategic Centre 2013) (accessed on 31st October 2014)

[82] Marsh and Gibb, "The private rented sector in the UK; An overview of the policy and regulatory landscape" (2019), Joseph Rowntree Foundation https://housingevidence.ac.uk/wp-content/uploads/2019/07/TDS-Overview-paper_final.pdf

[83] Moore and Dunning, "Regulation of the private rented sector in England using lessons from Ireland" (2017), Joseph Rowntree Foundation https://www.thinkhouse.org.uk/site/assets/files/1798/jrfregulation.pdf

[84] Neale and Nevett, "Can Landlord's Business Plans Sustain, Stable and Predictable Tenancies" (2012) <www.shelter.co.uk> accessed on 18 May 2019

and Rhodes.[85] This 2008 report followed an independent, whole sector review which concluded that the PRS, although vital, did not meet its potential and that further intervention was needed to achieve this, although the authors were cautious when calling for regulation, pointing out that any consequences would need to be considered before changes were made.[86] In the 2017 report the authors reviewed PRS regulation in England and made comparisons with the position in Ireland; they encouraged the use of landlord licensing but concluded that this alone is not sufficient to solve problems in the PRS without being "complemented by appropriate levels of enforcement capacity and educational measures that can tackle poor management practices [in the PRS]".[87] In regards to making PRS tenancies more attractive, Moore and Dunning concluded that longer term tenancies had merit but that tenancy term alone could not make the sector more effective, and rent levels and property condition would also need to be considered.[88] They recommended regulatory reform but concluded that this "will not be the only answer to problems in the PRS" and that incentives to encourage landlord compliance were also key.[89] A 2021 report commissioned by the Department for Levelling Up, Housing and Communities which focused on local authority enforcement practices in the PRS found an "uneven picture of enforcement" due to barriers faced by local authorities which appears to support the view that, without change, regulation alone is not sufficient to tackle the issues in the PRS.[90]

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[85] Rugg and Rhodes, "The Private Rented Sector: Its Contributions and Potential" [2008] www.york.ac.uk/media/chpp/documents/2008/prsreview.web.pdf

[86] Rugg and Rhodes, "The Private Rented Sector: Its Contributions and Potential" [2008] www.york.ac.uk/media/chpp/documents/2008/prsreview.web.pdf

[87] Moore and Dunning, "Regulation of the private rented sector in England using lessons from Ireland" (2017), Joseph Rowntree Foundation https://www.thinkhouse.org.uk/site/assets/files/1798/jrfregulation.pdf, Pg 2

[88] Moore and Dunning, "Regulation of the private rented sector in England using lessons from Ireland" (2017), Joseph Rowntree Foundation https://www.thinkhouse.org.uk/site/assets/files/1798/jrfregulation.pdf, Pg 2

[89] Moore and Dunning, "Regulation of the private rented sector in England using lessons from Ireland" (2017), Joseph Rowntree Foundation https://www.thinkhouse.org.uk/site/assets/files/1798/jrfregulation.pdf, Pg 3

[90] Reeve, Bimpson et al, "Local Authority Enforcement in the private rented sector" (2021), Centre for Regional, Economic and Social Research, Sheffield Hallam University

Rent control was reviewed by Gibb, Soaita and Marsh in a Jospeh Rowntree Foundation report in 2022.[91] This study looked at different types of control used and how they are viewed and analysed by academics and researchers, and recognises that both local politics and ideological trends, as well as the perspective of the reviewer can impact on conclusions about controls. However they also recognised the importance of non-price regulations on rent levels, concluding that these measures share an "interconnectedness".[92]

In a 2021 report Harris and McKee focused on how PRS accommodation can affect the health and wellbeing of its tenants and made some recommendations about future policy considerations aimed at making the PRS a more attractive choice from this perspective.[93] Although this research was conducted with health and wellbeing considerations in mind it is relevant to this study as it includes discussion of the importance of home to PRS tenants and the implications of the lack of security associated with the sector on those accessing it.[94] This helps to highlight how important it is that the PRS can offer a secure and stable home. Harris has also published research which focuses on using alternative approaches to resolving housing disputes, such as mediation, and again although this research has a particular focus it is relevant here as it looks at the motivation of PRS tenants and the impact on them of housing disputes.[95]

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https://www.gov.uk/government/publications/local-authority-enforcement-in-the-private-rented-sector-headline-report/local-authority-enforcement-in-the-private-rented-sector-headline-report pg 3

[91] Gibb, Soaita and Marsh, " Rent Control; A review of the Evidence Base" (2022) Harris and McKee, "Health and wellbeing in the private rented sector" (2021) https://housingevidence.ac.uk/wp-content/uploads/2021/07/HW-in-PRS-Part-2-final.pdf

[92] Gibb, Soaita and Marsh, " Rent Control; A review of the Evidence Base" (2022) Harris and McKee, "Health and wellbeing in the private rented sector" (2021) https://housingevidence.ac.uk/wp-content/uploads/2021/07/HW-in-PRS-Part-2-final.pdf, Pg 6

[93] Harris and McKee, "Health and wellbeing in the private rented sector" (2021) https://housingevidence.ac.uk/wp-content/uploads/2021/07/HW-in-PRS-Part-2-final.pdf

[94] Harris and McKee, "Health and wellbeing in the private rented sector" (2021) https://housingevidence.ac.uk/wp-content/uploads/2021/07/HW-in-PRS-Part-2-final.pdf, Pg 4

[95] Harris, "Alternative approaches to resolving housing disputes" (2020) https://housingevidence.ac.uk/wp-content/uploads/2020/02/200227-ADR_Report_c.pdf

In 2016, the Institute for Policy Research in London published two reports which came out of a study comparing the English and German housing markets.[96] This was a more general study than is intended here, encompassing the whole housing market, not just the PRS, but it includes information which is specific to the research objectives here and which sets that information within a broader context. It covers housing supply, investment and demand as well as considering in detail tenant power in the rental market.

Germany

A report on the German PRS by Jonathan Fitzsimons in 2014[97] looks at several aspects of the sector, providing both descriptive and analytical comment on why the regulations exist and how they operate. The report provides useful context as well as details about how the sector functions in practice. It includes both statistical and analytical details that will be useful in this study.

Marietta Haffner is a researcher based in Australia who specialises in economics. She does a lot of work in housing law and policy, including a case study report on secure occupancy in Germany.[98] This report includes some qualitative data about the rental sector in Germany as well as quantitative information concerning this.

[96] Davies, B, Snelling, C, Turner, E and Marquardt, S, "German Model Homes? A Comparison of UK and German Housing Markets" (Institute for Public Policy Research 2016); Davies, B, Snelling, C, Turner, E and Marquardt, S, "Lessons from Germany; Tenant Power in the Rental Market" (Institute for Public Policy Research 2017)

[97] Fitzsimons, J, "The German Private Rented Sector; A Holistic Approach" (The Knowledge Centre for Housing Economics 2014)

[98] Haffner, M, "Secure Occupancy in Rental Housing; A Comparative Analysis. Country Case Study; Germany" (Research Institute for Housing, Urban and Mobility Studies, Deft University of Technology 2011)

Newspapers

England

Newspaper commentary will also be considered. Reports from publications including the Sunday Times[99] and the Daily Telegraph[100], which speak of the current housing "crisis" and forecast an increased demand for private rents, will be considered. The stance of the publication or broadcaster will need to be considered as will the purpose of the story and any sensationalising of the subject matter, but these reports can be useful in identifying what people on the ground think of housing policy and what is the most current issue concerning the PRS.

Germany

Newspapers articles about German tenancy law in the English press tend to take the form of favourable comparisons with the PRS here.[101] These articles, and the reasons they give for favouring the German model, will also be considered.

German journalists writing about the German PRS tend to be more critical. For example, an article in Spiegel Online from 2011 which reports on the rising rents in Berlin, is more sensational, focusing on the problems caused and the locals' angry response.[102]

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[99] Keenan, M, *When the Rent Bubble Bursts We'll All Pay,* The Sunday Times (London 13th November 2011)

[100] Riddell, M, *Our Housing Crisis Will Dominate the Political Agenda for Decades,* The Telegraph (19th November 2014); Melican, B, *Germany; The Country Where Renting is a Dream,* The Telegraph (18th February 2015)

[101] For example O'Sullivan, F, "In Germany, Renters' Rights Trump Guest Bathrooms" (2015) <http://www.citylab.com/housing/2015/01/in-germany-renters-rights-trump-guest-bathrooms> accessed on 22 November

[102] Cottrel, Christopher, Locals Rage Against Rising Rent, Spiegel Online, <http://www.spigel.de/international/Germany/berlin-s-gentrification-row-locals-rage-against-rising-rent> accessed on 12 December 2016

Articles from the German broadcaster Deutsche Welle's website are also less than complementary, focusing on problems with the time it takes to evict tenants who fail to pay rent and the negative impact this has on landlords.[103] These articles help to draw attention to issues with the sector in practice, which may not be obvious if the laws are reviewed in isolation.

1.3.2 Conclusion

There is a wealth of literature on the problems and options for reform of the PRS, which encompasses many disciplines, perspectives and fields of study.

Although many studies have looked at some, and in a few cases all, of these issues in the context of English law, the present study will fill a gap in the extant literature and research by using German law as a comparator. This will enable the study to draw out the possibility of adopting different approaches to these issues in English Law, and different perspectives on the 'fitness for purpose' of the PRS. It will do so by using the example of German law as a paradigm example of a housing law model that is widely accepted to be more stable and functionally effective.

This study of existing literature will be an integral part of this analysis and the above is intended merely as the briefest of introductions; these sources will be considered in analysis in the later chapters in this thesis.

1.4- Conclusion

Housing is a key commodity. It plays a vital role in people's everyday lives and features prominently in political discourse and policy initiatives. Within the housing market in England, the PRS is currently facing

[103] Harman, S, "Nomad Tenants spark German Landlords' ire" (2010) <http://www.dw.com/en/nomad-tenants-spark-landlors-ire/a-6132989> accessed on 18 November 2015

changes and appears increasingly unable to meet the demands being placed upon it.

Following a protracted period of decline the sector is now expanding and taking on an ever-wide number and range of households. However the regulatory regime which covers the sector is almost 30 years old, and only minor changes have been made to the regulations during the intervening period. Despite declaring their recognition of the importance of the PRS the Government remain resistant to any significant regulatory reform. This study seeks to evaluate whether the sector is fit for purpose in its current form or whether reform is in fact needed to address the problems facing the PRS. This will build upon existing research in the field.

The structure of the work is set out below.

Chapter 2 covers the methodology used in this work, setting out the theoretical basis of the research as well as the methods used to collect and analyse the data. Chapter 3 will cover the policy objectives behind the PRS in England and Chapter 4 will provide some descriptive detail concerning the PRS. Chapter 5 will provide some more detailed analysis of the main problems in the PRS, their causes and effect, and Chapter 6 will focus on areas where further development is needed, bringing forward evidence from the data collected in the case studies to analyse the fitness of the PRS. The comparative jurisdiction, Germany, will be the focus of Chapter 7 with other jurisdictions in the UK being considered as comparatives in Chapter 8. The study concludes in Chapter 9 with recommendations for reform and prospects for future work.

Chapter 2- Theory and Methodology

This chapter will outline the methodology used in this thesis, covering the theoretical framework for the research, the methodology used and the reasons for its selection as well as details of how the fieldwork element of the research has been conducted.

2.1 Theory

2.1.1 Theory of housing

"Theories explain why and how things occur";[104] but it is well established within the academic literature that there is no clear right to housing in UK law and no clear theory of housing on which such a right could be based.[105] It is often argued that no housing theory is possible because of the "unique features" of housing as a commodity.[106] Instead it has been argued that housing touches on many areas of study including welfare rights, human rights, real property, economics and social policy and can be analysed using various different theories relating to those areas of study. Common theoretical focuses which can be used to examine housing law and practice include; human rights, welfare state and social rights, wealth redistribution and consumer rights.

The human rights approach to housing research is the theory that most closely aligns to the aims and objectives of this thesis. This is discussed further below.

The human rights theory of housing centres on the fact that housing is a basic human need, and that the right to housing should therefore be recognised as a human right; this theory extends beyond the basic principle that everyone has a right to a physical shelter. The International Covenant of Economic, Social and Cultural Rights (ICESCR), of which

[104] Clapham, D, "Housing Theory, Housing Research and Housing Policy", [2018], Housing Theory and Society, 35 (2), Pg 163-177, pg 172

[105] Rounavaara, H, "Theory of Housing, From Housing, About Housing", [2018], Housing, Theory and Society, Vol 35:2, 178-192, Pg 180

[106] Clapham, D, "Housing Theory, Housing Research and Housing Policy", [2018], Housing Theory and Society, 35 (2), Pg 163-177, pg 176

the UK is a signatory, recognises the right not just to housing but to *adequate* housing.[107] This should represent not merely shelter for the purposes of physical safety, but also an adequate standard of housing which is a "lynchpin to the realisation of other rights"[108], such as a right to education, employment, personal autonomy and security. [109]

The UN Committee on Economic, Social and Cultural Rights, who monitor the protections guaranteed under ICESCR, have laid out what they consider some of the necessary criteria to satisfy the right to adequate housing proposed in that covenant. The seven criteria that they use are set out below. These are not in any particular order or hierarchy.

1. Security of Tenure- legal protection from forced eviction or harassment.
2. Habitability- the idea that accommodation offers adequate space and protection with no hazards or risks to safety.
3. Availability of facilities and services for health, security, comfort and nutrition (for example sanitation, water supplies, energy supplies).
4. Affordability- housing should be affordable and should not be considered affordable without the household being unable to afford to satisfy their other basic needs.
5. Accessible- especially for specific disadvantaged groups like the elderly, young or disabled.
6. That the location allows access to employment and essential services like medical services and education services.
7. Cultural Adequacy- that housing construction enables people to express their culture and diversity.[110]

This definition of what should be included for housing to be considered adequate provides a framework that covers both the physical features and standards required from housing as well as a framework for the procedural safeguards that should be put in place to protect the right to housing. This offers a basic level of protection that domestic law can be

[107] Article 11.

[108] Kaufman, R, Davis, M and Wegleitiner, M, "The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel" [2014] 45 Colum Hum Rts L Review 772, 772

[109] Office of the United Nations High Commissioner for Human Rights, "The Right to Adequate Housing", (2014- Fact Sheet No 21), pg 1

[110] The Equality and Human Rights Commission, *Following Grenfell; The Right to Adequate and Safe Housing,* (2018), www.equalityhumanrights.com (accessed on 13th March 2023), pg 3-4

shaped and measured around. For these reasons, it provides an important benchmark against which the “adequacy” of the regulatory regime for the PRS in England can be measured, and informs the fitness for purpose criteria adopted in this thesis for the purpose of doing so, as explained below.

“Adequacy” of the housing provided by the PRS is a central concern of this thesis. This will be assessed here through a fitness for purpose criteria. The fitness criteria used are informed by and feed into these guidelines from the UN Committee on Economic, Social and Cultural Rights which underpins why an approach based in human rights theory is an appropriate theoretical framework for this research.

The fitness criteria are set out more fully in section 1.2, but briefly the criteria for assessing the fitness for purpose of PRS accommodation used here are;

- That it offers a reasonable level of security. This conforms with the first criteria as set out above.
- That it offers accommodation of a decent standard and condition. This conforms with the second and third criteria as set out above.
- That it offers affordable accommodation, is a key part of the housing market and is a mainstream housing option. This conforms with the last four criteria as set out above.

Despite being a signatory to ICESCR, the UK has never enacted a right to housing as a standalone and enforceable right into its domestic law. However the human rights applied in UK law through, for example, the Human Rights Act 1998, are relevant to housing, as aspects of these European protections were adopted in the 1998 Act. Of specific relevance is Article 8 of the European Convention on Human Rights which states that everyone has the right to respect for his private and family life, his home and his correspondence. This is incorporated into UK law by the 1998 Act.

Human rights laws impose duties on the state and its organs, but do not directly bind private individuals. Nevertheless, it is still a factor to consider when looking at the PRS because it imposes an obligation on the state to ensure that there are sufficient regulations in place as to promote and manage the supply of adequate housing and to provide appropriate remedies when these rights are breached.[111] Article 8 is not

[111] The Equality and Human Rights Commission, *Following Grenfell; The Right to Adequate and Safe Housing*, (2018), www.equalityhumanrights.com (accessed on 13th March 2023), pg 5

interpreted to impose a duty on a state to provide housing to every individual,[112] but it does impose duties on the state in regard to how they regulate the provision of housing within their jurisdiction. The Council of Europe guidance on Article 8 is clear that in addition to imposing a negative duty on the state not to interfere with private and family life, positive obligations and measures should be adopted to secure the respect for private and family life, even within the sphere of relationships between private parties.[113]

This gives the state a role in monitoring and enforcing standards and management of accommodation even when the accommodation itself is provided by private parties.

As Article 8 is a qualified right, states have a margin of appreciation in determining what measures to put in place to fulfil these duties. The domestic and European case law in this area helps to provide further guidance on what the court considers this duty to include and some of this also touches on the question of the right to adequate housing, either directly or indirectly. This provides some guidance as to what the human rights approach to the right to housing means in practice.

For example, in 2002 the UK High Court considered a claim for damages against a local authority based on a breach of the claimant's convention rights. In this case, a household which included a severely disabled adult was placed into accommodation which was not suitable for the needs associated with their disability. This was found to be a breach of their Article 8 right to respect for private and family life.[114] The court found this to be a breach because, they stated, that the authority had a duty both to ensure there was no unlawful interference with the household's Article 8 rights, but in addition,

"…to take positive steps, including the provision of suitably adapted accommodation, to enable the claimants and their children to lead as

[112] Morris v LB Newham [2002] EWHC 1262 (Admin)

[113] Council of Europe, *Guide on Article 8 of the European Convention on Human Rights*, https://www.echr.coe.int/documents/guide_art_8_eng.pdf [31/8/2022], pg 8. Accessed on 22nd April 2023.

[114] Bernard v London Borough of Enfield, [2003] EWHC 2282

normal a family life as possible, bearing in mind the second claimant's severe disabilities".[115]

Although the facts of this particular case centred on the severe disabilities and vulnerabilities of the household, and European caselaw has made it clear that a state's margin of appreciation in regard to when and how to take action is smaller when the parties are vulnerable,[116] the wording of the judgement here made it clear that this principle had a wider application. The court held, relying on previous decisions from the European Court of Human Rights, that Article 8 should be interpreted widely to ensure that "physical and psychological integrity" is maintained for anyone to whom a duty under Article 8 is owed.[117] In order for this to be achieved, suitable accommodation should be available to them; what is suitable will vary from household to household based on their particular needs.

One case where the European Court of Human Rights considered the state's duties in regard to the provision and protection of adequate housing involved the forced eviction of families in the Roma community from a site they had inhabited for several years. In their judgement the court confirmed that a state's duty extends beyond overseeing the physical nature of the housing provided to the procedure involved when allowing interference with an applicant's housing rights.[118] The court held that by allowing the applicants to be evicted without an independent assessment of the proportionality of the decision to evict, the state had acted unlawfully as this was a violation of a right to respect for private and family life. The judgement stated that

"*The Court finds that, in respect of all the applicants, there has been a violation of Article 8 of the Convention since they did not have the benefit, in the context of the eviction proceedings, of an examination of the proportionality of the interference in accordance with the requirements of that Article".*[119]

[115] See above, Paragraph 33. This position was confirmed in international cases such as Markcx v Belgium [1979] 2 EHRR 330, Paragraph 31 and Botta v Italy [1998] 26 EHRR 241, Paragraph 33

[116] See, for example, M.C v Bulgaria 39272/98 [4.12.2003] and August v UK 36505/02 [21.01.2003]

[117] Bernard v London Borough of Enfield, [2003] EWHC 2282, Paragraph 33.

[118] Winterstein v France 27013/07 [17.10.2013]

[119] Ibid, Paragraph 167

This confirms the position set out in the case of *Kay and Others v UK*.[120] In this case a group of tenants had been placed into social housing via a registered social landlord. The freehold of the accommodation was owned by the local authority, and this was leased to the housing association who then let it out to the applicants, their tenants. Despite being a registered social landlord, they let these premises on assured shorthold tenancies, the tenancy type dominant in the PRS. The authority took steps to terminate the head leases and regain possession of the premises and as a result the housing association issued possession proceedings against the resident tenants in order to ensure that they were able to deliver up vacant possession on the termination of their lease. They used the accelerated procedure under s.21 meaning that no grounds for possession were cited, and a possession order would be mandatory providing the formalities had been adhered to.

The tenants tried to challenge this possession claim but as a result of the lack of security of tenure associated with the applicants' housing status, the domestic courts found that they had no discretion to consider their personal circumstances before ordering their eviction and the eviction order was granted on mandatory grounds.

The European Court of Human Rights found the UK Government to have breached the Claimants' Article 8 rights by not allowing them to have the proportionality of the decision to evict them considered by the court. The court stated, at paragraph 68 of the judgement;

"…..the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end".[121]

Although this case did not occur within the PRS itself and the domestic courts have since ruled that the decision here does not mean that an Article 8 defence is available in proceedings against private landlords,[122] it did relate to the procedure for ending tenancies that applied to the vast majority of PRS tenancies, under s.21 of the Housing Act 1988. It is therefore relevant to this discussion as it demonstrates the role the

[120] No. 37341/06

[121] Ibid, paragraph 68

[122] Doherty v Birmingham City Council [2006] EWCA Civ 1739, paragraph 32.

European Court expects the state to take in monitoring and regulating decisions around housing policy that directly impact on tenants' convention rights.

The human rights theory of housing recognises the needs for these procedural safeguards, but also that these procedural protections are "of little ultimate value if there are no underlying rights to enforce or protect",[123] and therefore that housing should be considered a human right, which "states have the primary obligation to protect and promote"[124] through regulation.

In addition to the effect of Article 8 which implies into UK law elements of the right to housing, there are also elements of the protections recommended in the UN Committee on Economic, Social and Cultural Rights in other domestic legislation and regulation. For example, the rules regulating housing condition, which are set out in detail at section 4.4.4, seek to ensure that housing is habitable and free from hazards. In the private sector those standards are set out primarily in the Housing Health and Safety Ratings System (HHSRS)[125] which is enforced by local authorities as public bodies.

This study looks at the regulation of the PRS in England and Wales and how that impacts on individuals accessing housing in that sector. The needs of those individuals and households are central to this work and it aims to analyse whether the PRS can meet those needs in its current form. As such the human rights theory of housing is an appropriate theoretical framework for this piece of work. This theory will therefore be adopted as the framework for analysis of the PRS here. The approach taken to housing under the Human Rights theory will be used to evaluate the adequacy of the existing regulatory framework for the PRS and to make suggestions for reforming the system to make it more fit for purpose.

The theory that housing should be considered from a welfare state or social rights perspective is another rights-based theory,[126] with some

[123] Kaufman, R, Davis, M and Wegleitiner, M, "The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel" [2014] 45 Colum Hum Rts L Review 772, 807

[124] Office of the United Nations High Commissioner for Human Rights, "The Right to Adequate Housing", (2014- Fact Sheet No 21), pg 29

[125] See section 4.4.4

[126] Rounavaara, H, "Theory of Housing, From Housing, About Housing", [2018], Housing, Theory and Society, Vol 35:2, 178-192, Pg 183

similarities to the human rights theory discussed above. Its relevance and the additional perspective that it can offer on the problems addressed by this thesis will be briefly outlined here.

Like the human rights approach, the welfare state or social rights theory recognises that individuals within a society have a basic need for housing. It goes on to determine that the state has an obligation to protect those rights as part of their broader regulatory obligations towards the welfare of citizens under their jurisdiction.[127] Proponents of this theory suggest that "many facets of what we can rationalise as the right to housing are in theory already protected and enforceable in England and Wales",[128] but that there is no cohesive right underpinning that regulation. They state that housing can be analysed with the theory in mind, but that states should seek to introduce a "minimum core" of rights to underpin those regulations in practice. The Human rights approach gives us that minimum core to analyse the PRS against.

Other theoretical perspectives, although useful when specific aspects of housing are considered, are less useful here when the focus is on the overall fitness of the PRS.

The wealth redistribution theory, for example, looks at state interference in housing as a form of asset management or a way of challenging social and economic inequality. Although this can be useful as a means of understanding the way states regulate and adjust the relative economic position of landlord and tenant, these theories tend to focus on home ownership policies from an economic sociology perspective and are less useful when seeking to assess fitness within the PRS.[129]

The consumer rights approach to housing law also offers a theoretical framework on which housing regulation can be assessed, however this is a narrower theory, focusing primarily on the tenancy contract and the scope and implications of tenancy terms. It does not allow a full consideration of external factors such as national legislation and local

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[127] Stephens, M, "How Housing Systems are Changing and Why: A Critique of Kemeny's Theory of Housing Regimes", [2020], Housing, Theory and Society, 35: 5, pg 521-547, pg 532

[128] Maxwell, D. "A Human Right to Housing?", (2019), Faculty of Law Blogs, University of Oxford, accessed on 10th February 2023.

[129] Rounavaara, H, "Theory of Housing, From Housing, About Housing", [2018], Housing, Theory and Society, Vol 35:2, 178-192, Pg 188

authority interventions or the impact on fitness of the sector and is not therefore appropriate for use here.

2.1.2 Theoretical framework- security of tenure

The PRS will be analysed here with the human rights theory of housing rights as the framework for that analysis. However a further, more specific theoretical consideration will be used to analyse one of the key elements of the PRS. That is the mutual interdependence between security of tenure and other tenancy rights and how this impacts on the overall fitness for purpose of the regulatory regime for the PRS in England.

Security of tenure, and the interplay between that and other aspects of tenancy law, is one of the main considerations of this thesis. Within housing discourse there is a theory which states that in order for other tenancy rights to be effective in practice- such as the right to controlled rent, the right to have repairs completed in a timely and effective manner and the right to quiet enjoyment of their rental property - a tenant must have a reasonable level of security in their home to enable them to enforce those rights without fear of losing their accommodation and to encourage more "rational action by landlords".[130] Conversely, the theory supports the view that strong security of tenure is worthless if a tenant has no meaningful protection from arbitrary rents, failure by their landlord to carry out repairs or landlord harassment. What is needed for an effective PRS is a meaningful set of housing rights that are supported by an appropriate and adequate level of security of tenure; the differing housing rights depend on each other for their effectiveness. This is especially the case when we consider the effectiveness of legal remedies for breach of the various housing rights conferred on PRS tenants by legislation e.g. rights to prevent "revenge evictions" when complaints about disrepair are made by tenants, to prevent arbitrary evictions, or to challenge excessive increases in rent. Reasonable levels of security of tenure and reasonable tenancy rights must go hand in hand to make a PRS tenancy an attractive housing option.

[130] Yee, G, "Rationales for Tenant Protection and Security of Tenure" [1989] Journal of Social Policy 5, pg 59

Following the overhaul of tenure in the PRS brought about by the Housing Act 1988, security of tenure for most PRS tenants in England is extremely weak, arguably creating "a sense of instability (and) disempowerment";[131] see section 4.4.2, below. This "serious weakness with current housing legislation"[132] has the effect of eroding other tenancy rights by making them difficult to enforce without fear of retribution in the form of repossession action, which in turn makes the tenure less attractive as a stable, long-term option.[133] In Germany, the opposite is true. Due to the strong levels of security enjoyed by tenants of private landlords, other tenancy rights are meaningful and breaches can be freely enforced. This makes renting a more attractive, long-term housing option there.

As the need for and importance of security of tenure in assessing the fitness of the PRS is one of the key areas which this research seeks to analyse, this theory of mutual interdependence will be borne in mind. Academics including Rodgers,[134] Bennett,[135] Rugg and Rhodes[136] among others, have all discussed this theory, as has research from campaign groups such as Shelter[137] and Citizens Advice.[138] It is something which is crucial to understanding how the PRS functions and whether it does so effectively. Of course, ensuring that security and rights complement one another is not the only consideration for policy makers, as they also need to take in to account a wider range of issues including economic and

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[131] Jones, E, Policy Discussion Paper- Fit for Purpose?, (https://england.shelter.org.uk/__data/assets/pdf_file/0007/39526/Fit_For_Purpose.pdf 2007), pg 24

[132] Crew, D, *The Tenant's Dilemma,* (Citizens Advice 2007), pg 4

[133] Jones, E, Policy Discussion Paper- Fit for Purpose?, (https://england.shelter.org.uk/__data/assets/pdf_file/0007/39526/Fit_For_Purpose.pdf 2007), pg 7

[134]Rodgers, C, "Fair Rents and the Market; judicial attitudes to rent control Legislation" [1999] The Conveyancer and Property Lawyer 63C, pg 201-231.

[135] Bennett, Mark, "Security of Tenure for Generation Rent; Irish and Scottish Approaches" [2016] University of Wellington Law Review 47

136 Rugg and Rhodes, "The Private Rented Sector: Its Contributions and Potential" (2008) www.york.ac.uk/media/chpp/documents/2008/prsreview.web.pdf

[137] Reynolds, L, "Safe and Secure? The private rented sector and security of tenure" (https://england.shelter.org.uk/__data/assets/pdf_file/0017/48041/Safe_and_Secure.pdf 2005); Jones, E, Policy Discussion Paper- Fit for Purpose?, (https://england.shelter.org.uk/__data/assets/pdf_file/0007/39526/Fit_For_Purpose.pdf 2007)

[138] Crew, D, *The Tenant's Dilemma,* (Citizens Advice 2007)

political concerns, but in order to evaluate whether the PRS is fit for purpose, this key issue must be considered.

This theoretical concern will underpin the examination of the PRS in this study. The architecture of housing tenure is one of the key differences between the systems in England and Germany and by examining both countries and their approaches to PRS housing, the relevance of this mutual interdependence of security of tenure and other rights is clearly illustrated.

2.1.3 Theoretical Framework- methodology

As explained in section 2.2.1, this work will adopt a comparative analysis, using a mixed methodology.

Comparative work is not a universally approved approach to research. Many of the criticisms of comparative work centre on the fact that there is a risk that a researcher, to whom at least one of the comparators will be a foreign system, will decontextualize a law to force out the similarities and differences, making any comparison "superficial".[139] Critics such as Merryman argue that failing to appreciate the context in which a system operates can be damaging.[140] However whilst criticising "bad" comparative law critics acknowledge that it is possible for this to be done in a more meaningful way that allows context to be properly considered. In order to achieve this, comparative work must be underpinned by a theory which will direct the conduct of the research to ensure that it is empirically sound.[141]

One way in which context can be accounted for in the analysis itself is through a "system embedded" approach. With particular reference to the housing specific theories set out above, the research used in this study

[139] Gary Watt in Monateri, G (Ed), *Methods of Comparative Law* (Edward Elgar Publishing Ltd 2012) pg 86.

[140] Merryman, JH, "On the Convergence and Divergence of the Civil Law and the Common Law" in Cappelletti, M (Ed) New Perspectives for a Common Law of Europe, (Badia Fiesdana 1978) pg 221.

[141] Foster, N, "Comparative Legal Studies, A Topic for the Twenty-First Century" [2006] The Journal of Comparative Law 1, pg 1.

will be carried out using this “system embedded” approach, as set out by Mark Stephens in his 2011 work.[142]

Stephens, an economist, argued that housing is a distinctive policy area[143] being durable, provided by a mixed economy and managed over various Government departments, and that it exists within wider social and economic structures.[144] He argued that by conducting a proper examination of policy within these various contexts in two or more states, research can highlight how different systems use different methods over time to achieve the same or similar goals. The context itself becomes a variable and a tool for explaining systems and is not necessarily a “barrier to effective cross-national comparisons”.[145]

This “system-embedded” approach offers a solution to many of the issues likely to arise in this study. For example, one of the common problems encountered by comparative – or cross-national - housing researchers is the definition of housing tenure. This often does not mean the same thing in England as it does in other European countries, including Germany. This difference in meaning can call into question the direct comparability of data from different jurisdictions. The “system embedded” approach will explore these differences as part of the analysis. This does not classify the systems as being too distinct to compare, nor try and emphasis similarities that neutralise differences to the extent of making comparisons meaningless, but instead allows each system to be fully explored within its rightful context. Using this theory examination can be made not only of whether there are lessons that can be learned from abroad, but why lessons should be drawn and where those lessons can best be learnt. These are key considerations if a policy transfer or lesson drawing comparison is to be successful.[146]

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[142] Stephens, M, “Comparative housing research; A “systems-embedded” approach” [2011] International Journal of Housing Policy 11:4, pg 337-355

[143] Stephens, M, “Comparative housing research; A “systems-embedded” approach” [2011] International Journal of Housing Policy 11:4, pg 350

[144] Stephens, M, “Comparative housing research; A “systems-embedded” approach” [2011] International Journal of Housing Policy 11:4, pg 337

[145] In this view Stephens continued the earlier work of Hantrais in “Contextualisation in cross-national comparative research” [1999] International Journal of Social Research Methodology 2, pg 93-108

[146] Dolowitz and March, “Learning from abroad; the role of policy transfer in contemporary policy-making” [2000] Governance; An International Journal of Policy and Administration 13

This system-embedded approach will be applied using the method of Zweigert and Kötz. They propose a functional method for comparative legal study which corresponds to the aim of this study, arguing that to examine the law you should examine the purpose of the law[147] and use this as the standard by which to carry out the evaluation. This means that it is possible to evaluate how rules work when adopted and whether laws in other jurisdictions implemented for the same or similar purposes can achieve those purposes more successfully. The researcher can then consider "whether it (the law) has proved satisfactory in its Country of origin and ….whether it will work in the Country where it is proposed to adopt it".[148] If this is done critically it is useful in helping to assess whether borrowing or transplanting laws from another jurisdiction would actually work.

For this to be achieved comparative work must be carried out using the theoretical framework set out above, but it must also be in-depth, so that context can be fully considered. To ensure that the work is detailed enough to be successful, a case study approach will be adopted here.

2.2- Methodology

2.2.1- Use of Mixed Methods

This project will adopt both a comparative study focussed on the regulation of the PRS in Germany, which will be complemented by the use of qualitative research to identify and explore the core problems experienced by tenants and landlords in the PRS in England.

The project will, therefore, use a mixture of both qualitative research methods and doctrinal research, using existing literature, legislation and case law to evaluate the PRS in England and, for comparison, in Germany. As with the use of existing literature in the review, analysis of

[147] Zweigert and Kötz, *An Introduction to Comparative Law, (3rd Edn*, Clarendon Press 1998) pg 37.

[148] Zweigert and Kötz, *An Introduction to Comparative Law, (3rd Edn*, Clarendon Press 1998) pg 17.

these sources and reliability of the data used will be incorporated into the study.

2.2.2- Using Comparative Research

This study will be completed using comparative research. In order to effectively evaluate the PRS in England, the sector in Germany will also be evaluated and used as the principal comparator.

Although comparative research has its critics,[149] there is much to be gained from this type of work. For example, this approach can help a researcher to understand the system in their own jurisdiction more completely,[150] to enable improvement in the technicalities of the law to be considered by assisting with borrowing laws or drawing lessons from one jurisdiction to use in another[151] and by allowing a researcher to illuminate another system and study it in detail.[152] As the aim of this study is to evaluate the current law to see if it is fit for purpose with a view to recommending reform, comparative law analysis will help to achieve this aim. Were this conducted as a stand-alone study of English law, with no comparative element, then the study could conclude that change is needed, but would not be able to make fully informed recommendations for reform based on an evaluation of alternative options and the impact they may have.

As set out above Germany has been selected as comparator for several reasons. Primarily because Germany is unusual in having a housing market where the majority of households are in private rented accommodation, where this sector enjoys a positive reputation and is seen as an advantageous housing tenure. In addition Germany is

[149] See for example, Legrand, P, "Comparative Legal Studies and Commitment to Theory" [1995] Mod L Rev. 58; 262 and Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law" in Cappelletti (Ed), *New Perspectives for a Common Law of Europe* (Badia Fiesdana 1978) pg 197

[150] Markesinis, B, "Bridging Legal Cultures" [2002] Israel Law Review 27

[151] Siems, MM, "Bringing in Foreign Ideas; The Quest for "Better Law" in Implicit Comparative Law" [2014] The Journal of Comparative Law 9 pp119-136

[152] Legrand, P, "Comparative Legal Studies and Commitment to Theory" [1995] Mod L Rev. 58, pg 2622

currently at the forefront of many housing and tenancy research projects in European circles, where it is promoted as the basis for a harmonised European model of housing law.

Examining the system in Germany, with the intention of comparing this to the system in England, is not straightforward, as there are many differences between the two jurisdictions, but there are also similarities.

Germany is a federal state and the regulatory responsibility is split between the national Government and the various Länder, with the nature of that split varying between different areas of law. The broad legal framework governing tenancy contracts is determined at a national level, but housing is a local competence, administered by the Länder, which means that many of the details of the housing system are found at a local level. England is not a federal state, the national Government is responsible for the legislation which governs the PRS and this applies throughout the country,[153] but local authorities have been given increasingly wide powers in relation to the PRS- for example in relation to regulating the sector and assessing housing costs assistance provision- and this has allowed variations to develop at a local level here too. These similarities and differences will be considered as part of the thesis and the risks associated with legal transplants will be considered along with the recommendations raised as part of this study in Chapters 8 and 9.

2.2.3- Qualitative Research Methods Employed: The Case Studies

The research for this thesis included an in-depth analysis of the effectiveness of housing rights in the private rented sector in England using a case study approach focusing on three towns/cities. This enabled the study to take into account the broader regulations established at a national level and to explore in detail how these work in practice and what local variations exist.

[153] There is some devolution of power within the UK. Housing policy has been devolved to the Scottish Parliament in that jurisdiction since 1999 and the same applies in Northern Ireland, with the assembly there holding that power. These areas are not evaluated in this study. Housing law and policy in England still falls under the jurisdiction of the UK Parliament and they retain the power to legislate for Wales in this area, providing the National Assembly for Wales consents to those laws. Although the Assembly has power over housing under the devolution arrangements set out in the Wales Act 2017, the regulatory framework for the PRS in Wales is still currently based on legislation passed by the UK Parliament and therefore is covered in this study. Any differences in the regulation in Wales will be discussed in the evaluation of the PRS in this thesis.

Although no study focusing on just three towns/cities can generate generalisable research outcomes of universal validity as to the fitness for purpose of the PRS in England, this approach facilitated an analysis that provides useful data as to how the PRS functions in different areas with different local needs, within the regulatory framework imposed by English Law.

2.2.3.1 Case study approach- selection

The towns/cities selected for study this study are Gateshead in Tyne and Wear, York in North Yorkshire and Birmingham in the West Midlands. These areas have been selected in order to represent a range of different needs.

The following factors have been taken into account when selecting the case study areas:

- Economic position
- Population and household details
- Tenure

Further details of the case study selection are set out below.

Gateshead

Gateshead is a town in Tyne and Wear in the North East of England. Gateshead Metropolitan Borough Council is one of five local authorities operating within Tyne and Wear and is responsible for an area of 55 square miles, covering 22 electoral wards.[154]

The population of Tyne and Wear is approximately 1.3 million, and in Gateshead this is approximately 202,500, who comprise some 90,700

[154] https://www.gateshead.gov.uk/article/2874/About-Gateshead (accessed on 23rd November 2020).

households.[155] Approximately 5% of the population are from a migrant background.[156]

There are 94,302 dwellings in Gateshead;[157] approximately 50% of the occupied dwellings are owner occupied and the remainder of the dwellings are in the rental sector.[158]

Rental properties in the social sector account for 27% of dwellings in Gateshead; the PRS makes up the remaining 23%. This equates to 21,689 dwellings.[159] This local data broadly reflects national statistics, which show that approximately 20% of dwellings in the UK are PRS stock.[160]

The data from our local authority participant, GLA1, provides further insight in to how this PRS stock is distributed locally, confirming that in some areas in Gateshead there is a high concentration of PRS accommodation, at approximately 75%.[161] National statistics do show that 79% of all PRS stock is concentrated in urban areas,[162] which indicates that this local position is indicative of the picture nationally.

This type of concentration of stock could bring its own issues. If a household is committed to a particular locality due to access to work, education or support, then PRS accommodation could be their only option. If that accommodation is not suitable due to the nature of the tenure and the law and regulation governing it, then the household will be disadvantaged. Given the percentage of all households accommodated by the PRS and the higher percentage in concentrated

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[155] https://www.gateshead.gov.uk/article/2874/About-Gateshead (accessed on 23rd November 2020).

[156] https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/CensusProfile-North_East.pdf (accessed on 23rd November 2020).

[157] https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants (accessed on 23rd November 2020).

[158] https://www.gateshead.gov.uk/article/2874/About-Gateshead (accessed on 23rd November 2020).

[159] https://www.gateshead.gov.uk/article/2874/About-Gateshead (accessed on 23rd November 2020).

[160] See Chapter 1.1.2.1 above.

[161] GLA1 (24/04/2019), pg. 2.

162 Office for National Statistic; UK Private Rented Sector 2018, UK private rented sector - UK private rented sector - Office for National Statistics (ons.gov.uk) (accessed on 6th June 2021)

areas, it is essential that PRS accommodation offers a suitably secure housing option to those accommodated in it.[163]

The average household income in Gateshead is just under £33,700 per annum, against a national average of approximately £40,500.[164] The Gross Value Added (GVA) per capita in Gateshead is £21,661 per annum.[165]

Recent research from the Joseph Rowntree Foundation found that 39% of children in Gateshead live in poverty;[166] although this does not cover all households it is indicative of the overall poverty levels in the area. The most recent Government data measuring indices of multiple deprivation across local authority areas in the UK ranked Gateshead as the 47th most deprived area out of 317.[167]

York

York is a City in North Yorkshire which is governed by a unitary local authority, York City Council. York City Council is responsible for an area of approximately 105 square miles, that encompasses 21 distinct electoral wards.[168]

The population in North Yorkshire is approximately 1,158,816, and in the City of York this is approximately 198,051 who comprise 83,552 households.[169] Approximately 8% of the population are from a migrant background.[170]

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[163] See Chapter 1.1 above for a discussion on the importance of housing and why this matters.

[164] https://www.gateshead.gov.uk/article/2874/About-Gateshead (accessed on 23rd November 2020).

[165]https://www.ons.gov.uk/economy/grossvalueaddedgva/datasets/regionalgrossvalueaddedbalancedbylocalauthorityintheuk (accessed on 23rd November 2020).

[166] https://www.jrf.org.uk/data/uk-child-poverty-rates-local-authority (accessed on 2nd July 2023)

[167] https://www.gov.uk/government/statistics/english-indices-of-deprivation-2019 (accessed on 2nd July 2023)

[168] https://www.york.gov.uk/wards (accessed on 25th November 2020).

[169] https://www.york.gov.uk/census (accessed on 25th November 2020).

[170] https://www.york.gov.uk/census (accessed on 25th November 2020).

There are 90,027 dwellings in York;[171] approximately 86% of the occupied dwellings are in the private sector, and 20% of those are private rental units.[172] This equates to approximately 16,000 dwellings.[173]

This is broadly similar to the tenure split in Gateshead, where PRS properties account for 23% of the housing sector, and mirrors the national average which shows that approximately 20% of dwellings in the UK are PRS stock.[174]

The average household income in York is just under £30,000 per annum, against a national average of approximately £40,500.[175] The Gross Value Added (GVA) per capita in in York is £23,109 per annum.[176]

Recent research from the Joseph Rowntree Foundation found that 24% of children in York live in poverty;[177] although this does not cover all households it is indicative of the overall poverty levels in the area. The most recent Government data measuring indices of multiple deprivation across local authority areas in the UK ranked York as the 267th most deprived area out of 317.[178] This makes York the least deprived of our three case study areas by a considerable margin, and allows comparisons to be drawn between areas with higher and lower deprivation.

[171] https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants (accessed on 23rd November 2020).

[172] https://www.york.gov.uk/downloads/file/2266/private-sector-housing-strategy-2016-2021 (accessed on 25th November 2020).

[173] https://www.york.gov.uk/downloads/file/2266/private-sector-housing-strategy-2016-2021 (accessed on 25th November 2020).

[174] See Chapter 1.1.2.1 above.

[175] https://www.nomisweb.co.uk/reports/lmp/la/1946157112/report.aspx (accessed on 25th November 2020).

[176] https://www.ons.gov.uk/economy/grossvalueaddedgva/datasets/regionalgrossvalueaddedbalancedbylocalauthorityintheuk (accessed on 23rd November 2020).

[177] https://www.jrf.org.uk/data/uk-child-poverty-rates-local-authority (accessed on 2nd July 2023)

[178] https://www.gov.uk/government/statistics/english-indices-of-deprivation-2019 (accessed on 2nd July 2023)

Birmingham

Birmingham is a City in the West Midlands which is governed by a unitary local authority, Birmingham City Council. Birmingham City Council is responsible for an area of approximately 103 square miles, that encompasses 69 distinct electoral wards.[179]

The population in the West Midlands is approximately 2,920,000 and in the City of Birmingham is approximately 1,141,400 who comprise approximately 430,000 households.[180] Approximately 11% of the population are from a migrant background.

There are 441,536 dwellings in Birmingham;[181] approximately 75% of the occupied dwellings are in the private sector, and 12.5% of those are private rental units. This equates to approximately 55,192 dwellings.

The proportion of PRS dwellings in this area is significantly lower than in either of the other two case study areas, or the national average.

The average household income in Birmingham is just under £28,500 per annum, against a national average of approximately £40,500.[182] The GVA per capita in in Birmingham is £22,871 per annum.[183]

Recent research from the Joseph Rowntree Foundation found that 43% of children in Birmingham live in poverty;[184];although this does not cover all households it is indicative of the overall poverty levels in the area. This is the highest poverty level of our case study areas. The most recent Government data measuring indices of multiple deprivation across local authority areas in the UK ranked Birmingham as the 7th

[179] Wards and constituencies | Birmingham City Council (accessed on 29th November 2020).

[180]Knight Frank, Birmingham Report, Spring 2015, birmingham_web.pdf (knightfrank.com) (accessed on 29th November 2020).

[181] https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants (accessed on 29th November 2020).

[182]https://www.nomisweb.co.uk/reports/lmp/la/1946157112/report.aspx (accessed on 25th November 2020).

[183]https://www.ons.gov.uk/economy/grossvalueaddedgva/datasets/regionalgrossvalueaddedbalancedbylocalauthorityintheuk (accessed on 29th November 2020).

[184] https://www.jrf.org.uk/data/uk-child-poverty-rates-local-authority (accessed on 2nd July 2023)

most deprived area out of 317.[185] This mirrors the pattern with child poverty statistics for our case study areas, making Birmingham the most deprived area looked at in this study.

Case study selection- Summary

The table below highlights some of the key statistics from the areas selected for this case study and demonstrates the similarities and difference between those areas which this study will further explore in order to achieve a view of the fitness of the PRS in practice from a range of perspectives.

Area	**Total number of households**	**% of households in the PRS**	**Average income per household**	**% of households with children living in poverty**	**Local authority ranking on Indices of Multiple deprivation (out of 371)**
Gateshead	90,700	23%	£33,700	39%	47th
York	83,552	20%	£30,000	24%	267th
Birmingham	430,000	12.5%	£28,500	43%	7th

Birmingham has a significantly higher number of households, with higher levels of deprivation and child poverty than either of our other two areas. The proportion of households in the PRS here is smaller than in either Gateshead or York though due to the difference in the size of the population, this equates to more PRS units overall then in either of the other two areas. Using this as a case study area allows us to look at what impact, if any, having higher levels of poverty and proportionally less PRS accommodation has and whether the PRS accommodation that is available here is fit for purpose given these demographics.

York is the most affluent of the case study areas selected, with less child poverty and less overall deprivation despite lower average household incomes here. The PRS here covers one fifth of all accommodation types, which mirrors the picture nationally. This allows us to examine an area with an average sized PRS, but less obvious financial pressures on households, allowing us to look at whether the PRS is fit for purpose here when affordability should, in theory, be less of a barrier.

[185] https://www.gov.uk/government/statistics/english-indices-of-deprivation-2019 (accessed on 2nd July 2023)

Gateshead offers a different perspective from which to analyse the PRS. This is something of a middle ground between Birmingham and York and allows us to explore the fitness of the PRS in a larger urban area with a higher average household income but still significant level of poverty and deprivation and a higher proportion of PRS accommodation than our other two areas.

By focussing on these three areas to give a snapshot of the PRS in practice this study analyses this from a range of perspectives. Analysis of the PRS in practice, using the data collected from these case study areas, will be used in Chapter 6, below.

2.3- Fieldwork Design

As described above, this study will include the use of both existing doctrinal research and qualitative work to enable an evaluation of whether the PRS is fit for purpose using the methodology set out above.

The qualitative research conducted used questionnaires directed to key actors in the PRS in England.

2.3.1 Qualitative Data Gathering

It was necessary to gather qualitative data to conduct this study because the purpose of the work is to evaluate the effectiveness of the PRS in its current form. This is impossible to gauge from a stand-alone evaluation of the law, as something which appears effective in statute may not actually work in practice. It is only by examining the PRS in practice that we can truly establish whether it is fit for purpose, and what role current regulatory rights and remedies have in promoting or undermining its fitness when measured against the criteria established for this research (see section 1.2.1.1, above). Accordingly the qualitative research undertaken in the project sought the views of those actively engaged with the sector when reaching conclusions about its fitness. Quantitative research would not yield the type of results and information required for this type of evaluation and is therefore not appropriate here.

The qualitative method selected for this study was postal/electronic questionnaires. This method has been chosen for several reasons.

Questionnaires enable the inclusion of a broader range of participants as there are no geographical constraints and as the participants are able to complete and return them at their leisure, meaning that scheduling is less of an issue. On a more practical level this also helps to limit costs and make the project achievable.

This method allows the use of both closed questions where specific information is needed and open questions to elicit opinion. This allows fuller and more detailed answers which the respondents can supply in their own words and within the necessary context.[186]

Although there are some critics of this mode of data collection and disadvantages include the fact that this type of research typically has a low response rate and there is the possibility that the respondent may fail to understand the question without anyone involved in the project there to provide clarification, this will be mitigated by targeting the questionnaires appropriately. These were sent to experts and professionals who have an established interest in the subject area and who will be more likely to choose to respond despite the demands on their time. Their expertise allows them to answer questions about the topic without prompting or explanation.

Careful consideration has been given to the construction of the questionnaires to try and mitigate any negative aspects of this method of data collection, as set out below.

2.3.2- Questionnaire Design

Research has shown that the wording used in questionnaires is key to ensuring that the question is properly understood and therefore that the responses generate the intended data. When constructing these questionnaires careful consideration was given to the wording used,[187]

[186] Peterson, RA, *Constructing Effective Questionnaires (*Sage Publications 2000) pg 32

[187] Copies of the Questionnaires used have been provided in an appendix at the end of this work.

though as the target audience for the questionnaires are people who are actors in the PRS regime, or those who have a certain level of expertise in it, it is hoped that misinterpretation will be less of an issue here. In addition to the questionnaires themselves the respondents also received an information sheet setting out the purpose of the research so the questions can be read with that in mind and interpreted appropriately.[188]

Although this study does not include data which is particularly sensitive in nature it does seek the opinions of people who are active in the PRS. If those opinions are negative the participant may not wish those to be publicised. Therefore, in order to minimise the chance of their simply declining to participate at all, they have been offered the choice of doing so anonymously. Those who were happy to be identified have a further choice of simply being listed as a participant and with their answers woven into the evaluation, or if having their particular views assigned to them directly in the work. This choice was left entirely to the participants to allow them some control over the use of their ideas and views and to encourage engagement. The participant information sheet explained this fully to the participants so that they could make an informed choice about their participation.

2.3.3 Sample Selection

The questionnaires were sent to experts and key actors within the housing market in England, focussing on the case study areas.

The purpose of the study is to analyse the PRS in its current form and measure whether it is fit for purpose. In order to do information was needed about how the sector operates in practice and the problems that face those who have to navigate and work with the system in its current form. The sample was therefore selected accordingly. As noted above, the use of experts and otherwise interested parties was also intended to increase the response rates.

The sample is made up of the following groups;

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[188] Copies of all replies received, anonymised where appropriate, are included in an appendix at the end of this work.

- Representatives from tenants' advice and pressure groups including Shelter, Generation Rent and Citizens Advice.
- Representatives from the local authorities in the case study areas.
- Representatives from landlord groups.

Individual tenants and landlords were specifically excluded from the sample because the intention was to analyse the system as a whole and consider how it operates nationally and locally in the areas selected. The purpose is not to consider individual stories or complaints, but to gain a more rounded and general picture of the PRS.

2.4- Conclusion

Housing is a complex topic, straddling many different policy areas[189] and to study this correctly, the right methods must be employed. This section has explained why the approach to be taken in this study, i.e., a comparative case-study evaluation using mixed methods of doctrinal research and qualitative work, is appropriate to the aims of the research. The study was underpinned by a sound theoretical framework to ensure that it retains validity and is meaningful.

Aimed at an appropriately selected sample of experts and parties with a professional interest in the PRS, postal/electronic questionnaires were used to elicit views on -and information about- the PRS for use in this research. With participants having some control over the extent to which they are identified in the project and being able to complete and return these questionnaires in their own time, participation was encouraged. Copies of the information sent to participants is reproduced in an appendix to this work.

These methods were used to conduct the research within a defined analytical framework, which is set out above at section 1.2.

[189] Kemeny, J, "Corporatism and housing regimes" [2006] Housing, Theory and Society, 23:1

Chapter 3- Housing Policy and the Private Rented Sector in England

3.1- Why Policy Matters

Reviewing policy is important as this impacts directly on the direction of legislation, regulation and intervention in any given area. Policy also has a less direct impact, as ideals and objectives change over time and dictate Government priorities; a policy decision could just as easily lead to no action being taken and resources diverted elsewhere as to the introduction of a reform in any given area.

Policy, which is ultimately reflected in legislation, is largely dictated by the main political parties. It can be influenced by their own agenda or by the need to react to certain external stimuli. Government policy varies over time as political ideologies and priorities change. Policy papers, election manifestos and bills introduced by the governing and opposition parties are illustrative of their current policy aims and objectives.

Housing law can only be truly understood in the context of the policy that underpins it; it is "decisively shaped by public policy".[190] As shelter is a basic necessity, housing is a key policy consideration for any Government and analysing how this manifests in practice is key to understanding the housing sector.

However housing policy does not exist in isolation; wider policy context is also important in determining objectives and implementation.[191] For example we can see manifestations of the Government's energy efficiency policies in housing practice today[192] with regulation about energy efficient standards for rented homes,[193] and evidence of

[190] Kleiman, Mark, Housing, Welfare and the State in Europe; A Comparative Analysis of Britain, France and Germany, (Edward Elgar Publishing Limited 1996) pg. 1.

[191] Boelhouwer, P and Van Der Heijden, H, Housing systems in Europe Part 1; A Comparative Study of Housing Policy, (Delft University Press, Delft 1992) pg. 286.

[192] Set out in Appendix 6 of *2010 to 2015 Government Policy; energy efficiency in Buildings,* https://www.gov.uk/government/publications/2010-to-2015-government-policy-energy-efficiency-in-building.

[193] Under *The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015,* discussed at section 2.3 above.

immigration concerns manifesting in duties placed on landlords under the Immigration Act 2014.[194]

Once a policy is in place, local authorities have a role in implementing that; they can also influence the way in which it is implemented locally through the use of discretion. It is arguable that pressure groups, representing both landlord and tenant interests, also influence policy concerns through their position as lobbyists and, to a lesser extent, voters.

This chapter seeks to analyse the development of housing policy in England and the shifts and changes over time. The chapter will briefly consider the development of housing policy since 1915 to the present day, before going on to discuss the current policy objectives, its aims and impacts.

3.2- Housing Policy- Historical context 1915-1979

Until the outbreak of the First World War, the Government did not directly intervene in the PRS as a matter of policy. There were some areas where Government policy impacted on the sector, for example through sanitation laws,[195] but no policy specific to rented housing.

This began to change as a direct result of the First World War when the conditions generated by the war threatened to create a housing crisis with demand outstripping supply and landlords taking advantage and raising rents.[196] Fearing a detrimental impact on the war effort the Government commissioned a Parliamentary inquiry to investigate the

[194] These are commonly known as the “right to rent” regulations which require a landlord to carry out checks into whether a prospective tenant has a right to reside in the UK before they grant them a tenancy. Failure to complete these checks, resulting in a tenancy being granted to someone without a right to reside, is an offence which can lead to 5 years imprisonment or an unlimited fine.

[195] For example through the Housing of the Working Classes Act 1885- discussed in Cowan, D, Housing Law and Policy, (Cambridge University Press 2011) pg. 9-10.

[196] Demand for rented housing outstripped supply, allowing landlords to take advantage and raise rents, which made retaining existing tenancies and accessing new ones increasingly difficult. A rent strike in Glasgow in 1915, which included as many as 20,000 supporters, many doing jobs essential to the war, led to the threat of a general, UK wide, strike unless action was taken to address these social issues.

matter[197] and for the first time legislation was introduced to protect PRS renters from sharp rent increases and arbitrary evictions.

Despite the intention at the time that these laws were introduced that this would be a short-term measure, it would prove too politically damaging for any Government to withdraw completely from the sector when that would allow a return to the exploitation of tenants, and Government intervention in the rented sector has been evident in some form ever since.

The inter-war Governments did not repeal the temporary measures introduced in 1915 and instead regularly voted to extend the provisions in both scope and duration (see section 4.2). Despite several enquiries showing a preference towards deregulating the sector,[198] it was not considered politically expedient to remove the controls but in place at that time.[199]

In 1933 direct intervention in the PRS was briefly withdrawn as it was considered safe to do so, but this was swiftly reversed again in 1939, when necessity to intervene struck again as the likelihood of a second war increased. The Government took steps to control rent and limit evictions in an effort to ensure that the economy remained stable and that they would be able to manage the war effort without the risk of further social unrest.

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[197] Morgan, J, *Aspects of Housing Law* (Routledge 2007) pg. 79.

[198] Hunter Report- Report of the Committee on the Increase of Rent and Mortgage Interest (War Restrictions) Acts (HMSO 1919); Salisbury Report- Report of the Committee on the Increase of Rent and Mortgage Interest (War Restrictions) Acts (1920 HMSO); Onslow Report- Final Reports of the Departmental Committee on the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (1923 HMSO); Marley Report- Report of the Inter-Departmental Committee on the Rent Restrictions Acts (1931 HMSO); Ridley Report- Reports of the Inter-Departmental Committee on the Rent Restriction Acts (1937 HMSO).

[199] As early as 1919, the Hunter report concluded that there should be a "return to economic conditions" as soon as possible, although they conceded that this was not possible at that time. The 1923 Onslow report reached a series of twenty key conclusions about the war time Acts, the principle recommendation being "that all restrictions should be removed at the earliest possible date, but that it is not practicable to remove all restrictions on all classes of houses at once". Similarly the 1937 "Ridley Report" endorsed the views of the 1931 "Marley Report" that controls should only be introduced to manage wider social issues, such as problems of supply of accommodation, and that "it is not desirable to retain control longer than is necessary", but that no immediate repeal was recommended.

Policy on the PRS after World War Two was based on the promotion of two key objectives: stability and continuity. The measures introduced in 1939 continued in place until 1957 when the Rent Act introduced that year removed restrictions on rent and eviction procedures for new tenants and existing tenants in all but the lowest value rentals. Simonds argues that this was a typical Conservative approach; whilst there was some consensus that reviving the PRS was key to addressing housing shortages, the party felt that the way to do this was by abolishing controls.[200]

However as time went on poor conditions in the PRS became more widespread and scandals such as the exploits of the infamous private landlord Peter Rachman led to further dissatisfaction with the sector. The Labour Government that came to power in 1964 appeared more sympathetic to the tenants' cause. The Protection from Eviction Act 1964 and the Rent Act 1965 were the result. The Government introduced a new form of tenancy that afforded security for tenants and dictated that rents should be fair and open to challenge from an independent body.

When the Conservative party regained power in 1970, this position did not immediately change. The Fair rent system continued and was later confirmed by a new, Labour Government- which was in power from 1974-1979- in the 1974 Rent Act, which introduced protected tenancies that offered security from eviction.

Although these minimal protections remained in place, the PRS was often viewed as a marginal tenure, with political attention focussed instead on owner occupation and social renting. In their 1977 Green paper *Housing Policy; A Consultative Document,* the Labour Government allotted only 6 pages to discussion about its policy objectives in the PRS.[201]

By 1977 it appeared that a consensus had been reached. Both Labour and Conservative Governments seemed to acknowledge the need for regulation to ensure that this sector remained both an affordable and reasonably secure tenure choice, although not the tenure preferred by the Government. Intervention remained in place but little change was introduced. Both parties pledged a review for regulation of the sector to

[200] Simmonds, AG, "Raising Rachman; The Origins of the Rent Act 1957" [2002] The Historical Journal 45, pg. 844.

[201] *Housing Policy; A Consultative Document,* (HMSO 1977) pg. 69-74.

come at a later date, whilst other aspects of housing policy were prioritised and dealt with immediately.

3.3- Housing Policy 1979-Present

This policy consensus continued until the late 1980s. The Conservative Thatcher Government which took power in 1979 had made it clear that privatisation was a key policy aim and housing policy was influenced more by economic objectives of limiting public expenditure and promoting privatisation than any wider concerns about housing need.

Despite measures aimed at reducing social housing, the PRS was not prioritised as an alternative to social housing and the number of households in the PRS was in decline.

This led to a report being commissioned by an inquiry chaired by the Duke of Edinburgh into British Housing. Published in 1986 this report highlighted the fact that a reduction in the supply of affordable homes to purchase and a continual reduction in the PRS was pushing more people on to social housing waiting lists, making Government withdrawal from the provision of rented housing more difficult to achieve.[202] In 1987 a White Paper[203] was released in which the Government set out what they intended to do to overcome these problems.

Housing: The Government's Proposals[204] saw the Government place the blame for the perceived shortcomings of the PRS squarely at the door of previous policy decisions to intervene in this private contractual relationship. Furthermore, they blamed the "lack of political support given to private landlords",[205] which they felt was damaging to both landlords and tenants as it caused landlords to withdraw from the sector and thus limited supply.

This shift to a more active desire to privatise the PRS by deregulation led to the Housing Act 1988. Under this Act there was very little in the

[202] National Federation of Housing Associations Inquiry into British Housing; The Evidence (1986) pg. 10.

[203] *Housing White Paper- The Government's Proposals, (1987* HMSO*).*

[204] *Housing White Paper- The Government's Proposals, (1987* HMSO*).*

[205] Morgan, J, *Aspects of Housing Law* (Routledge 2007), pg. 87.

way of rent regulation and limited security for tenants (see section 4.4.1). This saw the PRS as a "mop-up" tenure that existed to house those who did not want to or could not afford to buy a property and could not access social housing and, as such, required flexibility to meet the particular needs of PRS tenants. It was felt that this flexibility could be best achieved by deregulation.

Following the 1988 reforms housing policy was characterised by continuity. Tempered with some minor reforms aimed at addressing specific issues within the PRS and the 1988 legislation remains in place.

The Government did take steps to encourage investment in the PRS, hoping to influence the sector without having to intervene themselves. The Business Expansion Scheme was introduced and rolled out between 1989 and 1993, aimed at providing tax relief to investors in the PRS, mainly large institutional investors. This followed other attempts by successive Governments to try and encourage large scale investment,[206] but these attempts have been largely unsuccessful and the PRS remains "amateurish".[207]

When Labour took power in 1997, it quickly became clear that housing was not a key policy area for this Government. It took them until 2000 to publish any clear policy documents at all in respect of housing and when they did, their 2000 Green Paper confirmed that they would not seek to alter the status quo.[208] There was a "striking cross party consensus" in relation to the PRS and its role",[209] with New Labour reaffirming the view that PRS housing was for those who could not afford to or did not wish

[206] Another example is the introduction of Housing Investments Trusts on the eve of the New Labour Government in 1996 aimed at encouraging long term investments (from pensions etc) into the private sector. These met with very limited success and no new trusts have been created since 2010. This is similar to the funding of private rental housing in Germany, where subsidies for the supply of rental housing are administered by the Länder but usually applied to small scale or individual landlord; see section 7.3. Institutional investment in the PRS here is limited, although the subsidies available are open to both institutional and private investors alike.

[207] Cowan, *Housing Law and Policy* (Cambridge University Press 2011) pg. 54.

[208] Reference- DETR report, 2000, para 5.2.

[209] Cowan, D and Marsh, A (Eds), *Two Steps Forward: Housing Policy into the Next Millennium,* (Policy Press 2001), pg. 75.

to buy and that it needed to remain flexible to accommodate the needs of those users, without excessive legislative intervention.[210]

The Conservative Government, which came to power as part of a coalition in 2010, also showed no signs of a major policy shift. A policy paper released in 2009 made it clear that their policy priorities were house building, planning reforms and the promotion of owner occupation. [211] Rather than reform the PRS as a whole, which they confirmed in a 2013 publication that they had no intention of doing,[212] the Government have preferred to focus on particular issues like the new Labour Government they succeeded.

In the 2017 Government paper, *Fixing Our Broken Housing Market,* the Conservatives stated that making housing more affordable was a key aim.[213] However the focus is clearly still on promoting owner occupation and helping people into ownership. The PRS is seen as a useful staging post, bridging the gap in the market whilst building for ownership is completed. This is therefore still marginalised, despite the acknowledgement of the growth of the sector and some of the problems it faces.[214]

The 2022 White Paper Levelling up continues this trend, with the sections dealing with housing focusing on ensuring that renters have a secure path to ownership by 2030.[215] The PRS is addressed in section 6 of the report, which takes up only 4 of the 39 pages.[216] The majority of this discussion on the PRS relates to energy efficiency measures, and only three paragraphs are dedicated to addressing the PRS in its current

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[210] *Quality and Choice: A Decent Home for All. The Housing Green Paper,* (2000 DETR*), pg. 7.*

[211] Conservative party- *Policy Green Paper No 10- Strong Foundations- Building Homes and Communities* (2009), pg. 34.

[212] *The Government Response to the Communities and Local Government Select Committee Report; The Private Rented Sector,* (2013 DCLG) pg. 1.

[213] HMSO, 2017, Pg 5.

[214] Pg 10; The Government acknowledge that housing shortages lead to the possibility of exploitation with dangerous and overcrowded properties being let with unfair terms subject to unreasonable letting fees.

[215] *White Paper- Levelling Up* (2022 HMSO) pg 221.

[216] Pg 34-37.

form and pledging a review of this at some stage; no further detail was provided.

3.4- Policy in the Present Day

Today the Government favours command policies in relation to its stance on the PRS.[217]

Kemeny defines command policies in housing as those designed to determine the course of the sector. For example, he argues, that the deregulation of the PRS in the Housing Act 1988 was aimed at driving down the high demand for social housing, from which the Government wanted to withdraw. This contrasts with what he describes as market policies which enable the sector to self-adjust to meet demand rather than actively promoting one path via legislation. The Government have pre-determined objectives for the PRS, namely that it will continue to exist to offer a flexible choice to those who cannot or choose not to buy, and policy is aimed at furthering that objective by allowing landlords to use their properties to make the best possible profit while ensuring only minimal protections for tenants.

Policy elsewhere continues to impact on this self-sufficiency model for the PRS as the reduced expenditure on social housing pushes more households into the PRS as tenants.[218] The Government aim to use broader housing policies to stimulate supply on the basis that once supply and demand issues are resolved, the market will self-regulate and will operate efficiently. However it can be argued that market forces alone would not lead to a stable and resilient sector; policy also affects this[219] and a market-based sector is in itself a policy choice.[220]

As well as this overarching policy geared at promoting a self-regulating PRS, the Government also continue to introduce targeted reforms in the PRS to solve individual “problems”. These are based on perceived

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[217] Kemeny, J, *Working Paper 120; Understanding European Rental Systems,* (SAUS Publications 1996), pg. 58.

[218] Crook, T and Kemp P, *Private Rental Housing; Comparative Perspectives* (Edward Elgar Publishing 2014) pg. 1.

[219] Balchin, Paul (Ed), *Housing Policy in Europe,* (Routledge 1996) pg. 211.

[220] Oxley, M and Smith, J, *Housing Policy and Rented Housing in Europe,* (E & FN Spon1996) pg. 3.

unfairness in the sector, and have often been introduced in response to campaigns for change to avoid conflict in the market. For example, policy on managing landlords is characterised by a habit of classifying landlords as either good or bad, and recommending measures that could be introduced at a local authority level (rather than implementing them at a national level) to protect tenants from the bad ones. In their 2015 policy statement on the Deregulation Bill, for example, the Government justified their position by pointing out that they were targeting bad landlords for the good of the sector as a whole, including good landlords whose position would be strengthened by the provisions.[221] However some commentators argue that this position is simply a way of justifying intervention where the Government's tendency is not to over-regulate,[222] and as the literature discussed at section 1.3 demonstrates, this piecemeal reform on single issues within the broader PRS has left the law and regulation in the sector confusing and complex.[223]

As well as "bad" landlords, letting agents have also been targeted for criticism by policy makers, on the basis of their fees and working practices (see section 4.4.3). The policy objectives underpinning proposals to regulate letting agents have been questioned by some, including the Letting Agents interest group ARLA in a 2017 report, but it remains the case that this type of intervention allows positive action with minimal regulation.[224]

National policy on the PRS also has an impact at a local level. Whilst at a national level the Government still shy away from heavy intervention, local authorities are the de facto primary regulators of the sector. Although they are not the only agency involved in regulation, local authorities are responsible for, amongst other things, licensing private landlords under selective licensing schemes and enforcing licence conditions,[225] enforcing standards in private rented housing and taking

[221] *Policy Statement on Amendment to Deregulation Bill,* (DCLG 2015).

[222] Blandy, *"Housing standards in the private rented sector and the three R's; Regulation, Responsibility and Rights"* in Cowan and Marsh (Eds), *Two Steps Forward; Housing Policy Into the New Millennium* (Policy Press 2001) pg 79.

[223] See above, pg 41.

[224] Chaloner, J, Debano, M, Dreisin, A, Evans, A and Pragnell, M, "Letting the Market Down? Assessing the economic impacts of the proposed ban on letting agents' fees" (ARLA 2017) pg. 5.

[225] Housing Act 2004, Part 3.

action against landlords who let sub-standard accommodation or fail to carry out repairs during a tenancy,[226] assessing and managing local housing allowance rates[227] and taking action against landlord harassment or unlawful eviction.[228]

This places the local authority very much in the role of enforcer in regard to the PRS. They are the body who tenants are directed to contact in the event of a breach by their landlord and they are empowered to take action against private landlords both civilly and criminally. As discussed at section 1.3 above, the use of these enforcement powers between different local authorities is uneven[229] and enforcement rates low. The data generated from our case study areas helped to illustrate this point. Respondents from all three areas identified inconsistent enforcement action as an issue with the PRS in their area, with the data suggesting that in at least of two of the case study areas, the local authority failed to take any action on two thirds of the complaints about condition which it received.[230] In addition the local authorities' management role can sometimes conflict with other policy priorities at a local level. For example under recent reforms in homelessness legislation local authorities have increasingly broad duties towards homeless households, including those not in priority need and those who are intentionally homeless.[231] The legislation and guidance impose a duty on the local authority to take reasonable steps to help homeless households to secure suitable accommodation; for many this is expected to be accommodation in the private sector. This requires the authority to have an increasingly heavy reliance on the private sector to enable them to discharge their statutory duties and necessitates a closer working relationship with private landlords. On the other hand, the authority would still be expected to take action against those landlords on whom they are relying, should there be any breaches in areas where the local authority has enforcement powers. Policy concerns are therefore placing

[226] Housing Act 2004, Part 1; Environmental Protection Act 1990.

[227] Welfare Reform Act 2007, s.30.

[228] Protection from Eviction Act 1977, s.6.

[229] See discussion of the report commissioned by the Department of Levelling Up, Housing and Communities discussed at pg 45, above.

[230] See section 6.4.1, above.

[231] Homelessness Reduction Act 2017.

local authorities into a dual role of enforcer and client of the private sector, which could lead to tension.

Policy on the PRS remains fragmented. Government objectives are focused on promoting owner occupation and reducing Government expenditure. However there is some evidence that the approach of the Labour party appears to be changing. In 2012 they released a series of policy papers setting out an intention to conduct a wholescale review of the PRS. They have set out a case for encouraging longer tenancies with indexed rent increases coupled with a register of landlords and increased powers to evict problem tenants.[232] In their 2015 election manifesto Labour further stated their intentions to increase tenant security and end the right to buy,[233] although the promises were vague and an extended period in minority has denied them the opportunity to put these promises into practice.

3.4.1- The Aims of Current Policy

"Post-war housing policy has been very tenure specific"[234] with the promotion of ownership as a consistent priority; this remains the case today through efforts to encourage ownership and housebuilding via finance schemes and incentives to promote investment.

The current policy aims demonstrate that the Government still see themselves as very much an outside influence on the PRS. They acknowledge the utility of the sector in housing those who cannot or choose not to buy their homes and who cannot access social housing, but they prefer to leave this private market to regulate itself. This, they believe, will stimulate supply and encourage good practice with minimal direct intervention. The Government maintain that regulating the sector further would lead to a decline and they continue to endorse that policy.

1. However, alongside this broader approach lie more specific and targeted policy concerns, such as a desire to drive up property

[232] Scanlon, K and Whitehead, C, *Proposals for regulation of the private rented sector; An analysis* (LSE 2015) pg. 6.

[233] *For the Many, Not the Few,* Labour Party, (2017).

[234] Haffner, M, Hockstra, J and Oxley, M, *Bridging the Gap between Social and Market Rented Housing in six European Countries,* (IOS Press Officer 2009), pg. 41.

standards and protect the vulnerable from bad or unscrupulous landlords.[235] These aims can often conflict. For example the ease with which a tenant can be evicted from a private sector tenancy, a policy upheld on the notion that this will stimulate supply, means that tenants who become troublesome by complaining about standards can be removed quickly, without the underlying issues being addressed. Vulnerable tenants may fear even to raise such concerns when eviction is a possible outcome (See 4.5.1 above for a discussion on retaliatory eviction and its implications). The Government have tried to find ways to circumvent this issue, i.e., by the introduction of laws stopping retaliatory eviction, but the relative weakness of those provisions limits their effectiveness. Despite this the Government still refuse to address security of tenure at a regulatory level, showing that among these competing objectives deregulation for the purposes of stimulating supply still appears to be the primary concern. This position fails to take into consideration the mutual interdependence of security of tenure and rights discussed at section 2.1.2, which will be considered when recommendations for reform are made in this thesis. It also points to a fundamental misalignment with the ICESCR criteria underpinning the human rights analysis of housing law adopted in this thesis i.e. the requirement for legal protection from forced eviction or harassment (as discussed above at section 1.2).

As well as a preference for deregulation, external policy matters can also influence housing policy. For example, under the Immigration Act 2014 landlords can be charged with a criminal offence if they rent a property to a person with no right to reside in the UK because of their immigration status,[236] bringing immigration and housing policy influences together. Environmental policy also impacts on housing. The Government have introduced Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 which require landlords to provide an energy efficiency certificate for any property they rent; properties with low efficiency ratings must be improved before they can be let.

[235] Cowan, *Housing Law and Policy* (Cambridge University Press 2011) pg. 281.

[236] Schatzberger, E, "The Immigration Act 2014; "Not on the list you're not coming in; Landlords forced to discriminate"" [2015] The Conveyancer and Property Lawyer, pg. 2.

3.4.2- Are these Aims Comprehensive and Justified?

Current policy aims do not correspond with the social needs. As discussed above in Chapter one, the PRS is expanding rapidly and is being relied upon to house a more diverse range of households for longer periods than at any time since the current regulatory framework was introduced in 1988. However policy relating the PRS appears largely unchanged since that time. By not acknowledging and addressing these changing realities, the policy is woefully out of date. Government rhetoric around the PRS "make(s) the appearance of activity, whilst doing absolutely nothing at all",[237] but policy which does not reflect current needs can never hope to adequately address those needs. The justification for this from the Government is that they wish to maintain the current system as it has enabled the market to grow to its current state, but there is no evidence that regulation would lead to a decline, in fact international comparisons suggest the opposite. Failing to properly regulate the PRS means that PRS tenants feel precarious in their homes, as discussed in the literature review at section 1.3,[238] and that PRS housing is not adequate or fit for purpose, when assessed against the criteria set out in section 1.2.1.1. In particular it fails to adequately align with the standards set out in the UN International Covenant of Economic, Social and Culture Rights and the human rights theory of housing law as discussed at section 2.1.1.

For whatever reason the Government seem reluctant to acknowledge the expanded role played by the PRS and to legislate for that accordingly, taking in to account the circumstances of the sector as a whole. They also seem unwilling to accept the fact that owner occupation is for many simply unattainable and treat the PRS as equal in status. There is no inherent preference for owner occupation, but in England this is a clear preference, driven by policy.[239]

The lack of political input from tenants is another factor that contributes to the shortcomings of policy in the PRS. Unlike in Germany (see Section 7.2.1.3), there is little joined up working by tenants in England.

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[237] Hunter, C, "The Private Rented Sector in England: How to appear to do something while doing nothing" [2014] Journal of Housing Law 17, pg. 2.

[238] See pg 40.

[239] Bramley, G, Munro, M and Pawson, H, *Key Issues in Housing- Policies and Markets in 21st Century Britain,* (Hal Pawson 2004), pg. 136.

Pressure groups such as Citizens Advice, Generation Rent and Shelter tend to raise issues and concerns, raise awareness and campaign for change, but individual tenants rarely get involved in this sort of action on any meaningful scale. This lack of involvement, almost a political apathy, limits the extent to which tenants' rights are placed onto the political agenda and therefore the time and consideration given to them in the formulation of policy. This is reflected in the fact that a lot of the recent legal reforms in the PRS have come off the back of campaigns against particular injustices or perceived injustices. Rather than consider tenants' rights as a whole in policy formulation, changes tend to be reactive to those specific topics raised by pressure groups and by addressing only these limited issues policy is not comprehensive.

3.4.3- How does Housing Policy Impact on the Performance of the Sector?

Like all other areas of law, the PRS exists within its current legal framework and the boundaries that imposes. That framework is in turn driven by "strategic policy making".[240] In this respect housing policy has a huge influence on the performance of the sector as it dictates the confines within which that system operates. The rate of Government intervention will influence the size and effectiveness of the housing market.[241] The academic Caroline Hunter supports the view that regulation is needed to address the effectiveness of the sector;[242] if the legal framework fails to adequately consider and address the reality of the needs of the PRS, then the sector cannot hope to perform effectively to meet that need.

Research has shown that policies which favour segregation in housing types drive those types into greater differentiation.[243] This is evident in England and Wales. In contrast countries that minimise policy differences have a more homogeneous sector; as discussed in Chapter

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[240] Kemeny, J, *Working Paper 120; Understanding European Rental Systems,* (SAUS Publications 1996), pg. 13.

[241] Balchin, Paul (Ed), *Housing Policy in Europe,* (Routledge 1996), pg. 13.

[242] See section 1.3, pg 40, above.

[243] Kemeny, J, *Working Paper 120; Understanding European Rental Systems,* (SAUS Publications 1996) pg. 13.

7, a comparative analysis of the law and policy governing the private rented sector in Germany amply illustrates this fundamental point.

3.5- Conclusion

It can be difficult to isolate housing policy, as it forms part of the Government's wider social, economic and environmental objectives.[244] However policy on housing in general, and on the PRS in particular, can be determined by considering policy as a whole.

It has long been a trend in housing policy to view the PRS as a necessary evil; something that is needed but which the Government prefers to allow to regulate itself. However this position is unsatisfactory. The PRS is changing. It is growing in volume but also in diversity. For a variety of reasons, larger numbers of tenants with different social needs are accessing the sector than ever before and the legal structure of the sector must be robust enough to meet their needs; the market alone cannot do this. Until policy aims are amended to reflect this, legal reform will not come, and without this the sector is not adequate to meet the needs being placed upon it.

Chapter 4, below, provides details of the laws relating to the PRS as they currently stand, before issues arising in the PRS are discussed at Chapters 5 and 6.

[244] Haffner, M, Hockstra, J and Oxley, M, *Bridging the Gap between Social and Market Rented Housing in six European Countries,* (IOS Press Officer 2009), pg. 45.

Chapter 4- English Private Rented Sector Tenancy Law- Development and Context

4.1 The Terminology of English Housing Law

There is no distinct and defined set of legal rules governing housing in England. Instead the sector has developed in a piecemeal manner over time and encompasses many legal and policy areas including public policy, social welfare, finance and economy, among others. This gives the housing sector in England a very distinct character as well as its own terminology. As England is the primary focus of this study it is that terminology which will be adopted here.

Some of the main generic terms common to English housing law are defined below;

- Tenure- a term used to describe a person's status in their property; how they hold that property. The term tenure can be used broadly, for example an owner occupier or tenant, or more specifically, applying to particular tenancy types.
- PRS accommodation- a term used to describe accommodation let on the open market at market rent. The owners of PRS accommodation tend to be private individuals, groups or companies who let the accommodation without subsidy.
- Private landlord- private landlords are individuals or companies who own accommodation which they rent out as dwellings in the PRS.
- Private tenant-occupiers who rent their accommodation from landlords in the PRS.
- Social rented sector accommodation- a term used to describe accommodation let out to tenants on a subsidized basis, usually with reduced rents and more generous tenancy terms. The owners of social sector rented accommodation tend to be local authorities, registered social landlords or not for profit organisations.
- Social landlord- landlords who own and rent out accommodation in the social rented sector.
- Social tenant- tenants who rent accommodation in the social rented sector.

- Excluded occupier- occupiers who usually occupy their homes under a licence who do not enjoy legal protection for their status.
- Occupier with basic protection- occupiers under a type of licence who have certain basic rights but do not enjoy all of the benefits of a tenancy.
- Owner occupied housing/owner occupiers- a separate housing tenure encompassing people who own their properties either on leasehold[245] or freehold, with or without a mortgage. These occupiers do not pay rent to live in the property[246] and are able to sell or otherwise dispose of the property as they see fit.
- Housing benefit- a means-tested social security benefit payable to eligible tenants to help towards their rent. Since 2008 this has only been available to social tenants and, following the introduction of Universal Credit (see below) is now only available in limited circumstances.
- Local housing allowance- PRS equivalent of housing benefit, paid to tenants in the PRS for help towards rent. Following the introduction of Universal Credit (see below), this is only available in limited circumstances.
- Universal Credit- a new benefit introduced under the Welfare Reform Act 2012 which replaces certain means tested benefits, including both housing benefit and local housing allowance in most cases. Under Universal Credit, assistance with rent is paid to both social and private tenants under one benefit but entitlement is assessed in the same way as it would have been under the old rules.
- Illegal eviction- this describes the situation whereby a private landlord, or someone acting on their behalf, seeks to exclude a lawful tenant from their home without following the correct legal process, either by physically denying access or removing services with the intention of driving the tenant out of their home.
- Retaliatory eviction- a term which is used to describe the process whereby private landlords seek to evict their tenants as retaliation for some act by the tenant which is considered unfavourable to the

[245] Leasehold here refers to a long lease, which is considered a type of ownership, rather than short leases which are the subject of this thesis.

[246] Exceptions to this including leaseholds who pay a ground rent or service charge to the freeholder and occupiers living in shared ownership accommodation which is part owned and part rented, usually from a social landlord.

landlord, i.e., reporting a failure to carry out repairs or refusing to accept an increase in rent.

Where these general terms are applied to other jurisdictions, issues regarding translation will be discussed in the text. Where more specific terminology is applied, for example in relation to different types of tenancy or possession proceedings, those terms will be defined in the text.

4.2 The Development of Private Tenancy Law

Private landlord and tenant law could be said to have matured into its own distinct legal discipline in 1915 when the Government were forced to intervene in the sector at a national level as a result of the uncertain social conditions created by WWI (See Chapter 3). Prior to this the relationship between landlord and tenant had been a mostly private affair, regulated, if at all, by the rules of private contract law and specific local rules. However as demand rose and supply diminished, landlords took advantage to raise rents, often to levels that were unattainable for many, forcing people out of their homes and barring access to new properties.

The Rent and Mortgage Interest (War Restrictions) Act 1915 restricted a landlord's right to increase the rent on a property let as a dwelling with a rateable value of under £26.00.[247] This stated, at s.1(1), that any rent increase imposed either during the war or whilst the Act remained in place, where the rent was increased to a level above the standard rent,[248] even if this were disguised as a transfer of costs usually paid by the landlord to the tenant, would be unenforceable. Exceptions were allowed where improvements had been carried out,[249] providing the correct notice was served.[250] The Act also stopped landlords evicting

[247] This was £35.00 or properties in London- Rent and Mortgage Interest (War Restrictions) Act 1915, s.2(2)

[248] Defined as the rent payable on 3rd August 1914 or the last time the property was let prior to that- s.2(1)(a)

[249] Rent and Mortgage Interest (War Restrictions) Act 1915, s.1(1)(iii)

[250] Rent and Mortgage Interest (War Restrictions) Act 1915, s.1(1)(vi)

tenants unless they had committed waste (i.e. caused damage or allowed the property to be damaged), failed to pay rent, caused a nuisance or if the landlord genuinely required possession of the property for their own or an employee's use or if the court otherwise deemed it reasonable that possession should be granted.[251] This was intended as a temporary measure, but the provisions remained in place until six months after the war, when the Act was replaced by the Rent and Mortgage Interest (Restrictions) Act 1919. Under the 1919 legislation, the provisions of the 1915 Act remained in place and the scope of the Act was extended to encompass approximately 98% of all tenancies,[252] succession tenancies were covered as of 1920 and statutory tenancies, which come into effect at the end of a fixed term, were also included.[253]

Restrictions were scaled back in 1923[254] to cover only existing lets and were withdrawn for most tenancies in 1933 as the worst of the housing crisis was over.[255] However by 1939, with WWII looming, the Government acted peremptorily and reintroduced controls for tenancies with a rateable value of under £75.00 (£100.00 in London), holding rents at the level set on 1st September 1939 and limiting the grounds for possession on the same terms as the 1915 Act.[256] These control remained in place until the introduction of the Rent Act 1957.

This Act removed a lot of the controls which were reintroduced in 1939 and replaced them with more limited restrictions. The rent and security provisions no longer applied where there was a change in tenant or the rateable value of the property was more than £30.00 (£40.00 in London).[257] Tenants living outside of controlled properties could be

[251] Rent and Mortgage Interest (War Restrictions) Act 1915, s.3

[252] Pollock and Maitland, The History of English Law (University Printing House Cambridge 1968) pg. 80

[253] Rent and Mortgage Interest Restrictions Act 1920

[254] Rent and Mortgage Interest Restrictions Act 1923

[255] Rent and Mortgage Interest Restrictions (Amendment) Act 1933

[256] Rent and Mortgage Interest Restrictions Act 1939

[257] Rent Act 1957, s.11

evicted after a four week notice period without the landlord having to prove grounds.[258]

The next major change came in the form of the Rent Act 1965, which introduced regulated tenancies. These provided security of tenure for all tenants and provided that rents should be fair and could be challenged if considered excessive. In 1977 a further Rent Act was introduced to consolidate the 1957 and 1965 Acts. This introduced protected tenancies,[259] confirmed the fair rent scheme[260] and ensured security for all tenants with eviction only permissible with a court order on limited grounds.[261]

Following on from this period of extensive intervention, the Housing Act 1980 showed the first signs of a reversal in public policy towards the PRS. The Act introduced protected shorthold tenancies for the first time, allowing landlords to seek possession of a property at the end of the tenancy term. This deregulatory trend was continued by the Housing Act 1988 which introduced sweeping changes to private tenancy law, including an extension of the principle of assured shorthold tenancies, whereby property could be let for a short fixed period of at least 6 months with no security of tenure beyond this period.[262] The bulk of the current law is based on this Act. This and other Acts relevant to private landlord and tenant law today are discussed in further detail below.

4.3 The Relevant law

There are several pieces of legislation which contain provisions relevant to the operation of private sector tenancy law today. The key pieces of legislation are listed briefly in Chapter 1 above (see section 1.3.1) and are discussed further below;

[258] Rent Act 1957, s.16

[259] Rent Act 1977, s.1

[260] Rent Act 1977, Part IV and Part V

[261] Rent Act 1977, Part VII

[262] Housing Act 1988, s.20(1)

- Housing Act 1988. This Act introduced assured and assured shorthold tenancies, which now make up the majority of PRS tenancies. It contains the provisions that define the tenancies,[263] terms relating to rent increases[264] and how and under what circumstances these tenancies can be terminated.[265]
- Protection from Eviction Act 1977. Although introduced before the 1988 Housing Act, the provisions of this earlier legislation which prevent tenants being evicted unlawfully, i.e., without the correct legal process being followed,[266] apply equally to the new tenancies types created under the 1988 Act.
- Landlord and Tenant Act 1985. Again this statute pre-dates the Housing Act 1988, but it contains, at s.11, repairing obligations that are applicable to the tenancies created under the 1988 Act. Although the obligation on landlords to complete repairs come from many different sources, including the tenancy agreement itself, common law and other statutes, s.11 of the 1985 Act is one of the most broadly termed and widely cited regulations concerning liability to repair so this remains a key piece of legislation in this area.
- Housing Act 2004. This Act introduced new rules about how landlords must handle a security deposit paid by new tenants[267] and introduced penalties for failure to comply[268] which can impact on tenancy termination.[269] This Act also introduced the Housing Health and Safety Ratings System (HHSRS) which introduces new repairing obligations and procedures.[270]
- Deregulation Act 2015. This Act, which deals with many areas of law, includes provisions which concern the procedure for

[263] ss.1, 19A, 20 and 20A

[264] Ss.13

[265] Ss.5-9, 21-21C

[266] Ss. 3(1)

[267] Ss212-213

[268] Ss. 215

[269] Ss.215

[270] Part 1

terminating assured shorthold tenancies and attempts to prevent retaliatory evictions.[271]

- Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015. These regulations focus on energy efficiency ratings in PRS tenancies and set out a time frame for the roll out of the enforcement of regulations concerning efficiency in private rented housing.
- Homes (Fitness for Human Habitation) Act 2018. This Act gives tenants increased rights to take action against their landlord if their home is not fit for human habitation.
- Tenant Fees Act 2019. This Act sets out rules on the amount of fees landlords and agents can charge at the outset of a tenancy and imposes penalties for breaches.

How these provisions operate in practice will now be considered below.

4.4 The Law in Practice

Although it is not possible to discuss in detail every piece of legislation which relates to landlord and tenant law in England, the principal provisions are discussed below.

4.4.1 Tenure

The Housing Act 1988 reformed private tenancy law and from 15th January 1989 no new regulated or protected tenancies can be created. Instead from this date all new residential private tenancies of dwelling-houses let as separate dwellings will be either assured[272] or assured shorthold tenancies,[273] with some limited exceptions.[274] The older tenancy types may still exist- along with some other special forms of

[271] This introduced changes to s.21-21C of the Housing Act 1988

[272] Housing Act 1988 s.1

[273] Housing Act 1988 s.19A, s.20, s.20A

[274] Schedule 1 of the Housing Act 1988 sets out the exceptions to tenancies which can be assured tenancies which are tenancies created on or after 1st April 1990 with rent exceeding £100,000.00 per annum.

residency-[275] as the reforms were not retrospective, but currently, almost 30 years after the reforms, the overwhelming majority of private tenants are assured or assured shorthold tenants.

Assured tenancies are more widely used by registered social landlords (RSLs) rather than by private housing providers, although this tenure remains open to landlords in the PRS. Assured tenancies, as defined by s.1 of the Housing Act 1988, can be for a fixed terms (usually 6 or 12 months) or periodic. A periodic tenancy is one which has no specified term but runs from period to period (i.e., week to week or month to month). Fixed term tenancies are created for a set period of time. Fixed term tenancies would become periodic at the end of the term by virtue of the statute unless the tenancy ended or a new fixed term was signed;[276] these continuation tenancies are known as statutory periodic tenancies.[277] Alternatively assured tenancies can be periodic from the start and are known as contractual periodic assured tenancies.

Assured shorthold tenancies follow the same pattern; they can be fixed term followed by a statutory periodic term or contractual periodic tenancies from the start.

As the predominant tenures in the PRS today, it is these tenures that will be the focus of this study.

4.4.2 Security

Security for private tenants is weak, especially so for assured shorthold tenants. The Housing Act 1988 specifies the conditions under which landlords can terminate assured[278] and assured shorthold tenancies.[279]

[275] Excluded Occupiers, Occupiers with basic protection etc.

[276] Housing Act 1988 s.5 (4)

[277] Housing Act 1988 s.5 (2)(a)

[278] Housing Act 1988, s.5-9A

[279] Housing Act 1988, s.5-9A, s.21-21 C

These tenancies can of course by terminated by agreement between the landlord and tenant or by surrender. In addition the tenant can serve notice to terminate their tenancy either at the expiration of the fixed term or during the time that the tenancy is periodic by serving notice in accordance with the tenancy terms or of at least 28 days if the tenancy does not specify a notice period. However in the absence of termination by the tenant or agreement between the landlord and tenant, the landlord can only terminate an assured or assured shorthold tenancy by securing a court order authorising this.

This is because of the provisions of the Protection from Eviction Act 1977, which states that no residential occupier can be removed from their home without due process.[280] Any landlord or any person acting on behalf of a landlord who acts to exclude a lawful occupier from their home without following the correct procedure commits a criminal offence.[281] Similarly acting in such a way as to harass a lawful occupier is also an offence.[282]

These offences are prosecuted by local authorities under powers they hold by virtue of s.6(a) of the 1977 Act. However local authority enforcement in respect of these tenancy offences is a power not a duty, with s.6(a) stating that “Proceedings for an offence under this Act *may* be instituted by…..”. This means that occupiers are at the mercy of local Government priorities and budgets in determining if or when action is taken. Tenants can prosecute errant landlords privately, but would have to bear the expense. [283] Due to the complexity of prosecutions, they would almost certainly need legal assistance to do this; they would also have pay for this assistance.

[280] s.3(1)

[281] Protection from Eviction Act 1977, s.1(2)

[282] Protection from Eviction Act 1977, s.1(3) and s.1 (3)(A)

[283] They could do this by exercising their right to institute a private prosecution under The Prosecution of Offences Act 1985, s.6(1)

Illegal eviction and harassment can also give rise to a civil claim for compensation or an injunction for reinstatement into the property.[284] Although clients who qualify for legal aid can get assistance under this funding if they have been illegally evicted,[285] this applies only if they want to be reinstated into their property and intend to take action to be reinstated. Stand-alone compensation claims cannot usually be funded by legal aid. The limited availability of housing legal aid[286] and the strict eligibility criteria[287] means that even those whose issue does fall within this scope are not guaranteed assistance.

For landlords seeking to terminate assured or assured shorthold tenancies lawfully, the 1988 Act sets out what due process must be followed in respect of these tenures.

s.8 of that act sets out a procedure that can be used to evict both assured and assured shorthold tenants. Under this section, a landlord can serve a notice on their tenant if certain grounds are met, requiring them to give up possession of the property on a specified date. The grounds are set out in Schedule Two, parts one and two, of the Act.

The grounds and the required notice period for each are summarised below;

1. Ground 1- that the landlord has previously occupied the property and intends to return to the property, or that the landlord intends to move into the property as their only or principle home and gave the tenant notice at the outset of the tenancy that they may serve notice under this ground. The notice period under Ground 1 is two months.

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[284] Protection from Eviction Act 1977, s.1(5) states that none of the provisions relating to the criminal offences specified under this act should affect civil liability and remedies available against the offender.

[285] This would be covered under the loss of home criteria under Schedule 1, s.33 (1) of Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[286] http://www.lawsociety.org.uk/news/stories/lack-of-housing-legal-aid-services-is-leading-to-nationwide-advice-deserts_/
http://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts/

[287] This is set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 under s.1 (which covers availability of resources, merits and the public interest) and s21 (which covers financial eligibility for this means tested assistance).

2. Ground 2- that the landlord's mortgage has been foreclosed and the lender needs vacant possession to sell the property. The notice period under ground 2 is two months.
3. Ground 3- that the tenancy is for a fixed term not exceeding eight months, that the landlord provided the tenant notice before or at the commencement of the tenancy that notice may be served under this ground and that at some point in the 12 months prior to the commencement of the tenancy the dwelling was occupied as a holiday let. The notice period under ground 3 is two weeks.
4. Ground 4- that the tenancy is for a fixed term not exceeding twelve months, that the landlord provided the tenant with notice before or at the commencement of the tenancy that notice may be served under this ground and that at some point in the 12 months prior to the commencement of the tenancy the dwelling was occupied as dwelling as defined in Schedule 1, paragraph 8(1) of this act, i.e. as student accommodation where the landlord is an educational institution. The notice period under ground 4 is two weeks.
5. Ground 5- The tenant is living in accommodation normally let to a minister of religion and the accommodation is required for a minister of religion. The landlord must, before or at the commencement of the tenancy, have provided notice to the tenant that notice may be served under this ground. The notice period under ground 5 is a minimum of two months or the length of a period of the tenancy, if longer.
6. Ground 6- the landlord, or a superior landlord in the case of registered social landlord, charitable housing trust or not for profit registered provider of social housing, wants to demolish or reconstruct all or part of the property, the works cannot reasonably be carried out without the tenant giving up possession and certain conditions have been met.[288] The notice period under ground 6 is a minimum of two months or a length of a full rent payment interval, if longer.
7. Ground 7- the tenant has inherited an assured tenancy from a deceased tenant and the landlord wants to repossess the accommodation. The landlord can apply for possession within 12 months of the death of the original tenant or within 12 months of

[288] These conditions include, for example, that the landlord must have had their interest in the property prior to the grant of the tenancy and the tenancy cannot be one which arose as a result of Schedule 1 of the Rent Act 1977 or s.4 of the Rent (Agricultural) Act 1976.

the date that the court accept that they had notice of the death of the original tenant. The notice period for ground 7 is a minimum of two months or a length of a full rent payment interval, if longer.

- Ground 7a- if the court has found a tenant, a member of their household or a visitor to their property guilty of anti-social behaviour or criminality in the locality of the property the landlord can sometimes seek possession on ground 7a. This ground contains detailed provisions of the conditions which must be met for this ground to apply. The notice period under round 7a is at least four weeks or the length of a period of the tenancy if that is longer.
- Ground 7b- if the secretary of state has given notice to the landlord or any one of joint landlords of a dwelling to notify them that the tenant or any occupier of their home aged over 18 years, is disqualified as a result of their immigration status from occupying the dwelling house under the tenancy, the landlord can seek possession on this ground. The notice period under this ground is a minimum of two weeks.

8. Ground 8- that the tenant is in rent arrears of two months or more. The notice period under ground 8 is two weeks.
9. Ground 9- the landlord wants the tenant to move and claims that suitable alternative accommodation is available. The notice period under ground 9 is a minimum of two months or a rent period, if longer.
10. Ground 10- The tenant is in rent arrears, i.e., some rent lawfully due remains outstanding. The notice period under round 10 is two weeks.
11. Ground 11- The tenant has been persistently late in paying rent which has become lawfully due. The notice period under ground 11 is two weeks.
12. Ground 12- The tenant is in breach of tenancy for some reason than rent arrears. The notice period is two weeks.
13. Ground 13- the tenant or a member of their household is alleged to have damaged or neglected the accommodation or common parts. The notice period is two weeks.
14. Ground 14- the tenant or someone living at or visiting the property has been convicted of using the home for an illegal or immoral purpose, has been convicted of an arrestable offence committed in the locality of the property or has been guilty of behaviour causing or likely to cause a nuisance or annoyance to

the landlord or their employee or to others living in, visiting or engaging in lawful activity in the locality. Action can be commenced under ground 14 as soon as the notice is served.

- Ground 14A- the tenant or their partner, with whom they lived together in the dwelling as a couple, has left due to violence or threats of violence by the other towards themselves or a family member with whom they were residing. This ground is only available to registered social landlords and is only made out if the court is satisfied that the partner who has left is unlikely to return. The notice period under ground 14A is two weeks.
- Ground 14ZA- the tenant or an adult living in the property has been convicted or an indictable offence which took place during and at the scene of a riot. Action can be commenced under ground 14ZA as soon as the notice is served.

15. Ground 15- The tenant or someone living with the tenant has damaged the landlord's furniture. The notice period is two weeks.
16. Ground 16- the tenant was let service accommodation with a job they are no longer doing. The notice period is a minimum of two months or a rent period, if longer.
17. Ground 17- the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by the tenant or someone acting on their behalf. The notice period is two weeks.

Grounds 1-8 are mandatory grounds and if the landlord makes a claim on the basis of one of these grounds and satisfies the court that the grounds have been made out, they are entitled to a possession order. [289] The judge has no discretion to allow the tenant to remain and must grant a possession order regardless of the tenant's circumstances.

Grounds 9-17 are discretionary grounds and even if the landlord satisfies the court that the ground is made out, the judge must still be satisfied that it is reasonable to make an order evicting the tenant before they do so. [290] They have the discretion to hear mitigating factors and can make a wide variety of orders, including allowing a tenant to remain in their home if they consider this reasonable on the facts.

[289] These are set out under Part I of Schedule 2 of the Act.

[290] These are set out under Part II of Schedule 2 of the Act.

In addition to the s.8 procedure set out above, s.21 of the Housing Act 1988 sets out another procedure which can be used against assured shorthold tenants; this procedure cannot be used against assured tenants. S.21 is a “no grounds” eviction procedure. Under this section of the Act, once an assured shorthold tenancy is periodic (or, if the tenancy was always periodic, once at least 6 months have elapsed), a landlord is entitled to seek possession under s.21 of the Housing Act 1988.

The first stage in the s.21 procedure is for a landlord to serve a notice giving the tenant 2 months’ notice that they wish them to vacate the property.[291] There were strict rules about what form the notice must take, the date on which it must expire etc, however recent changes have now simplified s.21 notices (see the discussion below at section 4.5.2). Now the service of 2 months’ notice in writing on a specified form will suffice.[292]

There is no requirement that the notice specify any grounds on which the landlord seeks to regain possession.

Once the notice period expires the landlord is entitled to apply to court for an order of possession.[293] Providing that the notice is valid and was validly served and that there are no legal bars on the use of s.21 notices because of the circumstances of the tenancy (see discussion below, Recent Changes, section 4.5.2 below), the court has no discretion and must make an order ending the tenancy as requested.[294] The order would normally require that the tenant give up possession of the property in 14 days.

The judge has no discretion to postpone possession on terms or even adjourn proceedings, regardless of the circumstances of the tenant. The Supreme Court have recently confirmed that public law defences of proportionality are not available in possession claims where both the

[291] The rules on notice periods were changed due covid and extended notice periods were imposed. These changes were temporary and no longer apply.

[292] S.21(4ZA)

[293] Housing Act 1988 s.21(1)

[294] Housing Act 1988 s.21(1)

landlord and tenant are private parties.[295] This means that the tenant can be evicted under this procedure even if they have adhered to all of the terms of their tenancy agreement and even if the landlord has not behaviour appropriately. The only discretion available to the judge is to extend the date on which possession must be given up to a date not more than 42 days from the granting of the order if they consider the tenant to have shown that they would suffer exceptional hardship if the order took effect sooner.[296]

Landlords issue possession claims under s.21 in the County Court[297] and can either request a hearing and ask the court to make a possession order at that hearing, or ask for the matter to be dealt with under the accelerated procedure.[298] Under this procedure the matter is dealt with swiftly without a hearing. The tenant is still given the opportunity to answer the claim and raise any defence or mitigating factors,[299] to ask for up to 42 days[300] before they are ordered to leave, but they will not usually have the chance to deal with this in person.

The tenant would usually bear the costs of the application and has to pay those back to the landlord. The costs are currently £355.00 to issue the claim[301] plus an additional fixed amount of £79.50 for solicitor's costs, if applicable. [302]

4.4.3 Rent

Rent regulation in England is minimal for assured and assured shorthold tenancies – the vast majority of tenancies in the PRS, although it still

[295] McDonald v McDonald [2016] UKSC 28

[296] Housing Act 1980 s.89

[297] CPR Part 55.3

[298] CPR part 55.11-55.12

[299] CPR part 55.14

[300] Housing Act 1980 s.89

[301] http://formfinder.hmctsformfinder.justice.gov.uk/ex50-eng.pdf, pg. 6

[302] CPR part 45.6

applies to a relatively small number of 'old' regulated tenancies that are governed by the fair rent system under the Rent Act 1977.[303] For assured and assured shorthold tenancies there is no legal restriction or guidance on initial rent levels. This is left entirely to the discretion of the landlord and tenant to agree as one of the key terms of the contract. In reality there is little negotiation as landlords advertise properties at a predetermined rent and expect tenants to pay that rent.

It could be argued that some informal rent setting rules now exists as, since 7th April 2008, private tenancies have fallen outside of the housing benefit scheme, and instead rent assistance is assessed under the Local Housing Allowance rules.[304] Under this scheme each authority determines, via a rent officer, market rents in each broad rental market area for different types and size of property. This should then be reviewed yearly in line with the customer price index. The local authority then uses these rent officer assessed figures to set the maximum assistance levels, usually at 30% of those market rents.[305]

The maximum assistance is calculated per bedroom, e.g., £70.00 per week for a one bedroom, £90.00 for a two etc. Households are then assessed on how many bedrooms they require based on household size, the relationship, gender and age of the occupants and in some cases based on any special needs in the household, such as disability, which require a separate room for an overnight carer or a room needed

[303] Under the Rent Act 1977, Parts iii, iv and v, statutory and contractual regulated tenancies are subject to the fair rent regime. Unless the tenancy agreement allows for a rent increase or the landlord and tenant agree an increase in writing, increases can only be vetted in certain circumstances. The landlord must serve a valid notice of increase (the requirements for a valid notice are set out in s.49) and the new rent becomes payable, if the increase is valid. The increase will only usually be valid if the tenancy is statutory rather than contractual and the increase is based on improvements made to the property or because of an increase in service charges. However either the landlord or the tenant has the right to apply to court at any time for a fair rent to be registered, under s.67 of the 1977 Act. Once an application is received a rent officer will determine whether they have the jurisdiction to set a fair rent and if so will inspect the property, consult and determine a fair rent, taking into account the age and size of the property, the state of repair, the facilities included and the locality (s.70). They disregard the means of both the landlord and tenant, demand in the area and any damage or improvements caused by the tenants. The rent officer then sets a fair rent, which will be entered onto the register that is held by the local valuation office (s.66). Either party can appeal the rent set to the First-Tier Tribunal under s.65A, but once the fair rent is set it is valid for at least 2 years unless it is cancelled (s.73). This is the maximum rent that can be charged and if the tenant had paid more they are entitled to claim back to difference for a period of up to 2 years.

[304] Welfare Reform Act 2007

[305] Housing Benefit Regulations 2006 Regulation 13D, 14

for someone who is away serving in the armed forces.[306] If the tenant has to apply for local housing allowance (or the housing element of Universal Credit) the maximum they would get would be their entitlement under the local reference rents based on their household composition; the actual amount paid would then be assessed based on their rental liability and financial eligibility.

Some commentators argue that landlords will take this into account when setting rent levels to ensure that their properties are affordable for tenants, keeping prices stable and affordable. [307] However this is entirely at the discretion of the landlord and there is no legal requirement that they pay any attention at all to these local reference rents.

Rent increases, by contrast, are regulated, although it is arguable that this regulation is ineffectual. The rent cannot be increased during the fixed term of a tenancy unless the parties agree to this or the tenancy contract itself allows for an increase during the term. This is because the tenancy agreement forms a contract and whilst the terms of that contract remain operational, the normal rules of variation of terms apply. Once a tenancy becomes periodic, rent increases can only occur by consent between the parties (which could be given expressly or by implication, i.e., by a tenant paying the higher sum) or if the landlord follows a set legal procedure.

The procedure is set out in s.13 of the Housing Act 1988 and applies to both assured and assured shorthold tenancies. This allows landlords to serve their tenant with notice of their intention to increase the rent. The notice should include details of the new proposed rent and the date that it would come into effect. This date must be a date which is at least one period of the tenancy from the time of the service of the notice, or at least one month if the period of the tenancy is less than one month or at least six months if the period of the tenancy is one year.[308] The landlord cannot rely on the s.13 procedure to increase the rent if the rent has

[306] Housing Benefit Regulations 2006 Regulation 13D (3A-D)

[307] Cowan, D, Housing Law and Policy, (Cambridge University Press 2011) pg. 237; Rhodes, D and Bevan, M, “Private landlords and the Local Housing Allowance system of Housing Benefit” (DWP 2010) pg. 33.

[308] Housing Act 1988 s.13(2) and s.13(3)

already been increased within the last 52 (or in some cases the last 53)[309] weeks.[310]

A tenant could then either; consent to the new rent either expressly or by paying the increased sum; negotiate new terms with the landlord; ignore the notice and continue to make payments at the original rate, in which case the new rent becomes effective as per the terms of the notice and the balance will start to accrue as arrears[311] or, before the notice expires, appeal the decision to increase the rent on the specified form[312] to the First-Tier Tribunal (Property Chamber).[313]

The tribunal will investigate the rent proposal and make a decision about what rent the tenant should pay. They will base this decision on a reasonable market rent for the property, having regards to similar properties in the area. The tribunal should not have regard to the fact that the property is tenanted, to any improvements that the tenant has made or to any loss in value resulting from the tenant breaching the terms of the tenancy. They should also not take into account the existing rent or the proposed new rent. The rent they set could be higher or lower than the proposed rent. The new rent would take effect from the date specified in the landlord's original notice unless the tenant could persuade the tribunal to delay the start date by showing that applying this earlier would cause them significant hardship. The new rent set by the tribunal attaches to the tenancy, not to the property, and does not bind future tenants.

In limited circumstances, i.e., within the first 12 months of the existence of a statutory periodic tenancy arising on the expiration of a fixed term, a landlord can also use s.6 of the 1988 Act to amend the terms of the tenancy, including the rent. They must serve their tenant a 'Notice proposing different terms for a Statutory Periodic Tenancy' and this would then take affect three months after service. The tenant has the

[309] Housing Act 1988 s.13 (3A) (a)

[310] Housing Act 1988 s.13 (3A)(b)

[311] Housing Act 1988 s.13(4)

[312] 'Application Referring a Notice Proposing a New Rent Under an Assured Periodic Tenancy or Agricultural Occupancy to a Tribunal'

[313] Housing Act 1988 s.13(4)

same right to challenge this to a tribunal as they do a proposed rent increase under s.13.

However, although periodic tenants can appeal a rent increase or a proposal of new terms to an independent tribunal, it is questionable how often they will exercise this right in practice. This is because the overwhelming majority of private tenants are assured shorthold tenants, who are vulnerable to eviction on the “no grounds” basis if they are periodic tenants outside of the first six months of their tenancy. This puts these tenants is a very weak position to bargain with their landlord or even exercise their statutory right to challenge proposed changes. If they do appeal and their landlord decides to terminate their tenancy to attract new tenants at a higher rent or on more favourable terms, they can do this regardless of whether the tenants have otherwise complied with the terms of the contract. This is an example, in practice, of an issue resulting from the mutual interdependence between security of tenure and other housing rights, the theory of which is discussed in section 2.1.2, above. Tenants need both legally enforceable rights and the security of tenure necessary to enforce those rights in order for them to be effective. In practice many tenants faced with a rent increase will simply pay the higher sum or, if this is unaffordable to them, seek to move themselves to avoid eviction proceedings.

Though not strictly relating to rent provisions, two areas which are similarly linked to affordability are that of deposits and fees.

Until very recently, there was no restriction on how much a landlord could demand as a deposit on their rental property. This made many tenancies unaffordable to tenants from the outset. The Tenants Fees Act 2019 has remedied this, and now limits deposits to a maximum of five or six weeks net rent for the property let as an assured shorthold tenancy.[314] Any breach of these rules renders the agreement non-binding, the tenant can apply to the First-Tier tribunal for repayment of any unlawful fee,[315] the landlord can receive a financial penalty from the local authority[316] and a landlord cannot use the s.21 notice procedure

[314] Schedule 1

[315] Ss.15-16

[316] S.8

until they have repair any unlawful fees.[317] There are also regulations in place about how landlord's must treat a deposit, once taken (see below-section 4.5.4).

In addition to deposits, often payable upfront, fees can also act as a barrier to access. Again these were largely unregulated until the 2019 Act came into force. Now, only the following payments are permitted, in addition to rent and deposits;

- A Holding deposit which is limited to up to maximum of one week's rent
- A fee in the event of a relevant default, i.e., if the tenant misses a rent payment or loses an access key and their tenancy agreement allows the landlord to impose a charge for this.
- Damages for breach of agreement, assessed under general damages rules.
- Fees incurred in connection with tenant's request for a variation of tenancy, including an assignment or succession
- Charges relating to council tax, utilities, communication services and TV licence

The same rules apply to situations where a landlord has charged an unlawful fee as to those charging excessive deposits; any breach of these rules renders the agreement non-binding, the tenant can apply to the First-Tier tribunal for repayment of any unlawful fee,[318] the landlord can receive a financial penalty from the local authority[319] and a landlord cannot use the s.21 notice procedure until they have repair any unlawful fees.[320]

[317] S.17

[318] Ss.15-16

[319] S.8

[320] S.17

4.4.4 Conditions in private rented housing

There is no provision that PRS accommodation must be shown to adhere to certain standards before it can be rented out, but tenants living in accommodation which they believe to be unsuitable may be able to take action in respect of the state of their home.

The responsibility for carrying out repairs and ensuring certain standards are met in private rented accommodation arises from many different sources. The most relevant are discussed below;

- The tenancy agreement- as a contract, enforceable between the parties, the tenancy agreement can be used as a starting point in determining obligations. This may deal with repairing obligations or standards.
- The Landlord and Tenant Act 1985, s.11, specifies that a landlord of a dwelling let for less than 7 years must keep in repair the structure and exterior of the building or part of a building which is let to the tenant (including drains, gutters and external pipes), keep in repair and proper working order the installations for the supply of water, gas, electricity, and for sanitation (including basins, sinks, baths and toilets), and keep in repair and proper working order the installations for space heating and heating water.[321]
- The Defective Premises Act 1972- this specifies that a landlord can be liable for any injury or damage resulting from disrepair.[322]
- The Environmental Protection Act 1990- if premises are “in such a state as to be prejudicial to health or a nuisance” then they will constitute a statutory nuisance and a landlord will have a duty to repair under s.79 (1) of the act. Breaches of this act enforced by the local authority under s.80 of this act.
- The Housing Act 2004- this introduced the Housing Health and Safety Ratings System (HHSRS).[323] This is a system that identifies certain hazards and assess them by category in reference to Government guidance.[324] A category 1 hazard is one which causes

[321] Landlord and Tenant Act 1985, s.11(1)(a-c)

[322] Defective Premises Act 1972, s.4

[323] Housing Act 2004, s.1-2

[324] The Housing Health and Safety Ratings System (England) Regulations 2005, SO (2005) 3208

an serious and immediate risk to a person's health; a category 2 hazard is any other hazard, which is less serious or urgent.[325] Local authorities are required to assess standards of accommodation in their area under this system.[326] If a category 1 hazard is identified the local authority are required to take action to ensure the landlord remedies this.[327] If a category 2 hazard is identified the local authority may take such action.[328] Action the local authority can take includes serving a hazard awareness notice,[329] pointing out the defect to the landlord; serving an improvement notice,[330] requiring the landlord to do remedial works within a set time; serving a prohibition order[331] which stops all or part of the building being used while works are done; taking emergency measures[332] to remove an imminent risk and then stopping the use of all or part of the building until works are done; making a demolition order[333] if the state of the property justifies this; or declaring a clearance area[334] so all buildings within a certain area will be demolished if they are dangerous. If landlords fail to do required works the local authority can prosecute them for this breach. For breaches of improvement or prohibition orders the local authority can impose a civil penalty of up to £30,000.00 and a tenant may also be able to claim back up to 12 months' rent under a rent repayment order;[335] this claim would be made to the First-Tier Tribunal (Property Chamber).

[325] Housing Act 2004, s.2

[326] Housing Act 2004, s.4(1)

[327] Housing Act 2004, s.5 (1)

[328] Housing Act 2004, s.7 (1)

[329] Housing Act 2004, ss.28-29

[330] Housing Act 2004, ss.11-19, ss30-31, ss.35-36

[331] Housing Act 2004, ss.20-27, ss.32-34. Ss.35-36

[332] Housing Act 2004, s.40

[333] Housing Act 2004, s.46

[334] Housing Act 2004, s.47

[335] Housing and Planning Act 2016, s.40

- Homes (Fitness for Human Habitation) Act 2018- this Act allows tenants to take direct action against their landlord where their rented home is not fit for human habitation.
- Common law- at common law certain terms can be implied into a tenancy agreement. For example the courts have found that property let furnished must be fit to be lived in and properties have been found unfit if, for example they have infestations, defective drainage or are unsafe. Claims can also be brought in negligence or nuisance if injury or loss is suffered because a duty of care is breached.

4.5 Recent Changes

The last fundamental change in the law concerning rent control and security of tenure for private tenancies occurred in 1988, leaving the law out of date with recent changes in the PRS as discussed in Chapter one.

Whilst the Government have shied away from larger, systemic reform, there have, however, been a number of more recent reforms which have amended the law and how it operates in practice, even if they have left the bulk of the provisions from the 1988 Act in place.

These tend to be small scale reforms targeted at specific issues identified within the PRS. Although these are often targeted at problem areas and "bad" or rogue landlord practices and therefore may indirectly improve the sector, they do not in change the system in which all PRS landlords, both "good" and "bad", must operate. If this system itself is inherently not fit for purpose, then the underlying problems with the PRS remained unaddressed in spite of these smaller scale reforms which are targeted at regulating the behaviour of PRS landlords rather than structural changes.

The most recent relevant reforms are detailed below:

4.5.1 Retaliatory Evictions

For several years calls had been growing for the Government to tackle the "problem" of retaliatory evictions. This term was used to express the idea that landlords routinely seek to serve s.21, "no ground" notices and

move to evict tenants who try to enforce their tenancy rights contrary to the landlord's interests, i.e., in pressuring to have repairs done and threatening to take action for any breaches of the repairing obligation.

The cause was taken up by pressure groups including The Citizens Advice Bureau and Shelter, who commissioned research to identify the scale of the problem and the need for reform. This led to private members bill being put forward calling for a change in the law and ultimately to the provisions aimed at preventing retaliatory eviction introduced in the Deregulation Act 2015.[336]

These provisions state, under s.33(2)A, that;

> (2)A section 21 notice given in relation to an assured shorthold tenancy of a dwelling-house in England is invalid where—
>
> (a)before the section 21 notice was given, the tenant made a complaint in writing to the landlord regarding the condition of the dwelling-house at the time of the complaint,
>
> (b)the landlord—
>
> (i)did not provide a response to the complaint within 14 days beginning with the day on which the complaint was given,
>
> (ii)provided a response to the complaint that was not an adequate response, or
>
> (iii)gave a section 21 notice in relation to the dwelling-house following the complaint,
>
> (c)the tenant then made a complaint to the relevant local housing authority about the same, or substantially the same, subject matter as the complaint to the landlord,
>
> (d)the relevant local housing authority served a relevant notice in relation to the dwelling-house in response to the complaint, and
>
> (e)if the section 21 notice was not given before the tenant's complaint to the local housing authority, it was given before the service of the relevant notice.

Any possession proceedings issued on the basis of a notice which is invalid by virtue of this section can be struck out.[337]

[336] s.33

[337] CPR Part 55, 55.16 (1) (c). This is because the landlord will not have made out the grounds for possession and therefore 55.17, directing the court to make a possession order will not apply. The

The new rules represent an attempt to shore up tenants' rights and make it more difficult for landlords to exploit tenants. This change in the law also acknowledges the mutual interdependence of security of tenure and other fundamental housing rights i.e. the fact that tenants need both rights and some security from eviction in order to effectively enforce them as discussed at section 2.1.2, above. However an examination of the new provisions highlights some potential weaknesses. They rely on tenants making complaints of disrepair in writing and elevating that complaint to the local authority if it is not acted upon. With the PRS in England as it is, a small-scale amateur market, many landlord and tenant relationships are more informal. In practice many tenants routinely contact their landlord by telephone or in person, or at best by text message. This is often not be enough to satisfy the condition that the repair has been reported in writing.

In addition, the regulations depend on the local authority, with their limited resources, carrying out an inspection and serving a "relevant" notice. Not all local authorities allocate adequate resources to housing standards enforcement and any inspection, if carried out at all, could be somewhat delayed. As discussed in the literature review in Chapter One, enforcement is uneven across authorities, leading to differences in protections in different areas.[338] One of the local authority respondents to the questionnaires sent out as part of the qualitative data gathering for this study made this point, highlighting the fact that although the level of enforcement actions they take is high compared to some other areas, this will not necessarily drive the worst landlords out of the sector, but instead encourages them to move to an area where enforcement is weaker. This illustrates the problem with weak and inconsistent enforcement.[339] In addition any enforcement notice from the local authority must be a "relevant notice", which means an improvement notice or a notice of emergency remedial action.[340] These will only be

court could strike out the application on the papers or dismiss the claim after a preliminary hearing under its case management powers in CPR 3.1(2)(i).

[338] See section 1.3, pg 45.

[339] See section 6.4.1, pg 191.

[340] Deregulation Act 2015, s.33(13), pg

served if, in the case of an improvement notice, the local authority believes that a landlord is in breach of a relevant statutory provision or, in the case of a notice of emergency remedial action, if there is a category 1 hazard and an imminent risk of harm. These would not be served in all cases, which would leave a landlord free to pursue a tenant via the s.21 procedure even after they have made a complaint.

4.5.2. The s.21 Procedure

In addition to the above restrictions on s.21 notices, and some restrictions relating to deposit protection discussed below, the Deregulation Act 2015 also introduced further changes to the s.21 procedure applying to all assured shorthold tenancies beginning after 1st October 2015 (and after 3 years to all tenancies).[341]

The first change was to remove the technical requirements about the expiry dates for s.21 notices; going forward notices must only give 2 months' notice in writing to allow sufficient time under s.21.[342] The rules also included the right for the secretary of state to use a statutory instrument to bring into effect a prescribed form of notice, so that it should be clear going forward if the correct notice has been used.[343] A statutory instrument has since been passed,[344] introducing a standard form, form 6A, which is to be used to satisfy this requirement.

A s.21 notice cannot now be served within the first 4 months of any assured shorthold tenancy.[345] Furthermore the s.21 notice will only remain valid for 6 months and if not acted on within that time a new notice would need to be served.[346] This is helpful to tenants as previously a notice could be served at any time, and remained valid indefinitely. This meant that a landlord could serve a notice at the outset

[341] Deregulation Act 2015, s.41

[342] Deregulation Act 2015, s.35, amending the Housing Act 1988, s.21

[343] Deregulation Act 2015, s.37

[344] The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 SI 1646 (2015)

[345] Deregulation Act 2015, s.36 (2), amending the Housing Act 1988, s.21

[346] Deregulation Act 2015, s.36 (2), amending the Housing Act 1988, s.21

of a tenancy and could apply to court based on that notice even, for example, 24 months later. They would not have to serve any further notice to the tenant before applying to court, meaning that some tenants would not actually receive any effective warning that proceedings were about to be issued.

Finally the s.21 procedure is not open to a landlord unless they have provided the tenant with a valid Energy Performance Certificate[347] for the property, with a current gas safety certificate[348] and with certain prescribed information, currently the Government's "How to Rent" booklet.[349] Again this appears to offer protection to tenants, ensuring that where landlords have not acted other than in accordance with their obligations they are barred for the use of the s.21 process to evict them. However, in practice, these issues- i.e., being provided with information about energy performance, gas checks and how to rent- are not generally of primary importance to tenants who tend to be more focused on their security in the property and issues concerning rent. Instead, these measures are more targeted by Government motivations, i.e., in meeting energy performance targets and trying to educate landlords and tenants to drive up standards from within without the need for intrusive regulatory reform.

4.5.3 Licensing

The Government in England have repeatedly declined calls to introduce mandatory licensing for private landlords, although such a scheme has now been introduced in Wales.[350] However what the Government has done is empower local authorities to introduce selective landlord licensing schemes in problem areas[351] and made it mandatory for all

[347] Deregulation Act 2015, s.38(2)(b), amending the Housing Act 1988, s.21

[348] Deregulation Act 2015, s.38(2)(c), amending the Housing Act 1988, s.21

[349] Deregulation Act 2015, s.39, amending the Housing Act 1988, s.21

[350] Housing (Wales) Act 2014, s.4

[351] Housing Act 2004, Part 3, ss.79-100

landlords owning and managing Houses in Multiple Occupation to have a licence, unless they are exempt.[352]

The selective licensing scheme enables local authorities to designate certain areas where landlords would be required to hold a licence for each rental property they own in that area[353] (the landlords would have to pay a fee to acquire a licence[354] and commit an offence if they fail to do so).[355] The scheme is designed to be used for areas with low housing demand or persistent anti-social behaviour, the idea being to monitor and manage landlord renting practices to ensure that standards are maintained and problem tenants dealt with efficiently.

Landlords in designated licensing areas must apply for a license for each property they intend to let and would be vetted before a license was granted. Both the landlord and any person managing their property would need to be shown to be a fit and proper person and license conditions can require landlords to thoroughly vet tenants, carry out repairs and ensure that their properties comply with certain standards both in terms of the condition and property management.

The approval of an appropriate national body is needed to make a selective licensing scheme valid,[356] and this approval can be given for a specific application of selective licensing or more generally to the local authority's policy on selective licensing.[357] Local authorities are not expected to use this scheme to require all private landlords in their borough to be licensed and any designation of a licensing area or series of designations made by one authority which would cover more than 20% of all private rented stock or more than 20% of the geographical area of the borough to be subject to selective licensing needs approval by the secretary of state for communities and local Government.

[352] Housing Act 2004, s.61

[353] Housing Act 2004, s.80-82

[354] Housing Act 2004, s.87(3)

[355] Housing Act 2004, s.95

[356] Housing Act 2004, s.82(1)

[357] Housing Act 2004, s82(6)

This means of course that the selective licensing schemes do not affect everyone.

4.5.4 Deposits

It was becoming established practice in some parts of the PRS for landlords to consider the security deposit as an additional payment which they had no intention of returning at the end of the tenancy. Tenants were struggling to get their money back, with deductions being made for unreasonable expenses. If landlords refused to return their money, the only recourse for tenants was to make an application to the County Court for a money judgment, which was a timely and costly exercise with no guarantee of the sums owed actually being paid even if they obtained a judgement in their favour. This meant that tenants could not reliably depend on the return of an existing deposit to cover up front payments on a new home.

To try and redress this the Government introduced some significant changes to deposit regulation in the Housing Act 2004,[358] which came into force in April 2007. Following some more recent amendments, the current basis of the legislation is that any landlord who takes a security deposit on an assured shorthold tenancy must, within 30 days of payment of the deposit, protect that sum under one of the three Government approved tenancy deposit protection schemes[359] and also, within that same time period, provide the tenant with prescribed information about their deposit and the scheme used.[360]

There are currently three Government approved tenancy deposit schemes; The Deposit Protection Service, MyDeposits, and the Tenancy Deposit Scheme. The schemes all have dispute resolution mechanisms, so that where there is any dispute about who is entitled to the money from the deposit at the end of the tenancy, landlords and tenants can

[358] Housing Act 2004, Part 6, Chapter 4, ss.212-215C

[359] Housing Act 2004, s.213(3)

[360] Housing Act 2004, .213(5), The Housing (Tenancy Deposits) (Prescribed Information) Order 2007, SI (2007) 797

make use of those schemes to get a decision on what percentage of a deposit should be returned to each party. The parties still have the option of applying to court if they choose to do so, but this allows them to avoid becoming involved in complicated court proceedings which will incur costs.

The deposit protection legislation is also now linked to possession procedures for private tenants. As noted above, landlords may be excluded from using the s.21 procedure where they have not complied with tenancy deposit regulations.[361] Any s.21 notice served at a time when the regulations had not been complied with will be invalid and proceedings issued on the basis of that notice can be struck out.

If the landlord has not protected the deposit at all then they would not be able to use a s.21 notice unless they paid the deposit back to the tenant in full or less any agreed deductions, or unless proceedings about non-compliance with the deposit rules had already been issued by the tenant and determined by the court. Protecting the deposit late would not enable them to use the s.21 procedure.[362] If the landlord has not served the prescribed information then they would have to do so before serving a s.21 notice for this to be valid.

These rules are beneficial to tenants as they mean that deposits are dealt with more fairly and landlords, anxious not to be excluded from the use of mandatory no grounds notices, are likely to comply. Non-compliance can also provide tenants with a useful technical defence to an otherwise un-defendable possession claim issued under the s.21 procedure. The rules can be circumvented, landlords can simply not take deposits or can return deposit money before serving notice, but as the deposit rules become more widely known it is increasingly difficult for landlords who choose to take deposits to avoid their obligations.

In addition to this protection in possession proceedings, tenants whose landlords have failed to comply with these rules can also make an application to the county court in respect of the breach.[363] The court can

[361] Housing Act 2004, s.215

[362] Housing Act 2004, s.215(A)

[363] Housing Act 2004, s.214(1)

order as a remedy that the person holding the deposit either returns it to the tenant or pays it into an authorised scheme[364] and they can also award the tenant between one and three times the amount of that deposit as compensation for the breach, payable by the landlord.[365]

This gives tenants some redress if their deposit has not been handled correctly, and also presents them with a bargaining tool in any negotiation with their landlord regarding their deposit or other tenancy terms. However enforcing breaches would require tenants to make a court application, incurring costs, and where they may not be awarded the maximum compensation by the court. Many private tenants may be unwilling to issue proceedings against their landlord when so much in the PRS depends on the goodwill of their landlords, but the mechanism is there if they choose to use it.

Where this is likely to be more useful for tenants will be as a defence to money claims issued against them for rent arrears, or in proceedings where a possession order is sought on the basis of rent arrears. In this case the tenant is already involved in court proceedings, issued by their landlord, and applying for the return of a deposit and compensation for a breach of the deposit protection regulations can be submitted as a counterclaim. If successful this could reduce what a tenant owes and could, in some cases, result in no possession order being granted at all if the basis of the claim (i.e., arrears) is significantly reduced or eliminated altogether by the amount the court orders that their landlord should pay them.

4.5.5 Homelessness

Homelessness is a separate and distinct area of law but, since the enactment of the Localism Act 2011, which amended the homelessness regulations, local authorities have the right to develop a policy enabling them to discharge homelessness duties by re-homing applicants in the PRS.[366] The Homelessness Reduction Act 2017 extended the use of

[364] Housing Act 2004, s.214 (2A)

[365] Housing Act 2004, s.214 (3A)(4)

[366] Localism Act 2011, s.148, Housing Act 1996 s.198 (7AA)

PRS accommodation in the discharge of local authority homeless duties, and securing a 6 month assured shorthold tenancy for homeless applicants can be sufficient to discharge the duties owed in some cases.[367]

They must secure for the tenant an approved tenancy in the PRS, which is a fixed term assured shorthold tenancy of at least 6 or 12 months duration, depending on the duty owed.[368] The normal homelessness rules apply in relation to the acceptance or refusal of offers on the grounds of suitability,[369] therefore in many cases applicants offered accommodation in the PRS will have little choice as to whether to accept this.

This is likely to divert many more households into the PRS, all of whom, as homeless applicants owed a full duty, will be "priority" households, including families with children and households with vulnerable members. These applicants will be applying for help after a period of housing turmoil and instead of being re-housed into a secure local authority tenancy, as they could usually expect in the past, they may find themselves placed into a sector which by its very nature is insecure. The new rules specifically state that an applicant who has to re-apply as homeless within two years of a PRS offer will automatically be owed a duty providing they are homeless, eligible and not intentionally homeless, regardless of their priority status,[370] but this does not offer them protection during the term of their private tenancy, when they are at the mercy of an insecure housing tenure.

Another way in which homelessness law and private tenancy law are linked is in relation to the issue of intentional homelessness. When an applicant applies for assistance under homelessness law, one of the tests which the local authority applies to determine whether they have a duty to re-house that applicant, is whether or not the applicant has made

[367] S.5

[368] Housing Act 1996, s.193 (7AC)

[369] Housing Act 1996, s.193(5)

[370] Localism Act 2011, s.149(4), Housing Act 1996, s.195A

themselves homeless intentionally.[371] If this is the case the applicant is not owed a re-housing duty and will be entitled only to advice and assistance on their housing options.[372] When an applicant is facing eviction from a private tenancy the landlord will be asked to provide an explanation for their decision to evict the tenant, even if they have followed the "no grounds" possession procedure set out in s.21 of the Housing Act 1988. Where the landlord has issued proceedings as a result of a tenant pursuing the completion of repairs, challenging a proposed rent increase or otherwise trying to enforce their tenancy rights the tenant could challenge any decision that they are intentionally homeless, though where the landlord and tenant relationship has broken down the landlord may misrepresent their reasons to the local authority; the onus would then be on the tenant/homelessness applicant to prove that they should not be considered intentionally homeless.

4.6 Conclusion

Following the introduction of rent regulation in 1915 to combat specific social needs in a time of crisis, private landlord and tenant law has developed into something that would have been unrecognisable to politicians and practitioners at that time. Over the course of the proceeding century, the legal changes in this area have kept abreast with changing social and economic conditions, but also fluctuating political will. The level of intervention in private landlord and tenant relationships, and the nature of whatever intervention has existed, has been influenced by the prevailing political will as well as market forces.

The last major change in the discipline was ushered in under the Housing Act 1988 by a Conservative Government who favoured privatisation. This saw an almost total withdrawal of the Government from intervention in the market. New tenancy types were introduced aimed at offering a minimal level of security to tenants whilst reassuring landlords that recovering possession of the property would be relatively

[371] Housing Act 1996, s.191 (1); *A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.*

[372] Housing Act 1996, s.191 (2) (b)

unproblematic. Initial rents remained at the discretion of the contracting parties. The impact of the regulation that did exist, governing rent increases and repairing obligations for example, was weakened significantly by the lack of genuine security afforded to tenants.

This legislation came at a time when the PRS was in what appeared to be an irreversible decline, with landlords seemingly unwilling to rent properties on contracts which were difficult to break at restrictive rents. The Government used this to justify its policy shift, arguing that as well as promoting social and economic mobility for tenants, the new regime would incentivise landlords and stimulate supply.

Since then very little has changed in relation to the regulation of private tenancies. The 1988 Act remains good law and, with the exception of the recent changes in the sector discussed above, each of which target specific “problem areas” rather than represent wholescale reform, assured shorthold tenancies, the predominant form of private tenancy, remain as insecure as ever. The law has moved on little in the 30 years since the 1988 Act was introduced, but the market certainly has, as discussed in Chapter One, above.

Private renting now comprises more households than social renting in the UK and demand continues to rise. The demographics of the tenants who rent from private landlords are also changing. Increasing numbers of families with children now rent their homes from private landlords as do more and more older households. Private renting is no longer a tenure aimed predominantly at the minority of younger person households seeking mobility. Instead, it now provides accommodation for a multitude of people who want and need greater security, both in terms of housing costs and tenancy length.

The current legislative framework surrounding private rented accommodation cannot provide for these changing needs. Chapter 5 will go on to discuss some of the problem areas identified briefly above in greater detail, followed by Chapter 6 which looks more closely at these issues in practice, with reference to the case study areas identified in Chapter 2.

Chapter 5- The Private Rented Sector in England- The Problem Areas

5.1- Introduction

Having discussed the PRS in England and the policy considerations that underpin it, Chapter 5 now goes on to consider in detail some of the problems associated with the PRS; these are outlined at Chapter 1.1.2.3 above.

As discussed at section 1.1.2 above, the PRS is housing an increasingly wide number and variety of tenants so it is vital that the sector is able it to cope with that need. An understanding of the shortcomings of the sector and why they have developed will help to address those issues and allow improvements to be made.

Some of the main problem areas associated with the PRS in practice, as outlined at section 1.1.2.3 above, are;

- The lack of security occupiers in the PRS have as a result of the use of assured shorthold tenancies, which are the predominant tenure for private tenants;[373]
- The lack of regulation over the rent a landlord can charge at the outset of a tenancy and the limited regulation over rent increases during ongoing tenancies, problems which are exacerbated by the limited bargaining power of tenants in the PRS, and;
- Problems with tenants enforcing their rights to get repairs completed, associated with both the weak regulatory framework and issues associated with the tenants' vulnerability to eviction action.

These issues impact on the fitness of the PRS for purpose, assessed using the criteria set out at section 1.2.1.1, above. These criteria are informed by the human rights theory of housing law and the factors that are considered to make housing adequate as set out in the International Covenant of Economic, Social and Cultural Rights.[374] These are the specific problem areas that this study will focus on and they will be discussed in turn in more detail below.

[373] This is a result of s.96 of the Housing Act 1996, which makes assured shorthold tenancies the default tenure type in the PRS.

[374] See section 2.1.1, above.

The overarching issue of the mutual interdependence of security of tenure and other tenancy rights, discussed at section 2.1.2 above, and how the interplay between those impacts on PRS tenants in England, will also be discussed further throughout this chapter.

Having discussed these specific problem areas in detail, this chapter will then go on to consider what has led to these practical problems in the PRS developing in the way that they have.

The issues considered will be;

- The piecemeal nature by which law and regulation concerning the PRS has developed, meaning that the laws do not always complement each other and are often ineffective as a result;
- The compartmentalisation of housing law and policy as an area, largely based on tenure, where the PRS is rarely the main focus, and suffers as a result;
- The fact that tenants, and to a lesser extent landlords, are not involved in the political process in any meaningful way which allows their needs to be marginalised, and;
- The lack of funding for the PRS which makes it difficult for the sector to expand and improve without regulatory reform.

5.2- Problems in the PRS in Practice

5.2.1- Tenure and Security

As a result of the provisions of s.96 of the Housing Act 1996, the default tenancy in the PRS is the assured shorthold tenancy. This means that this is the type of tenancy that is created by a private landlord in the absence of any written notice to the contrary.[375] Assured shorthold tenancies are now the predominant tenancy type in the PRS.[376] However they offer very little security to tenants. Without adequate security PRS accommodation cannot be considered fit for purpose when it is assessed against the criteria set out in section 1.2.1.1 and interrogated

[375] See chapter 4.4.1 above for a discussion of assured shorthold tenancies.

[376] These are the default tenancy type in the PRS as a result of s.96 of the Housing Act 1996.

using the human rights theory of housing law as discussed at section 2.1.1.

Landlords, relying on the procedure in s.21 of the Housing Act 1988, need not cite or prove any grounds to obtain a possession order ending an assured shorthold tenancy after the initial fixed term (usually 6 or 12 months) has expired.[377] This is the case whatever the length of the tenancy in practice, even where it may have endured for many years.

This limited security means that often the only protection tenants have is the protection of due process, i.e. the requirement that the landlord serve notice and obtain a court order before evicting a tenant. They have no grounds on which to defend a claim for possession and a possession order will be made if the correct process is followed[378]. This leaves tenants vulnerable to the whim of their landlord and can work to undermine the tenant's other rights and their ability to enforce those rights effectively, demonstrating how the theory of the mutual interdependence of security of tenure and housing rights operates to determine the fitness or otherwise of the PRS in practice.[379]

Because there is no requirement to prove a ground before applying to court to end an assured shorthold tenancy, the possession process can be started as early as four months into the tenancy by service of a notice under s.21 of the Housing Act 1988. Possession proceedings may then be issued on expiry of that notice providing any fixed term has expired; see section 4.5.2 above for a detailed description of the s.21 procedure, as it currently stands. A landlord could apply to end an assured shorthold tenancy because the tenant has breached the tenancy or because they need the property back, for example, but the process can also be started if the landlord, for any reason, prefers to remove that particular tenant even though they intend to keep the property as a rental unit. For example if a periodic assured shorthold tenant, or one whose fixed term is about to expire, complains about disrepair or the condition of the property or refuses to accept a proposed rent increase during an ongoing tenancy the landlord could simply choose to take steps to end their tenancy, and is legally entitled to do so without providing reasons. This has become known as "retaliatory eviction"

[377] Housing Act 1988, s.21, as discussed at section 4.4.2, above.

[378] Housing Act 1988, s.21, as discussed at section 4.4.2, above.

[379] See discussion at section 2.1.2, above.

because it could lead to a tenant losing their home for simply trying to enforce their contractual or statutory rights. Retaliatory eviction is discussed at section 4.5.1 above.

This makes those rights afforded to tenants by statute or as part of their tenancy contract less meaningful, as they cannot be enforced without the risk that action will be taken against them as a result.[380] If a tenant fears being evicted under a process where they have no right to defend the claim, then they may be reluctant to try and enforce their right, to pursue repairs or challenge a rent increase for example, in the first instance. As well as the disruption to their household, tenants could face cost implications if they have to move suddenly and may be concerned about whether they will get a good reference from their landlord, which could impact on any applications for re-housing.

This lack of security and the implications for tenants in respect of enforcing their rights to pursue a landlord to carry out repairs in particular, were the focus of a campaign for change which led to new laws aimed at combatting what is commonly known as “retaliatory eviction”.[381] However the new laws themselves are very weak. The conditions that must be satisfied for the retaliatory eviction protections to apply are strict, and if they are not met the landlord is entitled to use the “no grounds”, s.21 Housing Act 1988 procedure in the usual way.[382]

As well as the fact that, due to the stringent conditions attached to their enactment, the retaliatory eviction protections only apply in a very limited number of disrepair cases, another issue is the fact that those protections are only available in this type of case. There has been no similar attempt to restrict retaliatory evictions which are based on anything other than complaints about repairs, leaving tenants whose behaviour causes their landlord to apply for their eviction for any other reason without even this weak protection. For example if a tenant refuses to agree to a rent increase during the term of their tenancy or is not available to allow access for inspections at the times the landlord

[380] See section 2.1.2 and section 4.5.2 above.

[381] Discussed in detail at section 4.5.1, above.

[382] See section 4.5.1 above for a detailed discussion on these new laws and the operational issues with those laws.

prefers they could be faced with a possession claim under s.21 of the Housing Act 1988 and ultimately face losing their home.

This demonstrates how this weak level of security of tenure underpins and undermines all other rights that PRS tenants have.[383] Rights are worthless without security as a tenant may not feel secure enough to enforce those rights. Until there is some reform offering tenants in the PRS reasonable levels of security and protection against eviction for simply seeking to enforce their rights, their position will not improve. Moreover, until these issues are addressed by meaningful reform the PRS cannot be considered to be fit for purpose when measured against the criteria set out in section 1.2.1.1 above, or to offer adequate housing as required under the human rights theory of law and discussed at section 2.1.2, above.

This issue is discussed in further detail at section 5.3, below.

5.2.2- Rent

Although, as discussed at section 4.4.3 above, there are some controls on rents in the PRS, those are minimal and this causes affordability problems both with accessing suitable accommodation in the PRS and with retaining an ongoing PRS tenancy. These problems are related to the limited security that most PRS tenants have, as discussed above.

Theoretically, tenants are free to negotiate their rent with their prospective landlord at the outset of the tenancy, which enables them to seek suitable accommodation at an affordable price.[384] However in practice properties are usually advertised at a pre-determined rent and negotiation is not encouraged and is rarely successful.[385] The introduction of local housing allowance (as discussed at chapter 4.4.3 above) has provided local average reference rents which may have an effect on the rents that private sector landlords charge, but landlords are not obliged to adhere to these local reference rents or to reduce rents to those levels if a tenant requests this. Monthly reports on the PRS by ARLA Propertymark, the largest body in the UK representing and

[383] See section 2.1.2 above.

[384] See Chapter 4.4.3, above.

[385] See footnote 13, below.

regulating residential letting agents, indicate that the number of tenants who negotiate rent reductions is between 2 and 4%,[386] which demonstrates how infrequently rent negotiations are successful in practice. This can be attributed to the imbalance of power in landlord and tenant relationships, and the weak position of tenants in that relationship.

This limited ability to negotiate initial rents, impacts on affordability. Tenants accessing accommodation at the lower end of the market, with lower rents, have limited choice in what accommodation they can afford, limiting their bargaining power further. Housing costs for private tenants are still on average 34% of their total household income, compared to 28% for those in social rented housing and only 18% for those in owner occupied accommodation.[387] This presents a barrier to access for some households, meaning that the PRS is not always an affordable and accessible option, despite the increasing number and diversity of households who are coming to rely on it (see chapter 1.1.2 above).

There are further issues relating to rent provisions during ongoing tenancies.

Unlike the right to free negotiation at the beginning of a tenancy, there are regulations concerning rent increases during an ongoing tenancy.[388] However a tenant's ability to challenge a rent increase must be considered in light of their security in the property, as noted above at sections 5.2.1 and 2.1.2. When a tenant could face eviction proceedings without the landlord being required to state or prove any grounds for the application, then any objection to a proposed rent increase could put their home at risk. As the tenant would have to pay the costs of a court application for possession, even when this was not based on any ground proven against them,[389] tenants may consider it more prudent not exercise their right to challenge an increase as a result of fear of facing

[386] http://www.arla.co.uk/lobbying/private-rented-sector-reports/. They are produced by analysing data from their members, who currently number over 9000, and their client landlords and tenants.

[387] Ministry of Housing, Communities and Local Government, *English Housing Survey, Headline Report 2016-2017,* (2018), pg 15

[388] See section 4.4.3, above.

[389] See section 4.4.2, above.

this retaliatory action, making these statutory protections somewhat hollow.

Furthermore some tenants may find the process for challenging an increase intimidating, posing a further problem and barrier to enforcing this tenancy right. A tenant wishing to challenge a proposed rent increase must apply to the tribunal and go through a formal process that could ultimately lead to the rent being set at a higher rate than that proposed by the landlord.[390] Tenants may be concerned about starting this process with such uncertainty as to the likely outcome, especially as, given their limited security in their property, it can be difficult for an assured shorthold tenant to consider their PRS rental property as a home or to really consider themselves to have any sort of stake in the property worth disputing formally through the complexities of the tribunal system when they do not known how long they are likely to remain in that property in any event.

Another barrier to challenging a proposed rent increase, on top of concerns about their security, the tribunal process and the uncertainty of the outcome, relates to the costs of instigating a challenge. Although there is no fee for taking the matter to the First Tier Tribunal to dispute the claim initially, if a tenant disagrees with the decision of the First Tier Tribunal and seeks to appeal to the Upper Tribunal fees will apply; currently £275.00.[391] Tribunals may also order a tenant to pay legal costs in some circumstances.[392] The risk of incurring such costs may be off- putting for many tenants and lead to them choosing not to pursue this.

In addition, if the tenant does go through the tribunal process to challenge an increase and the tribunal ultimately either approves the proposed new rent or sets the rent at a higher rate, the new rent can be backdated to the time that the initial rent increase notice from the landlord expired. This could be a significant period, as tribunals are overstretched and cases are often delayed due to volume of work.

[390] This process is set out in s.13 of the Housing Act 1988 above and is discussed in detail at section 4.4.3, above.

[391] https://www.gov.uk/appeal-upper-tribunal-lands/how-to-apply-or-appeal

[392] These rules apply if they think that an applicant has acted unreasonably in bringing, defending or continuing proceedings under Tribunal Procedure (First Tier Tribunal) Property Chamber Rules 2013, rule 13 and the Tribunal Procedure (Upper Tribunal Rules 2008 rule 10.

Citizens Advice advises that the delay can be up to 10 weeks.[393] This will vary from time to time and region to region, but could be a real concern for tenants who could end up owing a substantial sum in backdated rent.

The threat of increased costs or a large backdated payment becoming due and the lack of security afforded to tenants in the PRS both undermine the effectiveness of the rent regulations that are in place, limited as they are.

5.2.3- Disrepair and Remedies

Another problem in PRS housing relates to property conditions and disrepair. This issue is particularly associated with PRS accommodation as privately owned rented accommodation is older on average than accommodation in any other sector,[394] with over a third being built before 1919 (as compared to 21% of owner occupied properties and only 7% of social housing). PRS housing also includes the highest percentage of properties that fail to meet the decent homes standard, at 29%.[395] Research suggests that vulnerable and low income households are disproportionately housed in these sub-standard or older properties.[396] It is this part of the PRS, the lower end of the market, which is the primary focus of this study.

As discussed at section 4.4.4 above, there are several laws and regulations governing a landlord's repairing obligations and the obligation to ensure that the property is not hazardous, but these obligations must be read in light of the particular relationship between landlords and tenants in the PRS. Landlords in the PRS have a reputation for failing to carry out repairs or maintain properties to a

[393] https://www.citizensadvice.org.uk/housing/renting-privately/during-your-tenancy/challenging-a-rent-increase/

[394] Ministry of Housing, Communities and Local Government, *English Housing Survey, Headline Report 2016-2017,* (2018), pg 24

[395] Ministry of Housing, Communities and Local Government, *English Housing Survey, Headline Report 2016-2017,* (2018), pg 29

[396] Housing, Communities and Local Government, *Private Rented Sector. Fourth Report of Session 2017-2018,* House of Commons, (2018), 440, pg 11.

reasonable standard[397] and the landlord's position of power in any dispute causes problems in enforcement.

As discussed at section 4.5.1, as a result of the possibility of retaliatory eviction action being pursued against a tenant who chooses to seek to enforce their right to have repairs completed against their landlord, many tenants are not prepared to do this. This inability of tenants to freely pursue their landlord to do repairs, was the basis of a campaign for a change in the law to stop retaliatory eviction but, as seen above at section 4.5.1 above, the reforms have limited practical effect. A recent report found that 44% of tenants in the PRS said that a fear of retaliatory evictions would stop them reporting disrepair, despite the recent reforms.[398]

In addition to the possibility of facing possession action for reporting disrepair, which stops many tenants from doing so, another problem related to conditions in PRS property is the difficulty in enforcing the regulations and ensuring that the necessary works are carried out. The easiest and least onerous way for a tenant to enforce their right to repair where this is not being done by their landlord, is to report this to the local authority who have extensive powers to investigate and enforce repairing obligations in PRS tenancies. However local authorities must manage these duties in light of their limited resources (see section 5.3.4, below) and bear their own relationship with private landlords in their authority area, which, as a result of recent reforms in homelessness legislation, is complicated and often contradictory (see 3.4 above). If an authority is overworked and underfunded (see section 5.3.4 below) or if, due to other policy concerns, they are prepared to take little formal action, then a tenant could be left without redress, leading to stark local differences as discussed at section 1.3 above.[399]

If dissatisfied with the local authority decision not to take action against a landlord who is in breach of their repairing obligations, the tenant could

[397] Lowe S, Housing Policy Analysis- British Housing in Cultural and Comparative Context, (Palgrave Macmillan 2004) pg 237 and Morgan, J, Aspects of Housing Law (Routledge 2007) pg 84

[398] Housing, Communities and Local Government, *Private Rented Sector. Fourth Report of Session 2017-2018,* House of Commons, (2018), 440, pg 3

[399] See pg 45.

make a complaint to the authority. If they remained dissatisfied after this they may have grounds to elevate this to the Local Government ombudsman or, potentially, pursue judicial review of any unlawful or irrational decision. However, the feasibility of doing this raises issues about the nature of the powers given to a local authority in relation to managing disrepair in PRS housing. Many of those powers are just that, powers rather than duties, which would make it difficult to establish a case against them for failing to take action.

The principle statutory powers relevant to this discussion on disrepair and remedies as enforced by the local authority are set out below;

- Housing Act 2004 s.4 sets out when an authority should inspect a property for hazards under the Housing Health and Safety Ratings System, and act on any hazards identified.

  Housing Act 2004 s.4(1) states that;

  (1)If a local housing authority consider-

  (a)as a result of any matters of which they have become aware in carrying out their duty under section 3, or

  (b)for any other reason,

  *that **it would be appropriate** for any residential premises in their district to be inspected with a view to determining whether any category 1 or 2 hazard exists on those premises, the authority **must** arrange for such an inspection to be carried out.*

  (Emphasis added)

  The inspection is mandatory, but only if the authority believe that it is appropriate that is it carried out. This is subjective and open to interpretation by the authority. Although guidance was issued under s.9 of the Act about how inspections should be carried out and risks assessed,[400] this was silent on when an inspection should be undertaken in the first instance. There is no guidance on what would make an inspection appropriate and no reported case law on this point. It is for the authority to decide.

[400] Housing health and Safety Ratings System Operating Guidance, 2006, ODPM, London

Any range of factors could be considered by the authority when making a decision as to whether it was appropriate to inspect and it would be permissible within the wording of the statute for them to consider those factors. For example resources- both financial and in terms of man power could be taken in to account, political considerations, for example relating to the status of landlords and tenants in the area and social considerations, such as general conditions in the area and the availability of alternative accommodation.

Once an authority has undertaken an inspection under s.4, their duties are clearer, but not unequivocal. s.5 states;

*(1)If a local housing authority consider that a category 1 hazard exists on any residential premises, they **must** take the appropriate enforcement action in relation to the hazard.*

(2)In subsection (1) "the appropriate enforcement action" means whichever of the following courses of action is indicated by subsection (3) or (4)—

(a)serving an improvement notice under section 11;
(b)making a prohibition order under section 20;
(c)serving a hazard awareness notice under section 28;
(d)taking emergency remedial action under section 40;
(e)making an emergency prohibition order under section 43;
(f)making a demolition order under subsection (1) or (2) of section 265 of the Housing Act 1985 (c. 68);
(g)declaring the area in which the premises concerned are situated to be a clearance area by virtue of section 289(2) of that Act.

*(3)If only one course of action within subsection (2) is available to the authority in relation to the hazard, they **must** take that course of action.*

*(4)If two or more courses of action within subsection (2) are available to the authority in relation to the hazard, they must take the course of action **which they consider to be the most appropriate of those available to them.***

(Emphasis added)

Here, the authority assess whether a category one hazard exists, but if it does they are required to act. The only discretion here applies if there is more than one suitable action available, in which case a wide discretionary again applies as to which to take. In the case of a category 2 hazard the provisions are weaker, as the

authority have the power to take action but not the duty to do so; s.7.

Housing Act 2004 s.8(2) does require an authority to provide a statement of reasons setting out why it chose to take the action it did, but where a wide discretion is allowed little justification is needed.

- Environmental Protection Act 1990 empowers local authorities to serve enforcement notices against statutory nuisances, but, the wording of this power under s.13(1) states;

  *1)If the enforcing authority **is of the opinion** that the person carrying on a prescribed process under an authorisation is contravening any condition of the authorisation, or is likely to contravene any such condition, the authority **may** serve on him a notice ("an enforcement notice").*

  (Emphasis added)

  Here neither the service of the notice nor the decision making process that could lead to this are mandatory. The authority is to make a decision that a condition has been breached, and then make a further decision as to whether to act on this. They are not subject to any specific statutory criteria or decision-making process but are instead given discretionary powers, which can be applied in a subjective manner.

Legal enactments of this nature, using common statutory terminology such as "considers appropriate", "is of the opinion of" and "have regard to" have been described as "so vague and diluted that they could only be interpreted as symbolic or, at best, aspirational".[401] Although in this article Ross discussed the law in the context of planning and sustainability, the principles apply equally here. Rodgers, in his 2013 work on conservation law, went further, stating that where the nature of a statutory duty is not clearly defined, leads to authorities balancing

[401] Ross, Andrea, *Modern Interpretations of Sustainable Development,* 2009. Journal of Law and Society, 36:1, 32-54, Pg 48

priorities and is open to interpretation, “judicial scrutiny….is weak”, the courts only interfering in plainly unreasonable decisions.[402]

To create “stronger obligations”[403] stronger language is needed, with mandated actions for breaches of clearly defined regulations. Without this, authorities will not be compelled to act and could fail to do so for a variety of reasons, leaving tenants in PRS housing without any effective enforcement of their statutory rights.

Tenants can of course pursue action by another means, such as direct negotiations with their landlord, by terminating their tenancy if they have the right to do so at that time or by seeking redress through the courts in the form of damages for specific losses or loss of enjoyment as well as or instead of orders for specific performance. However to succeed these methods require either co-operative landlords, tenants with the means and ability to move at short notice or tenants knowledgeable enough and with the financial means to pursue proceedings through the courts and assume the financial risks this entails.

Legal aid no longer funds free advice on disrepair issues for low income tenants unless they are raised as part of a counterclaim to proceedings issued against the tenant for rent arrears or unless the tenant can provide medical evidence that their health is at risk as a result of the disrepair in their home.[404] Tenants may be unable to get affordable specialist legal assistance with these issues. Advice is available from many third sector organisations, such as Citizens Advice and Shelter, but most of these services run on advice only basis and provision will vary geographically. A tenant wanting to take the matter further, for example to apply for an injunction to have works done, would need to pay a solicitor to assist them, negotiate a fee agreement or do this themselves as litigants in person. This can be extremely challenging and presents a barrier for many tenants. In addition to the complexity of issuing and managing proceedings themselves, court fees and potential

[402] Rodgers, Christopher, *The Law of Nature and Conservation,* 2013, Oxford University Press, pg 58.

[403] Ross, Andrea, *Modern Interpretations of Sustainable Development,* 2009. Journal of Law and Society, 36:1, 32-54, Pg 48

[404] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Part 1, Schedule 1, paragraph 35.

cost implications can be a detriment to many tenants pursuing this action.

Conditions in PRS are an area in which the theory rarely matches up to practice. The legal protections are there on paper, but the mechanisms for enforcing those protections and the funding to enable tenants to seek redress are seriously lacking. This inability to enforce standards contributes to the current reputation of the private sector.

5.2.4 Conclusion

Although the above have been explored as separate issues, in reality these problematic aspects of private tenancy law- security of tenure, rent regulations and issues relating to disrepair and remedies- are interdependent. For example, as seen above at section 4.5.1, one of the reasons that private tenants enjoy so little bargaining power in regards to rent increases during the term of their tenancy or are in such a weak position in regards to enforcing repairing obligations is because they could face retaliatory eviction action if they challenged their landlord. This demonstrates how the limited security rights given to PRS tenants under the dominant default tenure in the sector, assured shorthold tenancies, underpins every other aspect of private tenancy law.[405]

Tenancy rights for tenants with no security of tenure in their homes are meaningless; similarly problematic would be a robust regime conferring security of tenure but with no other tenancy rights. What is needed is a balance of the two. This theory, the theory of the mutual interdependence of security and tenancy rights, is discussed above at section 2.1.2. This issue is key to understanding the shortcomings of the PRS and seeking effective reforms and is explored in greater depth in the conclusion to this thesis (see Chapter 9).

One of the key limitations of the PRS in England in its current form is that it offers minimal levels of both- security and rights. Tenants have some rights, and whilst the law ensures that private tenants cannot be evicted without due process, they also have limited security. However neither tenants' rights nor security could be described as

[405] See section 2.1.2 above for a discussion on the mutual interdependence of security and tenancy rights.

comprehensive, and the interplay between the two reduces their practical impact further still.

This section will go on to consider how and why the sector has developed in this way by analysing some of the underlying issues that affect the PRS in practice.

5.3- Factors which Influence How the PRS Operates in Practice

The specific problem areas within the PRS discussed above, have arisen as a result of the approach taken to the PRS by policy makers and other interested parties, including landlords, tenants and funders. This section seeks to identify those approaches and explore how they have influenced the sector to develop in the way that it has.

As noted above at section 2.1.2, one overarching consideration that touches on all of these problem areas and the factors that have led to their development, is the mutual interdependence between security of tenure and other rights in private tenancies. The theory exploring the relationship between these elements of PRS housing underpins the discussion in this thesis and should be borne in mind here.

Bennett describes security of tenure as "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".[406] This is problematic for private tenants in England.

As we have seen above at section 5.2.1, the vast majority of tenants in the PRS are now assured shorthold tenants. This tenure, created by the Housing Act 1988, introduced a conscious separation of security of tenure from other rights, including rent control, and this separation is "integral to the tenancy structures" created.[407] Assured shorthold tenancies can be terminated under a mandatory procedure once outside

[406] Bennett, Mark, Security of Tenure for Generation Rent; Irish and Scottish Approaches, 47 Victoria U. Wellington L. Rev. 363 (2016)

[407] Rodgers, C, *Fair Rents and the Market; Judicial attitudes to rent control legislation,* [1999] 63 Conveyancer, pg 201-231, pg 229

of their fixed term without the need for the landlord to plead or prove any grounds, and in the case of periodic assured shorthold tenancies, after six months.[408] This puts those tenants in an extremely vulnerable position. Although they have the right to try and negotiate lower rents, challenge mid-tenancy rent increases and pursue their landlord to remedy disrepair, they are vulnerable to eviction if they pursue those rights because of their precarious level of security in their home. Their rights become hollow because of the inherent instability of their tenancy.

A tenancy can be considered a bundle of rights, but unless those rights complement one another they become meaningless. This is turn means that the PRS cannot be deemed fit for purpose, when measured against the criteria set out in section 1.2.1.1 and used to assess the PRS in this thesis. These criteria are informed by the human rights theory of housing law and the factors needed for housing provision to align with the human rights standards set out in the UN International Covenant of Economic, Social and Cultural Rights. This factor influences both the individual problem areas as discussed above, but also the factors which have led to these problems developing in the sector. These factors will now be considered, below.

5.3.1- Lack of Cohesive Regulation or Reform

One of the issues that has led to the current unsatisfactory state of the PRS is the way in which regulating the sector and reforming the regulation has been approached. This has taken place in a piecemeal fashion, with individual aspects of the sector being addressed in different pieces of legislation or regulation introduced at different times, often with little or no references to the interaction with other aspects of PRS housing and exiting laws.

There are currently over 140 Statutes and 400 Regulations which, either directly or indirectly, impact on private landlords.[409] Although this allows

[408] This procedure is set out under s.21 of the Housing Act 1988 and is discussed at section 4.4.2, above.

[409] Housing, Communities and Local Government, *Private Rented Sector. Fourth Report of Session 2017-2018,* House of Commons, (2018), 440, pg 20.

the Government to evidence that they are acting on issues as they arise and targeting reforms where they are needed, it means that there is a lack of cohesion in relation to the regulation and remedies applicable to the PRS. The fact that European law considers housing a national competence means that there is no cohesion imposed on the sector from this perspective either. Reforms, when they do occur, tend to be reactive and focus on particular aspects of the PRS which are prominent at that time, without taking a holistic view.

And this practice of piecemeal reform continues. For example the area to elicit the most recent political attention is the proposal to ban letting agent fees.[410] The Government justified this pending reform by focusing on the need to make rented housing affordable,[411] but no consideration was given to capping or restricting rent to achieve this aim. Focusing on letting agents' fees allows a reform to be passed that is, on the face of it, beneficial to tenants without too much of an adverse impact on landlords. However ARLA, the main regulatory body for letting agents in the UK,[412] argues that this will actually be harmful to both landlord and tenants alike and overall will not improve affordability in the PRS. They point out that the fees will still need to be paid, but will simply become hidden in higher management fees for landlords, resulting in higher rents for tenants.[413] If landlords are encouraged not to use letting agents as a result of this reform this could again be harmful, removing professional agents from the sector and putting property management in the hands of often ill-informed individual landlords. However the Government have chosen to pursue reform on this particular aspect of PRS housing without looking at the wider implications or considering larger scale reform to achieve their aims.

This current issue demonstrates the lack joined up thinking in relation to the PRS, but this is not a new problem- it has occurred historically too.

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[410] Culminating in the Tenants Fee Bill, currently passed by Parliament and awaiting Royal assent.

[411] DCLG- *White Paper- Fixing our Broken Housing Market,* (2017, HMSO), pg 61.

[412] See www.arla.co.uk

[413] See Chaloner, J, Debano, M, Dreisin, A, Evans, A and Pragnell, M, *Letting the Market Down? Assessing the economic impacts of the proposed ban on letting agents fees,* 2017, ARLA, London

As noted above at section 5.2.1, security for private tenants, or the lack there of, underpins all other rights for private sector tenants. Yet the Housing Act 1988, which introduced the current security and tenure structure, did not deal with private tenancy law as a whole, only the tenure structure was considered. Although this was a conscious decision on the part of the Government, implemented, they claimed, to try and stimulate supply in the PRS by making investment more attractive to landlords,[414] a full and comprehensive assessment of how this would fit in with and interact with the other aspects of tenancy law was absent from the provisions and from the debates that led to their introduction. The reform was implemented without a thorough consideration of the impact this would have on the utility of other tenancy rights, leading to the problems in enforcing those rights becoming embedded in the PRS today.

The provisions in relation to conditions in PRS accommodation too are similarly ill conceived. As noted above at section 5.2.3, the theoretical protections exist, but policy and regulatory decisions, for example those relating to funding for local authorities and legal aid undermine those protections. Recent reforms to prevent retaliatory eviction are similarly weak because they have failed to take in to account how the sector works in practice and how difficult it will be to satisfy the conditions which mean that those provisions apply.[415]

Taking this approach of targeting reforms at specific aspects of the PRS, means that they simply build on "outdated and complex foundation(s)".[416] As well as contradictions between regulations themselves, a further problem with this compartmentalised approach to PRS law and regulation, where reform is not holistic or cohesive, is that that can lead to a lack of coherence between regulation and practice, as regulation exists without the necessary enforcement mechanisms.

[414] Rodgers, C, *Fair Rents and the Market; Judicial attitudes to rent control legislation,* [1999] 63 Conveyancer, pg 201-231, pg 229

[415] See section 4.5.1, above.

[416] Housing, Communities and Local Government, *Private Rented Sector. Fourth Report of Session 2017-2018,* House of Commons, (2018), 440, pg 22.

Meaningful reform of the sector or any aspect of it, requires a consideration of the whole.

Without this reform cannot be properly targeted where it is needed and introduced in such a way as to achieve the desired results. An understanding of how different aspects of tenancy law and other external policy and regulatory considerations fit together and interact with each other is essential to successful regulation. Without this a situation arises where rights are ascribed to tenants, but which are meaningless in practice because of the effect of other regulations which undermine them. The PRS cannot be deemed to provide adequate housing, as required under the human rights theory of law discussed at section 2.1.1, or to be fit for purpose when assessed against the criteria set out in section 1.2.1.1, unless this is addressed.

5.3.2- Lack of Focus for the PRS

Another problem area, which has contributed to the fact that reform is piecemeal and to the current fractured and unsatisfactory state of the PRS, is the lack of focus by the Government on the PRS as a housing tenure. Morgan argues that the lack of political support for private landlords, is a factor in the failings of the sector,[417] but this is just part of a broader problem with the marginalisation of the PRS as a whole. Government focus, and therefore time and resources, have not been directed towards the PRS as a primary concern, impacting on the outcomes in the sector.

As we have seen above in Chapter 3, up until the end of the Second World War, the PRS was given political attention only in so far as actively managing this helped to meet other social and economic goals.[418] It was not a focus of policy makers in and of itself. This meant that the regulation concerning the sector was targeted at meeting those external goals and were not introduced with the promotion, stabilisation or continuation of the PRS in mind.

[417] Morgan, J, *Aspects of Housing Law* (Routledge 2007), pg 87

[418] See section 3.2, above.

Since that time housing has become more of a political objective in its own right, but the PRS has still received little attention in those policy objectives. At one time or another the successive Governments have actively favoured the promotion of social housing and the promotion of home ownership and the PRS has become, in political terms, something of an "also ran" tenure- sections 3.2 and 3.3 above discusses the marginalisation of the PRS in recent housing white papers. This is often neglected by policy makers, who tend to focus on encouraging owner occupation and building for the owner occupied sector and, to a lesser extent in recent years, on developing and managing social rented housing. "These developments have resulted in a decline in the competitive position of the PRS".[419] The PRS is usually considered the tenure available to catch anyone not suited to the two main tenure types of ownership or social housing. This limited attention persists despite the PRS now overtaking the social sector in size.[420]

Many of the recent substantive reforms or reform proposals relating to the PRS, including the retaliatory eviction protections[421] and the introduction of enforceable fitness for habitation standards,[422] have originated from back benchers who have to fight tirelessly against largely unwilling political colleagues to be given time to promote reforms in the PRS.

This is not to say that there have not been more large scale reviews of the PRS conducted by or on behalf of the Government. In fact such reviews happen relatively often, and recommendations for reform are made. Furthermore whenever seeking to introduce changes in

[419] Van Der Heijden, H and Boelhouwer, P, *The Private Rental Sector in Western Europe; Developments Since the Second World War and Prospects to the Future,* (1996) Housing Studies 11:1 13-33, pg 18

[420] See section 1.1.2 above.

[421] Initially introduced by a Liberal Democrat MP in 2014 and brought in to force as part of the Deregulation Act 2015.

[422] The Homes (Fitness for Human Habitation) Bill 2017-2019 was introduced by Labour MP Karen Buck. It received royal assent and was enacted in to law in December 2018.

ownership or social housing policy, the Government also tend to promise a review of PRS housing at a later date.[423]

The problem is that such reviews rarely lead to anything tangible. The Government prefer instead to either use the evidence collected to show that reform is not needed (whether the evidence supports this stance or not) or they tend to focus on one aspect of the review, usually one that is not deemed too politically sensitive, and focus reforms on that (see section 5.3.1 above).

Not all commentators agree that this stance is justified. Cowan, for example, when discussing the introduction of selective licensing in the Housing Act 2004, argued that the Government has never been able to provide clear evidence that this was the area where change was most needed at that time, but proceeded to introduce licensing requirements nonetheless.[424] They justified this by arguing that it would create a more professional PRS, by driving up standards in the areas with housing problems and low demand but refused to mandate licensing or to introduce any more wider ranging reform of the tenure structure or tenants' rights.[425]

It would be unreasonable and unrealistic to expect any area of policy to function without problems when it is afforded so little time and resource, and the PRS is unable to do so. The problems with the PRS, discussed at section 5.2 above, are the result of a lack of focus for the sector as well as a lack of a coherent and joined up approach and betray that fact that no one at a policy level has considered the needs of the sector as a whole when seeking to regulate it. In order to make the sector fit for purpose and enable it to adequately meet housing need, a more holistic and integrated focus on reform of the PRS is needed, one which considers all aspects of tenant's needs, legal rights, and the adequacy of

423 See, for example, Government publications including *Housing Policy; A Consultative Document, HMSO, London, 1977, pg 14, Conservative party- Policy Green Paper No 10- Strong Foundations- Building Homes* and *Communities (2009), pg 34-37 and DCLG- White Paper- Fixing our Broken Housing Market, (2017, HMSO)*

[424] Cowan, *Housing Law and Policy,* 2011, Cambridge University Press, pg 66

[425] Wilson, W, *Selective Licensing of Private Rented Housing in England and Wales,* (2017), House of Commons, London, pg 3

rented accommodation both in terms of the quality of the housing stock and provision of adequate security of accommodation.

5.3.3- Lack of Political Involvement as Tenants

Linked to the lack of political focus for the PRS is the lack of meaningful and consistent political involvement by private sector tenants and their representatives in the process of policy formation regarding the PRS, the law making and regulatory process or the local level enforcement processes.

Although tenants, as individuals, or organisations who represent tenants' rights are able to respond to Government consultations on housing policy generally or PRS policy in particular,[426] these are open to the public at large and this is not a specific attempt to involve tenants directly in the formal policy formation or regulatory process. In fact there is no mechanism for consultation with tenants when PRS policy is considered.

This contrasts sharply with the position in Germany where tenant organisations are a potent political force. As a result the Government, at both the Federal and Länder levels, cannot afford to discount tenants at the stage where policy is formed and regulation implemented and these groups are actively included in these processes. There is a national organisation which is supported by 320 local tenants' representative bodies who are involved in working with landlords' representatives and Government officials in tenancy management and policy formulation, for example in setting rents for the mietespiegel. The PRS is given equal attention when policy is formed and as a result Germany has a PRS which is much more inclusive and well-conceived. See Chapter 7 for a detailed discussion on the PRS in Germany.

In England this simply does not happen. With no formal involvement in the policy formation and law making process, it is easy for tenants' voices' to be ignored. What is needed is real and meaningful political

[426] For example the 2018 public consultation on the introduction of specialist housing courts- https://www.gov.uk/government/consultations/considering-the-case-for-a-housing-court-call-for-evidence

involvement for tenants from all areas of the PRS market, including those at the lower end who are more likely to experience challenges in their PRS accommodation. To be effective this would need to be organised and consistent. The most effective involvement would ideally take the form of regular consultations with tenants and their representatives, especially when reforms or reviews of existing regulation are proposed. Involvement at a local level, when funds are allocated to enforce regulations and priorities are determined would also be desirable and would help tenants to exert an influence on their own region, taking in to account the particular needs in that area. If tenants were involved in the process in this way then their needs could be more clearly established and it would be more difficult for the Government to justify a failure to consider those needs, especially as the PRS continues to expand.

At present, tenant interest groups such as Citizen's Advice, Shelter and Crisis often run campaigns for change targeted at getting the attention of the Government or the support of back bench MPs, invoking public interest and pressing for reform, but this is indirect political involvement and the success is variable. The retaliatory eviction reforms are evidence of a success in this type of campaigning (see section 4.5.1 above); the campaign for longer tenancy terms as standard is an example of a campaign which, to date, has not succeeded.[427] Furthermore, although they seek to represent tenants and often do so successfully, these organisations do not act directly for individual tenant members who are able to actively participate in the campaigns.

'Generation rent', another tenant interest group, is a national tenants' organisation that campaigns for change and, in addition, has a membership of PRS tenants as well as monitoring local tenants' groups. This model has the potential to be employed to enable useful intervention and direct political involvement for tenants living in the PRS, who can express their views as members which the organisation can carry forward, but at present the take up rate is fairly low, few tenants join as individuals and become actively involved and the amount of

[427] A Better Deal: Towards more Stable Private Renting, (2012) <http://england.shelter.org.uk/__data/assets/pdf_file/0009/587178/A_better_deal_report.pdf>

active local groups, picking up on issues, are sparse. In addition there is no interest by policy makers in consulting directly with such groups. This needs to change is tenants are to be fully considered when laws are passed which directly impact on their lives.

In addition to the Government and policy makers recognising the need to take tenants' views in to account by actively including them and their representatives in the regulatory process, tenants themselves need to be encouraged to get more actively involved in the sector and how this develops and works in practice in order to achieve this.

This is another area in which security in the PRS adversely impacts on other areas. One of the reasons that tenants are reluctant to get involved in the PRS at a policy level, is that, at present, a private tenancy is not always considered an asset worth protecting in this way. As discussed above at section 5.2, PRS tenants are overwhelmingly assured shorthold tenants with very limited security in their homes. This undermines both their other rights as a legal tenant and their sense of the property as a home which they have a stake in. This can deter PRS tenants from becoming actively and formally involved in the PRS sector. Unlike landlords, who own the rental property as a capital asset and use it to generate an income and who are therefore more motivated to protect this valuable asset, tenants with little security in their rental properties do not have the same motivation to do so.

This is cyclical and relates to the discussion above at section 2.1.2 concerning the separation of security of tenure from other rights. Unlike those in more secure tenures, PRS tenants are unlikely to feel the need to protect their asset whilst all it entails is an insecure short term right of occupation with other associated rights that are difficult to enforce, but the Government is unlikely to be persuaded to increase tenancy security if tenants themselves are not actively involved in this issue at a political level.

5.3.4- Lack of Funding

In addition to the compartmentalisation of different rights and obligations relevant to and underpinning the performance of the PRS which has led

to piecemeal reforms on specific issues, the lack of political focus on the PRS and the lack of tenant involvement in the political process, another underlying factor which contributes to the current state of the sector is the lack of funding or financial incentives on offer for landlord or investors in the PRS.

At present Government funding in the PRS is all but non-existent. At various times the Government has tried to encourage institutional investment in the sector and has also introduced schemes aimed at doing this, both largely without success. For example Housing Investment Trusts (HITs) were introduced in 1996 to encourage the investments of pension and long term funds in to the PRS.[428] The take up was limited for a variety of reasons, largely based on the slow returns from PRS housing and no new trusts were set up after 2010. Real Estate Investment Trusts (REITs) were introduced in 2005 aimed at encouraging institutional investment in commercial and residential property,[429] but again the take up in residential property has been very limited and commercial properties are the main focus of such funding.[430]

If the Government take the view that only by encouraging institutional investment will the sector improve, then they have failed in this objective. The role of institutional investors is "negligible", and what institutional investment there is, is largely based in central London.[431] The structure of ownership in the PRS remains largely unchanged despite these initiatives and is dominated by small scale individual private landlords.

Existing landlords do not fare any better than those applying for funding to enter the market. They are not eligible for any subsidies to improve rental dwellings, other than those available to all property owners.[432] For example schemes offering free insulation for energy efficiency. However

[428] Finance Act 1996, s.2

[429] Finance Act 2006, part 4

[430] See Chapter 3 above for a fuller discussion of these issues.

[431] Scanlon, K, Whitehead, C and Williams, P, *Taking Stock; Understanding the effects of recent policy measures on the private rented sector and Buy-to-let,* 2016, LSE, London, pg 35

[432] Wallace and Rugg, *Buy to Let Mortgages; Understanding the Factors that Influence Landlords' Mortgage Debt,* 2014 University of York, pg 30

as tenants are responsible for bills in any event, a landlord's incentive to apply for such improvement schemes for their rental properties is limited.

Furthermore the current tax regime can be burdensome for landlords. The tax regime in England was found to be "the least favourable to private landlords" in a comparison of eight countries with advanced economies carried out by Crook and Kemp in 2014.[433] This impacts on the PRS as a whole, as a more neutral tax system tends to reduce PRS costs and increase the size of the sector.[434]

The rental income that a PRS landlord achieves is assessed as part of their overall earnings, affecting their national insurance contributions and their income tax bracket, which is calculated taking this income into account. Landlords may be eligible for some income tax reliefs,[435] and can deduct some allowable revenue expenses, i.e. essential expenses incurred in the day to day running of the business such as letting agents' fees, building insurance, interest on mortgages and secured loans, maintenance costs and bills etc, but the remainder is taxable income. Capital expenses aimed at increasing the property value (e.g. renovations or the capital repayment element of a mortgage or secured loan) cannot be deducted from income tax as an expense, but could be offset against capital gains tax when the property is sold.

For any property that is not a seller's principle home, capital gains tax is payable on sale on any increase in value from the time that the property was purchased, less deductions for those costs incurred in improving the property, which could prove a further financial burden to landlords. In addition any property purchased as a second home or for buy to let purposes is also subject to an additional stamp duty land tax at purchase, set at 3-15% depending on the value.

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[433] Crook, T and Kemp, P, *Private Rental Housing; Comparative Perspectives,* (Edward Elgar Publishing, Cheltenham, 2014), pg 17

[434] Freeman, A and Holmans, A, *Is the UK Different? International Comparisons of Tenure Patterns,* (Council of Mortgage Lenders Research, Cambridge, 1996), pg 58.

[435] Tax relief applicable to landlords would be to claim back expenses incurred in running their business, including offices costs, financial and legal costs and travel costs. This was capped at relief at the basic rate of tax in 2015, with the restrictions being introduced gradually between 2017 and 2021.

The lack of Government funding for the PRS means that the sector is largely funded by private individuals or groups. This leads to a heavy reliance on private loans and mortgages to facilitate purchases, but as the mortgage or loan contract is a private contract between the landlord and the lender, it is not granted with the needs of the PRS and its' tenants in mind.

Buy-to-let mortgages, which are commonly used to finance PRS properties, come with particular risks for the lender, which means that conditions are often attached to those mortgages, which affect the PRS as a whole. One of the risks for buy to let lenders is the fact that the owner will usually be relying on rent payments from the tenant to service the mortgage payments. Normally, when granting secured credit, a lender undertakes extensive checks into the borrower's finances and the affordability of the repayments, but once a buy to let mortgage is granted the lender has no further involvement in the management of the property. They are not involved in the vetting process for perspective tenants and cannot assess their ability to afford rent payments or the likelihood of a default, which could in turn lead the landlord, their borrower, to default on the loan. Another risk relates to the fact that, if there is a default, the sitting tenants have an interest in the property which could impact on the lender's rights as a mortgagee. A tenancy creates an interest in the property and even though the secured lender will usually have a superior claim, the rights of the tenant cannot be ignored. A tenancy granted by a borrower who owns the property subject to a buy to let mortgage is deemed to be authorised by the lender, and they are therefore subject to that tenancy.[436] If the terms of the mortgage were breached and the lender needed to repossess the property, on doing so they would assume the position of the borrower in relation to the tenancy, i.e. become the landlord. They would then be required to issue separate proceedings against the tenant to terminate that tenancy in the same way as any private landlord,[437] which could lead to additional costs and a delay in their ability to sell the property with

[436] Paragraph 3.3 Industry guidance on buy-to-let arrears and possessions, Council of Mortgage Lenders, June 2009.

[437] They would need to use the procedure under s.8 or s.21 of the Housing Act 1988 as discussed above at section 4.4.2 above.

vacant possession and realise their security. Another option would be to sell the property with the sitting tenants, but again this is a potential risk as this could make the property less appealing to purchases looking for a property to live in themselves.

A landlord's ability to pay their mortgages, which also impacts on PRS supply and on existing tenants, can be influenced by market led factors, business led factors and policy changes.[438]

- Market factors that can impact on mortgages include house prices and rental prices as well as tenant demand. The value of property impacts on the amount of mortgage a landlord requires to purchase the property, which dictates the rent they need to achieve to service the mortgage, offset costs and make a profit. However if local demand is low or supply is high, the landlord's ability to achieve the rent they need is affected.
- Business led factors including the way in which the landlord (or their agents) manage the property, manage lettings and collect rents can also impact on whether a mortgage is maintained. If management practices are robust in respect of selecting suitable tenants, achieving realistic rents and collecting those rents efficiently, then risk is minimised. However if landlords are inexperienced or have little contact with their tenants or employ agents who do not manage effectively, the ability to keep the property occupied by suitable tenants who pay their rent on time is prejudiced. Again this could lead to an inability to make mortgage payments, which is concerning to lenders.
- Housing policy also impacts on this as changes to tenancy structure, possession processes, licensing rules, housing benefit or other social benefits could all impact the landlord and their ability to pay their mortgage.

In order to minimise those risks, lenders take a cautious approach. They need to protect their own interest in the property and, although the terms of a buy to let mortgage vary from lender to lender, most will insist that their borrowers only grant assured shorthold tenancies, and usually

[438] Wallace and Rugg, *Buy to Let Mortgages; Understanding the Factors that Influence Landlords' Mortgage Debt,* 2014 University of York, pg 13

insist on a limited fixed term.[439] Whilst there is such a heavy reliance on private funding to service this sector, it is difficult for the Government to intervene effectively to change this.

It is not just a lack of Government funding or financial incentives in the supply and upkeep of PRS properties themselves or the heavy reliance on private finance- which is provided with its own motivations- that impact on the PRS. The lack of sufficient funding for the enforcement of regulations in the PRS and for legal advice and representation for tenants also impacts on how the PRS operates in practice.

Local authorities are the ones with the primary enforcement role in the PRS, but they rarely have the resources to meet their obligations; see section 5.2.3 above. Local authorities are empowered to prosecute landlords for several offences related to the management of their properties. Some of the principle "housing offences" which the local authority prosecute are;

- Illegal eviction- Protection from Eviction Act 1977, s.6.
- Harassment- Protection from Eviction Act 1977, s.6.
- Failure to comply with an improvement notice- Housing Act 2004, s.30.
- Failure to comply with a prohibition order- Housing Act 2004, s.32.
- Licensing offences for houses in multiple occupation, Housing Act 2004, s.72, and management offences for houses in multiple occupation. s.234.
- Offences for breaching an overcrowding notice, Housing Act 2004, s.139.
- Breach of a banning order, Housing and Planning Act 2016, s.21.

However a recent report from the Housing, Communities and Local Government Committee found that 6 out of 10 councils surveyed about their role in enforcing property standards in the PRS had not prosecuted

[439] For example for by to let mortgages of residential premisses, Barclays bank's standard terms and conditions only allow assured shorthold tenancies of between 6 months and 2 years to be granted by the borrower (https://intermediaries.uk.barclays/content/dam/intermediaries-uk-barclays/pdf/lending-criteria/BAR_9914030.pdf), HSBC only allow assured shorthold tenancies and limit the term to a maximum of 3 years (http://www.intermediaries.hsbc.co.uk/criteria/buy-to-let-lending-criteria.html), Royal Bank of Scotland insist that assured shorthold tenancies are used, but have recently announced proposals to increase the maximum term from 12 month to 3 years (https://www.rbs.com/rbs/news/2019/03/natwest-to-lift-restrictions-on-buy-to-let-landlords.html)

a single landlord since 2016, and 80% of local authorities have prosecuted less than five.[440]. A further survey of councils in 2016-17 found that, out of 296 council's surveyed, only 467 prosecutions had been issued despite 105,359 complaints being received.[441] This report also highlighted that local authorities had reduced spending on enforcement by one fifth between 2009-2010 and 2015-2016[442] and concluded that "it is clear that local authorities have fewer resources to enforce standards in the private rented sector than they did in 2010".[443]

The lack of funding for legal advice and representation for tenants also highlights the detrimental impact of a lack of funding in the sector. The availability of legal aid funding for assistance with housing issues was reduced significantly in 2012 under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and since this came in to force in 2013, assistance with housing issues under legal aid has actually reduced by 58%.[444] Now, not only must applicants satisfy strict means tests, several aspects of housing law are out of scope for advice. The main area where this has adversely affected PRS tenants is in relation to disrepair issues[445] (see section 5.2.3).

The limitations of legal aid funding means that tenants wishing to take further action must often do so without benefit of legal advice. As discussed above at section 5.2.3, many tenants would find this an insurmountable barrier. This is particularly so for vulnerable private

[440] Housing, Communities and Local Government, *Private Rented Sector. Fourth Report of Session 2017-2018,* House of Commons, (2018), 440, pg 7.

[441] Housing, Communities and Local Government, *Private Rented Sector. Fourth Report of Session 2017-2018,* House of Commons, (2018), 440, pg 29.

[442] Housing, Communities and Local Government, *Private Rented Sector. Fourth Report of Session 2017-2018,* House of Commons, (2018), 440, pg 31.

[443] Housing, Communities and Local Government, *Private Rented Sector. Fourth Report of Session 2017-2018,* House of Commons, (2018), 440, pg 34.

[444] Fouzder, M, *Housing Legal Aid "Protected" for those most in need, MoJ insists,* (2018), The Law Society Gazette, https://www.lawgazette.co.uk/law/housing-legal-aid-protected-for-those-most-in-need-moj-insists/5066148.article (accessed on 17th August 2018)

[445] Carr, H, Cowan, D, Kirton-Darling, E and Burtonshaw-Gunn, E, *Closing the Gaps; Health and Safety at Home,* Shelter, 2017, pg 11

tenants who, it may be argued, lack the "stamina and confidence"[446] to pursue a legal action themselves.

These two issues highlight how the lack of funding can also have an indirect as well as a direct impact on the PRS, and also demonstrates how lack of funding and the other issues discussed in section 5.3 are interlinked. This situation, where the theoretical protections for tenants cannot be enforced because of funding cuts in local Government and in the provision of free legal advice and representation are examples of policies in the PRS being introduced in a piecemeal fashion, without consideration of the overall picture, and of how the needs of the PRS are not given sufficient priority in policy formation. This also demonstrates how central and local Government decisions, made without any meaningful tenant involvement, can have a real detrimental impact on the PRS.

5.4- Conclusion

The PRS in England is far from problem free. A report from Citizens Advice, looking at the PRS from a consumer point of view, concluded that "overall…on paper tenants have a number of rights that are ostensibly similar to the rights of consumers in other markets. However, tenants' rights are defined less precisely, are more thinly spread over a number of complex pieces of legislation, fall to Local Authorities rather than central regulators or ombudsmen to enforce, and are not, in general, backed up by the hard backstop of a right to refund".[447]

In some respects the theoretical protections are there, enabling tenants to negotiate initial rents, challenge unreasonable rent increases, pursue necessary repairs and challenge retaliatory eviction action issued as a result of them doing so. However in practice these rights as difficult to enforce and to some extent toothless, largely as a result of the limited

[446] Carr, H, Cowan, D, Kirton-Darling, E and Burtonshaw-Gunn, E, *Closing the Gaps; Health and Safety at Home,* Shelter, 2017, pg 14

[447] Citizens Advice Bureau- *Renting Uncovered- Evaluating Consumer Protections in the Private Rented Sector,* 2015

security of tenure afforded to private tenants in their homes. This need to have both rights and security and the mutual interdependence of the two underpins any analysis of the entire fitness for purpose of the PRS system and is discussed in detail above at section 2.1.2.

The discussion above highlights how the system has emerged in its current form as a result of a variety of factors. The lack of political attention and co-ordinated tenant involvement in the political process enables policy makers to discount the PRS as a primary concern. As such it is not prioritised in terms of funding and finances and is not considered as a whole in terms of reform. This means that the Government and policy makers do not take a measured view of the sector and the role it has to play and are unable to clearly define the aims and objectives they want the sector to meet and legislate effectively to meet those aims. This leads to a sector with no clear direction and which is not fit for purpose when measured against the criteria set out in section 1.2.1.1. These criteria were developed using an analysis of housing law based in human rights theory, which stresses the need for enforceable standards for the provision of adequate housing - and is a good basis on which the protections afforded in domestic legislation can be based.

Unless these underlying factors are addressed and attitudes towards the PRS change, then the PRS itself is unlikely to change and the problems cannot be effectively addressed. However over and above all of the other factors, what needs to be properly acknowledged and fully taken in to account with the introduction of regulation or reform, is the "mutual interdependent"[448] nature of security of tenure and other rights. Tenants in the PRS need to be given a reasonable level of security in their homes as well as other associated rights so that the two support and complement one another and ensure that the bundle of rights that make up a tenancy are meaningful and effective.

Having considered in some detail the PRS in England, its historical development, the policy underpinning it and the problem areas, this thesis will now go on to consider how the PRS operates and how these

[448] Rodgers, C, *Fair Rents and the Market; Judicial attitudes to rent control legislation,* [1999] 63 Conveyancer, pg 201-231, pg 227

problem areas manifest in practice, with specific reference to the case study areas identified in Chapter 2.

Chapter 6- English PRS Areas for Development:

Evidence from the Case Study Data

6.1 Introduction

This chapter will look in detail at areas of the PRS that require reform or development if they are to adequately fulfil the human rights requirements for a fully functioning PRS identified in Chapter 1, and thus be considered "fit for purpose" in the sense described in this thesis. It will draw on data from the case studies- introduced at section 2.2.3.1- which look at how PRS law and regulation is applied in practice and how the PRS functions in those areas. This chapter will use data generated by the qualitative aspects of this study (see Chapter 2.3) as well as on data available about the PRS from other studies and sources.

Section 1.2.1.1 set out the criteria against which this thesis will evaluate whether the PRS, in its current form, is fit for purpose. To summarise, the criteria are:

- That the PRS offers a reasonable level of security.
- That the PRS offers affordable accommodation, is a key part of the housing market and is a mainstream housing option.
- That the PRS offers accommodation of a decent standard and condition.

The discussion here therefore groups the issues identified into three common themes based on the above evaluation criteria- security, rent and condition. These aspects of the PRS are discussed in turn below in the context of the data collected from the case study areas identified in Chapter 2.

6.2 Security

The main and overriding issue with the PRS in England, and one which has an impact on the fitness of the sector in so many other spheres, is the in-built insecurity of the principal tenancy type offered in the PRS, the assured shorthold tenancy.

The fact that an assured shorthold tenancy can be terminated by the landlord without the need to prove any grounds for the termination under the so called “no fault eviction process”[449] means that tenants have no long-term security in their homes, regardless of whether they adhere to the tenancy terms. Tenants are always at risk of their agreement being terminated by notice, often for reasons wholly outside of their control - for example a change in their landlord’s financial circumstances which means they need to sell the rental property or seek vacant possession to move into it themselves. With the vast majority of all private lets being assured shorthold tenancies, this means that the insecure tenancy status is endemic in the sector.

Applying the fitness for purpose criteria discussed in section 1.2.1.1, it is arguable that if a tenant can be evicted without cause and for reasons over which they have no control, then their security cannot be deemed reasonable. This corresponds with the human rights theory of housing law which is the theoretical basis for this study, and stresses that security of tenure is a fundamental requirement for the provision of “adequate” housing.[450] This is explored further below, with reference to the data generated from the case study areas used in this study.

This inherent weakness will also adversely impact whether or not the PRS is considered a key part of the housing market and a mainstream housing option. Given the fundamental insecurity of tenancies in the PRS, most prospective tenants will view the PRS as a risky choice for their long-term housing needs, and they will consequently be less likely to enter this housing sector through choice or preference.

6.2.1- Case study data on Security in the PRS

This section highlights what the data from the case study areas tells us about security in the PRS.

[449] See section 4.2.2 above.

[450] See section 2.1.1, above.

Gateshead

The local authority respondent to the questionnaire (respondent GLA1) summed up the importance of tenancy security as follows;

> "A home is everything, isn't it, in so many ways, and we see that in everything we do".

> "Security in your housing situation is absolutely inherent in your ability to cope, manage all the rest of your affairs, get yourself educated, hold down a job, maintain relationships, not fall into debt, maintain your mental health".[451]

Despite stating that the PRS in Gateshead has a "very high churn",[452] respondent GLA1 believes that the current security offered, following the introduction of the Deregulation Act 2015,[453] can work "reasonably well". The 2015 Act introduced specific technical rules which landlords must follow in order to serve a valid notice under s.21 of the Housing Act 1988 and then to rely on that notice to seek a possession order, as well as introducing some protections for tenants against retaliatory evictions initiated by landlords in response to their complaints.[454]

However respondent GLA1 qualified their statement that protections work reasonably well by stating that this is only the case when there are sufficient "support services" to advise tenants about their rights and to help them challenge invalid s.21 notices[455] and where the local authority is acting to address poor behaviour by landlords in upholding their

[451] GLA1 (24/04/2019), pg 5

[452] GLA1 (24/04/2019), pg 6

[453] See Chapter 4, section 4.5 above for further discussion about the Deregulation Act 2015 and the changes that it introduced, particularly in relation to retaliatory eviction.

[454] GLA1 (24/04/2019), pg 4; See Chapter 2.5.1 for a discussion about retaliatory eviction protections.

[455] See Chapter 4, section 4.5.2 above for details of the s.21 process, including the recent reforms.

obligations. These services are particularly needed by those renting at the lower end of the housing market, the primary focus of this study. Local authorities have certain duties and powers to enforce property standards[456] and act against landlord offences, but funding for these services is uncertain and varies significantly in different localities. Respondent GLA1 stated that, if these essential support services are not available, tenants are not in practice able to enforce their rights, and therefore it is arguable that the security they have is not reasonable.[457]

Respondent GLA1 further acknowledged that the existence of a s.21 no fault eviction process "must cause problems for all sorts of households".[458] When the landlord has the right to end a tenancy without having to cite a reason, the tenant has no way of knowing if or when they will exercise this right and when they may face homelessness. In Gateshead the coming to an end of an assured shorthold tenancy is the third most common reason resulting in people presenting as homeless to the council's housing options team,[459] demonstrating the scale of the problem caused by this s.21 process. This impacts on both the households and families facing eviction- especially those on low or fixed income who cannot afford to move regularly- and on the public housing authority itself, which has limited resources to meet housing need in their area.

A report from 2021 showed that in the 2019-2020 financial year 15% of the homeless applications received by the council were made on the basis that a valid s.21 notice had been served against a PRS tenant.[460] In that year the Council deployed internal resources worth more than £2.5 million to managing homelessness services, yet looking ahead to the next financial year, grant funding of only £1.6 million had been

[456] See chapter 4.4.4 for a discussion of the property standards which local authorities have powers to enforce.

[457] GLA1 (24/04/2019), pg 4

[458] GLA1 (24/04/2019), pg 4

[459] GLA1 (24/04/2019), pg 12

[460] https://democracy.gateshead.gov.uk/documents/s29532/Item%204%20-%20Appendix%202%20-%20Homelessness%20Review%20Report%20Final%2030.07.21.pdf, pg 14 [accessed on 12/11/2023]

secured.[461] Any shortfall has to be made up from other Council resources as the homelessness duties are statutory and cannot be avoided.

Respondent GLA1 were not able to comment on average tenancy length in the PRS in Gateshead and this data is not available locally. However the most recent publication from the landlord agency ARLA (The Association of Residential Letting Agents) suggests that nationally, the average tenancy length for an assured shorthold tenancy in the PRS is 20 months.[462] This average tenancy length includes both the initial fixed period, if applicable, and the time that the tenancies were periodic.

The tenant representative who took part in this research (respondent GTEN1) commented that the short term nature of tenancies in the PRS makes it difficult for tenants to settle in to their communities, which is particularly problematic for households with school age children.[463] The inability of those who rely on PRS accommodation to establish a long term home, due to the insecurity of most tenancies in the PRS, can be disruptive to those households and can impact on their wellbeing.[464] The issue is particularly acute for those at the lower end of the PRS market, who tend to have lower, fixed incomes. The landlord representative (respondent GLL1) feels that tenants are "less transient then they were a few years ago",[465] but the data on PRS tenancy length in Gateshead seems to indicate that assured shorthold tenancies in the sector remain short term in nature.

Another issue, linked to security of tenure, which the local authority has experience in dealing with is illegal evictions or attempted illegal evictions in the PRS in the borough.[466] Respondent GLA1 recognised

[461] https://democracy.gateshead.gov.uk/documents/s29532/Item%204%20-%20Appendix%202%20-%20Homelessness%20Review%20Report%20Final%2030.07.21.pdf, pg 49-50 [accessed on 12/11/2023]

[462] Arla Property Mark PRS Report 02/2020- https://www.arla.co.uk/media/1048702/prs-report-february-2020.pdf, accessed 27.7.20

[463] GTEN1 (20/07/2018), pg 3

[464] See Chapter 1.1 above.

[465] GLL1 (06/11/2018), pg 3

[466] See Chapter 4, section 4.4.2 above for further discussion on what constitutes an illegal eviction and the regulations concerning this.

that this is an issue, and although they are confident that the council can support those tenants who come forward for assistance, they recognise that not all tenants will know that they have the right to do so and many will simply accept attempts by their landlords to change the locks or remove them from the property without obtaining a court order.[467] When they do get reports of illegal eviction or attempted illegal eviction, they will do all they can to support the tenant back in to the property and will investigate housing offences, but the ability to prosecute depends on whether the evidence is there to support a case beyond a reasonable doubt, which is a difficult threshold to meet.[468] Data available nationally supports this view that enforcement of illegal eviction legislation is minimal. Recent data suggests that only 2% of all reported illegal evictions result in prosecution action, and only 24 prosecutions were undertaken in the whole of the England in a 3-year period between 2016 and 2019.[469] There is no data available on prosecutions in Gateshead, however data provided to the House of Commons in response to a question on the topic of illegal evictions and landlord harassment indicates that only 1 of those prosecutions took place in the Northumbria police policing area, which includes Gateshead.[470]

The data shows that there is a significant amount of PRS housing in Gateshead housing a significant number of households.[471] The regulatory framework underpinning the PRS and the tenancy structure for PRS tenants undermine any feeling of security and put households in this sector at risk of homelessness. This has an impact on individual tenants whose insecure housing tenure can lead to increased financial loss through moving home more frequently and leaves them unable to establish strong ties to their local community; lower income households,

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[467] GLA1 (24/04/2019), pg 5

[468] GLA1 (24/04/2019), pg 5

[469] Morley, Em, *Only 2% of Illegal Evictions Result in Prosecution Action, Generation Rent Analysis Shows,* Only 2% of illegal evictions result in prosecution, Generation Rent analysis shows (landlordnews.co.uk) (accessed on 6th June 2021)

[470] https://questions-statements.parliament.uk/written-questions/detail/2021-03-08/HL13982 (accessed on 1/10/2023)

[471] See Section 2.2.3.1. This was also discussed with participant GLA1; (24/04/2019), pg 2

who tend to rent at the lower end of the PRS market, are particularly affected. However this also impacts on the communities themselves, where the population is more transient and where housing demand disenfranchises tenants, who are powerless to negotiate over rent.

The tenant representative who participated in this questionnaire, respondent GTEN1, stated that there can be “no control over security [or rent] without proper regulation”[472] and the data presented here appears to support this.

York

For the York case study, the local authority respondent to the questionnaire (respondent YLA1), stated that they would consider the offer of a 12-month assured shorthold tenancy to represent “reasonable security” for tenants in the private sector.

They were unable to comment on the average tenancy length, however as stated above the most recent publication from the landlord agency ARLA (The Association of Residential Letting Agents) suggests that nationally, the average tenancy length for an assured shorthold tenancy in the PRS is 20 months.[473] YLA1 did state that 50% of the tenants in their Yorhome programme have been in their properties for longer than 5 years,[474] significantly longer than this national average, however this is an intensive programme where the local authority works with a small group of landlords to encourage tenancy sustainment, covering 38 private rental units. This is not typical of the private rental sector in York where additional support and work around sustainment is not available and cannot be seen to indicate that PRS tenancies in York generally run for longer than elsewhere.

[472] GTEN1 (20/07/2018)

[473] Arla Property Mark PRS Report 02/2020- https://www.arla.co.uk/media/1048702/prs-report-february-2020.pdf, accessed 27.7.20

[474] YLA1 (03/10/2019), pg 4

As with the data for Gateshead,[475] the local authority respondent, YLA1, whilst stating that there seems to be reasonable security for PRS tenants overall did also raise concerns about the s.21 eviction process and its impact on security of tenure. [476] They stated that "as the section 21 is a no-fault eviction process tenants feel insecure in their tenure"[477] and may avoid reporting disrepair or other defects in rented housing because "they do not want to seem a nuisance".[478] Respondent YLA1 stated that the council assist with housing enforcement, including dealing with retaliatory evictions, unlicensed landlords and poor or defective housing conditions,[479] but if tenants are afraid to report problems then these security safeguards can have limited impact.

Another issue that impacts on security in the PRS, is how proactive the housing authority is at taking action against illegal evictions to protect and promote tenants' rights. A Freedom of Information Act disclosure from York Council indicated that, although the authority has a team which deals with PRS accommodation and receives complaints about illegal eviction, in the past 3 years they have never taken enforcement action against any PRS landlords for illegally evicting their tenants. In that period they received 35 complaints about illegal eviction.[480]

Birmingham

The local authority respondent to the questionnaire for the Birmingham case study area (respondent BILA1), was unable to comment on the average tenancy length, however as stated above the most recent

[475] GLA1 (24/04/2019), pg 4

[476] See Chapter 4, section 4.5.2 above for details of the s.21 process, including the recent reforms.

[477] YLA1 (03/10/2019), pg 3

[478] YLA1 (03/10/2019), pg 3

[479] YLA1 (03/10/2019), pg 3

[480] YFOI (01/01/2021), pg 1

publication from ARLA suggests that nationally, the average tenancy length for an assured shorthold tenancy in the PRS is 20 months.[481]

Reflecting similar opinions gathered from the research data for the Gateshead[482] and York[483] case studies, the local authority respondent, BIA1, did raise concerns about the s.21 eviction process[484] and its impact on security of tenure, stating that there is "anecdotal evidence that tenants with an assured shorthold tenancy are often reluctant to make complaints about disrepair and rent increases for fear of losing their tenancy".[485]

Respondent BILA1 stated that the council has a dedicated team who "actively seek to prevent illegal eviction and harassment"[486] but did not provide any data about complaints received or action taken. A Freedom of Information disclosure from Birmingham Council indicates that, although the authority have received 350 reports of illegal eviction and landlord harassment within the last 3 years, they have only undertaken 1 prosecution in that period, which represents action in 0.3% of all reported cases. The statistics alone cannot tell the full story, and give no insight into (for example) the reasons behind a decision of whether to prosecute or not. Nevertheless, this number is worryingly low and reflects the position in Gateshead and York, as set out above. If the authority with the power to take formal enforcement action against illegal behaviour by private landlords does so as infrequently as this data suggests, the legislation is unlikely to act as a deterrent to landlords or build confidence in tenants about the suitability of the PRS as a secure and stable housing option.

[481] Arla Property Mark PRS Report 02/2020- https://www.arla.co.uk/media/1048702/prs-report-february-2020.pdf, accessed 27.7.20

[482] GLA1 (24/04/2019), pg 4

[483] YLA1 (03/10/2019), pg 3

[484] See Chapter 4, section 4.5.2 above for details of the s.21 process, including the recent reforms.

[485] BILA1 (15/08/2019), pg 3

[486] BILA (15/08/2019), pg 3

Recent research on the PRS by Sheffield Hallam University used the PRS in Birmingham as a case study area and investigated security in the sector as part of that research.[487] This presented mixed views from tenants in the PRS in Birmingham; some felt secure in their homes or their ability to find another private tenancy should they need to move, "despite the absence of legally protected security",[488] but others felt that their accommodation was "temporary" and did not feel like a "real home".[489] Although this research focused on activity by social letting agencies operating in the private sector rather than the broader commercial private rented sector market and cannot be seen as indicative of the position in the private sector as a whole, this does mirror the findings from Gateshead and York in the current research project, and confirmed fears among PRS tenants relating to their tenancy security.

6.2.2- Evaluation of the Case Study Data on Security in the PRS

The data from our case study areas highlights the all-pervading impact that this inherent insecurity has on the PRS.[490] This also further demonstrates where the PRS falls short of the fitness for purpose criteria used in this thesis to interrogate the adequacy or otherwise of housing provision in the PRS. It also illustrates the extent to which it falls short of the standards expected if it is to meet those mandated by the UN ICESCR, and which would be expected if we adopt a human rights theory of housing.

The in-built insecurity of the tenancy structure itself also creates a barrier to tenant engagement in the PRS and disincentivises tenants from

[487] Mullins, D, Sacranie, H and Pattison, B (2017), *Let to Birmingham: 2016 Case Study Report,* Sheffield Hallam University

[488] Mullins, D, Sacranie, H and Pattison, B (2017), *Let to Birmingham: 2016 Case Study Report,* Sheffield Hallam University, pg 37

[489] Mullins, D, Sacranie, H and Pattison, B (2017), *Let to Birmingham: 2016 Case Study Report,* Sheffield Hallam University, pg 37

[490] See section 6.2 above

enforcing their rights against their landlords.[491] This in turn leads to a high turnover in the PRS,[492] with the average tenancy length being relatively short- approximately 20 months-[493] and movement between properties common.

Such flexibility and mobility within PRS accommodation may be suitable for some types of tenant, such as students or mobile workers seeking short term lets with the ability to move around frequently, but as our case studies show this is unsuitable for those relying on the PRS to meet their longer term housing needs, including households with dependent children. These groups, who may have ties to a particular location due to education, work or support and/or those who wish to establish a stable, longer-term home, are unable to do so due to the lack of security offered by a tenancy in the PRS. The PRS fails to offer tenants the security which would enable them to establish a longer-term home, and therefore it is arguable that the security offered is not reasonable as it fails to meet these needs nor can this being deemed as offering adequate housing, if we use the human rights theory criteria to evaluate the PRS.[494]

In addition the inherent insecurity in the PRS also affects suitability in so far as it imposes a cost burden and impact on wellbeing caused by the need to move frequently. Our questionnaire participants raised the fact that this creates uncertainty and causes significant problems for households relying on the PRS to meet their accommodation needs.[495] A 2021 report by Harris and McKee also highlighted links between the wellbeing of PRS tenants and their accommodation and tenancy status and this is supported by the data here.[496] Tenants renting at the lower end of the PRS market, which is the primary focus of this study, who

[491] See section 6.2 above

[492] See action 6.2 above

[493] Arla Property Mark PRS report 02/20- https://www.arla.co.uk/media/1048702/prs-report-february-2020.pdf, accessed 27.7.2020

[494] See section 2.1.1

[495] See action 6.2 above

[496] See section 1.3, pg 46

tend to have lower incomes and less resources will be particularly affected by this.

As we have seen, the limited security also impacts on tenants' ability to enforce their other rights, including challenging rent increases and taking action against their landlords for failure to carry out repairs which they are liable for. There is a lack of incentive to challenge such behaviour. With little scope for long term residence in the property due to the insecure tenancy structure, tenants are often not invested enough to enter into difficult or lengthy actions against their landlords, so issues go unaddressed. These issues are discussed further in section 6.3 and 6.4, below.

In addition to the lack of incentive for tenants to engage and to argue for change there is sometimes even a fear of doing so- as tenants are aware that this could lead to the landlord serving notice, the first stage in seeking to evict the tenant.[497] These findings further support the theory of the mutual interdependence of security and tenancy rights, as discussed at section 2.1.2, above. Although some of the participants in our questionnaire research felt that protections introduced in the Deregulation Act 2015 worked "reasonably well" to combat tenants fears of facing eviction for pursuing their rights,[498] they conceded that this only applied where there was sufficient support for tenants to understand and enforce their rights in the correct way and sufficient resources within the local authority to take enforcement action against landlords for the breaches. Concerns were also raised about the fact that the protections apply only in very limited circumstances, and are not often likely to be engaged.[499] Our research has shown that such support and resourcing at a local authority level is inconsistent and unreliable and cannot be considered sufficient to address these concerns.

Where a tenant feels unable to challenge landlord behaviour or enforce their legal or contractual rights due to the insecure tenancy structure in the PRS, then this cannot be seen to offer a reasonable level of security,

[497] See section 6.2, above

[498] See section 6.2 above

[499] See section 4.5.1 which sets out in what circumstances these protections apply.

one of the criteria used in this thesis to assess fitness for purpose based on the human rights theory of housing law- see section 1.2.1.1, above. Nor can the PRS be considered a key part of the housing market offering a mainstream housing option when these problems are well established and endemic in the tenancy structure.

6.2.3- Security- Conclusions

The above issues indicate that, due to the security offered under an assured shorthold tenancy, the default tenancy type in the PRS, the PRS is not fit for purpose. It leaves a large proportion of households in the UK vulnerable to eviction on a no-fault basis, imposes unnecessary barriers for households seeking a stable rented home who are unable, due to this in-built insecurity, to establish this in the PRS and impacts on other aspects of tenants' rights as well as their wellbeing and social needs. This does not offer "adequate" housing provision when evaluated using the human rights theory of housing.

The security offered needs urgent reform. This is especially important as the PRS plays such a prominent role in housing the population in England, with roughly 18.7% of all households renting in the private sector.[500] For many there is no option but to move in to PRS accommodation and they live in PRS accommodation not out of choice but due to necessity.[501]

We can see from other jurisdictions that offering longer term tenancies in the private sector works; this is discussed further in Chapters 7 and 8. The regulatory framework can be framed in such a way that ensures that private tenancies are seen a real long term housing option. What is evident from research in to the PRS in England is that many look at the PRS as a way of meeting immediate need, but with a view to seeking an alternative tenancy in the social housing sector, for example from a housing association or housing trust, or, if possible, ownership, in the

[500] English Housing Survey data on tenure trends and cross tenure analysis- Trends in Tenure; FT1101_Trends_in_tenure.ods (live.com), accessed on 27/2/2022

[501] Campbell Robb, former CEO of housing and homelessness charity Shelter in BBC, *More Private than social tenants in England,* (2014) http://bbc.co.uk/news/business-20157841

longer term.[502] Few households plan to rent in PRS on an ongoing basis and this is due in large part to the inability of that sector to meet their need for stability. This needs to be addressed, and the sector made more attractive as a choice for tenants, to make the PRS fit for purpose.

There have recently been legislative proposals to reform or restructure tenure with in the PRS. The Renting Homes Bill 2023 is, at the time of writing, at committee stage in the House of Commons, and the ultimate outcome of the proposed legislation is unclear.[503] Although the proposals were limited, it is evident that introducing such reform would have a positive impact on the PRS. These proposals are discussed further at section 9.3.3.

Allowing tenants greater security and the knowledge that they could not be evicted unless clearly defined grounds were proven to the satisfaction of an independent judge would enable people to see PRS property as a longer-term option. It would remove the uncertainty and avoid unnecessary moving costs brought about by an unanticipated need to move from one PRS accommodation to another. Tenants would be able to invest more in their rented homes, challenge unlawful or unreasonable landlord behaviour without fear of reprisals- which would further help to improve standards in the PRS-, and become more socially engaged in their local communities, knowing that they could remain there for an extended period if they chose to do so.

This type of change is also likely to stimulate greater tenant involvement in the PRS through increased tenants' rights, which could be enforced via tenants' associations and groups. We can see from other jurisdictions that these could even be adopted into the legal framework of tenancy law and regulation, to give tenants a formal voice in the governance of the sector.[504] More coherent action from tenants will inevitably drive positive reform in the PRS, giving it more political focus. It will improve attitudes towards the PRS as well as strengthening rights.

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[502] Campbell Robb, former CEO of housing and homelessness charity Shelter in BBC, *More Private than social tenants in England,* (2014) http://bbc.co.uk/news/business-20157841; Morgan, J, *Aspects of Housing Law* (Routledge 2007) pg 94

[503] https://bills.parliament.uk/bills/3462/stages/18007 [accessed 12/1/2023]

[504] See Section 7.2.2, above

One of the primary purposes of the PRS is to offer suitable homes and the PRS can only benefit from greater involvement by the service users. This would help to ensure that the sector is shaped around the needs of the tenants who access it, allowing it to become a mainstream housing option.

The best way to approach reform of this nature, looking at the security offered by the PRS and the lack of tenant engagement in the sector, is as part of a holistic review and reconsideration of PRS law and regulation rather than through piecemeal reform addressing only one aspect of the sector as has previously been the case.[505] The piecemeal nature of reforms to date has contributed to the way the sector operates now, with little cohesion between different regulations and different aspects of the law.[506] If the objective of reform is to ensure that the sector is fit for purpose, measured against the criteria developed using the human rights theory of housing as a starting point, set out in 1.2.1.1 above and summarised at Section 6.1, then action to address the issues identified with security in the PRS, needs to be considered alongside the law on rent setting and rent increases, tenancy fees, finance, property condition and landlords' repairing obligations. True security can only be obtained where tenants' have sufficient rights and the confidence to enforce those rights. Only then can clear regulation be implemented.

There is some concern that reform of this nature will adversely impact on landlords or on those tenants who prize, and indeed rely on, the mobility and flexibility of the current tenancy structure.[507] However, these concerns can be adequately addressed by the nature of any reforming legislation. One concern is that, should more rights be afforded to tenants and the ability of a landlord to regain possession restricted to situations where clearly defined grounds can be proven, it will deter some landlords from entering the PRS or will cause some of those within

[505] See section 5.3.1, above

[506] See section 5.3.1, above

[507] Monk, S and Whitehead, C (Ed), *Making Housing More Affordable- The Role of Intermediate Tenures,* (Wiley Blackwell 2010) 269

it to leave, reducing its overall capacity.[508] However, this in itself could lead to positive changes.

One of the issues with the PRS in England is that it has a high proportion of small scale, amateur landlords, those with little actual knowledge of housing law and regulation but who inherit or invest in rental property for financial reasons. These landlords may struggle to fulfil their legal obligations because of lack of knowledge or other commitments outside of management of their rental property. Many of these landlord operate in the lower end of the PRS, the primary focus of this study. When the provision of someone's home through a PRS property is not managed as a professional concern, this contributes to the amateurish[509] and short-term nature of the PRS. Should the law change to make renting out a property to a private tenant a more considered action which longer term consequences and planning necessary from the outset, the likely impact of this is to attract landlords with better tenancy management skills and a more long-term attitude to the sector, including business investors. This will have a positive impact on the PRS which will become more professional in nature as a result, enabling it to offer a reasonable level of security, decent and affordable accommodation and to form a key part of the housing market.

Protections for landlords can be built into any reforming legislation. The grounds on which they can seek possession can be more clearly defined and processes expediated against those tenants who breach their tenancy terms. This would mean that landlord would not be vulnerable to longer term tenants who simply fail to pay rent, for example, but would know exactly how and in what circumstances they would be entitled to recover possession of their homes, which would address the concerns about the difficulty in recovering possession should reform be carried out. This is the approach taken in other jurisdictions, see Chapters 7 and 8 and the balance works well. The further implications of any reform proposals will be discussed in greater detail in Chapter 9.

[508] Monk, S and Whitehead, C (Ed), *Making Housing More Affordable- The Role of Intermediate Tenures,* (Wiley Blackwell 2010) 269

[509] Cowan, Housing Law and Policy, 2011, Cambridge University Press, pg 54

For those tenants who wish to have flexibility, mobility and speedy access to the PRS where required, a key indicator that the sector is fit for purpose, reforms can allow for termination of a PRS tenancy by a tenant on notice, in the same way as it does now under the assured shorthold tenancy regime for tenants outside of their contractual fixed term. The notice period needs to be sufficient to protect the landlord's interests and give them time to seek a replacement tenant, but not so long as to cause hardship for the tenant wishing to move quickly.

Secure tenancies in the social sector operate on just such a security structure, and work well as a way of meeting tenants' needs. Tenants have periodic tenancies from the beginning and can terminate whenever they choose, by giving notice to quit; a written notice giving the landlord at least 28 days' notice of the tenant's intent to terminate.[510] Landlords cannot end the tenancy for no reason, but there is a comprehensive list of grounds, set out in statute, which they can utilise as the basis for terminating a tenancy.[511]

The grounds are set out in statute and are available to the tenant from the outset, so they should be aware of what is expected of them during their tenancy. Under this tenancy structure, tenants are not tied into a fixed tenancy term and can move as needed, and both parties are fully aware of their obligations and the possible consequences of breach. There is nothing to suggest that similar tenancies cannot operate effectively in the PRS, with some additional grounds for possession to reflect the fact that such tenancies are privately financed and that there may be some circumstances where the landlord needs to end the tenancy for their own personal reasons.

This is discussed further below in Chapters 7 and 8, where regulation is other jurisdictions is considered. Reform proposals for England and their possible consequences will be discussed in more detail in Chapter 9.

[510] Protection from Eviction Act 1977, s.5

[511] Housing Act 1985, Schedule 2 and Schedule 2A

6.3 Rent

The PRS cannot be seen as fit for purpose when measured against the criteria set out above,[512] if it does not offer accordable accommodation which tenants can afford to access and, once secured, to maintain. If we consider housing from a human rights perspective, as this study seeks to do, it is also a requirement that accommodation to be both affordable and accessible (including financially accessible) in order for it to be considered "adequate". What makes accommodation or housing "adequate", is set out in the UN International Covenant on Economic, Social and Cultural Rights this is discussed in section 2.1.1, above.

Although all linked to the affordability of accommodation in the PRS overall, there are several distinct issues with rent and affordability in the PRS which the data here has highlighted.

One issue is the actual cost of renting at the outset of the tenancy, including the upfront costs associated with renting a PRS property such as fees and deposits, as well as the initial rent charged. This is an access issue; if tenants cannot afford to access the sector because the costs involved are prohibitive then it can be argued that the sector is not fit for purpose.

Another issue around affordability relates to the limited assistance with housing costs available to PRS tenants who do enter the sector. Those tenants who have to rely on assistance to manage their rents may well find their accommodation unaffordable where rent levels are significantly higher than the assistance they can claim. This tends to impact tenants at the lower end of the PRS in particular, as they are more likely to be seeking low rent, affordable accommodation. This could present a barrier to the PRS at the point of access or impact on a tenant's ability to maintain their PRS accommodation if they have a change of circumstances during their tenancy term and no longer have the ability to afford their rent. The human rights theory of housing requires a household to be able to afford both their accommodation and their other

[512] See Section 6.1, above.

basic needs before it considers the housing they have to be "adequate".[513]

A further issue with affordability of accommodation in the PRS relates to rent increases during the term of an ongoing tenancy; the lack of strong regulation on this issue can put PRS tenants at risk of their accommodation becoming unaffordable and unsustainable during the tenancy term.

These issues are discussed in the analysis below.

Further to those specific issues around affordability, responses from all of our case study areas raised the more general issue that, as there is no central control over PRS rents, and very little control over rent increases, there is an unreasonable imbalance of power in the landlord and tenant relationship. This impacts on the fitness for purpose of the sector for purpose as it means that PRS accommodation is not affordable for all households, which can lead to it being inaccessible in practice.

This case study data on rent in the PRS is presented below.

6.3.1- Case Study Data on Rent

This section highlights what the data from the case study areas highlighted about rent in the PRS.

Gateshead

Respondent GLA1 recognises that "there is so much complexity" involved in housing costs, that it can be very difficult for tenants to access suitable PRS accommodation to begin with.[514] Different landlords require different upfront costs, which can create barriers to the sector if tenants cannot meet these demands.

[513] See section 2.1.1
[514] GLA1 (24/04/2019), pg 3

Examples of upfront costs include;

- Cash deposits- some landlords require this before they will give up possession, others may agree to a deposit being paid by instalments within a set term. This is at the landlord's discretion as it is a contractual agreement between the landlord and tenant.
- Rent in advance- this can cover one or two months, rent for the whole tenancy term, first and last month or any other variation, as there is no regulation governing this. Again this is a contractual term.
- Insistence on a suitable guarantor- although not a cost as such as no money is required, some landlords will refuse to let premises unless the tenant is able to secure a guarantor who will sign an agreement to cover the costs in the event of default. Most landlords require the guarantor to provide details of their income and assets to verify their suitability to act in this role. There is nothing in the regulations preventing a landlord from requiring a guarantor.

Although the landlord representative, respondent GLL1, was of the opinion that landlords would waive these fees if this was the only way to get their property let,[515] the tenant representative, respondent GTEN1, agreed with the local authority, that upfront costs represent an insurmountable barrier to many tenants.[516]

Respondent GLA1 estimates moving costs to be upwards of £1000.00,[517] whereas the tenant representative, respondent GTEN1, put the average costs at closer to £2000.00, based on their experience of working with tenants in the area.[518] Both agreed that this was a significant barrier to access. They both identified these costs to include rent in advance and deposits as set out above, as well as moving costs plus incidental expenses, such as sorting out waste removal or decoration in their new property. GTEN1 further stated that, due to the short-term nature of tenancies in the PRS and the need to move more

[515] GLL1 (06/11/2018), pg 1

[516] GTEN1 (20/07/2018), pg 1

[517] GLA1 (24/04/2019), pg 6

[518] GTEN1 (20/07/2018), pg 4

frequently, these moving costs will have a particularly acute impact on households on a low or benefit income.[519]

In addition to the costs of securing and moving to PRS accommodation, the rent on this accommodation itself was recognised as another potential barrier, which could exclude some tenants. Whilst the landlord representative, GLL1, felt that many landlords would be prepared to negotiate and would not raise rents for good tenants,[520] the local authority representative GLA1 felt that there was "no way" for tenants to negotiate the amount of rent, given their insecure status,[521] and the tenant representative GTEN1 agreed that tenants have "no leverage to negotiate rent".[522] This, GTEN1 argued, is a result of high housing demand in the PRS, increased further by the lack of social housing which means that "all control is in the hands of the landlord".[523] They are able to set the rent they want and, as there is competition among tenants for PRS housing, they can afford to decline tenants who try to get this reduced. Tenants with a low or fixed income, seeking accommodation at the lower end of the PRS market, will have limited options when seeking a property.

Average rents in Gateshead are £475.00 per calendar month for a one-bedroom property, £550.00 for a two bedroom and £610.00 for a three bedroom.[524] This is significantly cheaper than the national average of £725.00 for a one bedroom; £800.00 for a two bedroom and £900.00 for a three bedroom.[525]

[519] GTEN1 (20/07/2018), pg 1

[520] GLL1 (06/11/2018), pg 4

[521] GLA1 (24/04/2019), pg 8

[522] GTEN1 (20/07/2018), pg 5

[523] GTEN1 (20/07/2018), pg 6

[524] Private rental market summary statistics in England - Office for National Statistics (ons.gov.uk) (accessed on 6th August 2023)

[525] Private rental market summary statistics in England - Office for National Statistics (ons.gov.uk) (accessed 6th August 2023)

Section 4.4.3 above explains how housing costs assistance levels are calculated in each area. Under these regulations, those who claim housing assistance with their rent in Gateshead would be entitled to up to £304.16 per month if they are restricted to the shared room rate (including claimants aged under 35, unless an exemption applies), £423.84 per month if they are restricted to the one bedroom rate (including single claimants aged 35 and over and childless couples, unless an exemption applies), £473.72 per month for those restricted to the two bedroom rate and £548.51 per month for those restricted to the three bedroom rate.[526] This could lead to significant rent shortfalls for households relying on housing costs assistance as discussed further at section 6.3.2 below.

It is no longer possible to accurately assess the number of tenants in receipt of housing assistance to cover or partially cover their rent. Although this data was available monthly when housing costs assistance were paid in all cases by the local authority through housing benefit and local housing allowance, this data has not been published since May 2018 as benefit claimants are slowly migrated across to Universal Credit, and they now claim housing costs monthly as one element of that claim.[527]

The most recent data indicates that there are 17,118 households claiming Universal Credit in Gateshead,[528] and national data estimates that 62% of all Universal Credit claimants receive assistance with housing costs. Based on these figures, it seems that the number of local claimants seeking assistance with housing costs is likely to be significant, but there is no longer data available on the number of people in the area who remain on legacy benefits and claim housing benefit or local housing allowance.

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[526] https://lha-direct.voa.gov.uk/Secure/SearchResults.aspx?LocalAuthorityId=53&LHACategory=999&Month=8&Year=2023&SearchPageParameters=true (accessed on 6th August 2023)

[527] https://www.gov.uk/government/statistics/housing-benefit-caseload-statistics (accessed 23rd November 2020)

[528] Stat-Xplore - Table View (dwp.gov.uk) (accessed on 6th August 2023)

York

Respondent YLA1 was unable to provide an estimate for the average costs of moving in York, but was able to list several potential expenses relating to relocation following eviction, which supports the view expressed by Gateshead local authority (GLA1), that this area is complex.[529] Potential costs identified by YLA1 include deposits, rent in advance, clearing former arrears, clearing court costs following an eviction, moving expenses, storage expenses and paying for interim accommodation to fill any gaps.[530]

They recognise that these expenses could be a barrier.[531] YLA1 does state that tenants who seek housing through Yorhomes do not pay upfront fees,[532] but as this is a small programme managing a fraction of the PRS property in York, this is unlikely to mitigate the impact of such barriers. In an area such as York where demand for rented accommodation often outstrips supply, tenants will have little bargaining power to try and negotiate reductions in these expenses. Tenants seeking accommodation at the lower end of the PRS will not be able to rely on the same protections as those seeking accommodation through this scheme.

YLA1 stated that assistance with bonds and rent in advance is available via their housing options team,[533] but were unable to provide details of the assistance available or eligibility criteria. Local authorities have a wide discretion as to whether they offer such financial assistance and, if they do, in what circumstances. There is no duty to provide such assistance and therefore support varies hugely from region to region.

Another potential financial barrier for tenants is rent. YLA1 stated that tenants have “limited ability” to negotiate over the rent levels at the start of a tenancy or over rent increases during their tenancy term and stated

[529] GLA1 (24/04/2019), pg 3

[530] YLA1 (03/10/2019), pg 4

[531] YLA1 (03/10/2019), pg 2

[532] YLA1 (03/10/2019), pg 5

[533] YLA1 (03/10/2019), pg 5

that “if the level of rent is unaffordable the landlord will most likely bypass them and offer it to a tenant who can afford the rent”.[534] The housing conditions in York, where there is a high demand for rented accommodation, exacerbate this issue, especially for tenants seeking lower cost accommodation.

This mirrors the position in Gateshead, where both the local authority and tenant representative respondents agreed that the tenant had “no way” [535] of negotiating rent and had “no leverage” to do so.[536] This problem is likely to be compounded by the fact that, in YLA1’s opinion, there is “sufficient private rented housing” in the York area; if supply and demand is in balance, or indeed if demand outweighs supply, then there is no pressure on landlords to offer rents at advantageous prices.

Average rents in York are higher than those in Gateshead and are closer to the national average rents (see above). They are £750.00 per calendar month for a one-bedroom property, £850.00 for a two bedroom and £975.00 for a three bedroom.[537]

As explained above, as a result of the introduction of Universal Credit and the delivery of housing costs assistance through that benefit, it is no longer possible to accurately assess the number of tenants in receipt of housing assistance.[538] However the most recent data indicates that there are 8,823 Universal Credit claimants in York[539], and national data estimates that 62% of all Universal Credit claimants receive assistance with housing costs, so the number of local claimants is likely to be in the region of 5,470. There is no longer data available on the number of people in the area who remain on legacy benefits and claim housing benefit or local housing allowance.

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[534] YLA1 (03/10/2019), pg 6

[535] GLA1 (24/04/2019), pg 8

[536] GTEN1 (20/07/2018), pg 5

[537] Private rental market summary statistics in England - Office for National Statistics (ons.gov.uk) (accessed on 6th August 2023)

[538] https://www.gov.uk/government/statistics/housing-benefit-caseload-statistics (accessed 23rd November 2020)

[539] Stat-Xplore - Table View (dwp.gov.uk) (accessed on 6th August 2023)

Those who do claim housing assistance would be entitled to up to £325 per month if they are restricted to the shared room rate (including claimants aged under 35, unless an exemption applies), £543.49 per month if they are restricted to the one bedroom rate (including single claimants aged 35 and over and childless couples, unless an exemption applies), £648.22 per month for those restricted to the two bedroom rate and £723.02 per month for those restricted to the three bedroom rate.[540] The impact of the potential rent shortfalls is discussed below in section 6.3.2.

Given the average rents in York, single person accommodation is likely to be unaffordable to someone reliant on benefit and restricted to the shared room rate as a one-bedroom property here would costs them, on average, £750.00 per month. They would get help of up to £325.00 per month and would have a shortfall of £425.00 to cover. Claimants entitled to the one-bedroom rate would face an average shortfall on a one-bedroom property of £206.51 per month. Even those entitled to the higher rates of benefit would have significant rent shortfalls if they relied solely on costs assistance; a benefit claimant in need of a two-bedroom property and claiming the two-bedroom rate of benefit would face an average shortfall of £201.78 per month. A claimant claiming the three-bed rate of benefit would face an average shortfall of £251.98 per month on a three-bedroom property.

Birmingham

As in Gateshead and York, the local authority respondent in Birmingham, BILA1, was unable to provide an estimate for the average costs of moving in to PRS accommodation in Birmingham but did identify potential costs associated with doing so e.g. deposits and rent in advance.[541] They recognised that these costs could form a barrier to

[540] https://lha-direct.voa.gov.uk/Secure/SearchResults.aspx?LocalAuthorityId=53&LHACategory=999&Month=8&Year=2023&SearchPageParameters=true (accessed on 6th August 2023)

[541] BILA1 (15/08/2019), pg 2

renting privately in the area, as can the fact that some landlords will not rent to tenants in receipt of benefit.[542]

These views reflect those expressed by the respondents in Gateshead and York.[543] Respondents in all areas agree that potential costs associated with renting in the PRS are varied and complex and can prevent tenants accessing suitable accommodation.

As in the other case study areas, BILA1 stated that tenants have "very little" ability to negotiate over rent either at the outset of the tenancy or during the term, as "housing shortage means landlords can let properties quickly".[544] The position was the same in both Gateshead[545] and York.[546]

BILA1 stated that "more security would give tenants the opportunity to effectively challenge rent increases",[547] providing direct evidence of the impact of the weakness in the legal and regulatory framework of the sector and tenants' rights in practice.

Average rents in Birmingham are £700.00 per calendar month for a one-bedroom property, £800.00 for a two bedroom and £880.00 for a three bedroom.[548] These rents are similar to those from the York case study area and close the national average; they are higher than the average rents in Gateshead.

As stated in the previous sections above concerning Gateshead and York, it is no longer possible to accurately assess the number of tenants in receipt of housing assistance. Data on housing benefit claimants is available up to May 2018, but this data is no longer published as

[542] BILA1 (15/08/2019), pg 2

[543] GLA1 (24/04/2019), pg 3; YLA1 (03/10/2019), pg 4

[544] BILA (15/08/2019, Pg 6

[545] GLA1 (24/04/2019), pg 8

[546] YLA1 (03/10/2019), pg 6

[547] BILA1 (15/08/2019), pg 6

[548] Private rental market summary statistics in England - Office for National Statistics (ons.gov.uk) (accessed on 6th August 2023)

Universal Credit now covers housing costs for most claimants.[549] The most recent data indicates that there are 128,253 Universal Credit claimants in Birmingham,[550] and national data estimates that 62% of all Universal Credit claimants receive assistance with housing costs, so the number of local claimants is likely to be significant at approximately 79,516, but there is no longer data available on the number of people in the area who remain on legacy benefits and claim housing benefit or local housing allowance.

Those who do claim housing assistance would be entitled to up to £290.33 per month if they are restricted to the shared room rate (including claimants aged under 35, unless an exemption applies), £523.55 per month if they are restricted to the one bedroom rate (including single claimants aged 35 and over and childless couples, unless an exemption applies), £623.17 per month for those restricted to the two bedroom rate and £673.14 per month for those restricted to the three bedroom rate.[551]

Based on the average rents set out above, tenants restricted to the shared room rate of housing costs assistance would struggle to manage a one-bedroom property at the average rent of £700.00, if they were reliant solely on this assistance, as there would be a rent shortfall of £409.67 per month. There would also be a significant shortfall of £176.45 on the one-bedroom rate, a £176.83 shortfall for a two-bedroom property for those entitled to the two-room rate and a £206.86 shortfall for a three bedroom property for those entitled to the three bedroom rate. This indicates that the rental market in this area may be unaffordable for the lowest income households, causing a problem for those in this bracket in need of suitable housing.

[549] https://www.gov.uk/government/statistics/housing-benefit-caseload-statistics (accessed 23rd November 2020)

[550] Stat-Xplore - Table View (dwp.gov.uk) (accessed on 6th August 2023)

[551] https://lha-direct.voa.gov.uk/Secure/SearchResults.aspx?LocalAuthorityId=53&LHACategory=999&Month=8&Year=2023&SearchPageParameters=true (accessed on 6th August 2023)

6.3.2- Evaluation of the Data on Rent in the PRS

The data above has helped to highlight some of the affordability issues in the PRS and how these affect the fitness of the sector in practice and its ability to offer “adequate” housing, as defined by the standards established in the UN International Covenant for Economic, Social and Cultural Rights, which includes affordability as one of its assessment criteria, as set out in section 2.1.1.

Affordability issues at the point of access to the PRS can form a barrier to those households who want or need to access PRS accommodation, particularly those operating at the lower end of the PRS market. This means that it does not represent an affordable or accessible housing option and cannot be seen as a mainstream housing option.

The Tenant Fees Act 2019 (see section 4.4.3) introduced some restrictions to the fees landlords can charge at the outset of a PRS tenancy, but costs barriers still exist. This includes informal costs such as the cost of moving and decorating as well as the need to pay money upfront or find a suitable guarantor, something which is beyond the means of many households.

Initial rents can cause another access barrier, affecting the fitness of the PRS. The Government have been very reluctant to reintroduce any form of rent control in the PRS, preferring to allow the market to set the rent levels itself. However in practice this means that landlords have the power to set rents at whatever level they choose and many tenants will be priced out of the rental market.

The informal controls imposed via the benefit system and local housing allowance rates only have the effect of limiting the choice further for those tenants on low incomes who will rely on benefits assistance to meet some or all of their rent costs. Our data shows that in our case study areas local housing allowance is often not sufficient to cover median rents, and the level of the shortfall varies significantly between areas and household type.

The way that housing costs assistance is calculated is especially problematic, given the different shortfalls in rent charged - as highlighted above in the case study data, and summarised below.

The amount of housing assistance a tenant in the PRS is entitled to is based on Local Housing Allowance (LHA) rates. LHA rates are calculated using an index approach. The Valuation Office Agency collects data on current rents being paid in a broad market rental area (usually approximate to a local authority area) for each type of dwelling (based on numbers of bedrooms). LHA rates are then set at 30% of the rents being charged in that area. This means that housing assistance is set at the lower end of the rents charged in the local area for any given period.

This is arbitrary in that it differs from one area to another, depending on market conditions in the PRS locally. There are shortfalls in the assistance available and average rents charged in all areas, though these appear less prominent in the lower end of the PRS (e.g. Gateshead) and more pronounced in areas with higher rents like York. This could again impact on tenant choice as there will be areas they simply cannot afford to live in, but where they may have ties to family, work or education.

In addition the system is subject to a delay as it is reviewed annually looking at rents for the previous year and is therefore not adaptable to changes in rental rates as they occur. This is particularly problematic in times of crisis. Recent figures suggest that in 2023 rents have risen at the fastest rate in 9 years, rising by 12% from January 2023 to August 2023,[552] whilst LHA rates have remained static because of the way they are reviewed retrospectively.

The issues around LHA rates are not only an access barrier for tenants seeking a new PRS tenancy, but could also raise affordability issues for existing tenants who experience a change of circumstances and find themselves having to rely on housing costs assistance which may not cover a rent they are already committed to.

The tables below demonstrate the potential affordability issues for those tenants reliant solely on housing costs assistance.

[552] BBC News Online, "Rental Prices Rise at Fastest Rate for Nine Years, Figures Show", https://www.bbc.co.uk/news/business-66824019 (accessed 29/10/2023)

Claimants entitled to the shared room rate of benefit

Area	Benefit rate	Average rent- 1 bed	Shortfall
Gateshead	£304.14	£475.00	£170.86
York	£325.00	£750.00	£425.00
Birmingham	£290.33	£700.00	£409.67

The rent shortfall for these tenants, if they rent a one bed property at the average rent in their area, is very high. Gateshead, where average rents are lower than in Birmingham or York, has a smaller shortfall, but this is still significant. If tenants are entitled to the full local housing allowance rate to begin with, they are likely to be solely reliant on benefit income, giving them a low fixed income from which they must try and meet this shortfall. This will be unaffordable for many. Under the human rights theory of housing law which is discussed at section 2.1.1 and underpins this analysis, accommodation is not deemed “adequate” unless a tenant can both afford the rent and to meet their other basic needs. For those tenants relying on housing costs assistance, they will be required to make up a substantial portion of their rent from the money meant to be used for other living expenses because the housing costs assistance falls so short, leading to the accommodation not being affordable, and therefore not being adequate, in the true sense. If the PRS does not offer affordable accommodation and cost imposes a barrier, the PRS cannot be seen to the fit for purpose, as measured against the criteria set out in section 1.2.1.1, above.

This is, to some extent, a policy decision by the Government, who introduced the shared room rate to encourage tenants reliant on benefit income to share accommodation to reduce costs. However this policy objective does not reflect the reality of the housing market. There are limited shared accommodation units in many local authority areas and personal circumstances do not allow many individuals to share accommodation with others.

Claimants entitled to the one-bedroom rate of benefit

Area	Benefit rate	Average rent- 1 bed	Shortfall
Gateshead	£423.84	£475.00	£51.16
York	£543.49	£750.00	£206.51
Birmingham	£523.55	£700.00	£176.45

If the tenant is reliant on housing costs assistance, but at the one-bedroom rate, then, as the table above indicates, the difference in the rent shortfall amounts is highly variable in our three case study areas. This highlights the challenges some renters face when seeking affordable accommodation.

Although those opposed to any form of rent control may argue that this reflects supply and demand, these shortfalls are significant for households on limited income and York and Birmingham in particular are significantly less affordable for tenants relying on financial support who seek PRS accommodation there. As stated above, those entitled to full costs assistance with rent are likely to have a low, possibly benefit only incomes. These shortfalls can be a significant barrier to accessing and maintaining a PRS property, but many households simply do not have the luxury of moving out of area to seek accommodation. They may have work, educational or social ties to a particular area and need to remain within that area, but by failing to intervene on rent levels the Government make this increasingly difficult for many households.

Where rent levels are unaffordable the PRS cannot be seen as a mainstream housing option, cannot offer affordable accommodation and cannot be seen as accessible due to the cost barrier.

Claimants entitled to the two-bedroom rate of benefit

Area	Benefit rate	Average rent- 2 bed	Shortfall
Gateshead	£473.72	£550.00	£76.23
York	£648.22	£850.00	£201.78

Birmingham	£623.17	£800.00	£176.83

Claimants entitled to the three-bedroom rate of benefit

Area	**Benefit rate**	**Average rent- 3 bed**	**Shortfall**
Gateshead	£548.51	£700.00	£151.49
York	£723.02	£800.00	£76.98
Birmingham	£673.14	£880.00	£206.86

A similar picture emerges here for households entitled to the two- and three-bedroom rate of housing costs assistance. The likely shortfalls in rent, based on average rent, varies hugely between different local authority areas, causing inconsistency within the PRS.

Those households relying on benefit assistance to meet some or all of their rental costs must seek accommodation that is affordable within the local housing allowance rate in their area, which often falls short of average rent levels. This means tenants have no choice other than to seek less desirable accommodation as a short-term option and in turn puts further pressure on social housing waiting lists, which cannot keep up with demand. In these circumstances the PRS cannot be considered as a mainstream housing option and is not fit for purpose.

Reforming rents in the PRS may not be as straightforward as reforming security, but is necessary if the PRS is going to function as a longer term, professionally managed housing option, responsible for accommodating a large proportion of households in England.

One option for addressing the issues highlighted above is limiting the initial rent a landlord can charge based on local market forces. The structure for determining median rents is already in place through the local housing allowance regime. This works out average rents based on property size and location. This data could be used to set rent brackets for different property types and sizes within a local authority area, and landlords could be required to offer their property to rent at a price within

that bracket. Using a bracket allows some flexibility for variation in property quality or finish, whilst at the same time giving some certainty to both landlords and tenants about what they can charge and what they will have to pay for the property they own or rent. The bracket can be calculated with reference to the benefit level available and affordability of any shortfall for low-income households. This will also help with consistency in the sector.

There could be some additional measure of flexibility built into the system for those properties at the luxury end of the rental market, where landlords could be allowed to apply for an exemption from the rent regulation rules. Local authorities can assess and monitor exemption requests and charge a fee for this to generate income to help manage their enforcement work in the PRS.

This proposal would require some investment at a local authority level, as it would be local authority staff who would need to gather the data and keep it under review, set the rent brackets and enforce breaches, however the benefits to the PRS would be substantial.

This proposal and the possible consequences are considered in more detail in Chapter 9.

A further issue around affordability relates to the landlord's ability to increase the rent for an ongoing tenancy, which could lead to a tenant being unable to maintain their accommodation due to affordability issues. Although rent increases are, in theory, already regulated for ongoing tenancies,[553] the reality is that most private tenants have no real choice but to accept an increase when it is proposed or do not know that they have the option of challenging this.[554]

Due to the fact that most landlords in England tend to be amateur landlords, rather than professional bodies, rent increase demands are often dealt with at an informal level, so formal challenge is not often pursued. Tenants are advised that the rent is going up, and will often just accept this without question, either expressly or by paying the higher

[553] See section 4.4.3, above.

[554] See Section 4.4.3, above.

amount demanded, which is considered to constitute an acceptance of the new rent.[555] Tenants often do not know their rights, that they have the right to challenge an increase or how to go about doing so. Greater education is needed to address this issue.

Even when the formal s.13 rent increase process is used, the inherent lack of security in the PRS and risk of eviction will put many tenants off challenging an increase. This is because the vast majority of tenants are assured shorthold tenants, with very little security beyond their initial fixed term, see section 6.2, above. Periodic tenants can be evicted without grounds under the s.21 process, so if they refuse an increase it could lead to eviction. The Deregulation Act 2015 seeks to impose barriers to landlords using the s.21 procedure in a retaliatory fashion, but this applies only where tenants are seeking to enforce repairs. There are no restrictions on landlords seeking to use the procedure against tenants who refuse or challenge a rent increase.[556]

As well as being disincentivised from challenging an increase due to the risk of damaging their relationship with their landlord and risking eviction, tenants also have to consider the fact that there is no guarantee that a formal challenge will succeed. They may choose to appeal an increase demand and take this to a tribunal, but if the tribunal ultimately decides that the proposed rent is reasonable, they would end up having to pay the higher rent and may possibly owe a backdated payment. This could apply if there is any delay in the tribunal reaching its decision, as any decision is automatically backdated to the date that the rent increase notice expired, unless the tribunal accepts that this would cause hardship and orders a later date.[557]

The process used to scrutinise proposed rent increases itself can also be problematic. Whether or not the rent increase is allowed on appeal is assessed on reasonableness, with reference to market rent levels in the area and the property condition, but with no reference to the existing, pre

[555] https://www.citizensadvice.org.uk/housing/renting-privately/during-your-tenancy/dealing-with-a-rent-increase/#:~:text=If%20you%20pay%20the%20new,deal%20with%20your%20rent%20increase. Accessed (6.3.22)

[556] See Section 4.5.2, above

[557] Housing Act 1988, s.14(7)

increase rent. This could lead to a situation where a tenant has moved to a property which was affordable for them, then suddenly finds the rent increased to a level above their means, for example if comparable local rents change following a change in demand and the landlord seeks to raise the rent or if the landlord's mortgage increases and they seek to recover that through increased rental income. The tenant in this case would have no option but to move and it could take them some time to find another suitable, affordable property, all the while they would be accruing rent arrears if they were unable to meet their rent payments. This, it could be argued, means that the PRS does not offer affordable accommodation or a reasonable level of security and cannot therefore be seen as a mainstream housing option, making the PRS unfit for purpose when measured against the criteria set out above.[558]

The current rules relating to the regulation of rent increases could be retained and merely amended to make them, and therefore the PRS, fit for purpose.

The rent increase process itself is reasonable. It allows increases only on notice, at reasonable intervals (a maximum of once a year) and with the option for external scrutiny of the proposed increase. However, the lack of any reference to the previous rent is unreasonable. There needs to be a cap so that tenants know their rent will not suddenly increase significantly above their income level or above reasonable inflation. Limiting the maximum annual increase to a percentage of the previous rent is reasonable, ensures that both landlords and tenants have certainty about income and outgoings for their household and can plan accordingly. In addition, this would help to mitigate any impact of delays caused by appealing to a tribunal. Even if the increase was allowed and backdated at the time of the final decision, if the increase amount is capped by reference to the current rent, the backdated payment should not be too onerous.

[558] See Section 1.2.1.1 and 6.1, above.

6.3.3- Rent- Conclusions

As with attempts to reform security provisions, critics raise concerns about the feasibility of managing property with rent regulation and fear that any such attempts at regulation will drive many landlords out of the sector.[559] However as with concerns about any reforms around security, this is likely to be drive out those landlords who are not housing professionals to begin with and improve tenancy management standards, especially at the lower end of the housing market. Properly regulated rent rates and increases as proposed above are more likely to attract professional landlords and investors as they can better predict their returns. This will have the effect of making the PRS as a whole more professional and the benefits for tenants are clear.

The upfront costs of securing a private tenancy have long been a concern for many tenants, which could be seen to cause a barrier to access, making the PRS unfit for purpose. Recent legal changes have capped the amount that can be charged by landlords and agencies in upfront fees, which go some way to tackling the concerns around unregulated charges raised in our case studies (see section 6.3.1, above). The Tenant Fees Act 2019, which came in to force on 1st June 2020, introduced caps on fees in the PRS which applied to assured shorthold tenancies.

The main provisions are:

- Deposits. These have been capped at five weeks' rent for any tenancy where the rent is £50,000 per annum or less or six weeks' rent where the rent is £50,000 per annum or more. Any deposit charged in excess of that cap is a prohibited payments and sanctions can be applied to landlords or agents charging such payments.[560]
- Holding deposits are capped at one weeks' rent for the property and agents can only take one holding deposit at any one time.

[559] Monk, S and Whitehead, C (Ed), *Making Housing More Affordable- The Role of Intermediate Tenures,* (Wiley Blackwell 2010) 269

[560] Tenant Fees Act 2019, s.6-17

A decision as to whether to enter in to a tenancy must then be taken within 15 days from the date that holding deposit is paid and the amount must be returned to the tenant within 7 days if they subsequently enter into a tenancy, the landlord decides not to proceed with the tenancy (unless an exemption applies and the reason for the decision is deemed to be due to the tenants' behaviour) or the 15 day deadline has ended without a decision.[561] Any holding deposit charged in excess of that cap is a prohibited payments and sanctions can be applied to landlords or agents charging such payments.[562]

- Default fees can only be taken if allowed in the tenancy agreement and the amount taken is reasonable to cover the potential loss (i.e. the costs to replace a lost key).[563]
- A fee of up to £50.00 to vary a term of the contact, if done at the tenants' request, can be charged. A landlord can charge a greater fee, assuming that this is reasonable.[564]
- Reasonable costs incurred if the tenant chooses to surrender the tenancy and the landlord agrees.[565]

These reforms go some way to addressing the issue with upfront and in tenancy costs, reflecting the fact that landlords and agents operating a rental business do incur costs and need some protection, but that tenants do not have limitless means and should not be charged unfair or unreasonable amounts. This helps ensure that the PRS offers speedy access, one measure of fitness for purpose, as that access is more affordable at the outset.

However there are some costs associated with the PRS that cannot be controlled by regulation, such as the costs of moving or decorating a new property when tenants have to move unexpectedly. These remain a barrier to access, contributing to the fact that the PRS is unfit for

[561] Tenant Fees Act 2019, Schedule 2

[562] Tenant Fees Act 2019, s.6-17

[563] Tenant Fees Act 2019, Schedule 1(4)

[564] Tenant Fees Act 2019, Schedule 1(5)

[565] Tenant Fees Act 2019, Schedule 2(6)

purpose in its current form. These costs can only be addressed by seeking to make PRS accommodation a longer-term option, so that tenants need to move less frequently.

6.4 Condition

Condition has a significant impact on fitness for purpose in the PRS. Although not every property in the PRS will be sub-standard, unless the current regulatory framework can ensure that the majority of properties are of a decent standard, and offer timely and low cost remedies for tenants to ensure that those that are not can be remedied, then PRS accommodation cannot be seen to be fit as measured against the criteria set out in section 1.2.1.1 and 6.1, above, nor can the PRS accommodation been seen to offer adequate housing as assessed under the human rights theory of housing. Issues with property condition are particularly prevalent at the lower end of the PRS market, the primary focus of this study.

6.4.1- Case Study Data on Condition

This section sets out what the data from the case study areas highlighted about property condition in the PRS in practice.

Gateshead

The local authority respondent to this questionnaire, GLA1, was confident that standards in the PRS in Gateshead were “OK” and that many tenants are satisfied with their PRS accommodation, however they advised that they receive approximately 500 complaints per year from PRS tenants about the condition of their home, plus additional complaints from those living in neighbouring properties.[566]

Gateshead Council has a small PRS housing team made up of two environmental health officers and two technical officers who manage

[566] GLA1 (24/04/2019), pg 10

complaints about housing condition and other issues within the PRS. The respondent stated that this service is funded by the council directly and that, although they appreciate that there is a limited budget, what they get is “not enough”. Although they are able to reinvest any money they recover from enforcement action, this income is variable and highly uncertain and this is “not really a way to fund activity”.[567]

In spite of this respondent GLA1 stated that the PRS housing team “tackle all sorts of things by using HHSRS[568] (Housing Health and Safety Ratings System) creatively” and that they use their powers widely which “isn’t something that many authorities are considering”.[569]

However respondent GLA1 also recognised some limitations within the regulations themselves. They stated:

> *“It’s a shame that there was never a mental health hazard (included in the HHSRS regulations, because) the absolute inability to decorate because your walls are crumbling isn’t necessarily a safety hazard but it doesn’t make the PRS an attractive place to be”.*[570]

GLA1 also recognised that their powers are limited by the fact that they are a largely reactive service, and rely on tenants coming forward in the first place. They highlighted the fact that “there are loads of things that tenants put up with or don’t know that are safety risks”[571] which their officers pick up at inspection when a tenant complains about a more serious issue, and in their opinion there will be many tenants living with smaller instances of housing disrepair who never recognise this as an actionable issue and do not seek assistance. Often those who do

[567] GLA1 (24/04/2019), pg 4

[568] See Section 4.4.4 above

[569] GLA1 (24/04/2019), pg 1

[570] GLA1 (24/04/2019), pg 1

[571] GLA1 (24/04/2019) pg 10

contact them have spent months trying to get their landlord to undertake repairs and have simply “had enough” and choose to seek alternative accommodation.[572] This highlights that although the protections are there and, in Gateshead, the authority are willing to undertake enforcement action, tenant awareness is poor which makes the practical application of the regulations difficult.

Furthermore the effectiveness of the regulations is very much dependent on the strategy and resources of each local authority and will vary from locality to locality. GLA1 advised us that Gateshead Council take approximately 60-70 cases of formal action against landlord per year relating to housing conditions in the PRS and stated that “this is high compared to some authorities and is up on previous years”.[573] If one local authority enforces the regulations and another doesn’t, the worst landlord may simply move to an area where they are less closely monitored so “it doesn’t necessarily drive them out of the sector”.[574]

The tenant representative, respondent GTEN1, stated that “in my opinion current regulation is not effective and all landlords should be vetted and be made to have suitable qualifications in order to rent out a home”.[575] They also pointed out that these local authority powers are limited and they are reactive and reflected on the fact that the only other regulation is primary legislation which is there to help when things go wrong, but does not help to set a standard in the sector to begin with.[576]

In particular GTEN1 highlighted the issue with regulations against retaliatory eviction which are “not effective at all” due to the complexity of the procedure and the requirement that the local authority has issued a formal notice to the landlord in order for the protections to apply, which happens infrequently.[577]

[572] GLA1 (24/04/2019), pg 11

[573] GLA1 (24/04/2019), pg 11

[574] GLA1 (24/04/2019), pg 13

[575] GTEN1 (20/07/2018), pg 2

[576] GTEN1 (20/07/2018), pg 2

[577] GTEN1 (20/07/2018), pg 7

The landlord representative, respondent GLL1, feels that too much regulation pushes good landlord out of the sector and that this should be concentrated on "bad landlords",[578] but failed to address how to do this in practice. If the regulations did not apply across the sector, how would these bad landlords be identified.

The PRS housing team at the local authority receive a significant number of complaints about housing condition annually, and recognise that many more tenants will live with issues in their home without reporting them. Despite the efforts of the local authority to use the regulatory powers they have to manage conditions in the PRS creatively, limitations within the regulations themselves and budget constraints which result in limited resources within the team mean that their scope to control standards in the sector is finite. The service is reactive in nature.

York

The local authority respondent to this questionnaire, YLA1, stated that the Housing Standard and Adaptations team deal with enforcement in the PRS in York but was unable to provide any additional detail.[579]

However the Council's Private Sector Housing Strategy provides some additional data on conditions in the PRS here;

"Whilst average conditions are good and above the national average, there are 3,711 properties in the private rented sector that have category 1 hazards. This equates to 23% of the private rented stock having one or more category 1 hazards".[580]

This shows that a large amount of housing stock is below legally accepted standards.

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[578] GLL1 (06/11/2018), pg 2

[579] YLA1 (03/10/2019), pg 1

[580] https://www.york.gov.uk/downloads/file/2266/private-sector-housing-strategy-2016-2021 (accessed on 25th November 2020)

The report further states that;

"We receive about 300 reports a year from tenants about poor conditions and management and we act upon these in line with our Enforcement Policy. We need to find ways to encourage more reporting".[581]

This seems to indicate that, as in Gateshead,[582] that the service is reactive and although it acts on complaints received not all tenants have the knowledge to seek support or the incentive to do so, and so will live with issues in the condition of their home.

A Freedom of Information request response from York Council provided further additional information about their enforcement activities. The council have confirmed that in the three years from 2018-2021 they have received 857 complaints about conditions in PRS accommodation; in that same period they have taken action under the HHSRS regulations about property condition on 257 occasions.

This means that the authority, the body with the statutory power to enforce housing conditions, has failed to take any action under the HHSRS on over two thirds of all complaints made to it about condition. The data on this is incomplete, for example these figures do not tell us the reasons for the actions taken or the failure to take action on over two thirds of all complaints. This could be simply that, on inspection, the authority felt that no action was necessary, they were able to resolve the issues by talking to the landlord informally or that the property condition was adequate. However given that the authority's own report stated that they wished to encourage more tenants to report disrepair[583] and that our questionnaire data demonstrated that many tenants do not reach out to the local authority until they have lived with disrepair for several months, or sometimes longer,[584] it is concerning that such a high proportion of these complaints lead to no formal action.

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[581] https://www.york.gov.uk/downloads/file/2266/private-sector-housing-strategy-2016-2021 (accessed on 25th November 2020)

[582] GLA1 (24/04/2019), pg 6

[583] https://www.york.gov.uk/downloads/file/2266/private-sector-housing-strategy-2016-2021 (accessed on 25th November 2020)

[584] GLA1 (24/04/2019), pg 11

Birmingham

The local authority respondent to this questionnaire, BILA1, stated that the council have a Private Rented Services Team who enforce housing legislation in the city[585] as well as Environmental Health Officers enforcing the HHSRS (Housing Health and Safety Ratings System).[586] They receive an average of 100 complaints per month from private tenants about the condition of their property[587] and they stated that property condition in the PRS in Birmingham "varies".[588] The number of complaints reported in this response is high compared to those reported by the other case study areas, which could be indicative of low standards in the PRS in this area.

However BILA1 stated that in the past 3 years, despite these high levels of complaints, they have only taken formal action in respect of property condition on 46 occasions.[589] This is an average of just over 15 cases per year, out of an estimated 1200 reports from tenants, and equates formal action in only 1.25% of cases. As with the data from York discussed above, this relatively low enforcement level could impact on confidence among tenants in the sector, who may be less likely to report actions if they feel that no action will be taken.

However a Freedom of Information request from Birmingham City Council provided additional information about their enforcement activities, which conflicted somewhat with the information given in the semi structured questionnaire by respondent BILA1. This stated that in the 3 years from 2018-2021 the council have received 2210 complaints about conditions in PRS accommodation; in that same period they have taken action about property condition under the HHSRS on 705

[585] BILA1 (15/08/2019), pg 2

[586] BILA1 (15/08/2019), pg 7

[587] BILA1 (15/08/2019), pg 8

[588] BILA1 (15/08/2019), pg 7

[589] BILA1 (15/08/2019), pg 8

occasions. Even on these higher statistical figures, which give a fuller picture than the response to the semi structured questionnaire response, this means that no enforcement action has been taken on the vast majority of cases, almost two thirds of the total made. This is similar to the picture in York. More concerning still is the downwards trend in enforcement in Birmingham; of those 705 recorded above. 297 were in 2018-2019, 356 were in 2019-2020 and only 52 were in 2020-2021.

As with the data from York, these figures cannot tell the whole picture. No information was disclosed as to why almost two thirds of complaints failed to result in formal action and therefore, we cannot know whether this was because formal action was not justified or whether this was a result of funding or policy issues from within the local authority. However as the protections from retaliatory eviction introduced in the Deregulation Act 2015 only apply where the local authority has taken formal action against the landlord,[590] this evidence of how rarely formal action is pursued demonstrates that the protections do not go far enough; BILA1 themselves stated that the regulations which try to prevent illegal eviction are “very ineffective”.[591]

Property condition varies and although the local authority questionnaire response indicates that the council receives approximately 1200 complaints about property conditions each year, they take formal action against landlords to enforce the regulations about condition in only 15 cases per year.

6.4.2- Evaluation of the Case Study Data on Condition in the PRS

There is a wealth of legislation relating to property condition and this can be confusing for tenants.[592]

As a starting point in addressing concerns about property condition, the regulations should be consolidated so that the rules are clear, tenants

[590] See above, Chapter 4, section 4.5.1 for further discussion about the Deregulation Act 2015 and the retaliatory eviction protections.

[591] BILA1 (15/08/2019), pg 8

[592] See section 4.4.4, above

have a better chance of understanding their rights and how to enforce those rights and landlords are clear about their own obligations in respect of property condition. As part of this process the scope of the regulation themselves should be looked at and any gaps addressed. As our Gateshead participant commented, the current rules make no allowance for the impact of poor property condition on mental health and wellbeing, which is an essential part of a secure home life.[593]

However, although a review of the scope of repairing obligations would help remedy some of the issues with the PRS, the main finding from our case studies in relation to property condition was to highlight the lack of strong enforcement powers in place to enforce property condition, with reform urgently needed in this area. Property condition in the PRS is enforced by the authorities and our evidence shows that enforcement activity varies widely between different local authority areas. Funding and resourcing can impact on this, as well as prioritisation within the authority governance structure. Enforcement is also often reactive in nature so problems are addressed on report, but standards are not enforced as a routine practice.

Enforcement needs to be strengthened and standardised if property condition in the PRS is to improve and be consistently maintained across the sector. This would also help to reduce the stark differences in accommodation types within the PRS itself, with the lower end of the PRS market often seeing older and poorer quality housing stock utilised as rental units. Unless standards are enforced consistently, the sector cannot be seen to offer decent or habitable accommodation, making it unfit for purpose.[594]

The fact that the legislation gives local authorities the power to enforce standards, but does not obligate them to do so, is also an issue. This means that local agendas can impact on what level of resource is allocated to this important task, resulting in stark local variations. As one of our questionnaire respondents acknowledged, landlords who fail to meet the required standards and face greater scrutiny in one local

[593] See section 6.4.1 above, GLA1 (24/04/2019), pg 5 and section 6.4.1 above, GLA1 (24/04/2019), pg 1

[594] See section 2.1.1 above for a discussion about the theory behind property condition and fitness for purpose.

authority area, may simply choose to stop operating there and move to an authority area where enforcement is less robust, moving the problem instead of addressing it.[595] If authorities were required to inspect condition in all private lets, this would enable them to build up a granular picture of the overall condition and state of repair of housing stock in the PRS in their area, address issues and ensure that substandard properties were not let. Greater scrutiny at the outset of a let would help to minimise many problems tenants face once in their homes, where they often find themselves trapped.

This approach would require significant investment from local authorities, but having made the investment they would see an increase in property standards, less reliance on emergency homelessness support due to property condition and a more stable housing market in their area. The costs could be met in part by landlords paying a fee to have the property inspected and confirmed as suitable for let. This would also ensure that the authority would then have a team of housing enforcement professionals, so issues arising in ongoing tenancies could be more readily addressed. This approach would generate income that could be used to fund enforcement activity but would have the further impact of ensuring that landlords were committed to compliance before investing in the fee.

In addition to amending the way local authorities approach tenancy condition, it is clear from our analysis that, although tenants have the right to take action themselves, the process can be costly and cumbersome. This makes tenants less like to pursue such actions and this is an area which needs reform. In addition to this the lack of residential security, coupled with the landlords' ability to increase rents, means that many tenants will be disincentivised from pursuing defects in the condition of their homes unless these are extremely bad and problematic.

Some aspects of private tenancy law, such as challenges to rent increases and unlawful fees, are enforced through the first-tier tribunal, rather than the county court. Here costs are significantly lower, the process is less formal and more accessible and the outcomes more

[595] See section 6.4.1 above

timely. There is a strong argument for extending jurisdiction of the tribunal to hear tenants' claims against their landlords relating to property condition. The judges there have the expertise to hear such matters without the complexity of the formal court process. This is likely to encourage more tenants to take action where there are breaches of the repairing obligation.

6.4.3- Condition- Conclusions

Should such a reform be introduced as part of a wider review of the PRS as suggested it will go hand in hand with changes to tenancy security and would have the added benefit of increasing tenants' confidence to challenge unsuitable conditions or unlawful practices; these proposals are considered further in Chapter 9.

6.5 Conclusion

The case study data presented above has identified several issues with the PRS in practice. These include;

- There is a high turnover of tenants in the PRS.[596]
- Tenancies secured in the PRS are predominantly short term in nature, which means that tenants cannot establish roots in their community.[597]
- The no fault eviction notice under s.21 makes tenants feel insecure, unable to enforce their rights and causes issues for households.[598] The security structure underpinning the PRS is inherently weak which impacts not only on how long a tenant is able to remain in their property and maintain a stable home life, but also on their ability to enforce their other rights and engage with the PRS in a meaningful way.

[596] GLA1 (24/04/2019), pg 6; GTEN1 (20/07/2018), pg 1

[597] GTEN1 (20/07/2018), pg 3

[598] YLA1 (03/10/2019), pg 2: BILA1 (15/08/2019), pg 3 and 5

- The ability of tenants to enforce their rights depends on the availability of agencies to advise and support them.[599] This varies from one local authority area to another, as our case studies show (above).
- The upfront costs of accessing PRS housing are complex, substantial and pose a barrier to entry.[600]
- Moving regularly puts a large financial strain on lower income households.[601]
- Landlords have all of the control in the tenancy relationship, and tenants have no leverage to negotiate over rents.[602] Initial rents and rent increases need more robust regulation.
- Work to challenge poor tenancy conditions is reactive in nature, is dependent on funding and will vary between different authority areas.[603]
- The regulations themselves are not comprehensive and do not appear to offer the protections needed to create a stable housing tenure.[604]

The issues within the PRS are varied and the different issues will impact on different types of tenants or households in different ways; tenants in accommodation at the lower end of the PRS market will be particularly affected by the above issues as they tend to be lower income households who are less able to absorb the cost of frequent moves, rent increases and unexpected costs and legal challenges against property condition issues. Some of the issues with the PRS in England come about as a result of the regulatory provisions and could be resolved with a genuine will for reform. Part of the problem that has led to the PRS being in the position it is in now has been the lack of political engagement in the sector, and therefore the lack of primacy for PRS issues in the reform agenda. Where reform has come it has been

[599] GLA1 (24/04/2019), pg 4

[600] GTEN1 (20/07/2018), pg 1; GLA1 (24/04/2019), pg 6: YLA1 (03/10/2019), pg 2 and 4: BILA1 (15/08/2019), pg 6

[601] GTEN1 (20/07/2018), pg 1

[602] GLA1 (24/04/2019), pg 8; GTEN1 (20/07/2018), pg 5: YLA1 (03/10/2019), pg 5: BILA1 (15/08/2019), pg 6

[603] GLA1 (24/04/2019) pg 10; GLA1 (24/04/2019), pg 4; GLA1 (24/04/2019), pg 13

[604] GTEN1 (20/07/2018), pg 2

piecemeal and targeted primarily at managing the behaviour of landlords operating within the PRS without addressing the underlying issues with the structure of the sector (see section 4.5, above). This means that the different aspects of the sector do not work cohesively or effectively.

Other issues are systemic. The PRS in England does not have a positive reputation and is short-termist in nature- both the regulation and the structure of the sector are designed with this view in mind. Tenants (and tenants organisations) have historically had very little formal involvement in the formation of the legal rules which govern the sector, meaning that the sector lacks a strong tenant voice.

A clear focus is needed on PRS reform in order to address the current issues in a meaningful way. Reforms should be undertaken to the sector as a whole, with all aspects of the PRS considered in a holistic way. This will allow the PRS to be looked at with the human rights theory of housing in mind, and ensure that all areas of PRS regulation are addressed with an emphasis on their need to complement each other. A holisitic and integrated approach is needed if we are to ensure that the regulatory regime for the PRS can underpin its fitness for purpose.

This analysis will be considered further when this study makes recommendations for reform in Chapter 9. Before these recommendations are made, Chapters 7 and 8 consider what can be learned from the way PRS accommodation is regulated in other jurisdictions. This will then inform the discussion of potential reform to the PRS in England set out in Chapter 9.

Chapter 7- Learning from Other Jurisdictions:

German Private Rented Sector Tenancy Law- Development, Policy and Context

7.1 Introduction

The primary focus of this study is English private tenancy law, specifically the lower end of the PRS market. The German PRS is being used here as a comparator, to illustrate another way to regulate landlord and tenant relations to meet the same or similar objectives. The analysis will take into account the methodological framework set out in section 2.1.2, which looks at whether comparisons of this nature are useful and can lead to valid recommendations.

The development and current state of private tenancy law and housing policy in England has been discussed in detail in the previous chapters. This chapter intends to address the same issues in relation to Germany, though more briefly.

English terminology will also be used throughout, including to describe and explain particular features of the German PRS. German terms may be noted in the text but will not be adopted routinely in the explanation, instead an approximate English word will be substituted, with reference to the explanation of terminology provided at Chapter 4.1. Where necessary context will be explained and explored to minimise any distortion from this use of English terminology.

Bearing this in mind, this chapter will go on to consider the policy objectives underpinning the PRS in Germany and will then provide more detail about the regulatory regime there.

7.2 Policy Objectives

7.2.1 Factors which Influence Policy

German housing law and policy sits within the very particular historical, political and economic context of that country. This is influenced by several factors and the nature of the German legal system itself. Some of the key contextual factors are discussed below.

7.2.1.1 The Hierarchy of German Law

As a civil law country, Germany has codified laws. The codes are the framework of the law and dictate how rules and regulations interact with one another. In Germany, laws exist in a hierarchy.

The Grundgesetz (GG), is Germany's constitution and is its highest legal code.[605] The articles of the GG encompass broad statements about the law and all other regulations have to be read in light of those provisions.

Next in the hierarchy are the Bürgerliches Gesetzbuch (BGB). These are Germany's legal codes which are split into civil, administrative and criminal sections. These set out the national legal framework and specify which areas are a national competency, and in which areas local laws take precedent. Where local laws prevail, they are determined by the Länder, the state Government.

Next, special statues or byelaws/customary laws deal with details not covered in the broader codes.

Case law is not binding in Germany so it does not fall within this formal hierarchy, although decisions are considered persuasive.

Land law, encompassing tenancy law, is a national competence and the legal framework for tenancy law can all be found in the BGB. However the Länder are often responsible for developing local regulations and policies to enforce these codes, so regional variations apply. Laws relevant to landlord and tenant relations in Germany are set out in more detail below at section 7.4.

[605] EU Law (Europarecht) is not strictly part of this hierarchy, but as it is binding law in Germany it sits over and above all of these domestic provisions.

7.2.1.2 Historical Factors

The particular historical development of Germany can to some extent explain the political regime and policy choices of the country so historical influences also need to be considered.

Germany's history as a single unified state started relatively recently in European terms.[606] A federal, unified German empire with Prussia at the fore developed in 1871 out of a loose gathering of independent states, each bringing their own laws and customs to the union. Over time the centralised powers took greater and greater control over the states and, although local laws were still important, codification of the law took place at national level in 1900 in an attempt to develop further unity. As noted above in section 7.2.1.1, German federal law remains codified today, with regional laws still relevant in some policy areas.

Germany has also had to deal with the effect of several wars, sanctions imposed on it after World War One, hyper-inflation, occupation by foreign powers (on more than one occasion), partition, reunification and high levels of immigration. All of these factors have impacted on the development of the country as a whole, and its laws in particular, as foreign influences have been adopted over time[607] and there are still marked differences between the former West German states and the former East German states.

German policy as well as its jurisprudence and legal development both bear the marks of these aspects of the country's history. For example, Roman law has been highly influential on German legal development,[608] as the views of Karl von Savigny were adopted during the French occupation in the early Nineteenth Century. Von Savigny favoured a restrictive view on property which is still evident in German law today; ownership of land is seen as the only real property right and tenancies

[606] Fulbrook, Mary, A Concise History of Germany, (Cambridge University Press 1990)
[607] Legrand, P, "Comparative Legal Studies and the Matter of Authenticity" [2006] J. Comp L. 1, pg 378; Watson, Legal Transplants, (Scottish Academic Press 1974) pg. 6

[608] Watson, Legal Transplants, (Scottish Academic Press 1974) chapter 6; Robbers, G, An Introduction to German Law, (5th Edn, Nomos 2012)

are purely contractual agreements (BGB s.535).[609] However tenancies are special contracts and are now recognised as being close to a property right.[610]

7.2.1.3 Political Factors

Unlike England, Germany is a federal state. Areas of competence in policy and law making are divided between the federal Government and the Länder, and each legislates in its designated areas. There are also areas of shared competency, where broader national legislation is used as a framework in which local laws are enacted and operate. The Länder have their own legislative bodies and courts.

In general, the Government in Germany at both a national and regional level, is characterised by a conservative outlook coupled with a tendency towards a social state. This means that policies tend to be cautious, designed to cause as little upheaval as possible in the economy or broader society, whilst protecting those in weaker or more vulnerable positions.[611] This is not too dissimilar from politics in England from time to time, but in England the political ideology is more changeable with swings to the left then right being more pronounced. A key feature of the German political system is stability.

Furthermore, tenants' groups in Germany are more common and politically active, meaning that tenants' rights are considered when policies are formed. There is a national association of tenants in Germany that represents 320 district tenants' associations. They offer advice and practical assistance to their members but also work closely with local Government and are involved in lobbying.

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[609] Perry, Erskine (Translator), Von Savigny's Treatise on Possession; or the Jus Possessions of the Civil Law, (6th Edn, The Law Book Exchange Limited 2003); Schuster, Ernest J, Principles of German Civil Law, (Oxford Clarendon Press 1907) pg. 237

[610] The Federal Constitutional Court have found that tenants' right to possession is protected by GG Art 14, which deals with the right to property- BverG 26.05.1993, 1BvR 208/93

[611] Kemeny, J, From Public Housing to the Social Market (Routledge 1994)

7.2.1.4 Economic Factors

Historical development in Germany and the conservative nature of the political system also contribute to the structure and functioning of its economy. The German economy is known for its stability.[612] Germany has a social market economy where the state intervenes only to the extent that they deem necessary to correct inequality that would otherwise occur in a completely free market.[613]

There is a cautious attitude to financial risk taking and a long term outlook on profit and returns.[614] This feeds into the housing market where there are stringent lending requirements for mortgages.[615] There is no sub-prime sector in Germany, variable rate mortgages which pose a risk are rare and interest-only mortgages where the borrower has no savings (the loan type often used in the buy-to-let market in the UK) are "regarded as almost exotic".[616] As a result, buyers in Germany tend to wait until they are older to buy a property when they have saved a considerable deposit (25-30% is usually required) and have stronger financial backing to manage the risks associated with lending.[617] Evidence suggests that Germans do aspire to own their own homes,[618] but there is a general aversion to debt among the German population

[612] De Boer, R and Bitetti, R, "A Revival of the Private Rental Sector of the Housing Market? Lessons from Germany, Finland, The Czech Republic and the Netherlands" (OCED Economics Department Working Paper 1170)

[613] Oxley, M and Smith, J, Housing Policy and Rented Housing in Europe, (E & FN Spon 1996)

[614] Kemp, P and Kofner, S, "Contrasting Varieties of Private Renting; England and Germany" [2010] International Journal of Housing Policy 10, pg. 382

[615] The maximum mortgage to loan ratio, set at a federal level is 60%. Additional loans or mortgage could be used to increase the amount needed to be paid down to 20%, but this is the minimum amount of the purchase price a buyer needs when purchasing a property. Davies, B, Snelling, C, Turner, E and Marquardt, S, "German Model Homes? A Comparison of UK and German Housing Markets" (Institute for Public Policy Research 2016) pg. 21

[616] Kofner, S, "The German Housing System; Fundamentally Resilient?" [2014] J Hous and the Built Envir 29, pg. 271

[617] Muelbauer, John, "Anglo-German difference in Housing Market Dynamics" [1992] European Economic Review 36, pg. 547

[618] Early, F, "What explains the Differences in the Homeownership Rates in Europe?" [2004] Housing Finance International, pg 26; Bentzien, V, Rottke, N and Zietz, J, "Affordability and Germany's Low Homeownership Rate" [2012] International Journal of Housing Markets and Analysis 5:3, pg. 293

and mortgages are not taken out lightly.[619] Home ownership is considered a "once in a lifetime" event.[620] This delay in purchasing property pushes up the demand for rental properties which impacts on the size of the PRS and the demands placed upon it.[621] Arguably, the existence of a large PRS is a cause as well as an effect of the tendency to buy later in life as the fact that there is a stable and reliable rental market allows people to delay buying a property until they feel secure enough to do so. There is no rush to buy because people have a real alternative to owning their homes; a long-term stable tenancy with built in rent control to protect them from spiralling costs.

Within the sector private landlords also take a longer-term view to the properties they buy for rental purposes and are often anxious to secure tenants on a long-term basis.[622] Although there are inevitably areas of higher demand with higher rent prices, especially in busy cities, it is more difficult to identify distinct types of PRS rentals here, like the lower end of the market in England which is the primary focus of this study. This is a result of this economic culture which appears starkly different to that in England where home ownership is actively promoted at a political level and there is less aversion to financial risk taking. The buy-to-let market is an example of this. In this sector mortgages are usually interest only mortgages with higher fees and interest rates. This is a riskier type of borrowing focussing on the income generating potential of the property being mortgaged rather than on a long term, stable investment.[623] The economy in England does not have such a long-term outlook as we see in Germany and is more changeable as a result.

This distinction does not, however, invalidate the comparison. Instead the very fact that Germany has a set legal structure for private lets,

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[619] Bentzien, V, Rottke, N and Zietz, J, "Affordability and Germany's Low Homeownership Rate" [2012] International Journal of Housing Markets and Analysis 5:3, pg. 295

[620] Urban, Florian, "Germany, Country of Tenants" [2015] Built Environment 41, pg. 184

[621] The Private Rented Sector- Cambridge Centre for Housing and Planning and the London School of Economics- http://www.publications.parliament.uk/pa/cm201213/cmselect.cmcomloc/writev/953/prs152.htm

[622] Kofner, S, The Private Rental Sector in Germany, (Amazon.co.uk Ltd 2014) pg 7, 17

[623] https://hoa.org.uk/advice/guides-for-homeowners/i-am-buying/buy-to-let-explained/ [accessed on 12.11.2023]

which is suitable for both the lower and higher ends of the rental market there, offers opportunities for comparison and consideration. As discussed below at section 7.6, the functional approach to comparative research can be taken, looking at what the law seeks to achieve rather than the specific system in which it operates, and analysing whether the effectiveness of the law offers any lessons to the PRS in England.[624]

An example of the differences in the two economies can be seen in relation to house prices. Since 1995 house prices in the UK have increased by 400%, in Germany the increase has been only 50%.[625] House prices here have been described as showing a "remarkable long-term stability";[626] something which is not evident in England.

7.2.2 Housing Policy

Germany's legal, historical, economic and political context, as discussed above, affects its housing policy.

As a federal state there are three layers of input into policy in Germany. They are the Federal state, the Länder and the municipalities, i.e., local authorities, within the Länder. Housing policy is set at a federal level with the Länder being granted powers to implement national objectives and manage subsidy schemes in their regions, therefore all three have an input into housing policy. Most Municipalities also have a housing office (Wohnungsamt) that manages housing at a local level.

Germany has been described as having a unitary housing market,[627] which means that the Government allows the market to adjust itself to meet demand. However, this does not mean that there is no state intervention, as this is required in all parts of the housing sector to ensure that the broader political and economic objectives are met. In

[624] See section 2.1.3 for a discussion about functional approaches to comparative law.

[625] Davies, B, Snelling, C, Turner, E and Marquardt, S, "German Model Homes? A Comparison of UK and German Housing Markets" (Institute for Public Policy Research 2016)

[626] Kofner, S, "The German Housing System; Fundamentally Resilient?" [2014] J Hous and the Built Envir 29, pg. 258

[627] Kemeny, J, Working Paper 120; Understanding European Rental Systems, (SAUS Publications 1996), pg. 31

Germany tenants are much more politically active and command greater consideration. This is because there is a tenants' association that represents 320 district tenants' associations, offering legal cover and advice to tenants for a membership fee.[628] German tenants have greater political power as a result of this organisation and the political system is sensitive to tenants needs in policy formation.[629]

By comparison, English housing policy is "dualist",[630] with high levels of state intervention in the social sector which is targeted at the disadvantaged minority, coupled with a tacit promotion of owner occupation and an almost wholescale withdrawal of state intervention in private rented housing. German politics favours market policies aimed at levelling out inequalities without unduly disrupting the functioning of the market; English favours command policies aimed at interfering with the markets to bring about outcomes which have been pre-determined by the policy makers to be in the best interest of the market and the people at that time.[631]

In relation to its policy on the private sector, the English system is built on the premise that only free market rents and weak security can create a "commercially viable" PRS.[632] However in Germany the current rent regulation has been in force since 1971[633] (see section 7.5.3 below) and tenants are afforded considerable security in their homes (see section 7.5.2 below) and yet the market here thrives; the percentage of housing stock which is in the private rental sector in Germany has remained

[628] Davies, B, Snelling, C, Turner, E and Marquardt, S, "Lessons from Germany; Tenant Power in the Rental Market" (Institute for Public Policy Research 2017) pg 23

[629] Holdsworth, R, How Rent Control Works in Other Countries (2014) <http://londonist.com/2014/01/how-rent-controls-work-in-other-countries.php> accessed 4 March 2017

[630] Kemeny, J, Working Paper 120; Understanding European Rental Systems, (SAUS Publications 1996), pg. 16

[631] Kemeny, J, Working Paper 120; Understanding European Rental Systems, (SAUS Publications 1996), pg. 16

[632] Kemp, P and Kofner, S, "Contrasting Varieties of Private Renting; England and Germany" [2010] International Journal of Housing Policy 10:4, pg. 379

[633] Balchin, P (Ed), *Housing Policy in Europe,* (Routledge 199) Pg 32

relatively stable at about 60% since the 1980s.[634] Rent control is linked to local comparable rents with built in flexibilities to meet specific costs and adapt to inflation, and with security meeting the needs of both tenants and landlords who consider their rental properties as long term investments and seek long term returns.[635] Intervention has been aimed purely at targeting inequalities and the decentralised nature of policy making means that the market is well adapted to meeting variable local needs.[636]

7.3 The Development of Private Tenancy Law in Germany

As discussed above at section 7.2.1.1 Germany has a hierarchy of laws and there are regulations relevant to private landlord and tenant law at all levels of this hierarchy. However as German law is codified, many of the key or overarching provisions can be found in GG (discussed below at section 7.4) and the BGB, which contains the legal framework governing tenancies throughout Germany.

The BGB was first introduced in 1900. It is a "highly technical and fairly extensively detailed"[637] document but it remains flexible and can be adapted. The codes have been reformed over time, with the most substantial reform occurring fairly recently in 2002. This reform consolidated most of the laws which had developed outside of the codes, i.e., in special statutes or case decisions, so that they now form part of the BGB. These provisions are discussed below, at section 7.4.

Although the BGB has always dealt with property law and obligations, the Government did not intervene directly in private tenancy law directly until after the First World War, mirroring the beginning of intervention in England. In 1923 the Tenant Protection Law (Mieterschutzgesetz) introduced protection from eviction and rent control provisions into

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[634] Haffner, M, *Affordable private rental housing produced by private rental landlords,* (2013) OTB, Delft University, pg. 1

[635] Kemp, P and Kofner, S, "Contrasting Varieties of Private Renting; England and Germany" [2010] International Journal of Housing Policy 10:4, pg. 380

[636] Kofner, S, "The German Housing System; Fundamentally Resilient?" [2014] J Hous and the Built Envir 29, pg. 259

[637] Foster, N and Sule, S, German legal Systems and Laws, (4th Edn, Oxford University Press 2010) pg 35

Germany for the first time. Municipalities also reserved the right to allocate privately owned housing based on need. This was deemed necessary to protect tenants in a market with housing shortages and high demand. The laws were meant to be temporary in nature, but they were extended under National Socialism and were deemed necessary after World War Two when demand once again outstripped supply.

After the Second World War the Government further intervened in the housing market to try and stimulate supply, as well as regulating existing rental dwellings. It was considered a public task to rebuild the market after the destruction caused during the war[638] which, coupled with immigration, left a shortage of between 5.5 and 6 million dwellings.[639] They did this by introducing subsidies in the form of interest free loans paid to investors to construct new properties in return for promises to allow the state to distribute the property, set the rent level and on the basis that the circumstances in which they could evict tenants were limited.[640]

These measures helped to stimulate supply. Since 1951 there have been approximately 30 million new dwellings built in Germany across all tenures, in the UK the figure is 16 million.[641]

With urgency to intervene decreasing the Federal Government in Germany began to withdraw from regulation in the PRS. For example from 1950 new, privately financed dwellings were exempt from rent control and the rules restricting eviction,[642] and in 1956 market loans were used to finance building subsidies rather than funds direct from the Government. In 1960 existing dwellings subject to rent control and protection from eviction regulations were gradually removed from

[638] Kemp, P and Kofner, S, "Contrasting Varieties of Private Renting; England and Germany" [2010] International Journal of Housing Policy 10:4, pg. 387

[639] Leutner, B and Jensen, D, *German Federal Republic,* in Kroes, H, Yankers, F and Mulder, A (Eds), *Between Owner Occupation and the Rented Sector; Housing in ten European Countries,* (The Netherlands Christian Institute for Social Housing, De Bilt, 1988), pg. 149

[640] Leutner, B and Jensen, D, "German Federal Republic" in Kroes,H, Ymkers, F and Mulder, A (Eds), *Between Owner Occupation and the Rented Sector; Housing in Ten European Countries*, (The Netherlands Christian Institute for Social Housing NCIV 1988) pg. 150

[641] Davies, B, Snelling, C, Turner, E and Marquardt, S, "German Model Homes? A Comparison of UK and German Housing Markets" (Institute for Public Policy Research 2016)

[642] Ertes Wohnungsbaugesetz- the First housing building law

protection.[643] However as the population increased again through the 1960s and another housing shortage loomed, general regulations on rents and evictions were reintroduced in 1971, and, with modification, remain in place today.

In addition to reintroducing regulation, supply-side subsidies still exist and since 2001 have been administered by the Länder, who, with funding from the Federal Government, have discretion to set their own policies for stimulating and financing supply. The schemes therefore differ from region to region.[644]

Gradually the Federal Government are moving towards promoting demand-led subsidies as an alternative path.[645] Housing Allowances, for example, were first introduced into Germany in 1955 in a limited form, were consolidated in 1965[646] and remain available today[647] (see section 7.5.3 below).

Having outlined the development of the law, this section will now go on to discuss the current laws which are the most relevant in this field.

7.4 The Relevant law

The relevant provisions in Germany private tenancy law include;

- The GG is Germany's constitution, introduced (into West Germany) in 1949.[648] The GG can only be amended by statute and some of the provisions cannot be amended at all.[649] It contains basic principles or norms in light of which all laws have to

[643] Abbaugesetz- Reduction Act

[644] By 2020 the Federal Government will no longer supply funding, and these schemes will be entirely Länder led- Kofner, S, The Private Rental Sector in Germany, (Amazon.co.uk Ltd 2014) pg. 7, 54

[645] Kofner, S, "The German Housing System; Fundamentally Resilient?" [2014] J Hous and the Built Envir 29, pg. 267

[646] Under the Erstes Wohngeldgesetz- the First Housing Allowance Law.

[647] These allowances have developed over time from times limited assistance for low-income household

[648] At this time the country was rebuilding itself after the devastation caused by World War II and when the Government was anxious to avoid any further usurpation of absolute power as witnessed under National Socialism.

[649] GG- art 79.

interpreted and applied, meaning that it affects landlord and tenant law even though it does not deal with the matter directly. The norms are set out in order of importance, beginning with Article 1. The key provisions include;

- Article 1; Dignity of the person is inviolable and must be respected and protected by the Government in the implementation of law. This article also states that the basic principles of the GG bind all legislative, executive and judicial powers as directly applicable law.
- Article 3; All people are equal before the law.
- Article 14; Property and inheritance are ensured and property rights will only be restricted by clear and defined legal rules.
- Article 20; The Federal Republic of Germany is a democratic and social Federal state.
- Article 71; If the Federal Government has exclusive legislative power in an area, the Länder can only enact legislation in that area when specifically empowered to do so.
- Article 72; On matters of concurrent jurisdiction, the Länder can legislate in an area if the Federal Government have not done so.

- BGB sections 535-580a contain the provisions that govern residential leases- the Mietrecht. Some of the most relevant provisions contained in the BGB are;
  - S.536- the tenant is entitled to a reduction in rent for any period when the property has a defect which affects its suitability, unless the tenant was aware of this defect when they accepted the lease (s.536b).
  - S.542- a fixed term lease ends on expiration of the term, a lease for an indefinite period can be terminated only in accordance with the statutory provisions.
  - S.550- leases for a fixed period of over 1 year must be in writing, otherwise they take effect as indefinite leases.
  - S.551- this deals with how landlords must manage deposits, and also limits the deposit amount to up to three times the monthly rent.

- S.556- this section covers how the operating costs of the property, including utility payments, should be dealt with.
- S.557- 559- these sections prescribe how rent can be increased during the term of the tenancy.
- S.568-580- these sections cover termination of the lease by either party and the methods of termination.
- S.575- this section sets out the limited circumstances in which a landlord is able to grant a fixed term lease, and how that lease can be terminated.

- Special statutes also exists, although the majority of the provisions they introduce are inserted into the BGB and are covered in the analysis of those provisions.
  Some of the key specific statutes are listed below;
  - Verordnung über Heizkostenabrechnung (regulation of heating costs)- last amended 2008. This statute applies to most shared accommodations (excluding student accommodation, homes for the elderly, care homes and dormitories), and sets out that a landlord must calculate and distribute heating and water costs between the various residents.[650]
  - Gesetz zur Regelung der Wohnungsvermittlung (law on regulation of estate agencies)- last amended 2015. This statute sets out the detail about the regulation of fees charged by agencies when setting up contracts.
  - Wirtschaftsstrafgesetz (economic criminal law)- last amended 2017. The relevant provision- s.5- in regard to tenancy law makes it an offence (profiteering) for a landlord to charge more than 20% above the local reference rents at the outset of the contract. This figure can be as low as 10% for areas of high housing demand.
  - Wohngeldgesetz (Housing Benefit Act)- last amended 2021. This act deals with entitlement to and payment of housing costs assistance in Germany.

[650] The regulations require the landlord to work out consumption and charge tenants accordingly. The statute provides detailed guidance on how consumptions should be calculated and formulae for using this to ascertain costs. Between 30% and 50% of charges can be attributed to associated charges (e.g., service charges) and split proportionally between residences based on the volume of space they have use of, regardless of consumption.

- Mietrechtsreformgesetz (Rental law Reform)- last amended 2001. This amended the law on leases. The changes it introduced were incorporated into the BGB.
- Gesetz zur Dämpfung des Mietanstiegs auf angespannten Wohnungsmärkten (The Moderation of the Rent Increases in Overstretched Housing Markets Act)- 2015. This law which introduced the rules for setting initial rents in high demand housing markets.

- As a civil law jurisdiction, case law is not usually binding in Germany, but is persuasive.[651] As such case law will not be discussed separately in this section, but relevant decisions may be referred to in the text.[652]

This section will now go on to consider how these provisions operate in practice.

7.5 The Law in Practice

The discussion below centres on four main areas of private tenancy law and how they work in practice in Germany. These are all areas which form part of the human rights theory of adequate housing, and therefore feed into the fitness for purpose criteria used in this study and set out at section 1.2.1.1, above. These are; tenure, security, rent and condition.

This discussion includes analysis of recent reforms; these will not be discussed separately.

[651] Although judgements of the Bundesgerichtshof (the Federal Constitutional Court) must be followed.

[652] German cases (with the exception of corporate law decisions) are reported anonymously so will be cited in text without party names.

7.5.1 Tenure

Unlike England, Germany does not have several different types of tenancy. All tenants in Germany have the same status,[653] which has no specific name assigned to it (i.e. such as assured shorthold tenant, secure tenant etc). It is still possible to identify those who rent in the private sector- the majority of tenants in Germany- but the PRS market is less distinct, as are different elements of the market such as the lower end, the primary focus of this study.

In Germany the vast majority of tenants will have a tenancy for an indefinite term and will continue to pay rent periodically until the tenancy is validly terminated. The tenancy can be completed in writing or orally; only fixed term leases of over 12 months carry a requirement that they must be made in writing. This is because the law limits the circumstances in which a fixed term contract is valid and therefore certainty is needed if a fixed term is proposed.

BGB s.575 allows a landlord/lessor to grant a fixed term lease only if, at the expiration of the term, they wish to use the dwelling for themselves, their family or household; they wish to demolish or alter the premises substantially so that the continuation of the lease would be impractical; or they wish to let the property to an employee. The landlord must have informed the tenant at the outset of the tenancy why this was for a fixed term, otherwise this is deemed to be an indefinite term tenancy. If such notice is given at the outset the tenant can still challenge the fact that the lease is for a fixed term if they think that the landlord has fabricated the grounds and they can, within the last 4 months of the lease, ask the landlord to notify them in writing that the grounds for the lease being fixed term still apply. If the grounds no longer apply or, on application to the court for a determination on a dispute, they are found not to be genuine, the tenancy is deemed indefinite. The burden of proving the ground to justify a fixed term lease falls on the landlord and the parties cannot contract out of this provision to the detriment of the tenant. A landlord cannot grant a new fixed term tenancy of a premises after the

[653] There are some distinctions, for example leases/tenancy contracts can be between an owner as landlord and a resident as tenant (Mietvertrag) or let under a sublease agreement (Untervermietung) and both of those types of contracts could be for a limited term (befristeter Mietvertrag), or for an indefinite term (unbefristeter Mietvertrag), however all renters have the status of tenants/lessees.

expiration of one fixed term unless they can prove again that one of the grounds applies.

This contrasts directly with England where fixed term contracts are the norm, often providing for a term of only 6 months. In practice tenants can remain beyond this term on a periodic basis for an indefinite period until the tenancy is legally terminated, but most private tenants have a short, fixed term at the outset with no justification needed for a fixed term to be valid.

Another area in which the German system contrasts with England, is the provision by private landlords of subsidised rental housing in Germany. Although "social housing as a concept formally does not exist in Germany",[654] subsidised housing is still available but is provided by any landlord, including a private individual or company. Private landlords can therefore become providers of what we would recognise in England to be social housing, to an extent which does not occur here. Although in England housing associations are private companies or groups, they have to be registered as social landlords to provide social housing and become subject to a different regulatory and legislative regime. This is not the case in Germany.

Social/subsidised housing provision in Germany is "complementary not competitive".[655] This benefits tenants as it means the rental sector as a whole is regulated and protections are not in place for only a limited number of tenants in a specific sub- sector of the rental market. Different subsidy schemes exist, both at national level through housing allowances and building schemes, and at a regional level as Länder have been administering social housing since 2006.[656] In broad terms landlords are given assistance to build or modernise their dwellings if

[654] Haffner, M, "Secure Occupancy in Rental Housing; A Comparative Analysis. Country Case Study; Germany" (Research Institute for Housing, Urban and Mobility Studies, Deft University of Technology 2011) pg 1

[655] Freeman, A and Holmans, A, Is the UK Different? International Comparisons of Tenure Patterns, (Council of Mortgage Lenders Research 1996)

[656] Federal involvement in funding subsidies is being withdrawn, with Lander expected to administer this themselves. It is hoped that this will be the case from 2019- Droste, C and Knorr- Siedow, T, "Social Housing in Germany" in Scanlon, K, Whitehead, C and Fernandez- Arrigiota, M, *Social Housing in Europe* (John Wiley and Sons Limited 2014) pg. 185

they agree to accept certain tenants at restricted rents for a period of time.[657]

Once a subsidy is in place, local authorities can either agree with the landlord that they will take tenants only with a certificate proving their entitlement to subsidised housing (Wohnberechtigungsschein), in which case the landlord can choose freely among such tenants, or the authority can reserve the right to nominate tenants for the accommodation directly. They can elect to make a direct allocation of an individual tenant or to nominate three potential tenants, from whom the landlord chooses one. A landlord is often given some choice in the allocation, and will usually select the tenant with the lowest risk.[658]

Tenants will be eligible for a certificate for subsidised housing, a direct allocation or referral if their income is below certain levels. This can vary region to region but is generally 12000.00 euros for a single person household, 18000.00 euros for a two-person household plus 400 euros per additional person.[659]

The number of properties available at a subsidy will reduce naturally over time as the subsidised status of a dwelling is time-limited. For example, in their book chapter on social housing in Germany Christine Droste and Thomas Knorr-Siedow state that in the two decades up to 2014, 100,000 properties left the system but only 20,000-30,000 were produced on a subsidy basis.

7.5.2 Security

"The starkest difference between the two countries' rental markets is in the security of renting in England and Germany".[660] As security of tenure

[657] Droste, C and Knorr- Siedow, T, "Social Housing in Germany" in Scanlon, K, Whitehead, C and Fernandez- Arrigiota, M, *Social Housing in Europe* (John Wiley and Sons Limited 2014) pg. 185

[658] Haffner, M, Hockstra, J and Oxley, M, Bridging the Gap between Social and Market Rented Housing in six European Countries, (IOS Press Officer 2009) pg. 164

[659] Cornelius, J, *Tenant's Rights Brochure for Germany,* Tenlaw

[660] Davies, B, Snelling, C, Turner, E and Marquardt, S, "Lessons from Germany; Tenant Power in the Rental Market" (Institute for Public Policy Research 2017) pg. 13

is a key part of what makes housing provision “adequate” under a human rights analysis of housing, as well as being one of the fitness criteria used as a key focus of this study, this is an important distinction.

Tenants of private landlords in Germany have a high level of security. Unless they agree to leave or transfer to another property, tenants cannot be evicted from their homes without a court order. This mirrors the provisions in England, however one key difference is that a landlord is only entitled to an order against a tenant renting under an indefinite term if one of the specific termination grounds are made out and the correct procedure followed. In England a court order is required and due process must be followed, but it is not always necessary for the landlord to prove grounds for ending the tenancy (see section 4.4.2 above).

The position is much weaker for tenants in Germany under a valid but expired fixed term tenancy from whom possession can be sought on mandatory grounds without even a requirement to serve notice, however this only applies to a minority of tenants as the circumstances in which a fixed tenancy can be granted and enforced are very narrow (see section 7.5.1 above).

For indefinite term tenants who choose to give notice themselves, they need to give their landlord 3 months’ notice of their intention to terminate the tenancy under an ordinary notice. They are not required to provide any grounds. In England once a tenancy is periodic a tenant can terminate without cause; the notice period here varies but it is usually 28 days, one complete term of the tenancy or whatever period is specified in the tenancy. In Germany, the tenant’s right to serve ordinary notice can be excluded in the contract for up to 4 years, but only if the landlord’s right to use this type of notice is also excluded for the same term. An exclusion clause that impacts only the tenant is not valid and any clause excluding this right for over 12 months must be in writing.[661]

For landlords wishing to terminate a tenancy in Germany the procedure is more complex than it is for a tenant.

[661] Cornelius, J, *Tenant’s Rights Brochure for Germany,* Tenlaw, pg 25

If a landlord seeks to evict a tenant, the first stage in the procedure is to serve the tenant with notice of their intent to end the contract. This should be done in writing, with the tenant's right to object set out in that notice. There are three types of notice that a landlord can use;

- Ordinary notice (ordentliche Kündigung)- BGB s.573. The landlord can use this if they have a legitimate interest in ending the tenancy because the tenant is in manifest breach of tenancy, they need the premises for themselves or a family member (including a spouse, parents, children, step children, siblings and relatives through marriage), or if the terms of the lease are such that they prevent the landlord from making economically viable use of the premises. However s.573 specifically excludes the service or ordinary notice on the grounds that the landlord wants to increase the rent.

  Even if a legitimate interest is established, if the property is let with any subsidy the landlord can only claim the property back for their own use if the municipality agrees to them doing so.

  The notice period for an ordinary notice is 3 months in most cases, but this is extended up to 6 months if the tenant has been in the property for 5 years and up to 9 months if they have been in the property for 8 years.[662] S.573c sets out this notice period criteria.

  A tenant can object to an ordinary notice under s.574, if its effect would cause them hardship. The tenant must object to the landlord in writing at least 2 months before the tenancy is due to end. The tenancy can then be continued as long as appropriate, the period of which will be determined by the court if it cannot be agreed by the parties. The tenant only needs prove that they would suffer hardship and the lease can be continued, even if the landlord has a legitimate reason for ending this. Grounds that constitute hardship have been found to include; that the tenant could not secure alternative accommodation on reasonable terms (this is confirmed in BGB 574 (2)), pregnancy, low income, illness and upcoming examinations.[663]

[662] The period could be up to 12 months for come leases concluded before the reforms to the BGB in 2002 under BGB s565 as it was prior to the reforms.

[663]Kofner, S, The Private Rental Sector in Germany, (Amazon.co.uk Ltd 2014) pg. 40

- Immediate notice (Ausseriordentliche Kündigung)- BGB s.596. The landlord can serve this, ending the tenancy with immediate effect, if certain grounds are made out and the notice is served within a reasonable period of the landlord discovering the existence of the ground. A non-exhaustive list of special reasons is found in sections 543-569 of the BGB and include rent arrears if the last 2 monthly payments have been missed, a breach of an important tenancy term and subletting in a situation where a landlord would not have to accept the subtenant and warned the tenant not to sublet.

  Tenants can also use immediate notice if a breach has occurred which is so manifest that the landlord tenant relationship has completely broken down; both fixed term and indefinite term tenants can exercise this right (BGB s.543).

- There are also some special termination rights for landlords where they are the original landlord and their tenant dies but the property remains occupied. These are known as Sonderkündigungrechte and are set out in BGB s.563.

In Germany there is no equivalent of the English s.21 “no grounds” notice (see section 4.4.2). A landlord of a tenant under an indefinite term lease can only service notice for cause. Partly as a result of this, in Germany the average tenancy lasts for 11 years, in the UK the average length is 2½ years.[664] This demonstrates that the PRS in Germany offers its tenants security of tenure, and is more closely aligned to the standards required by by an analysis of its fitness for purpose based in a human rights theory of housing.

Where the landlord serves a valid notice and no legitimate objection is raised, if tenant does not leave in accordance with the notice the landlord can apply to court for possession of the property, which is functionally the same as the procedure in place in England, though there are differences in the way the courts process these cases and apply

[664] Davies, B, Snelling, C, Turner, E and Marquardt, S, “Lessons from Germany; Tenant Power in the Rental Market” (Institute for Public Policy Research 2017) pg. 3

their discretion (see below). The judge will grant a possession order if they are satisfied that the entitlement is proven.

Possession proceedings are usually dealt with the in the Amtsgericht (the equivalent of the County Court which deals with possession claims here), unless the financial value of the case exceeds 600 euros or there is a complex issue or question of law, in which case this can be referred up to a higher court. The court will try and reach a conciliation before the matter goes to a hearing and will often order the parties to attend a mediation session if they have not already done so. Parties can also choose this route voluntarily.

As in England, parties can represent themselves in front of the court, but they are also entitled to employ a solicitor. Legal aid (Prozesskostenhilfe) is available if they are of limited means.[665] The court costs are usually borne by the tenant if an order is made against them and average 3000 euros for the full possession process.[666] There are an average of 270,000 landlord and tenant cases in court per year.[667]

If the grounds are proven and possession is to go ahead the court can order this to take affect at any time within between 1 month and 1 year of the date of the order. The minimum time is not prescribed by law but it is general practice that the order is for a minimum of 1 month. The average time taken to evict a tenant through the court process is estimated to be 331 days.[668] This is a considerably longer period than applies in England.

[665] Like Legal aid in England, this is means tested and is only available if the claim or defence has reasonable prospects of success and the case is not frivolous. It can guard against a party paying costs for representation, but if they are unsuccessful they would still have to pay the costs of the winning party. Legal aid is governed by s. 114 of the German civil procedure code (ZPO)

[666]Fitzsimons, J, "The German Private Rented Sector; A Holistic Approach" (The Knowledge Centre for Housing Economics 2014)

[667] Davies, B, Snelling, C, Turner, E and Marquardt, S, "Lessons from Germany; Tenant Power in the Rental Market" (Institute for Public Policy Research 2017) pg. 24

[668] De Boer, R and Bitetti, R, "A Revival of the Private Rental Sector of the Housing Market? Lessons from Germany, Finland, The Czech Republic and the Netherlands" (OCED Economics Department Working Paper 1170)

The order, once expired, can be enforced by bailiffs (Gerichtsvollzieher) who should give the tenant at least 3 weeks notice of their eviction date. The court can delay enforcement of this by between 2 weeks and 1 year if hardship is proven. Hardship would typically be if the tenant were too ill to move and there may be at risk if they were forced to do so.[669] At at this stage impending homelessness alone does not give the judge the right delay enforcement. However even where the correct procedure has been followed, there is provision for the Länder to force a landlord to allow a tenant to remain if they would be homeless if evicted. This is an extraordinary power and Länder are not expected to exercise their discretion unless there is no other accommodation available in the district for homeless households.[670]

7.5.3 Rent and Tenancy Costs

In contrast to the minimal rent regulation in England, rent in Germany is highly regulated.

The gross rent (Bruttomiete) in Germany is split between net rent for the use of the premises, Nettomiete or Kaltmiete (the cold rent), and Nebenkosten which covers all other charges on the accommodation, such as heating charges etc. Landlords remain liable for all Nebenkosten unless they transfer liability to the tenant in the contract (BGB s.535 (1)(3)), which is usual.[671] In most cases the tenant will pay the landlord a set monthly amount and the landlord will return any surplus or demand any shortfall when the actual bills are received. BGB s.560 allows a landlord to increase the rent if the Nebenkosten are paid by lump sum at a flat rate and the actual costs have increased.

By contrast, in England the tenant usually pays rent and becomes liable for associated charges as an occupier. This has the same effect as the

[669] ZPO- Zivilprozessordnung (the Civil Procedure Code) s.740

[670] Cornelius, J and Rzeznik, J, Tenlaw National Report' Germany, (2014), 47

[671] Terms transferring liability have to be clear and unambiguous or they can be deemed unenforceable. A landlord can avoid ambiguity by inserting a clause referring to the tenant's liability for all operating costs in § 2 BetrKV-Betriebskostenverordnung- Operating Costs Order. This an umbrella provision which lists all possible operating costs that the tenant may have to pay. BGB s.556 (1) allows such a clause to be used.

rules in Germany, where tenants are usually responsible for the costs under the tenancy contract, but in England this liability applies to the tenant automatically.

Under Article 3 of the GG, the landlord and tenant are free to negotiate the rent on the property- as is the case in England- but this freedom is mitigated.

For new contracts, a landlord who charges more than 20% above the local average rent in the area[672] where the property is based may be deemed to have committed the offence of profiteering under the economic criminal law[673] and can face fines of up to 50,000 euros (rent which is over 50% higher than local reference rents is deemed to be deliberately excessive and will always attract a criminal charge).[674] This level has been reduced to 10% in areas of high housing demand.[675] The rent can remain higher if the previous tenant paid a higher rent and this is deemed reasonable (although this exception is not applicable if the higher rent was agreed within the last year of the previous lease), otherwise a lower amount must be applied. Any rent paid over and above this amount after the tenant makes a complaint about the rent and submits a request for an amendment can be recovered by the tenant.

There are no comparable rules in England where initial rents can be negotiated freely.

If the property is subject to a subsidy, the landlord may be required to adhere to additional regulations imposed by the Länder in respect of the rent they can charge at the outset of the tenancy. Private individuals or

[672] Calculated with reference to the Mietspiegel, if one is available, which is discussed in detail below. If none is available for the area then the opinion of experts is sought to clarify the comparable rents.

[673] Wirtschaftsstrefgesetz-s.5

[674] In practice this is not routinely enforced. For example Kofner states, in this book Kofner, S, The Private Rental Sector in Germany, (Amazon.co.uk Ltd 2014), pg 34, that in 2012 there were no proceedings under this act in Hamburg or in Berlin in 2013.

[675] BGB s.556d(1). Länder have to identify overstretched markets within their jurisdiction by 2020 and once assigned an area will keep this status until at least five years as per BGB s.566d. New builds, i.e., residential space not previously let or used before 1st October 2014, are excluded from the provisions- BGB s.556d as are the first lets after a property has been modernised.

companies do not provide subsidised housing in England, so this rule has no direct comparator.

These rules have been criticised by some who are concerned that as the reference tables used to determine the local average rents in some areas are outdated or unrepresentative, the law will actually represent a rent freeze and drive down profits,[676] causing landlords to withdraw supply. Schick argues that the indexes of local reference rents (Mietenspiegel), which have always previously been used to manage increases within existing rental contracts only, are not suitable for the purpose of managing new rents and "simply cannot fulfil this additional function".[677]

The problem lies in how they are calculated.

A Mietspiegel is a database of local reference rents, complied using either details of market rents charged on property of comparable size and quality in the area over the proceeding four years (unqualified indexes- BGB 558e) or on scientific criteria (qualified indexes) based on strict procedure set out in the BGB s558d. A Mietspiegel is introduced and maintained by the individual municipalities of the Länder, who determine what geographical area will be covered by it and how properties will be classified on that database, i.e., in terms of property type and size (BGB 558).

There can be many different indexes for each municipality area, often calculated on different criteria.[678] However Schick argues that these indexes are not differentiated enough. For example in Berlin, there are only three types of apartment recognised as distinct for the purposes of the indexes, despite the huge variety of living space in the city.[679] Things

[676] Derschermeier, P, Haas, H, Hude, M and Vöigtlander, M, "A first analysis of the new German rent regulation" [2016] International Journal of Housing Policy, 16:3, 293-315.

[677] Schick, Michael, "What Germany's Amended Tenancy Laws Do and What They Don't" in Just, T, Maennig, W (Eds), Understanding German Real Estate Markets, (Springer International Publishing 2017) pg 151

[678] Schick, Michael, "What Germany's Amended Tenancy Laws Do and What They Don't" in Just, T, Maennig, W (Eds), Understanding German Real Estate Markets, (Springer International Publishing 2017) pg. 147

[679] Schick, Michael, "What Germany's Amended Tenancy Laws Do and What They Don't" in Just, T, Maennig, W (Eds), Understanding German Real Estate Markets, (Springer International Publishing 2017) pg. 151

that are dissimilar are being compared when a Mietspiegel is created and this is then being used to set new rent, which causes distortions in the market.

Furthermore, Kofner argues that Mietenspiegel have “built in delay factors”,[680] which mean that they do not represent accurate local rents even when the criteria for the data has been set. The fact that rents from ongoing contracts are included when the databases are amended, but excluded when not, that they include rents which have been set in accordance with existing rent caps and therefore do not reflect actual market value, and that there is often an administrative delay in adjusting the Mietenspiegel, are all cited as issues.

However despite these criticisms, this is the current system used to regulate new rents. For areas without a Mietspiegel (which are not compulsory), three comparative local market rents are used to set a reference rent level, or the opinion of an expert is sought.

In Germany, rent increases for ongoing tenancies are also regulated. Rent can be increased once within any 12-month period if the tenancy contract allows this. The contract can allow either a negotiated increase (BGB s.557a) or a graduated rent increase based on either fixed and certain criteria set out in the tenancy agreement (a stepped increase) or on the cost of living index produced by the Federal Statistics office (an indexed increase) (s.557b). If the tenancy includes a rent increase clause, the rent cannot be increased in any other way. This is not dissimilar to the position in England in practice, where a tenancy may allow an increase or an increase can be negotiated.

Furthermore, like in England, there is also a legal process that allows a rent increase if these options are not available and increases have not been provided for in the lease.

Under BSB ss.558-560, landlords are able to increase rent by following a set legal procedure, but they are not able to increase the rent by over 20% in any 3 year period even if a comparable rent on the Mietspiegel

[680] Kofner, S, The Private Rental Sector in Germany, (Amazon.co.uk Ltd 2014) pg 27

would have allowed a higher sum[681] for a new let, and they can only increase the rent once in any 15 month period using this method. The new charge should be based on either the Mietspiegel (see above), on expert advisory opinion or on three comparable sample rents from the local area.[682]

Again, there is a difference if the property is let with a subsidy. In this case the rent can be increased if operating costs increase and the local authority agree to the new rent, but likewise if the costs decrease then so should the rent. These rules help to protect tenants against sudden and sharp increases in rent.[683]

BGB s.559 also allows a landlord to increase rent by up to 11% if they have modernised the property and incurred costs in doing so, providing the modernisation achieves long term reductions in energy or water consumption, increases the utility value of the property or sustainably improves the general condition of the property.[684] To increase the rent this way the landlord should serve written notice of the proposed increase and date on which it will start.[685] The start date must be at least 3 months after the notice is served. The tenant has two months to challenge the rent increase if they choose to do so, otherwise the rent is payable from the third month. In addition to this under s.555c the landlord must also give the tenant 3 months written notice before actually commencing the works, warning them of the impact on their rental liability. If they choose to do so they can end the tenancy by extraordinary notice at that stage.

It is not only the level of rent and rent increases which are regulated in Germany; the BGB, s.556b(1), even proscribes when the rent is due; this is the first day of the month or at the latest the third working day if

[681] This can be capped at 15% in areas of high demand (BGB 558(iii)

[682] BGB s.551a(ii)

[683] Crook, T, and Kemp, P, *Private Rented Housing; Comparative Perspectives,* (Edward Elgar Publishing 2014), Pg, 44

[684] Schick, Michael, "Regulations and Laws on Real Estate Agents, Notaries, Cadastres and Rent Increases" in Just, T, Maennig, W (Eds), Understanding German Real Estate Markets, (Springer International Publishing 2017) pg. 114

[685] BGB 558a

the tenancy allows this. There is no regulation in England regarding when the rent should be paid which is reflective of the differences between the two countries. In relation to rent there is little regulation in England; in Germany this is extensive.

In Germany assistance with rent comes mainly in the form of Wohngeld, although residents can also get help with housing costs through a wider claim for social assistance. These are means tested provisions payable to any residential occupier, regardless of their housing tenure, if their income is not sufficient to enable them to secure accommodation of a reasonable standard.[686] Wohngeld is similar to housing benefit/local housing allowance, which is also means tested financial assistance. The assistance scheme is set at a Federal level but is funded by the Federal and Länder Governments in equal shares.

Wohngeld rates are calculated by reference to maximum allowable rents listed in Wohngeld tables, which are complex. There are many tables covering different household circumstances, income and size and these tables are annexed to the national legislation rather than being locally maintained documents.[687] This means that they cannot be changed easily and require a statutory amendment. However the benefit of the system is that it is open to residents from all tenures and a landlord does not usually know if their tenant claims Wohngeld, minimising discrimination.[688] Claiming Wohngeld is not seen as having negative connotations and is considered to conform the Germany's social economic view,[689] however Kofner argues that it "is now more or less limited to the working poor or the short term jobless".[690] This also makes it less likely that particular types of property, such as properties in poorer

[686] This is currently based on household size, income and the maximum rent or mortgage payments that can be covered by Wohngeld.

[687] Wohngeldgesetz (WoGG) 2017

[688] Borsch-Supan, A, "Housing and Market Regulations and Housing Market Performance in the United States, Germany and Japan" in Blank, R, Social Protection v Economic Flexibility; Is there a Tradeoff? (Chicago Press 2009) pg 132.

[689] Kofner, S, "Housing Allowances in Germany" in Kemp, P. A. (Ed), Housing Allowances in Comparative Perspective, (Bristol: Policy Press 2007) pg. 159

[690] Kofner, S, "Housing Allowances in Germany" in Kemp, P. A. (Ed), Housing Allowances in Comparative Perspective, (Bristol: Policy Press 2007) pg. 161

condition, will be let to tenants on benefits or on a lower income, making different elements of the PRS here less distinct than in England. The focus of this study is the lower end of the PRS market in England, which is easier to identify than its counterpart in Germany because of the way the system operates there. However as noted above at section 7.2.1.4, this does not invalidate any comparison between the two systems, instead this highlights how Germany uses a different model to achieve a functioning PRS; something which England can look to borrow from.

There is also clear regulation in Germany in relation to deposits and fees.

Deposits (Kaution) can be freely negotiated but cannot exceed three months' rent.[691] In England there was no restriction on the amount that could be charged until as recently as 2019, when the Tenant Fees Act came into force. The jurisdictions are also similar in that both have rules about what must be done with a deposit once it is paid. In Germany the landlord must pay this into a savings account which accrues interest and at the end of the tenancy they should return both the amount and the interest to the tenant, less any deductions.[692]

Tenants in Germany may be expected to pay up to 2 months' net rent plus VAT to cover agency fees after a contract is concluded under the law on the regulation of estate agents,[693] but this only applies if they instructed the agent to find the property for them. If the agent was instructed by the landlord who asked them to find a suitable tenant, they pay the fees. An agent cannot work for both parties, and any attempt to circumvent these rules can attract a fine for the agent.

If the landlord does not use an agent then they can only charge a reasonable fee for the conclusion of the contract to cover their own costs. They are not allowed to charge commission for letting their own property. A reasonable fee is usually considered to be between €50.00 and €75.00.[694] Unlike in England, fees cannot not be applied before the

[691] BGB 555(iii)

[692] Cornelius, J, *Tenant's Rights Brochure for Germany,* Tenlaw, pg 15, BGB S551(3)

[693] Gesetz zur Regelung der wohnungsvermittlung

[694] Cornelius, J, *Tenant's Rights Brochure for Germany,* Tenlaw, pg. 8

contract is concluded, i.e., to “hold” a property,[695] by either a landlord or an agent.

7.5.4 Conditions in Private Rented Housing

Repairing obligations are heavily regulated, like most areas of German private landlord and tenant law. German tenancy law takes into account all of the key areas of a tenancy contract and ensure that rights and obligations work together and complement one another to make the sector fit for purpose. As a result, the German model can be seen to confirm more closely to the standards expected if we adopt a human rights theory of housing and consequently more closely represents the provision of “adequate” housing.[696]

Landlords are responsible for all internal and external repairs and upkeep, but it is permissible to transfer responsibility to the tenants for small repairs, providing the cost of those repairs is reasonable and is specified in the contract.[697] “Reasonable” is not defined, but €75.00 is the amount usually accepted as such for a single repair, or between 8% and 10% of annual rent for a series of repairs.[698] The tenant is entitled to do these repairs themselves as long as they are completed in a workman-like manner.

A tenant has a right to make minor alterations to the property but must do so at their own cost. They are required to get permission from the landlord first, but this cannot be unreasonably withheld and cannot be withheld at all if that would infringe someone’s basic rights under the GG. For example, the courts have previously held that a tenant has a

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[695] Cornelius, J, *Tenant’s Rights Brochure for Germany,* Tenlaw, pg 6

[696] See section 2.1.2

[697] Cornelius, J, *Tenant’s Rights Brochure for Germany,* Tenlaw, pg. 9-10

[698] Cornelius, J, *Tenant’s Rights Brochure for Germany,* Tenlaw, pg 9-10

right to attach a satellite dish to the property if they need to access additional TV channels to avoid becoming isolated.[699]

For all other defects, where the landlord is liable, the tenant must notify the landlord of a defect immediately upon this coming to their attention. They can specify a reasonable time in which the landlord should carry out a repair and a landlord who fails to do the work within that time is in default. The tenant can then rectify the defect themselves and reclaim the costs from the landlord. If the tenant gives the landlord notice one month before the rent is due, they can withhold all or part of their rent to recover costs they have incurred.[700]

Tenants only have to pay an appropriate portion of the rent when there is a defect in the property, unless they knew of that defect, or should reasonably have known, when moving in and elected to do so anyway. If there is a dispute about whether a tenant owes the full rent or how much they can deduct, the courts will determine this. Anything that affects whether a tenant can use the property as they wish to, can be a defect,[701] the landlord does not have to be at fault. Therefore, the scope of what is considered a deficiency is much broader in Germany. This could include mould damage, whatever the cause, faulty appliances or noise in the neighbourhood.

7.6- Evaluation of German Tenancy Law

The detailed discussion above highlights the differences in private tenancy law between England and Germany. The main differences are considered below, with an evaluation of how the approach taken in

[699] This decision was based on a case brought by a German Citizen of Turkish birth who needed to access channels in his native language- it was held that his rights were breached if he could not. Cornelius, J, *Tenant's Rights Brochure for Germany,* Tenlaw, pg 19-19, case Ref BGH, NZM 2005, 335

[700] BGB S.556

[701] Haffner, M "Secure Occupancy in Rental Housing: An International Comparison" (Australian Housing and Urban Research Institute 2012), <Ahuri.edu/publications/p50565> accessed on 05 April 2016, pg. 29

Germany could be used to improve PRS law in England and make this more fit for purpose.

One main feature of the German system which is sorely lacking in England, and which impacts on the fitness of the sector, is the long-term attitude of the Government, investors, landlords and tenants to the private rental market. The whole infrastructure of the PRS there is designed with this in mind (see section 7.2.1.4, above).

The finance and mortgage sector which underpins the purchase and ownership of properties in Germany is designed in such a way that landlords are predisposed to the idea of longer- term tenants. Investment in property is a considered undertaking in an economy that is risk averse (see section 7.2.1.4) and the tenancy legislation supports that long- term view. Where tenants have greater security and landlords are aware that the grounds for eviction are limited, they end up with longer term lets and this is built into the decision making process when a property is let. This is not the case in England, where PRS tenancies tend to be shorter in length, resulting from the regulatory framework underpinning the sector (see section 5.2.1, above). This does need to be borne in mind when considering borrowing regulation from Germany, as the systems in the two jurisdictions are so different. However using the functional method of comparative law discussed at section 2.1.3 enables us to see the way the German model uses regulation to achieve stability in the PRS within the context of its own system, and consider how the same function could be established in England by reforming the regulation there.

Germany is often known as a tenure neutral country, all tenants having the same status in law.[702] Unlike in England, the vast majority of tenants have indefinite tenancies, as fixed term agreements can only be granted in limited circumstances.[703] Subsidised housing, roughly equivalent to social housing in England, can be provided by any landlord, when the tenant meets the qualification conditions. This has the benefits or ensuring that renting from a private landlord is not seen as inferior or

[702] See section 7.5.1, above

[703] See section 7.5.1, above

secondary, and the PRS really is a mainstream housing option. In England, by contrast, there is a stark difference in private and social renting, both in the tenancy structure, tenant rights and the reputation of each type of renting.

Although neutralising tenure may be challenging in the English system due to the funding of different tenancy types, introducing regulation which promotes the PRS as a mainstream housing option whilst keeping it as a distinct tenure is a way of borrowing in a functional way from the German model to make the PRS fit for purpose. This can be achieved by looking at what the German model achieves in terms of security, affordability and condition in the PRS and seeking to develop similar regulation, within the existing system in England. This is discussed further when recommendations for reform are made in Chapter nine.

In Germany, indefinite term tenancies can only be terminated by court order, or certain grounds being proven to the satisfaction of the court. Notice must be served in all cases, and in most cases notice of at least 3 months is required.[704] This means that private sector tenants in Germany know from the outset in which circumstances they may lose their homes and can plan for this. They have sufficient security in their homes to enable them to make their rental properties their homes and they have greater investment in their property and the locality as a result. In England, private tenants do have the security of due process and the requirement of a court order before they can be evicted, but it is not always necessary for the landlord to prove grounds, which can lead to uncertainty and impact on fitness.[705]

The process for a tenant in Germany wishing to terminate their tenancy is slightly different to the position in England. They can do so on an indefinite tenancy by giving notice, in the same way that a periodic tenant can in England, but the notice period is 3 months, rather than 28 days. Enabling all tenants to terminate their tenancy on notice, rather than tying tenants to an initial fixed term would help to make the PRS more accessible and flexible to meet tenants needs, however there is a

[704] See section 7.5.2, above- there are some cases where immediate notice can be given, but these are limited and set out in the regulations

[705] See section 7.5.2, above

risk that increasing the notice period could limit flexibility and mobility in the PRS.

As well as differences in security and possession rights, rents in Germany are much more highly regulated that in England.[706] Landlords can be deemed to have committed an offence, and by liable for prosecution and fines, if they charge an initial rent that is in excess of 20% higher than the local market rents.[707] This ensures that properties are more affordable and accessible at the outset; there is no similar provision in England where landlords can set whatever initial rent they choose.

Section 7.5.3 outlines the procedure for rent increases for private tenancies in Germany. These are broadly similar to the provisions in England, however one major difference is that the reasonableness of any proposed increase is measured against the existing rent, and the rent cannot be increased by in excess 20% of that initial rent in any 3-year period. In England there is no such provision; the rent increase must be reasonable, but there is nothing to stop a rent increasing by 100% or more at any one time.

Unlike in England, tenants in Germany do not face arbitrary eviction if they challenge increases which they deem unreasonable as their landlord can only terminate their tenancy on certain grounds (see above, section 7.5.2) and therefore these regulations have more effect than the equivalents in England as they have both the security and rights needed to ensure fitness.[708]

Another major difference in Germany- one which could help improve the PRS in England- is the fact that tenants here are heavily involved in the sector. They have a vested interest in the rented accommodation sector and have a formal voice in the regulatory process via associations which have legal recognition.[709]

[706] See section 7.5.3, above

[707] See section 7.5.3, above

[708] See section 2.1.2, above

[709] See Section 7.2.1.3, above; Holdsworth, R, How Rent Control Works in Other Countries (2014)

This is not the case in England. There is no coherent tenant voice and no formal consultation. Tenant driven change and reform is rare and limited to particular issues taken up by lobby groups which are able to gain political support. There is no set process for this and results are variable. This is partly the result of a lack of political will. PRS accommodation has never been high on the political agenda and reform has been piecemeal. This has led to a complex set of legislative rules which do not interact positively with one another. Should the sector be taken more seriously, and looked at as a whole with reform in mind, it could be shaped around the needs of the service users and made fit for purpose. The German model demonstrates that this is possible. A major part of such an exercise would be considering how to introduce reforms which would make the sector more professional and long term in nature, and looking at the PRS in Germany is a good starting point.

Tenants, who make up a greater percentage of the housing market in Germany, have greater security in their properties than their counterparts in England, rent is more closely controlled and the law steps in to regulate on common areas of dispute, easing tensions in the landlord tenant relationship and helping to make the sector more stable and sustainable. Tenants voices are more prominent in the political discussion through organised tenant associations (see section 7.2.1.3 above) and for many households it is a long-term option.[710]

7.7 Conclusion

There are clear differences between the PRS in England and Germany and in the policy objectives that underpin them. The differences have many causes, including economic, social and historical factors.

Although the Government in Germany prefer to allow markets to progress unaided, there is extensive regulation in this sector. This level of regulation has not led to withdrawal from the sector as some fear it

<http://londonist.com/2014/01/how-rent-controls-work-in-other-countries.php> accessed 4 March 2017

[710] Muelbauer, John, “Anglo-German difference in Housing Market Dynamics” [1992] European Economic Review 36 pg. 545

would in England. Instead long term security of tenure “broadens its (renting’s) appeal to many types of household” and rent regulation increases demand because it “provides security and reduced uncertainty about future housing costs”.[711] This increased demand in turn benefits landlords who can expect a tenant to provide a long-term source of income. There are lessons that can be taken from the approach here to inform reform of the PRS in England with a view to making it more fit for purpose.

Chapter 8 will go on to consider lessons that can be learned from other jurisdictions within the UK, before Chapter 9 expands on these issues and makes recommendations for reform.

[711] Crook, T and Kemp, P, Private Rental Housing; Comparative Perspectives, (Edward Elgar Publishing 2014) pg 13

Chapter 8- Lessons from Other UK Jurisdictions:

Wales and Scotland

8.1 Introduction

Chapter 7 discussed the PRS in Germany in detail to look at lessons that could be drawn from the regime there. Although there are elements of the German PRS that could be used as a model when considering reform to the PRS in England, it would not be straightforward to transplant the German system into the UK. The vast differences in the political, social and legal landscape between Germany and England would make a wholescale transplant of this nature problematic, as discussed in sections 2.1 and 2.2, above. Instead a functional approach should be used when looking to borrow laws from Germany.

In order to further address these concerns this Chapter will go on to consider the PRS in two other jurisdictions within the UK itself, Wales and Scotland. Adopting or learning from the approach taken in these jurisdictions would represent a more limited change to current PRS in England and also allows us to take into account the broader economic, social and political structures which mirror those of England. This makes it easier to see how reform could work within the existing systems and regime, whilst still functionally achieving the beneficial outcomes based on analysis of the German model.

8.2 Wales

PRS tenancies in Wales fell under the same regulatory regime as the PRS in England until late 2022.[712] This meant that the majority of tenants there were assured shorthold tenants, as is still the case in England. This has now changed (see below), but even before these changes to the tenancy structure itself were introduced, the Welsh Government used their devolved powers to introduce reforms that differentiated the PRS there from its English counterpart.

[712] Renting Homes (Wales) Act 2016, as amended.

8.2.1- Licensing

Since 2014 all private landlords in Wales have had to be registered and hold a valid licence in order to let out a domestic property. These rules came into force under the Rent Smart Wales scheme, enacted under the Housing (Wales) Act 2014, Part 1. If a landlord does not manage their properties themselves, they can transfer this requirement to their managing agents. There is training the landlords or agents must complete in order to obtain a licence. This training must be approved by the Rent Smart Wales scheme and takes between 6 and 7 ½ hours to complete. It covers the legal framework for renting a property and ensures that landlords and agents are aware of their legal obligations before entering into a landlord and tenant arrangement.

There is no such comparable requirement in England. Anybody is free to advertise and rent out a property without any requirement to obtain a licence or prove any understanding of tenancy law, unless their property falls into one of the designated selective licensing areas. Even where selective licensing applies there is no requirement that the landlord or managing agent themselves be trained and licensed, only that a license is obtained for the property. The requirements can vary between different authorities; these can include a requirement that training is undertaken by the property manager but that is not mandatory. They commonly include requirements to ensure that the property is in a decent condition, complies with gas and energy performance requirements and that the landlord agrees to manage anti-social behaviour from their tenants, for example.

In addition to completing training, it is a condition of the licence scheme in Wales that the landlord/agent must adhere to a code of practice throughout the term of the letting.[713] The code covers all aspects of letting and managing a tenancy to a professional standard and gives a clear framework which can be acted against if breached. Penalties for non- compliance include fines, prosecution, rent repayment orders and

[713] https://www.rentsmart.gov.wales/Uploads/Downloads/00/00/00/01/DownloadFileEN_FILE/Code-of-practice-for-Landlords-and-Agents-licensed-under-Part-1-of-the-Housing-Wales-Act-2014-English-Doc-1.pdf, accessed on 23.1.22

restrictions on the right to seek possession. There is no such comparable scheme in England. This type of external scrutiny is particularly useful for highlighting issues at the lower end of the rental market, which is the focus of this study. Properties tend to be older, in poorer repair and less desirable and formal reviews to ensure that landlords operating in this part of the PRS were adhering to a minimum standard of property condition and management would help to address some of these issues.

Although at the time that this was introduced the legal structure of tenancies in the PRS remained the same as that in England, this was a serious attempt to improve the professionalism of the PRS and drive up standards from within using the existing legal framework as it was at that time, which was the same framework that still governs the PRS in England. These licensing reforms did not go far enough to address the systemic issues in the PRS as a result of the legislative structure that underpinned it, but did ensure that all landlords had to meet a minimum standard, were known to the local authorities and could be scrutinised.

8.2.2- Tenure Reform

In 2022 reforms came in to affect in Wales which altered the tenancy structure of the PRS itself, making the PRS there more distinct from the PRS in England and offering tenants greater protections, including some improvements to security of tenure, a key feature of both the human rights theory of housing and the fitness for purpose criteria used in this study.

The Renting Homes (Supplementary Provisions) (Wales) Regulations 2022 cover tenants and licensees with an occupation contract with their landlord; they will now be known as contract holders rather than assured or assured shorthold tenants, for example. For those renting from private landlords, their tenancy type will be known as a standard contract. This requires their landlord to provide a written statement setting out the main terms of the agreement.

Under this new law, from 1st December 2022 Wales no longer uses assured shorthold tenancies nor is it possible to have wholly oral

tenancies, without defined written terms. This is a significant change to PRS governance when compared to the previous regime and the current regulation in England.

8.2.2.1- Security of Tenure

Unlike the reforms introduced in Scotland (see below), those in Wales do not remove the “no-fault” eviction process which existed under the previous regime and which still exists in England, but they did introduce some changes to that which are favourable to PRS tenants.

The notice period for no-fault evictions in Wales has been extended from two months to six. The notice can only be issued after the occupier has lived in the property for at least 6 months and they would then be entitled to at least 6 months’ notice, ensuring a minimum occupation term of 12 months. This does not actually remove the insecurity from the sector, as tenants can still be evicted without the need for the landlord to prove any grounds, but it does ensure that the tenants are given a longer period to seek suitable alternative housing if they face such an eviction.

The reforms in Wales also continue to protect tenants from retaliatory eviction, so if a judge is satisfied that a landlord has served a notice to avoid their repairing obligation, they cannot rely on a no-fault notice. Homes must also meet the fitness for human habitation conditions, which mirror the laws in England.

8.2.3 Conclusion

These reforms to the PRS in Wales, though limited, are a step in the right direction. The licensing reforms were introduced with no other substantive reforms to the PRS and the reforms to the tenure and notice period were also introduced to the existing regime without causing an adverse effect on the sector.

However the underlying insecurity remains, with all of the problems associated with that. It is still possible to evict a tenant without the need

to prove grounds and the laws about rent, tenancy costs and condition still mirror the laws in England.

Although similar changes could be introduced in England with little difficulty, it is arguable that further reform is needed if the PRS is going to be fit for purpose, as measured against the criteria set out in section 1.2.1.1.

Another jurisdiction within the UK, Scotland, which also operates in the same economic and political landscape have gone further in their reforms and the position there can also be compared to English PRS law and regulation. Again, as with Wales, the social, cultural, political and economic systems in Scotland are similar to those in England, which would ameliorate many of the issues with transplanting or borrowing laws identified in the methodology section at 2.1.3, above, making this jurisdiction a useful comparator.

8.3 Scotland

Recent reforms in Scotland, introduced by the Government there using their devolved powers, have made significant changes to the PRS regime in that Country. In many areas this is now quite different in substance to the PRS in England, despite operating within the same or very similar economic, political and social conditions. This therefore offers a useful comparator to the PRS in England as it is evidence of the scope of changes that can be made to a sector operating within that landscape.

8.3.1- Tenure

The Private Housing (Tenancies) (Scotland) Act 2016 provides that, from 1st December 2017, a new tenancy type- private residential tenancies- exists in Scottish housing law and all new private lets will have this tenure type, providing they relate to separate dwellings let as an individual tenant's main or principal home. There are some limited

exceptions,[714] but the vast majority of residential tenancies in the private sector are now private residential tenancies.

These are open ended periodic agreements that can only be terminated either by agreement, notice from the tenant or by the granting of an eviction order by the First-Tier tribunal, who manage possession claims. The tribunal can only grant an order where grounds to be proven.

This is a significant change to the law in England relating to private tenancies where short term tenancies are still the norm and no fault evictions are possible, but it is similar to the social housing regime governing secure tenancies in England.

8.3.2- Security

Security for tenants in Scotland has been strengthened significantly under these reforms, moving it into closer alignment with the human rights theory of adequate housing.

If a landlord wishes to seek an eviction order from the tribunal (used here rather than the County Court, which still hears possession claims in England), they must first serve the tenant with notice. If the tenant has lived in the property for less than 6 months, the notice period for all grounds is 28 days. If the tenant has lived here for over 6 months, the notice period varies depending on whether a landlord intends to use a conduct ground, grounds 10-15, where 28 days is required, or a non-conduct ground, grounds 1-11 and 17-18, where 84 days or 12 weeks' notice is required.

There is no longer a no-fault eviction ground in Scotland.

The permissible grounds for possession are set out in law and are discussed below;

1. The landlord intends to sell the property.

[714] The legal conditions for the creation of a lease must be satisfied, mobile homes are excluded and business tenants, such as companies, are excluded

If the tribunal are satisfied that the landlord intends to sell and intends to put the property up for sale within three months of the tenant ceasing to occupy, they must grant an eviction order.

2. The property is to be sold by the lender.
The tribunal must make an order for eviction if they are satisfied that the property is subject to a security, the creditor is entitled to sell and they require the tenant to leave in order to sell with vacant possession.

3. The landlord intends to refurbish the property.
The tribunal must make an order for eviction if they are satisfied that the landlord intends to refurbish the property, has the right to do so and it is impractical for the tenant to occupy the property during these works.

4. The landlord intends to live in the property.
The tribunal must make an order for eviction if they are satisfied that the landlord intends to live in the property as their only or principal home for at least 3 months.

5. The landlord's family member intends to live in the property.
This is a discretionary ground. The tribunal does not have to make an order for eviction, but can do if they are satisfied that a member of the landlord's family intends to live in the property as their only or principal home for at least 3 months and in those circumstances it is reasonable to make an eviction order.

6. The landlord intends to use the property for non-residential purposes.
The tribunal is required to make an eviction order if they are satisfied that the landlord intends to use the property for non-residential purposes.

7. The property is required for religious purposes.
The tribunal must make an order for eviction if they are satisfied that the property is held for occupation by a person engaged in

religious work as a residence from which to perform such duties, the property has been continuously occupied for these purposes and is required for these purposes again.

Grounds 1-7 cover circumstances in which the landlord or lender need to regain possession of the property following a change in circumstances or the need to change the use of the property. These grounds seek to strike a reasonable balance between the rights of the landlord and tenant. The scope of the grounds are clear and an independent tribunal must be satisfied that the grounds are made out before an order can be made. The evidential requirement would need to be managed carefully to ensure that these grounds were not exploited, but if a specialist judge is hearing the case that would mitigate this risk.

8. The current tenant is not an employee.
The tribunal must make an eviction order where they are satisfied that the tenancy was entered in to for the purposes of providing an employee with a home and that person is no longer a qualifying employee.

9. The tenant is no longer in need of supported accommodation.
This is a discretionary ground and the tribunal has the power to make an eviction order where the tenant was assessed as having support needs and the accommodation was offered in order to meet those needs, but that the tenant no longer has such needs.

10. The tenant is not occupying the let property.
The tribunal must make an eviction order where they are satisfied that the property is not being used as the sole or principal home of the tenant or lawful sub-tenant.

Grounds 8-10 cover situations where the intended use of the property is no longer being met. These ensure that, on the production of sufficient evidence, a landlord can recover possession which protects their interest, but also ensures safeguards for the tenant as there is an evidential burden on the landlord if they wish to rely on these grounds. In addition, the grounds are known prior to commencement of the tenancy

and the tenant would know if they were in breach of the conditions relating to use of the property.

11. There has been a breach of tenancy by the tenant.
This is a discretionary ground and the tribunal may make an eviction order where there has been a breach of tenancy (other than non-payment of rent) and it is considered reasonable to make an order.

This ground mirrors the current grounds available in England against assured shorthold tenants. It enables an independent judge to consider the tenant behaviour and apply reasonableness to the decision as to whether to evict and appears a reasonable ground. A landlord should be entitled to apply for possession if there is a breach of tenancy, but possession will not be appropriate in all cases and an independent judge is best placed to make that decision.

12. Rent arrears.
This ground is mandatory if there have been arrears for at least three consecutive months and at least one month's rent is still owing at the time of the hearing.
The ground is discretionary if less than 1 months' rent is owed at the time of the hearing.

Again this is similar to grounds available against assured shorthold tenants, under Housing Act 1988 s.8, making this mandatory if the arrears are above a certain level, and discretionary if not. This protects a landlord from a non-paying tenant but allows some flexibility for lower level areas which may have accrued for reasons outside of the tenants' control.

13. Criminal behaviour by the tenant.

The tribunal must make an eviction order if the tenant receives a relevant conviction[715] and an eviction order is applied for within 12 months or as soon as reasonably possible.

This ground is quite broad. Some of the relevant offences relate specifically to the property management, but others are just any offence committed in the locality which could attract a prison sentence. This could lead to a tenant losing their home for an action in no way connected to their tenancy and, as there is no judicial discretion, this could appear unfair. However it does protect a landlord from a tenant who behaviours in an unacceptable manner, and the decision of whether to apply for possession or not would rest with them.

14. Anti-social behaviour.
This is a discretionary ground and the tribunal may make an eviction order if they are satisfied the tenant has acted anti-socially towards another person and the eviction order has been applied for within 12 months or as soon as reasonably possible afterwards.

15. The tenant has an association with a person with a relevant conviction or who has engaged in anti-social behaviour.
This is a discretionary ground and the tribunal can make an order if they are satisfied that the tenant associates with someone with a relevant conviction or who engages in anti-social behaviour and that person is a subletter, resides or lodges at the property or has been admitted there more than once.

Grounds 14 and 15 are similar to the grounds available against assured shorthold tenants and balance the landlord and tenant interest fairly. A landlord can apply if they are dissatisfied with their tenant's behaviour, but an independent judge will consider this behaviour and make a decision as to whether possession is reasonable.

16. The landlord has ceased to be registered.
This is a discretionary ground and the tribunal can make an eviction order if they are satisfied that the landlord is required to be

[715] This included offences of using or allowing the use of the property for immoral or illegal purposes or any offence committed in the locality which is punishable by a prison sentence.

licensed, is no longer licensed and would be committing an offence by continuing to have a tenant.

17. The landlord's HMO licence has been revoked.
This is a discretionary ground and the tribunal may make an order if they are satisfied that the landlord requires an HMO licence, doesn't have one and it is reasonable to evict the tenants in those circumstances.

These grounds allow the tribunal to manage landlord behaviour and enforce regulation, ensuring that properties are not let where the owners are in breach of their obligations, but it also gives them the right to consider the interests of the tenants.

18. The property is statutorily overcrowded.
This is a discretionary ground and the tribunal may make an eviction order where they are satisfied that an overcrowding notice has been served and it is reasonable to evict the tenants.

As with grounds 16-17, this enables the tribunal to ensure that regulations are not breached, but allows the tenants position to be considered.

These possession grounds are comprehensive and protect landlords from poor tenant behaviour but also from unavoidable changes in their own circumstances, whilst at the same time ensuring that tenants have security in their homes to know that unless these set conditions are proven, they can remain in their homes and settle there. This offers PRS tenants here real security of tenure, one of the fitness for purpose criteria used in this study and one of the factors deemed necessary to make housing adequate under the UN International Covenant on Economic, Social and Cultural Rights.

8.3.3 Rent reform and tenancy management

It is not just the tenure and security provisions in Scotland which have been amended and are now different to those in England. Additional protections are offered in the new regime, covering both the tenant's and landlord's needs. These are discussed briefly below.

Rent receipts must be provided for cash payments of rent and must state whether or not there are arrears. There is no such similar management of rent payments in English tenancy law which means that tenants can often be left without any proof of payment or claiming to have made cash payments which there is no record of. This regulation should help to minimise disputes where rent is paid in cash and is a positive step, offering protection to both parties. This is likely to have the most impact on the lower end of the PRS market, which is the primary focus of this study. This is because relationships between landlords and tenants here tend to be less formal with less use of professional agents to manage lets.

There are no other substantive changes to rent setting and rent control under the reforms here. As in England, the initial rents on PRS tenancies are not regulated, rent increases are capped at once per year and allow the tenant to object and refer the increase to a rent officer and ultimately, to the First-Tier Tribunal. This is governed by s.22 of the Private Housing (Tenancies) (Scotland) Act 2016. This is similar to the s.13 and tribunal appeal process in England. The new rent is assessed against reasonable market rents, in the same way that they are assessed in England under the s.13 process.

Under Scottish law a private residential tenancy cannot be sublet, assigned or a lodger taken in without the written agreement of the landlord. The tenant must also advise the landlord, in writing, of any other adults living in the property. There is no similar legal provision in England; a landlord may choose to add similar terms to their tenancy agreements but this is not provision that applies across the PRS.

The tenant must be given written terms of the tenancy at the outset or within 28 days of them converting into a private residential tenancy, so fully oral tenancies no longer operate. This is not the case in England.

Reasonable access must be allowed for repairs or inspections on at least 48 hours' notice or where there is an urgent need. Again there is no uniform regulation in the PRS in England which makes this the case, however landlords may write this term into their tenancy agreements.

8.3.4- Conclusion

These reforms to the PRS in Scotland address the underlying insecurity in the PRS by removing the ability to evict tenants without proving a ground for doing so, improving tenants security and ensuring that they have the security to properly enforce their tenancy rights. This highlights the crucial nature of the theory of interdependence between security and rights in housing law.[716] The grounds themselves strike a balance between the interests of the landlord and tenant. These reforms could be used as a model for implementing change in the PRS in England.

However, whilst addressing the most pressing problem with the PRS- the insecure tenancy structure- the Scottish reforms do not tackle the issues with rent or property condition. The improved security ensures that the existing rights can be enforced, but it is arguable that further reform is needed that addresses all of these issues if the PRS is going to be fit for purpose, as measured against the criteria set out in section 1.2.1.1.

8.4 Conclusion

The Governments in both Wales and Scotland have introduced reforms aimed at improving the PRS in those jurisdictions. The fact that they have been able to do so within broadly the same political, social and economic landscape as exists in England means they offer a useful comparator for what could be achieved here with a genuine will for change. Lessons can be learnt from both of these jurisdictions, and these are considered further, and recommendations for reform made in Chapter 9.

[716] See section 2.1.2

Chapter 9- Recommendations for Reform

9.1 Introduction

This thesis has analysed the PRS in England in detail in order to address the research questions set out in Section 1.1.4.1. It has assessed the fitness for purpose of the PRS against the set of criteria, discussed in detail at section 1.2.1.1, above, but summarised below;

- That the PRS offers a reasonable level of security.
- That the PRS offers affordable accommodation, is a key part of the housing market and is a mainstream housing option.
- That the PRS offers accommodation of a decent standard and condition.

The criteria used to assess the fitness for purpose of the PRS in England here have been informed by an approach grounded in human rights theory as applied to housing provision. This approach is reflected in the UN International Covenant of Economic, Social and Cultural Rights (ICESCR), which provides a set of criteria for ensuring that housing is “adequate”. The reforms to the PRS suggested below would align it more closely with international standards of human rights law set out in this Covenant. This is discussed further at Section 2.1, above. The thesis has identified the main problem areas which tend to indicate that the PRS is not fit for purpose- as measured against these criteria. These problem areas are discussed further as part of the analysis of the data gathered in the empirical research in Chapter 6.

Based on this analysis, this chapter will now go on to make recommendations for reform of the PRS in England, with a view to addressing these fitness concerns and aligning housing provision in the PRS in England more closely with international standards, especially those set out in the ICESCR, as discussed at section 2.1 above).

9.2 Putting Reform on the Agenda

This section considers some of the broader factors which impact on the fitness for purpose of the PRS, before going on to consider specific

reform proposals to amend the regulatory framework underpinning the PRS.

9.2.1 Taking a Holistic Approach to Reform

As demonstrated in the previous chapters in this thesis, one of the reasons that the PRS functions as it does today, with the inherent insecurity of the tenancy structure undermining tenants' rights in other areas, is that reform has come about in a piecemeal fashion. When individual aspects of PRS regulation have come under scrutiny, changes have been made, but no consideration has been given to how these individual aspects of private tenancy law interact with one another, which can affect the impact they have in practice.

An example of this is the recent changes introduced by the Homes (Fitness for Human Habitation) Act 2018. This gives tenants the right to take direct action against their landlord if their property is considered unfit for Human Habitation.[717]

The assessment as to whether a property falls below this standard includes;

- Whether there are any hazards evident in the property, as defined in the Housing Health and Safety Ratings Systems rules
- Consideration of any repairs needed in the property
- Whether the property is free from damp
- The internal arrangements of the property
- Whether there is enough natural lighting and ventilation
- Whether there is a sufficient water supply, drainage and sanitary system
- Whether the property is stable
- Whether or not there are sufficient cooking and waste disposal facilities

The Landlord and Tenant Act 1985 already implied a term that a property be fit for human habitation into tenancy agreements under s.9, but the 2018 Act seeks to define a tenant's rights in respect of a breach.

[717] The factors to be considered when determining fitness are set out in s.10(1) Landlord and Tenant Act 1985, as amended by s.1(4) Homes (Fitness for Human Habitation) Act 2018.

The definition of fitness used here is wide enough to allow tenants to raise any issues which may make their home unfit and the assessment is to be carried out objectively by the court.[718]

Although this appears a positive development, with broad rights for tenants, the fact that the majority of tenants in the PRS are assured shorthold tenants impacts on their ability to use these new provisions in practice. These tenants are vulnerable to the s.21 no fault eviction regime after the expiry of the fixed term of their tenancy and risk a breakdown in their relationship with their landlord, which could ultimately lead to their eviction, if they take such action. This concern is supported by the data gathered in the empirical research conducted as part of this study, as set out in Chapter Six. For example, respondent GLL1 stated that regulations aimed at stopping retaliatory eviction are "not effective at all", leading to many tenants feeling unable to challenge issues with property condition.[719] This was echoed by one of our local authority respondents, BILA1.[720]

Another example of a recent change in one area of PRS regulation, which is affected by how the sector operates in other respects, is the Tenant Fees Act 2019. This has introduced restrictions on the amount of money tenants can be asked to pay at the outset of a tenancy, limiting deposits, holding deposits and fees.[721] This helps to remove some financial barriers to those seeking to access PRS accommodation. However, this does not in any way limit the amount of rent a landlord can claim for a property, so properties may still be unaffordable at the outset. The limited ability tenants have to negotiate initial rent, and the relative weakness of their bargaining power against landlords was raised by respondents in all three of our case study areas.[722]

[718] S.10(3) Landlord and Tenant Act 1985, as amended by s.1(4) Homes (Fitness for Human Habitation) Act 2018

[719] See above, 6.4.1.

[720] See above, 6.4.1.

[721] See Section 4.4.3, above

[722] See above 6.3.1.

Furthermore, tenants who agree a tenancy at an initial affordable rate may face a rent increase after the first 12 months of the tenancy which increases the rent to an unaffordable level. Measures to manage affordability in the PRS would need to address both upfront costs, initial rent and rent increases if affordability is to be adequately addressed.

What is needed is a full sector review, looking at all aspects of the PRS and how they interact with one another, before change is introduced. A recent report suggested that the Government must define an overall vision and strategy for the regulation of private renting.[723] Any such review should encompass, as a priority, the tenancy structure in the PRS.[724] This needs to be stable and secure enough to offer an attractive longer-term option to tenants, one which enables them to make a stable home but also enforce their other tenancy rights without fear of reprisals. These rights also need to be considered; rent must be regulated to ensure that PRS accommodation is affordable to access and sustain and the management of property conditions must be considered to ensure that the properties offered in the PRS are of a decent standard and that any issues with condition can be challenged quickly and efficiently.

This type of holistic reform and review would align the PRS regulation in England more closely with the regulatory framework used in Germany, where the PRS enjoys a much more positive reputation. As discussed in Chapter 7, the regulations that govern tenancy law in Germany are contained in one document, the BGB, specifically in section 535-590a, known as the Mietrecht. These rules are supplemented by special legislation which defines and clarifies the law, but the main provisions fall under one document. This ensures consistency and cohesion between the different provisions relevant to PRS law. By contrast the regulatory framework for the PRS in England has developed piecemeal and is contained in numerous statutes and statutory instruments, making

[723] National Audit Office, Regulation of Private Renting (Department of Levelling Up, Housing and Communities 2021) pg. 12

[724] There have been some recent reform proposals put forward by the Government in the Renters Reform Bill 2023, which proposed an amendment of the tenancy structure in use in the PRS, abolishing assured shorthold tenancies and introducing a new tenancy type. However the Government have recently announced that they do not intend to pursue this Bill, delaying the proposed reforms indefinitely (https://www.bbc.co.uk/news/uk-politics-67197411, accessed 31/10/2023). There are no current active reform proposals before Parliament.

it difficult to navigate for tenants and their advisers. The PRS in England could benefit from a legislative approach of the kind seen in Germany, with rules and standards codified and accessible in one overarching piece of legislation.

9.2.2 Embedding Tenant Involvement in the PRS

For review and reform of the PRS to be effective and cover the things that it needs to cover to make the sector fit for purpose, meaningful involvement is needed from the service users, the PRS tenants themselves. Only then can a reform truly address the issues with the PRS in practice, those which are important to the tenants and would encourage them to consider the PRS as a mainstream housing option.

There is very little tenant involvement in the PRS in its current state; there is no formal consultation with tenants or their representatives in the regulation or review of the sector. This is discussed further at section 6.2.2, above. Tenant or social welfare campaign groups, such as Generation Rent, Citizens Advice or Shelter, may take up campaigns and act as a voice for the tenants facing disadvantage but there is no formalised or direct tenant involvement in the governance of the PRS.

Following the model used in Germany, which works well there, local authorities should set up tenants' associations in each ward in their borough and all private tenants should be encouraged to join; it is not recommended that membership be mandatory as this is unlikely to lead to meaningful involvement. Instead the authority could identify PRS tenants in their area via a licensing process for landlords where they are required to notifying changes in occupation (see section 9.2.3, below), and contact them to invite them to join their local association.

These tenants' associations should be given a formal voice in the PRS, working in partnership with the local authority and feeding back on issues within the local PRS in practice to influence the best use of local authority resources and the use of enforcement powers relating to landlord regulation, rent setting and enforcement of property condition.

As well as influencing PRS oversight at a local level, a mechanism can be introduced whereby a representative for each local authority area can

also feed back into the national agenda via consultation on sector performance and reform. Currently the Office for National Statistics produces statistics on performance relating to the PRS and tenants' associations can be asked to contribute to that data. This then tends to feed into Government consultations and therefore this could be introduced as a formal step in the consultation process, ensuring that the needs of the service users are taken into account.

This action could also be used to increase tenant knowledge, as lack of awareness of tenants' rights is seen as a barrier to tenants in enforcing their rights.[725] This was a view shared by one of our questionnaire respondents, as discussed at section 6.4.1, above.

As discussed at section 9.3.1 below, the PRS in Germany has a very different legal and economic structure, which creates complications if we propose to transplant the laws and systems in place in Germany into the system here. However this matters less in this particular respect; the simple matter of tenant involvement does not turn on the difference between the jurisdictions and thus transplanting this mechanism is feasible within the English system.

9.2.3 Landlord Engagement and Regulation

If tenant involvement is to be formalised and included at both a local and national level, landlord engagement would also be needed in order to take a balanced approach. This would ensure that the interests of both parties to the tenancy contract are taken into account in any consultation or reform. As it stands, landlords have more political influence over the sector than tenants, organised through more politically active local landlords' associations and ARLA, the national association of residential landlords. They have a formal membership structure which offers support and training and they feed into formal consultations on the sector. This existing structure could be used to give landlords a formal voice in the governance of the PRS, in a similar way to the proposals

[725] National Audit Office, Regulation of Private Renting (Department of Levelling Up, Housing and Communities 2021) pg. 10

that tenants become involved via tenants' associations as set out above at section 9.2.2.

However, as well as giving landlords an organised voice in PRS regulation and reform, what is also needed is some form of organised regulation of PRS landlords, to help manage standards in the sector. The Rent Smart Wales scheme is a good example of how this could work in practice.

This scheme requires all private landlords who will manage a property themselves, or the managing agents acting on their behalf, to be licensed. A similar scheme could be introduced in England. Licenses should be required for each individual property managed by the landlord (or agent) and should only be granted on the satisfactory completion of mandatory training, ensuring that those in charge of PRS accommodation have at least a basic knowledge of their obligations and responsibilities before they are allowed to let a property to a tenant.

Introducing this into England would help to manage issues within the PRS. The tenant representative who took part in the research for this project for the Gateshead area recommended this as a way of improving standards across the sector.[726] It would ensure that all PRS landlords or managing agents were trained to an agreed standard, which would drive up professionalism within the sector. In addition, through the licensing process landlords and their PRS units would also be known to the local authority, who would manage this licensing scheme. This would give local authorities a better overview of available PRS accommodation in their area and of who the landlords of those properties were. The recent White Paper, Levelling Up, sets out plans to introduce a national landlords register, which would procedure similar results, but without the requirement of the landlord to satisfy any conditions, and is therefore less satisfactory.[727]

A regulation should be built into this process requiring the landlord to notify the authority of the name of their tenant, and to keep this updated as accommodation changes hands, ensuring that the authority know

[726] See section 6.4.1, above

[727] HMSO, *White Paper- Levelling Up, (2022),* Pg 226

who lives in PRS accommodation in their area so that they can be offered the opportunity to become involved in their local tenants' association.

It is recommended that a fee is charged for the licensing process, which would help to fund local authority activity in this area and in their other enforcement activities relating to the PRS. Below is an example of how this fee structure could work in practice using one of our case study areas, Gateshead, and the resource it could generate for local authorities.

As stated in section 2.2.3.1, above, there are 21,699 private sector rental dwellings in Gateshead. Currently no landlord licence is required unless the property falls within a selective licensing area.[728] However when this selective licensing scheme does apply, the authority charges £550 for an early application submitted before the property became licensable, £750 for a standard application submitted within 28 days of the property becoming licensable, £950 for a standard fee for applications made more than 28 days after the property became licensable when a reminder was sent and £1000 for a late application where the authority have had to chase this on several occasions.[729]

Using this pricing structure from Gateshead Council as an example, an authority could apply a standard fee of £750 for each application, and require this to be updated every 3 years. This would generate £16,266,750.00 of income for the local authority every 3 years based on the number of dwellings, and extra charges could be imposed for late application. This would equate to income of £5,422,250.00 per year. This could fund the staff required to manage the scheme and enforce this. If necessary, the training required to obtain a licence could also be offered at a charge in addition to the actual licence fee, as it is under Rent Smart Wales.

If a landlord were to let a property without a licence, their tenant should have the right to apply for a rent payment order to claim back up to 12

[728] Currently only the Avenues in Saltwell are subject to selective licensing in the Borough- https://www.gateshead.gov.uk/article/7139/The-Avenues-Saltwell-selective [Accessed on 8/01/2024]

[729] https://www.gateshead.gov.uk/media/6079/Selective-landlord-licensing-fees-and-charges/pdf/FEES_2019_19.pdf?m=637030997462100000; accessed on 5.4.2022

months of rent paid, as current HMO tenants are entitled to do against an unlicensed HMO landlord. The local authority should also have the right to impose fines and sanctions.

This is discussed in further detail below as part of proposals for reform.

9.3 Tenancy Structure- Security

One of the main issues impacting on fitness in the PRS as it currently stands is the inherent instability of the default tenancy structure, the assured shorthold tenancy. The weak security offered under an assured shorthold tenancy has an all-pervading impact on the PRS, limiting a tenant's ability to establish a longer-term stable home in the PRS and enforce their other tenancy rights. This issue was raised as an issue by all respondents in our case study data to different extents and is an area of the PRS which is in urgent need of reform.[730]

No reform of the PRS will succeed in making this fit for purpose without a reform of this tenancy structure as a starting point.

9.3.1 Reforming the Tenancy Structure

As evidenced in the preceding chapters, the assured shorthold tenancy, the default tenancy type in the PRS in England, is not fit for purpose. Reform is urgently needed and the position in Germany is a good starting point when considering reform of the tenure structure in England.

As discussed in sections 7.5.1 and 7.5.2 above, all tenants in Germany have the same status,[731] the differences occur depending on whether the tenancy is for an indefinite term or for a fixed term, but indefinite term tenancies are the norm. Tenants with these tenancy types have a high

[730] See Chapter 6 for further details of the case study data and questionnaire responses.

[731] There are some distinctions, for example leases/tenancy contracts can be between an owner as landlord and a resident as tenant (Mietvertrag) or let under a sublease agreement (Untervermietung) and both of those types of contracts could be for a limited term (befristeter Mietvertrag), or for an indefinite term (unbefristeter Mietvertrag), however all renters have the status of tenants/lessees.

level of security and, if a landlord wants a tenant to leave, they must obtain a court order and can only do so on certain grounds.

A similar approach should be taken here and the principles of German PRS tenancy security embedded in England. However, to implement the German system in its current form would represent a radical change and would not be viable as discussed at Chapter 2.1.3, above. The system in Germany allows for different types of notice, different court processes and extensive judicial discretion to delay possession. Many of these features work in Germany as a result of the social and economic structures there and would sit less easily in the English system in their current form. It is therefore not recommended that we adopt the German model in its totality, but rather that, following the functional approach to comparative law suggested by Zweigert and Kötz and discussed at Chapter 2.1.3 above, it is recommended that the indefinite term aspect of German tenancy law is introduced into the PRS in England, but not the particular detail of the tenancy structure there.

This does not mean that it is necessary to create an entirely new tenancy structure to satisfy this need for reform in England. There are existing tenancy structures that can be used as the basis for a suitable model for the PRS in England, which embody the security principles of the German model but fit more easily into the English system. The structure for a suitable tenancy can be borrowed from the existing structure in Scotland, for example. Scotland operates under broadly the same economic and cultural conditions as England therefore it is less problematic to borrow elements of that system to implement here.

The current tenancy structure in place in Scotland appears to work well and addresses many of the issues identified with the PRS in England in this study. It is recommended that a similar tenancy structure is introduced here.

This structure allows that;

- An open ended periodic tenancy agreement is granted, the main provisions of which must be provided in writing.
- Rent receipts must be provided where rent is paid in cash.

- Written permission must be sought from the landlord for subletting, assignment or for the tenant to take in a lodger and a tenant must allow reasonable access for repairs.
- The tenancy that can only be terminated by agreement, notice from the tenant (see below, 9.3.1.1) or by the landlord obtaining a possession order on grounds (see below, 9.3.1.2).
- Possession orders are managed by the First-Tier Property Tribunal, where the process is quicker and cheaper than in the County court.

Reform could be introduced in England using this model; a new residential tenancy tenure could be created to encompass this new regime.

Recent reform proposals put before Parliament under the Renters (Reform) Bill 2023 would have implemented similar changes by abolishing assured shorthold tenancies, making all PRS tenancies assured, and adding some additional possession grounds to the current assured tenancy regime.[732] However, it would be more helpful to follow the Scottish example, introduce an entirely new tenancy type for new lets and phase this in for existing tenancies over a set period rather than follow through with this more limited reform. This allows a clear break with the previous regime and is likely to mitigate any confusion over which rules apply to which tenancies.

Under a new residential tenancy structure, rent regulation, as set out below at section 9.4.2 and 9.4.3, could be incorporated into the law. This could make it clear that initial rents must be set within allowable rent brackets and the existing rent increase rules, currently dealt with under s.13 of the Housing Act 1988, can be reproduced with amendments for this new tenancy type. Similarly the new rules about tenancy condition and enforcement can be referenced in the new rules. This then means that all regulations governing PRS tenancies are consolidated, which reduces complexity.

[732] The Government have recently confirmed that this Bill will not be pursued and is on hold indefinitely. https://www.bbc.co.uk/news/uk-politics-67197411 (accessed on 31/10/2023)

9.3.1.1 Termination by the Landlord

In order for the new tenancy structure to offer a reasonable level of security, it is essential that the grounds on which a landlord can seek to terminate the tenancy are clearly defined in law, balance the rights of both parties to the contract fairly and that possession cannot be sought on any other basis. This echoes the German model; there grounds for termination are clearly defined and must be proven for the landlord to obtain a possession. It also addresses the issues with the insecurity raised in the data from our case studies and questionnaires, which found the availability of no fault evictions under the s.21 process "must cause problems for all sorts of households and cause tenants to feel "insecure" in their homes. "[733]

As the recommendation is to use the tenancy structure currently in force in Scotland as the basis for the new PRS tenancy in England, it is further recommended that the possession rules in Scotland can be utilised here, with some amendments. The allowable grounds for possession are set out in section 8.3.1, above. The grounds that can be utilised against tenants under Scottish tenancy law are similar to the current grounds that are available against assured tenants, with some additional grounds added.

These grounds are comprehensive, reflect the needs of both the landlord and the tenant and work well with the tenancy structure in place. They allow for changes in circumstances for the property owner which may mean that they need to take the property back, but also ensure reasonable notice for the tenant and external scrutiny of the possession application by the tribunal before the order is made. They also allow the landlord to seek possession if the tenant breaches the terms of the tenancy or the property is not being used for the purpose intended, again on notice and if possession is considered reasonable by the tribunal.

The table below summarises the grounds available under Scottish tenancy law and under the current assured tenancy regime in England (with the additional grounds proposed under the reform proposals

[733] See section 6.2.1, above.

added) and makes recommendation about the benefit of retaining or discarding each ground under these recommendations for reform.

The grounds have been grouped into those covered under both existing regimes, those available only to tenancies in Scotland and those available only to assured tenancies, for ease of comparison.

Scotland- Grounds which can be used against a residential tenant	**England- Assured tenancy possession grounds- including the new grounds proposed under the reform proposals**	**Key Recommendations arising from this research project-** **Recommendations for grounds to be used in the proposed tenancy structure, with comment**
The landlord intends to sell the property.	The landlord intends to sell the property.	**This ground is available under both tenancy structures and should be retained, offering reasonable protection for landlords whose circumstances may change suddenly.**
The property is to be sold by the mortgage lender. This applies if the lender has the right to sell, i.e., on a repossessed property.	That the landlord's mortgage has been foreclosed and the lender needs vacant possession to sell the property.	**Again, this ground currently covers both Scotland and England and is a reasonable way of protecting the interests of investors. This should be retained.**
The landlord intends to refurbish the property.	That the landlord intends to refurbish the property, and; The landlord, or a superior landlord in the case of registered social landlord, charitable housing trust or not for profit registered provider of social housing, wants to demolish or reconstruct all or part of the property, the works cannot reasonably be carried out without the tenant giving up possession and certain conditions have been met.	**Comparable grounds are available under both current regimes and allow the flexibility for refurbishment to keep the stock of a decent standard. This should be retained but consolidated into one ground.**
The landlord intends to live in the property.	The landlord intends to live in the property.	**This ground, currently available under both regimes, offers reasonable protection for landlords whose circumstances may change and should be retained.**

The landlord's family member intends to live in the property	The landlord's family member intends to live in the property.	**As above.**
The property is required for religious purposes.	That the property is required for religious purposes, and; The tenant is living in accommodation normally let to a minister of religion and the accommodation is required for a minister of religion.	**This ground is currently available to both tenancies granted under Scottish law and Assured tenancies under English law and allows for the proper use of specified accommodation. This should be retained.** **This ground should be consolidated into a single ground, not split over two grounds as under assured tenancies.**
The current tenant is not an employee.	The tenant was let service accommodation with a job they are no longer doing.	**As above.**
There has been a breach of tenancy by the tenant.	The tenant is in breach of tenancy for some reason other than rent arrears.	**This ground, currently available under both regimes, is reasonable. It allows the landlord to act in a case of a breach by the tenant. This should be retained.**
Rent arrears. The ground can be either mandatory or discretionary, depending on the level of arrears.	That the tenant is in rent arrears. There is a mandatory ground where the tenant is in arrears of at least 9 weeks or two months net rent or more. There are discretionary grounds when the tenant is in rent arrears below the specified amount or where the tenant has been persistently late in paying rent which has become lawfully due.	**Both regimes allow possession to be sought for arrears and both set a level over which possession is mandatory.** **This protects the landlord but allows discretion where the arrears are below a set level.** **It is reasonable that a rent arrears ground is retained, but it is recommended that this ground be discretionary in all cases, so that an independent judge can consider the application and balance the interests of both parties.**
Criminal behaviour by the tenant.	If the court has found a tenant, a member of their household or a visitor to their property guilty of anti-social behaviour or criminality in the locality of the property the landlord can seek possession.	**Under both regimes, some criminal offences can lead to a mandatory possession ground.** **Although it seems reasonable to allow possession on the basis of criminal behaviour, it seems reasonable to make this ground discretionary.** **An independent tribunal should have the right to consider the behaviour and any impact on the tenancy and decide whether possession is reasonable.**

		It is therefore recommended that this ground is retained in an amended form. **It is recommended that this should cover criminality by the tenant and anyone else living at or visiting the property.**
Anti-social behaviour. The tenant or an associate has a relevant conviction or has engaged in anti-social behaviour.	The tenant or someone living at or visiting the property has been convicted of using the home for an illegal or immoral purpose, has been convicted of an arrestable offence committed in the locality of the property or has been guilty of behaviour causing or likely to cause a nuisance or annoyance to the landlord or their employee or to others living in, visiting or engaging in lawful activity in the locality.	**Both regimes allow for possession on the grounds of anti-social behaviour on a discretionary basis if the judge considers this reasonable.** **This is a reasonable ground and should be retained.** **It is recommended that this should cover anti-social behaviour by the tenant and anyone else living at or visiting the property.**
The landlord has ceased to be registered.	N/A	**This ground is currently only available under Scottish tenancy law.** **Although it may seem unfair to allow the tenant to lose their home due to the landlord's regulatory breach, the authorities must have some way of managing landlord compliance and ensuring that properties are not let unlawfully. Other options for managing non-compliance should be available in the first instance, such as removing the landlord's licence and enabling the tenant to apply for a rent repayment order, but ultimately if the landlord does not comply with the licence requirements the option to terminate the tenancy should be available.** **An independent judge will have an option to assess whether a possession order is reasonable in the circumstances and can allow sufficient time for the tenant to avoid hardship.** **This ground should be retained.**
The landlord's HMO licence has been revoked.	N/A	**As above.**

The property is statutorily overcrowded.	N/A	**As above.**
The landlord intends to use the property for non-residential purposes.	N/A	**This ground, available only under Scottish law, is more problematic.** **Although it could be argued that this allows the best use of stock, the ground is not aimed at addressing a necessary requirement of the landlord or their family member following a change of circumstances or addressing a breach of regulation, but is more economic in intent.** **It is proposed that this ground is retained, but that the guidance to judges when assessing reasonableness is clear and only allows possession to be granted for this reason when it is reasonable in all of the circumstances.**
The tenant is no longer in need of supported accommodation.	N/A	**This ground is reasonable, it allows best use of specified stock and should be retained.**
The tenant is not occupying the let property.	N/A	**As above.** **This ground could also be covered in breach of tenancy, as occupation is a standard tenancy term, however this standalone ground makes the position clear and should be retained.**
N/A	The tenant has inherited an assured tenancy from a deceased tenant and the landlord wants to repossess the accommodation.	**This ground should be retained as it is reasonable for the landlord to recover possession where one of the contracted parties has died and they should not be required to accept a tenant who they did not agree to contract with. ***
N/A	The landlord wants the tenant to move and claims that suitable alternative accommodation is available**.	**This ground should not be retained.** **It is not reasonable for landlord to force a tenant to move for no proven reason. If the landlord has an allowable reason for requiring the tenant to move, they can seek possession on that ground.**
N/A	The tenant or a member of their household is alleged to have damaged or neglected the accommodation or common parts.	**This ground should not be retained as it can be covered in the breach of tenancy and anti-social behaviour grounds above.**
N/A	The tenant or someone living with the tenant has damaged the landlord's furniture.	**As above.**
N/A	The landlord was induced to grant the tenancy by a false statement made knowingly or	**This ground should be retained.** **If the tenancy was entered into on the basis of a fraud, the landlord should have a speedy route to**

	recklessly by the tenant or someone acting on their behalf.	**have this tenancy terminated and should not have to wait until another ground is made out.**

**The recommendation is to keep this ground for possession where the tenancy is inherited on the death of the tenant, rather than where the tenancy has passed via succession. Succession rights exist for assured shorthold tenancies, the current default tenure in the PRS, and for assured tenants. These rights apply to statutory tenants (i.e., those whose tenancy is periodic following the expiry of a contractual fixed term or which were statutory from the outset) and are covered by the Housing Act 1988, s.17 (1). This allows limited succession for the spouse, civil partner or person living with the tenant as their spouse or civil partner if they were occupying the home with the tenant immediately prior to their death. Only one succession is permitted and the successor tenant takes over the existing tenancy. It is recommended that this right is retained as it protects the partner of the tenant who is a normal member of their household. By contrast, contractual or fixed term tenancies are assets which can be passed by will or under the rules of intestacy. It is recommended that the ground for possession against inheritors is retained as this could lead to landlords having to accept tenants with no previous interest in the property and who are not close relations of the original tenant.*

***The current rules allow possession on this ground only when suitable alternative accommodation has been offered. It is for the court to determine whether the alternative accommodation offered is suitable, using the criteria set out in Part 3, Sch.2, Housing Act 1988. A landlord can establish that suitable accommodation is available if they can get the local authority to provide a certificate confirming that they will provide that accommodation on a specified date,[734] however this is very rare. Alternatively they must demonstrate to the court that they can provide accommodation which gives reasonably equivalent security of tenure, which is suitable for the tenant and their household in relation to proximity to work having regard the distance and time needed to travel there[735] and which is affordable in terms of rent and property size.[736] In the past the courts have found that a property which is considered less desirable or smaller or which has no garden (when the previous property had a garden) can be suitable,[737] this depends on the circumstances. However, the courts have found accommodation to be unsuitable where the locality had a bad reputation and if the tenant is leaving a furnished property, furniture which is similar or reasonably suitable must be included. The assessment is therefore subjective. It is recommended that this ground is not retained as it is not reasonable that landlords are allowed to force a tenant to move without their consent.*

[734] Part 3, Sch.2, Housing Act 1988, s.1

[735] Yewbright Properties Ltd v Stone (1990) 40 P&CR 402, CA

[736] Part 3, Sch.2, Housing Act 1988, s.3

[737] Hill v Rochard [1993] 1 WLR 479, CA

Although the recommendation is to keep the grounds for possession as highlighted in column three above, two further changes are recommended;

- One recommended change is to standardise the notice period. Under Scottish law, the notice periods vary based on the tenant's length of residency and the ground used. The length of notice also varies based on the ground used for assured tenancies under English law and the current reform proposals. Although this is intended to protect tenants, especially those who have lived in their homes for some time and where possession is not sought on a ground based on their own conduct, it introduces unnecessary complexity which could give rise to uncertainty and disputes. A standardised notice period of 28 days for all grounds is recommended in order to make the system simpler and more easy for tenants to understand their rights.
- Another is to make all grounds discretionary, with clear guidance for judges about what factors to consider and the weight to give them when making a decision on a possession application.

As the housing market and regulatory framework in Scotland is similar to England, basing reform on the functioning law there should not prove too problematic. This will also, in essence if not in detail, reflect the tenancy and possession structure in Germany.

Under German law, landlords can rely on some of the same grounds (i.e., if they wish to return to live there or to refurbish or sell the property), but only if they identify the possibility of doing so at the outset of the tenancy and create a fixed term lease to cover that scenario.[738] This may offer tenants more stability but does not take into account unexpected changes to the landlord's circumstances. Furthermore, the need to differentiate between fixed term and indefinite length tenancies introduces unnecessary complexity. The recommendation to adopt the Scottish position seems more reasonable as it balances the rights of both parties in more concise terms.

In terms of other possession grounds, again many of the same scenarios are covered in Germany- because the tenant is in manifest

[738] See Section 7.5.1 above for a discussion about fixed term leases in Germany.

breach of tenancy, there are rent arrears, the tenant has unlawfully sublet the property or the landlord needs the premises for themselves or a family member- but the process differs because of the tenancy structure (see below, section 9.3.1.2).

9.3.1.2 The Possession Process

It is recommended that the current basic structure for possession claims is retained- the landlord serves notice then, when that expires, they make an application for a possession order. If made, then when the order expires if the tenant does not move out the landlord can apply for an eviction warrant, to be executed by a court bailiff.

However it is recommended that the jurisdiction is switched from the County Court to the First-Tier Tribunal. Here the processes are less formal and the costs lower, which will benefit all parties. The tribunal already has jurisdiction in many areas of housing law and can build up expertise in this area.

If an application is made for a possession order, then lessons can be learned from the procedure used in Germany. Here, in the first instance, the judge will try and reach a conciliation before the matter goes to a formal hearing and will often order the parties to attend a mediation session if they have not already done so; see Chapter 7 for a detailed discussion on the possession process in Germany. This step is missing from the process here. There may be some communications between landlord and tenant at the notice stage, but these take place informally, entirely outside of the possession process. A more formal attempt at reaching an agreement could help to avoid the need for an order and reduce costs. The cost of moving frequently was one of the barriers to the PRS being seen as fit for purpose as discussed by our case study respondents in section 6.2, above. In many cases, if given the opportunity to negotiate with their landlord in a more structured way, tenants may agree to give up possession if an extended time is allowed before that takes effect or a deposit is returned upfront to allow them to move on, and this could be managed without the need for a court order.

The Government have recently attempted to introduce mediation as a step in the possession process, but this was a pilot and uptake was not mandatory.[739] The pilot had little uptake and has now come to an end. This is currently under evaluation whilst next steps are determined. Another option, suggested in the 2021 report Regulation of Private Renting, is to introduce a dispute resolution service or ombudsman into the PRS.[740]

Under German law, following this conciliation process, if the matter proceeds to a hearing and a possession order is made, the court have the discretion to allow between 1 month and 1 year before possession takes effect. In England the standard possession order is made to take effect between 14 and 42 days from the date of the order, at the judges' discretion.

It is recommended that a middle ground approach is taken under these reform proposals. The German model creates too much uncertainty for landlords and tenants alike, but the English system can lead to possession being given on very short notice. A more appropriate time frame may be possession between 6 weeks (42 days) and 3 months from the date of the order. As these proposals recommend that all grounds are discretionary, the judge would, as part of their balancing exercise, be able to decide at which point on this scale they should set the order, and could consider the rights of both parties when making this decision.

On expiry of the order an eviction warrant application can be made. In Germany, even when eviction is granted this can be deferred by between 2 weeks and 1 year. In England, where eviction is to take effect, the court only has the discretion to delay the eviction by up to a maximum of 42 days from the date of the original possession order.

It is recommended that the English system is retained. A landlord is entitled to possession once an order has been made and it has expired and the circumstances of the tenant will already have been taken into account when a decision was made as to how much time to allow before

[739] https://www.gov.uk/guidance/rental-mediation-service, accessed on 6.4.2022

[740] National Audit Office, Regulation of Private Renting (Department of Levelling Up, Housing and Communities 2021) pg. 40

the order expired. Some certainty is needed and a further extension delay at this stage is not reasonable.

9.3.1.3 Termination by the Tenant

One essential feature which must be retained in the new tenancy structure is the ability of tenants to terminate the tenancy by giving reasonable notice. Tenants must have the ability to do this without undue restrictions if the PRS is going to offer the flexibility and mobility needed to meet local needs.

The current rules regarding termination of periodic tenancies could be retained under the new tenancy structure. Tenants will retain the right to terminate their tenancies by giving their landlord 28 days' notice in writing. It can be built into the default tenancy terms that tenants must allow reasonable access for viewings during this notice period to protect the landlord's position by allowing them to advertise the property to be re-let and landlords would have recourse to take action against their former tenant for damages if they refuse to comply and the landlord suffers a loss as a result.

This protects the tenant from being tied into a tenancy which may no longer be suitable, but protects the landlords from unexpected voids by giving them a reasonable period of time in which to find a replacement tenant.

As well as mirroring the current rules for periodic tenants here, this also reflects the way PRS tenancies work in Scotland. In Germany too, tenants can terminate on reasonable notice, though the notice period is longer, usually 3 months. It is not recommended that the longer period be introduced here as this could restrict tenant mobility.

9.3.2 The Impact on Fitness for Purpose

If these recommendations are accepted, this would help to make the PRS in England fit for purpose, as measured against the criteria set out in Section 1.2.1.1, which are based on the human rights theory of

housing law as discussed in section 2.1. This theory recognises the need for tenants to have security, as well as the need for the accommodation to be meet tenants needs based on location and access to services. The lack of security in the PRS and the need for tenants to establish a real home in their rented accommodation was something which came across strongly in our case study data, and this reform would help to achieve that objective.[741]

By treating the PRS as a political priority it can be seen as a key part of the housing market and as this would offer a more secure and stable housing option for tenants under this recommended model, meaning that it can be seen as a mainstream housing option.

This more robust tenancy type, but one that allows tenants to terminate on reasonable notice, will ensure that the PRS can house those looking for short term lets or longer terms homes alike. Taken together with the proposals around rent and condition (see sections 9.4 and 9.5 below), this will ensure that decent and affordable accommodation is available for the period needed.

The proposed tenancy structure offers a reasonable level of security, balancing the rights of both parties and would address issues with security in the sector identified in the case study data presented in Chapter six. This is discussed further at section 9.6 below.

9.4 Rent and Tenancy Costs

As discussed at Section 4.4.3 above, there are already some existing regulations in place which go some way to ensuring that PRS accommodation is affordable, but further regulation is needed to address issues arounds rent and costs in PRS tenancy. It is proposed that the existing provisions are retained and strengthened to contribute to fitness for purpose.

[741] See section 6.2, above.

9.4.1 Upfront Costs

The existing regulation under the Tenant Fees Act 2019 offers reasonable protection for both parties to the tenancy contract, in relation to upfront costs at the start of the tenancy. The rules achieve this by allowing landlords and agents to charge those upfront costs which are reasonable to ensure the smooth management of the let, whilst ensuring that tenants are not exploited and unable to secure a property from the outset because of these fees.

It is recommended that these regulations and sanctions for any breaches are retained. Further education and promotion of the rules would be beneficial so that tenants know what they can be asked to pay and how to take action if they are overcharged as, as stated in our case study data, “there is so much complexity” when it comes to housing costs that tenants can see this as a “barrier”.[742]

However, there are some weaknesses in regards to upfront tenancy costs, which arise as a result of the lack of rent regulation in the PRS. One of the flaws with this current system is that the restrictions on payments are linked to the total rent charged, i.e., charges are restricted to 1 weeks rent or 5 weeks rent depending on the charge. As there is currently no restriction on the amount of rent that can be charged at the outset of a tenancy, these charges- a proportion of that rent- could still be prohibitively high, as could the rent the property is offered for.

Further reform to the rules on outset tenancy costs is not necessary, however it is recommended that the amount of rent that can be charged at the outset of the tenancy be limited, which will remedy this issue and manage affordability. This proposal is discussed further at section 9.4.2, below.

9.4.2 Initial Rent

It is recommended that the initial rent a landlord can charge is limited by regulation, with the restriction based on local market rents, similar to the rules regarding rent levels in Germany.

[742] See discussion at section 6.3.1, above.

As stated in Chapter 6.3.2, the median rents in England are already calculated for properties based on their location and size via the local housing allowance regime. These figures can be used for the basis of this new initial rent restriction.

A rent bracket should be allocated to a property based on the median rent for a similarly sized property in that local authority area. The bracket should cover £100.00 either side of the median rent, to allow some flexibility. The example below uses one of our case study areas, Gateshead to show how the rent brackets would work;

- One-bedroom properties have an average rent of £475.00 per month, so landlords should be permitted to charge rent of between £375.00 and £575.00;
- Two bed properties have an average rent of £550.00 per month, so landlords should be permitted to charge a rent of between £450.00 and £650.00 per month; and so on.

The brackets should be published so that landlords and investors are aware of the likely returns on their property and tenants know what charges are lawful for the type of property they are seeking.

As the same system and figures would be used to calculate both allowable rent and local housing allowance rates, affordability for low-income households will be automatically factored into the rent-setting process.

There may be some concern that rent regulation of this type will keep rents artificially low. If rents are limited for new lets, but then the rent brackets are set based on rents charged in the area, these will never increase. Similar concerns were raised in Germany about the rent restrictions there- see section 7.5.3, above. If it is deemed necessary this can be addressed within the regulations themselves, as a provision can be made to increase the brackets annually in line with inflation. This will ensure that landlords can collect a reasonable return on their asset but will ensure that the cost of accommodation does not rise beyond the cost of living.

The system should allow some flexibility for properties that are at the luxury end of the rental market. Landlords should be allowed to apply, as

part of the licence application process recommended and discussed at section 9.2.3, above, for an assessment for exemption from the rent brackets. An additional fee can be charged for this assessment, the revenue from which can be put into funding local authority enforcement work in the PRS. On receipt of an exemption application, a local authority officer should make this assessment based on the standard and location of the property. The criteria used to determine exempt properties can be set locally to allow local variations to be considered (i.e., if there are certain areas in a particular locality that are more desirable). The exemption certificate can then specify a different rent bracket which will apply to that property, based on its particular characteristics.

Initial rent levels would be enforced in the first instance by local authorities. If a property is advertised outside of the allowable bracket without a valid exemption certificate, restrictions can be placed on a landlord's ability to let the property through the landlord licensing regime. The infrastructure for managing licences will already be in place and these can be suspended until the rent is adjusted appropriately. Landlords or agents who persistently break the rules can be issued with a warning and could be forced to re-train or risk losing their PRS licence if they continually fail to comply; civil penalties could also be imposed. The money from the licensing scheme can fund local authority activity in this area.

Tenants should also be allowed to take action through the First-Tier tribunal. If a landlord has charged a rent outside of the allowable bracket without an exemption, a tenant should be able to apply for a rent repayment order, in the same way that tenants in Houses in Multiple Occupation can if it transpires that the landlord did not have a valid licence to operate an HMO at the time that they lived there. The structures for such orders and applications are already in place and the regime can be amended to allow claims in these circumstances. Any rent charged above the allowable bracket should be deemed invalid and not be enforceable as a debt, nor should the landlord be allowed to make a claim for possession for non-payment of rent where the rent was unlawful based on these brackets.

9.4.3 Rent Increases

The existing process for managing rent increases for assured and assured shorthold tenants, enshrined in the s.13 procedure, should be retained but amended to make this more fit for purpose. This will ensure that the accommodation offered in the PRS is affordable.

The mechanisms themselves- notice served at intervals of at least 12 months, giving 1 months' notice of the proposed increase and with the right to appeal the proposed rent built into the process- work well. These balance the rights of the landlord to maximise their investments, therefore encouraging them to remain in the sector, and the tenants who have advanced warning of a proposed increase and the right to have this scrutinised externally to ensure that it is reasonable.

However, under the rent increase rules as they currently stand, an increase only has to be deemed reasonable based on the property type and the market rates for that area. There is no reference to the current rent when a determination about reasonableness is made. This means that there is nothing to stop the rent increasing by 50%, 100% or more at any one time. This is not reasonable for tenants who have no certainty that their rent, and therefore their home, will remain affordable.

A regulation should be added to limit the amount of the increase to a percentage of the current rent. This will allow landlords to raise the rents by a reasonable level, but give tenants some reassurance that their rent will not suddenly become significantly higher than that they are currently paying and manifestly unaffordable. Germany has a similar system where rents cannot be increased by more than 20% over any 3-year period.

An annual increase of up to 10% would be a reasonable way of balancing landlord and tenant interest. 10% is still a significant annual increase, if the landlord can demonstrate that the highest percentage raise is reasonable, but this gives tenants some certainty about the total maximum increase possible. This will also ensure that, if there is a delay in a tribunal making a decision as to whether the new proposed rent is reasonable, any backdated amount will be limited and is more likely to be affordable.

As, under these recommendations, the tenancy structure itself will have been reformed and the security strengthened, tenants will have the confidence to challenge unfair increases as they will not be at risk of eviction simply for doing so. This will address the concern raised by questionnaire respondent BILA1 that tenants do not feel able to challenge increase because of their lack of security should also be addressed by this holistic reform. [743]

This would not address the fact that rent increases are often managed at an informal level between landlord and tenant, however if the PRS is given priority on the political agenda this can lead to better promotion and education of the correct rent increase process, which will go a long way to increasing tenants' awareness of their rights and options. If this increase system is put in place, then it is recommended that this should be the only way that rent can be increased other than by agreement between the landlord and tenant. Contractual rent increases can be abolished as these can be confusing and complex.

9.4.4 The Impact on Fitness for Purpose

If the above recommendations were put in place, this would not only improve the fitness for purpose of the PRS when assessed against the criteria set out above in in Section 1.2.1.1, but also align it more closely with the international human rights standards in the ICESCR, as discussed at section 2.1 above. Ensuring that housing is affordable and accessible is a key tenet of both the human rights theory of housing (see Chapter 2.1, above) and the criteria used in this thesis as set out in Section 1.2.1.1 and summarised above in section 9.1.

It will make rents predictable and help to make them affordable so that the PRS is an attractive, mainstream housing option. This will address the issues around affordability identified by the case study data in Chapter 6. The affordability and certainty against unsustainable increases will help to ensure that the PRS can house any person and meet the local need, as rents will be measured against local market forces. Affordability will be aided and the limits against upfront costs or

[743] See section 6.3.1, above.

high initial rents will ensure speedy access to the PRS. The rent regulations will work in conjunction with the amendments to tenancy security, allowing tenants to enforce their rights in regards to rent levels and increases without fear of eviction.

9.5 PRS Property Condition

The existing laws relating to property condition in the PRS need some reform to make them fit for purpose. The laws on property condition are complex and need to be simplified, but the main issue is the lack of effective enforcement in this area.

9.5.1 Consolidating the Existing Law

The regulations relating to repairing obligations themselves are fairly comprehensive, but understanding these can be difficult for tenants and landlords alike, because the rules are spread over so many different pieces of legislation and regulatory instruments.

As a first step towards reform, the rules about repairing obligations should be consolidated. Regulations should be standardised and apply to all tenancy contracts. Landlords and tenants should not be able to contract out of the repairing regulations, nor shift the burden of responsibility for repairs. The rules relating to repairs should be incorporated into the same legislation that sets out the tenancy type and rent rules, as recommended above.

Furthermore landlords should be refused a licence (see above, section 9.2.3, above), if their property does not meet a minimum standard of repair. This standard can be based on the current rules under the Fitness for Human Habitation regulations, which lends heavily from the HHSRS (see below). The 2022 White Paper, Levelling Up, set out the Government's intent to bring into being a decent standard in rented homes and a separate White Paper is promised.[744]

[744] HMSO, *White Paper- Levelling Up, (2022), Pg 226*

A landlord's repairing obligations should include:

- The obligation to keep in repair and proper working order;

    - The structure and exterior of the building or part of the building which is let to the tenant (including drains, gutters and external pipes)
    - The installations for the supply of water, gas, electricity, and for sanitation (including basins, sinks, baths and toilets)
    - The installations for space heating and heating water.

    This would mirror the rules currently enshrined in s.11 of the Landlord and Tenant Act 1985.

    To this can be added the obligation to keep in proper working order any installations or furnishings let with the property.

    As under the current law, an exclusion can be added for damage caused deliberately or negligently by the tenant themselves or someone living at or visiting their home as an invited guest.

    Issues with the installations etc covered under these rules can be assessed as hazards, following the guidance of the Housing Health and Safety Ratings System (see below).

- The obligation to keep the rented property free from hazards, mirroring the rules under the Housing Act 2004- Housing Health and Safety Ratings System (HHSRS).

    Hazards should be assessed following the current guidance under the 2004 Act and should include:

    - Dampness and mould growth.
    - Excessive coldness or excessive heat, usually linked to structural issues such as poor window or door fittings, or issues with heating installations.
    - Pollutants in the property such as asbestos, biocides, carbon monoxide, lead, radiation or volatile chemicals.
    - Hazards relating to overcrowding and lack of space.

- Hazards relating to lack of physical security in the property, such as unsafe doors or locks.
- Lack of adequate lighting.
- Excessive noise entering the property.
- Unhygienic conditions, pests, sanitation, drainage and refuse.
- Protection from falls relating to bathing facilities, uneven surfaces, stairs and steps.
- Electrical and fire hazards.
- Hazards relating to the physical layout of the property including the risk of explosion, entrapment, structural collapse or similar.

It is recommended that when these hazards are being assessed and a determination is made as to whether a risk exists and if so whether this should be deemed a category 1 or category 2 hazard, that the authority, who will assess this (see below), should consider the risk to mental as well as to physical health. This is in line with the comments made by one of the local authority respondents to our questionnaire, GLA1, as discussed at section 6.4.1, above. See Chapter 4.4.4 above for further discussion about how hazards are identified and a definition of category 1 and category 2 hazards.

The following existing rules which cover specific aspects of property condition can be repealed, as they will be covered under the new regulations:

- The Defective Premises Act 1972- this specifies that a landlord can be liable for any injury or damage resulting from disrepair. This would be an implied term in any breach of the new regulations.
- The Environmental Protection Act 1990- if premises are “in such a state as to be prejudicial to health or a nuisance” then they will constitute a statutory nuisance and a landlord will have a duty to repair under s.79 (1) of the act. This would be an unnecessary regulation as anything prejudicial to health could be considered a hazard under the recommended reforms.

Having established what the repairing obligations will cover, the regulations will then need to cover the process to be followed when there are repair issues in a PRS property.

The recommended process is:

- Notice.
  - A tenant is required to notify their landlord of any defect in their home. The notice should be given within 48 hours of the tenant becoming aware of the defect.
  - For urgent repairs, notice can be provided via telephone or instant message, including SMS. The tenant should keep a record of such notification and the landlord should send a written acknowledgment of the notification within 2 working days.
  - For non-urgent repairs, the tenant should give notice in writing. The normal rules about notice should apply, namely that this can take place via email if agreed or if not by letter, posted first class to the address that the landlord has given for notices and deemed delivered 2 days after postage.
  - The landlord, or their agent, is required to acknowledge the notification within 2 working days of receipt.

- Urgent repairs.
  A repair will be deemed urgent where the issue is sufficient to make the property unfit for human habitation or where, as a result of this issue, the property would be subject to a category 1 hazard.

  In such cases, as well as acknowledging the issue within 2 working days, the landlord is also required to set out what steps they intend to take to resolve the issue and the expected timescales.

  As a minimum the property should be inspected within 5 working days of the report of the disrepair and immediate hazards addressed. Work should be undertaken within 10

working days of the original report unless there are compelling reasons as to why this is not possible.

- Non-urgent repairs.
  Where a repair is not urgent, the landlord can either set out what steps they intend to take to resolve the issue and the expected timescales at the same time as they acknowledge the report or do so within 10 working days of their acknowledgement.

  As a minimum the property should be inspected within 20 working days of the report of the disrepair the work needed addressed. Work should be undertaken within 40 working days of the inspection unless there are compelling reasons as to why this is not possible.

9.5.2 Enforcement of Breaches- Local Authority

Once the repairing obligations are consolidated into a single set of rules and the process for notification and action set out, the rules about enforcement should be strengthened to ensure that this is more consistent across the PRS in England. This will help to drive up standards, ensure that PRS accommodation is decent and that PRS accommodation is a mainstream housing option. The lack of consistency in enforcement of disrepair regulations by different local authorities was one issue which came out strongly in the case study data discussed at section 6.4, and is an area which needs substantive reform. Reforming the process to have clear guidelines and time limits will help to address this issue.

Should the licensing requirements recommended above be introduced, the local authority will be aware of every private let in their area and will inspect them as part of the initial licensing process. Landlords (or their agents) will not be permitted to rent out a property if it does not meet the required standard.

Any landlord letting a property without a license should be subject to a civil penalty and given a set period of time to comply with the licence

requirements. Tenants should be entitled to apply to have their rent back for any period of time where a license was required and not in place and the landlord should not have the right to enforce the rent charged but unpaid during any period when no licence was in place. The authority should impose the civil penalty and enforce that, using the revenue to help fund their enforcement activities.

All local authorities should be required to have a PRS enforcement team, who manage breaches in ongoing tenancies. This could be funded through revenue generated through the licensing scheme (see above) and from penalties imposed for breaches.

Where a tenant makes a report about the condition of their property, the authority should be under a statutory obligation to arrange an inspection within a reasonable time. The suggested time limits are 5 working days for urgent issues or 20 working days for non-urgent issues. Following inspection, the authority should produce a report identifying any issues in the property and whether they constitute a category 1 or level 2 hazard.

Where a hazard is identified the authority should be required to serve the landlord with an Improvement notice, setting out the defects and giving them set time to remedy the defects, at which time the property will be inspected again. A default time limit of 10 working days is recommended for a level 1 hazard and 40 working days for a level 2 hazard, unless the authority agrees that it is reasonable in all of the circumstances to set a different time limit. Where a different time limit is set, this should be clearly set out in writing and kept under review and the tenant should be advised of the timescale given.

If the landlord fails to comply with an improvement notice without reasonable excuse, they should be subject to a civil penalty administered and collected by the authority, with the income used to fund their enforcement activities. Local authorities are already able to impose civil penalties for Housing Act 2004 offences, such as breaching an improvement notice and can apply a penalty of up to £30,000.00 as an alternative to prosecution. This should be retained, although it is proposed that the ability to prosecute a landlord is removed and that this is dealt with as a civil matter.

In addition to imposing a civil penalty, a landlord in breach should also be given a warning that their licence will be revoked, should they not take immediate remedial action, and this step taken if the condition issues are not addressed within a further 14 days.

Tenants should be entitled to rent repayment orders for any period that their landlord is in non-compliance with an improvement notice.

Landlords will have the right to appeal the terms of the notice and any penalty imposed to the First-Tier Tribunal, who can review the terms, but in the interim the notice and its terms will stand to avoid delay for the tenant. If the notice is overturned retrospectively the authority should be liable to repay any reasonable costs incurred by the landlord.

Where issues with the property are noted but they are not sufficient to constitute a hazard, a warning letter should be issued, advising the landlord to remedy the issues before the condition of the property deteriorates further. This can then be kept under review by the authority, or the tenant encouraged to report the issue again should the condition worsen.

It will be necessary for the authority to retain some extraordinary powers to deal with cases where there is an immediate risk to life. An authority should be able to serve a prohibition order, stopping all or part of the building being used while urgent works are done, as they can under the current regime. In such a case the authority should be required to provide the tenant with temporary accommodation from their own emergency stock (or stock to which they retain nomination rights), but charge the landlord for their reasonable costs. The landlord should then be given an improvement notice in the normal way (see above).

9.5.3 Enforcement of Breaches- Tenants

Although local authorities will have a statutory duty to deal with reported repairs, as set out above, tenants should retain the right to take direct action as a result of breaches by their landlord. This would be to seek compensation for loss of enjoyment of their home and for rent repayment orders where they have been found to have been left to live in property which is unfit or contains hazards.

It is recommended that such claims are issued in the First-Tier Tribunal. They currently hear claims relating to rent repayment orders in unlicensed HMO cases and other similar claims, so have the expertise and infrastructure to manage property condition claims and make the kind of orders that tenants would seek under these recommended reforms.

Where a tenant takes action after the local authority have already enforced against the landlord, the tenant should be able to reply on the local authority action as evidence of the breach. Should a tenant take such action before the local authority seek to enforce breaches and obtain an order, the tenant can seek, as a term of the order, a direction from the judge that authority take enforcement action against the landlord based on the tribunal's findings.

Where the authority fails to take action when they are required to do so, the tenant will be able to pursue a formal complaint against the authority.

9.5.4 The Impact on Fitness for Purpose

Under the human rights theory of law, the ICESCR- as discussed at Chapter 2.1 above- states that in order for housing to be adequate it must be habitable and allow access to the services necessary for comfort and security. Based on that theory, the fitness criteria set out in Section 1.2.1.1 establishes that accommodation must be of a decent standard and condition in order to be fit for purpose.

If enacted, these reforms would help to make the PRS fit for purpose as they would address the issues around condition in the PRS identified in the case study data and presented in Chapter 6. This would help to drive up standards in the sector, ensuring that it could meet housing need and offer a decent home to all. The reputation of the PRS would improve as a result and it would be a more attractive and mainstream housing option. The tenants would have the security to enforce their rights in regards to property condition thanks to their strengthened security, under the tenancy structure reforms, set out above.

9.6 Conclusion

The preceding chapters of this thesis have looked at whether the PRS in England is fit for purpose, measured against a clearly defined set of criteria (see below), which were designed based on the human rights theory of housing as discussed in detail in Chapter Two. This has identified several problem areas of PRS law and regulation which, due to the way they operate, result in the sector falling short of those criteria. These problem areas have been highlighted by the qualitative research data gathered from the questionnaires sent out as part of this study and discussed at Chapter Six.

Central to the failings with the PRS in its current form is the lack of security within it, which comes about as a result of the regulatory framework which underpins the PRS. This contrasts significantly to the German model where the sector offers security to tenants as well as attracting longer term investors.

This chapter has made recommendations for reform aimed at addressing these issues and making the PRS fit for purpose. The proposals in this chapter will achieve this aim by ensuring that the stated fitness for purpose criteria are met;

- **That it offers a reasonable level of security.**

  Reform of the tenure structure underpinning PRS accommodation will achieve reasonable levels of security.

  Having an open-ended periodic tenancy which can only be terminated by the landlord by proving one of the statutory grounds and obtaining a possession order will ensure that tenants have reasonable security in their homes. This will give certainty around how and when a tenancy can be terminated and will allow judicial scrutiny where possession is sought.

  Tenants will be empowered to enforce their tenancy rights as they will be confident that they will not lose their home as a direct result of doing so.

  Although some grounds for possession which are based on the landlord's needs or those of their mortgagees are required, these do not unduly prejudice the tenants and are necessary to ensure a fair and reasonable balance of rights.

By allowing tenants to terminate their tenancies on reasonable notice, the PRS will retain its flexibility and mobility, but landlords will also be protected as they will receive reasonable notice if their property is due to become vacant.

- **That the PRS offers affordable accommodation, is a key part of the housing market and is a mainstream housing option.**

  By putting the PRS at the heart of the reform agenda, giving this priority and actively engaging landlord and tenants in the reform and regulatory process, the reputation of the sector as a key part of the housing market will be enhanced.

  By reforming the tenancy structure in the PRS, strengthening security for tenants and backing this up with meaningful and enforceable rights, supported by an accessible enforcement regime, PRS accommodation will become an attractive and stable mainstream housing option.

  Involving local authorities more actively in the management of PRS accommodation by requiring them to license all PRS landlords will mean that the local governance bodies will have a better overview of what the PRS offers in their area and can address persistent issues. Local authority oversight of tenants' associations will ensure that they are appraised of any concerns from tenants in their area.

  Training for landlords and agents will be an in-built part of the licensing process, driving up standards, and providing an income to enable to authority to undertake enforcement work.

  Existing legislation regarding upfront costs and fees will be retained to aid affordability, but strengthened further by the introduction of rent brackets set by local authorities based on comparable properties in the area. Initial rents must be offered within these brackets, ensuring that rents are affordable but reflecting local variations. As some of the limits to upfront fees are set with reference to the rent (i.e., 5 weeks net rent etc), this will also impact on what a tenant can be charged prior to moving in.

  Existing processes in relation to rent increases will be retained, but with the additional requirement that any proposed increase does not exceed 10% of the current rent charged. Limiting this with reference to the current rent, rather than simply by what is

reasonable, ensures that landlords are allowed to maximise their asset but that tenants are not subject to unaffordable, unplanned increases.

Local authority management of rent setting will ensure that accommodation is affordable for that area and can meet local need.

- **That the PRS offers accommodation of a decent standard and condition.**

  Consolidating regulation relating to property standards will simplify this complex area of law so that both landlords and tenants can better understand their rights and obligations. Mandatory landlord training will also help to enforce this point.

  The reform of the tenancy structure and the removal of the threat of no-fault eviction, will give tenants the confidence to enforce those rights where there has been a breach.

  A streamlined process for enforcement via the First-Tier Tribunal will make challenges to unsuitable conditions cheaper and more accessible.

  More robust local authority enforcement work, funded in part by income generated through their management of landlord licensing and in part by penalties imposed for breaches will compliment this improved access for tenants and help ensure that standards in the PRS are decent.

Enacting the changes recommended above will help to satisfy the criteria established in this thesis for measuring whether the PRS is fit for purpose. The changes will also bring the PRS in England into closer alignment with the human rights theory of housing, by providing what the UN Committee on Economic, Social and Cultural Rights consider necessary for housing to be considered adequate.[745] As such these reforms will help to make the PRS in England fit for purpose.

[745] See Chapter 2.1, above.

APPENDIX ONE

Qualitative Research Coding

Participant	Reply/Interview Date	Coding used in Thesis
Birmingham Local Authority	21/05/2019	BILA1
Bristol Tenants' Adviser/Representative	16/05/2019	BRTEN1
Gateshead Local Authority	24/04/2019	GLA1
Gateshead Private Landlords' Association	06/11/2018	GLL1
Gateshead Tenants' Adviser/Representative	20/07/2018	GTEN1
National Tenants' Adviser/Representative-Shelter	20/07/2018	NTENS
National Tenants' Adviser/Representative-Generation Rent	25/07/2018	NTENGR
Portsmouth and Southampton Tenants' Adviser/Representative	08/10/2019	PTEN1
Portsmouth Landlords' Association 1	02/02/2019	PLL1
Portsmouth Landlords Association 2	06/04/2019	PLL2
York Local Authority	03/10/2019	YLA1

Appendix Two

Not Fit for Purpose? An Evaluation of the Private Rented Sector Housing System in England.

Questionnaire for Local Government Participants

General information

A1. Describe your current role in and previous experience of the housing sector in England

A2. Approximately how many private rental units are there in your authority area?

A2.1 In respect of how many private rental units is local housing allowance claimed?

A2.2 How many licensed private landlords are there in your authority area?

A3. In your view, is there sufficient private rented housing in your authority area?

A3.1. In your view, are there any barriers to access, either formal or informal – and if so what are they?

A4. How are private landlords regulated in your area? Which departments and external agencies are involved in this?

- Additional comments

Tenancy Security

B1. What would you consider to be “reasonable security” for tenants in private rented accommodation?

B2. What role does your authority play in ensuring that private sector tenants enjoy security of tenure e.g. against illegal evictions?

B3. In your view, how does the degree of security of tenure that a tenant enjoys impact upon their other rights and ability to enforce those rights?

B4. What would you estimate to be the average length of a private sector tenancy in your area?

B5. How many re-housing applications do you receive from tenants facing eviction from private rented accommodation?

B6. What are the average relocation and associated costs to a tenant facing eviction in your area?

- Additional comments

<u>Rent and other costs</u>

C1. What sort of costs do prospective tenants face at the outset of a tenancy in your area?

C2. Do these costs represent a barrier to accessing private rented accommodation?

C2.1. Is there any assistance available with upfront costs?

C3. How often is an attempt made by landlords, either successfully or unsuccessfully, to increase rent during ongoing tenancies?

C4. In your view, what ability do tenants in your area have to negotiate the amount of rent at the start of a tenancy or the rent set during increases?

C5. In your view, what impact does tenancy security have on a tenant's ability to negotiate rent levels?

C6. What input, if any, does your authority have in setting rent levels or regulating rent increases e.g. through a voluntary landlord association scheme?

C7. How many re-housing applications do you receive from private tenants facing eviction for rent arrears or refusing to accept rent increases?

C8. How many private tenants claim local housing allowance in your area? What is the annual cost?

- Additional comments

Property condition

D1. Describe the general standard of private rented accommodation in your area.

D2. What involvement does your authority have in enforcing property standards?

D3. How many complaints do you receive about tenancy condition from private tenants per month, on average?

D3.1 What is the nature of the complaints received?

D4. How many incidents of formal action were taken by your authorities against private landlords as a result of the condition of their property/properties within the last 5 years? Please provide details of the type of action taken and the outcome.

D5. How effective are regulations which try to prevent retaliatory evictions of tenants who complain about the condition of their private rented accommodation?

D5.1. How does retaliatory eviction impact on your duties under homelessness legislation?

D6. How often do tenants face eviction or seek re-housing from your authority as a result of the condition of their private rented accommodation?

- Additional comments

Not Fit for Purpose? An Evaluation of the Private Rented Sector Housing System in England.

Questionnaire for Landlord and Tenant Interest Groups

General information

A1. Describe your role in or experience of the housing sector in your area.

A2. In your opinion is there sufficient private rented housing in your area?

A2.1. Are there any barriers to access, either formal or informal- and if so what are they?

A2.2. Does this vary in different localities?

A3. How is private rented accommodation regulated in your area? Which agencies are involved in this?

A3.1 In your opinion how effective is this regulation? Please provides details of why you believe this is effective or ineffective.

- Additional comments

<u>Tenancy Security</u>

B1. What would you consider to be “reasonable security” for tenants in private rented accommodation?

B2. In your view, how does the degree of security of tenure that a tenant enjoys impact upon their other rights and ability to enforce those rights?

B3. In your experience how long are most private sector tenancies in your area?

B4. What are the average relocation and associated costs to a tenant facing eviction in your area?

- Additional comments

Rent and other costs

C1. What sort of costs do prospective tenants face at the outset of a tenancy?

C2. Do these costs represent a barrier to accessing private rented accommodation?

C2.1. Is there any assistance available with upfront costs in your area?

C3. How often is an attempt made, either successfully or unsuccessfully, to increase rent during ongoing tenancies?

C4. In your view, what ability do tenants in your area have to negotiate the amount of rent at the start of a tenancy or the rent set during increases?

C4.1. In your opinion, how much input do local authorities or other agencies have in setting rent levels or regulating rent increases, i.e. through voluntary landlord association schemes etc.?

C5. In your view, what impact does tenancy security have on a tenant's ability to negotiate rent levels?

- Additional comments

Property condition

D1. Describe the general standard of private rented accommodation in your area.

D2. What involvement do the Government or official agencies have in enforcing standards in private rented property here?

D3. How effective are regulations which try to prevent retaliatory evictions of tenants who complain about the condition of their private rented accommodation?

D4. How often do tenants face eviction or seek re-housing as a result of the condition of their private rented accommodation in your area?

- Additional comments

APPENDIX THREE

PARTICIPANT INFORMATION SHEET

Not Fit For Purpose? An Evaluation of the Private Rented Sector Housing System in England.

Names of researcher:

Arianne Graven- PhD Candidate.

This Project

The project seeks to analyse the role of private rented accommodation as a housing option within the wider housing sector in England and to evaluate whether this is fit for purpose. This study will also contain a comparative element. As part of the analysis, the private rented sector in England will be compared with that in Germany, which is structured and regulated differently.

It is hoped that the results of this study allow the researcher to make recommendations for reform, aimed at making the private rented sector in England more robust and more able to deal with the increasing demands being placed upon it to accommodate a larger and more varied range of tenants.

For the purposes of this study private rented accommodation will be taken to mean accommodation rented from private individuals or companies. This can be with or without social assistance such as housing cost allowances or restricted rents; it is the status of the landlord which will determine whether accommodation is privately rented for the purposes of this research. As such certain types of landlord are specifically excluded, including local authorities, municipalities, charitable organisations and not for profit organisations, including housing associations.

The project is expected to continue until December 2020.

Invitation to Participate

This study is interested in gathering views on the private rental sector from those who have knowledge in that field, to use as data in the research. You are invited to participate as part of a small group of participants who have the necessary expertise to contribute to this project. Your views are integral to the aims of this study and to enable reliable conclusions to be drawn about the effectiveness of the private rented sector.

Your participation is entirely voluntary and you may decline this invitation to participate if you wish. If you choose not to participate, you will not be approached again for this study.

No risks associated with this research that would affect you as a participant have been identified. Participation is entirely voluntary, and you may withdraw at any time.

Project Procedures

If you choose to participate in this study you will receive an electronic questionnaires that you are asked to complete and return to the researcher.

In order to analyse private rented housing criteria have been established to measure the fitness of the sector against. This questionnaire has been divided into subsections, each pertaining to one of those criteria. These include;

- Tenancy Security
- Rents and Other costs
- Property condition

You will be asked specific questions about these areas but there is also space at the end of each section for you to raise any additional comments or issues that you feel may be relevant to this discussion.

You are asked to keep in mind the definition of private rented housing being used in this study when answering these questions, however if you feel that this definition is too wide or too restrictive, and that impacts on your answers to the questions, please explain this as part of your answer, as this will also be of use in the analysis.

The expected time commitment from you for this will be up to 60 minutes.

Data Storage, Retention, Destruction and Future Use

Your responses will be recorded to provide information for this study and a possible academic paper containing the findings. Any electronic files will be kept in a secure file and secure back-up, and will be securely deleted after six years.

Right to Withdraw from Participation

You have the right to withdraw from participation at any time before, during or after the completion of this questionnaire without giving any reason. The right to withdraw is available until May 2020 when it is anticipated a final report and/or publication of the research findings will have been completed.

Anonymity and Confidentiality

Your answers will be used as part of the analysis of the sector, and referred to in discussion about what role the private rented accommodation sector performs and how well it performs that role. The views and opinions generated from these questionnaires will be referred to generally as part of the researcher's own analysis and may also be quoted in the study. The questionnaires will not be used for any other purposes and will not be passed on to any other agencies or individuals.

In this study participants will be offered a choice about whether they wish to remain completely anonymous as to their involvement in the research, whether they wish their contribution to be acknowledged but not linked to any particular comments or opinions, or whether they consent to their responses being ascribed to them in the final thesis. The choice lies with the individual participant depending on their preference or the preference of the agency they represent. You will be asked to indicate your preference on the informed consent form that will be sent to you separately.

Please note that the list of the individuals and agencies who were invited to participate in this questionnaire will remain strictly confidential. Any reference to those canvassed in the study will be made in broad terms, i.e. that questionnaires were sent to experts such as academics, campaigners, landlord's and tenant's associations and local housing offices. Where a respondent chooses to remain anonymous, nothing will be used in the study that could identify them or the agency they represent.

A summary of the research findings will be made available to you following the conclusion of the research project.

CONTACT DETAILS AND APPROVAL

Principal Investigator:	**Project Supervisor:**
Arianne Graven- PhD Candidate Newcastle Law School, Newcastle University, 21-24 Windsor Terrace, Newcastle upon Tyne NE1 7RU Email: a.graven1@ncl.ac.uk Phone: 07521769212	Professor C. Rodgers, Newcastle Law School, Newcastle University, 21-24 Windsor Terrace, Newcastle upon Tyne NE1 7RU Email: c.p.rodgers@ncl.ac.uk Phone: +44 0191 208 7612

For any queries regarding ethical concerns you may contact the Chair, The Faculty of Humanities and Social Sciences, Research Ethics Committee, Newcastle University, Daysh Building, Newcastle upon Tyne NE1 7RU email:.

Approved by Newcastle University, Faculty of Humanities and Social Sciences Research Ethics Committee on 8th July 2017.

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