Repair in the Private Rented Sector: Where Now?

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Abstract

Purpose – This paper aims to analyse the extent to which recent changes in the law, most notably the Homes (Fitness for Human Habitation) Act 2018, and proposals for changes in tenant redress, will help tenants living in the private rented sector with issues of disrepair and poor living conditions.

Design/methodology/approach – It applies theoretical scholarship on procedural justice, to two proposals for reform: compulsory membership of redress schemes and a new housing court or use of the first-Tier Tribunal for claims relating to disrepair.

Findings – The Homes (Fitness for Human Habitation) Act 2018 will not provide decent private rented homes without increased security of tenure and a requirement for inspection prior to letting. Tenants should have the right to a fit home at the time of moving in and a cheap and relatively fast method of redress when things go wrong. A combination of compulsory licensing, membership of an ombudsman scheme, and either the transfer of disrepair cases to the first-Tier Tribunal or a new housing court would provide the best overall solution for tenants with regard to repair and condition.

Originality/ value – This article contributes to the important scholarship on procedural justice and applies it to ongoing current debates regarding disrepair in the private rented sector.

Keywords – disrepair, procedural justice, housing court, decent homes.

Introduction

The private rented sector (PRS) is in a worse state of condition than any other tenure type. In 2018, a quarter of private rented homes were found to be non-decent (Ministry of Housing, Communities and Local Government, 2019). This meant that they failed to meet the Decent Homes Standard that was set by the Government for council and housing association accommodation (Department for Communities and Local Government, 2006). Poor housing causes both physical and mental health problems (see, for example, Burdette *et al,* 2011; Gibson *et al,* 2011 and Marsh *et al*, 2000). Where homes are in poor repair, tenants are often reluctant to complain, and when they do complain, repairs may not be carried out quickly or may not be dealt with at all. These problems have been acknowledged by recent changes in the

law, most notably the Homes (Fitness for Human Habitation) Act 2018 (H(FHH)A), and also by proposals for changes in the way that tenants access redress. This article seeks to examine the problem of repair in the PRS both in respect of the law itself and in terms of the ability of tenants to enforce their legal rights. It then examines the extent to which recent proposals that are aimed at improving redress will assist tenants. The article uses the lens of procedural justice as a tool to critically assess these proposals. Part I of this article assesses the reasons why private rented tenants are not living in decent homes. Part II outlines the theory of procedural justice and discusses how the theory has been applied to studies relating to differing forms of dispute resolution. Part III applies the theoretical lens of procedural justice to two proposals for improving tenant redress; first, compulsory membership of an ombudsman scheme, and second, a new housing court or use of the existing first-Tier Tribunal. This article does not consider a further recent proposal made by Justice for a Housing Dispute Service (HDS) because, unlike the other two proposals that are based on existing forms of redress, the HDS would be something very different. Part IV draws together the analysis of the proposals from Part III and makes normative suggestions for reform.

Part I – The problem

There are three main interconnected reasons that private rented tenants are not living in decent homes. First, the inadequacy of both the law in requiring landlords to provide decent homes and the dispute resolution mechanisms available when landlords fail to comply with the law. Second, the lack of access to justice, resulting primarily from a dearth of legal aid and scarcity of housing lawyers. Finally, both the power imbalance between the parties and the amateur nature of the private rented sector which makes tenants reluctant to try to enforce their legal rights and landlords unclear as to the nature of their obligations.

The law is both insufficient in scope and overly complicated to provide tenants with a decent home. A landlord is not prevented from marketing and renting out a home that is unfit for purpose. Recent changes in the law allow a tenant to bring a claim against a landlord where the home is unfit, but the landlord will only act once the tenant becomes aware that there is a problem and notifies the landlord of it. There is no clear obligation on the landlord to act in a timely fashion from notification of the problem. Furthermore, the complexity of the law may leave both parties uncertain of their rights and obligations.

Until relatively recently, the main statutory duty imposed on private landlords concerning repair was the Landlord and Tenant Act 1985 (LTA) s 11 which required the landlord to keep

the structure and exterior, and gas and water installations in repair. Common problems such as mould were rarely caught by s 11 because to find an issue of disrepair there had to be a deterioration from a previously better state of repair. Under s 11, where houses had no damp proof course or metal window frames, repairs were not required unless they led to an instance of structural disrepair such as plaster falling from the walls.[1] This left some tenants living in homes 'virtually unfit for human habitation'.[2] Furthermore, the obligation is not triggered until the landlord has notice of the disrepair and a vague complaint about disrepair will not meet this requirement.[3] There is no statutory guidance on what constitutes 'notice' but the burden falls on the tenant to demonstrate that the landlord had notice and therefore some form of writing, whether letter or email, is advisable. This notice can come from the tenant, the local authority[4] or any other 'reasonable source'[5] With nearly three times as many pre-1945 houses in the private as compared to the social rented, sector damp is likely to be more common (MHCLG, 2019).

As an alternative to taking direct action against the landlord, the tenant could, and indeed still can, report problems of disrepair to the local authority which has powers to assess the condition of private rented housing under the Housing Health and Safety Rating System (HHSRS).[6] The HHSRS lists 29 types of hazard that are 'Category 1' hazards if they are a serious problem or 'Category 2' if they are less serious.[7] Where the local authority identifies a serious problem there is a duty to take action from a range of measures including serving an improvement notice, making a prohibition order, serving a hazard awareness notice, or taking emergency remedial action.[8] Where a landlord fails to comply with an improvement notice the tenant or local authority can apply to the First-tier Tribunal (Property Chamber) under s 41 of the Housing and Planning Act 2016 for a rent repayment order which may result in the tenant being awarded up to 12 months' rent. Where the hazard is less severe, the local authority has a power rather than a duty to act.[9] In theory, these powers should be useful to tenants but in practice, this is often not the case in part because the approach taken by local authorities varies considerably across the country (Pigeon, 2016). Research has found that tenants rarely involve the local authority where repairs were not carried out by their landlord in a timely manner (Isaksen, 2017). Local authorities can monitor and improve conditions by inspecting properties but, in the absence of a mandatory register of tenanted properties, this is difficult and there is a significant disparity in approach between local authorities (Pidgeon, 2016).

New provisions enacted by the H(FHH)A 2018 have attempted to address some of the inadequacy of the law identified above but have not solved the problem. The H(FHH)A

requires that a dwelling be fit for human habitation at the time of the grant of the tenancy and that the landlord keeps it fit for human habitation for the duration of the term.[10] A home will fail to be fit for habitation if it is not reasonably suitable for occupation in its current condition as a result of it being defective in one of the following areas: repair; stability; freedom from damp; internal arrangement; natural light; ventilation; water supply; drainage and sanitary conveniences; facilities for preparation and cooking of food and for the disposal of waste water.[11] In addition, the Act imports the 29 hazards from the HHSRS into a new section 10(2). Although the preamble to the Act states that it amends the LTA 1985 to require that the accommodation is 'provided' in a state of fitness for human habitation, the fact that the landlord is only required to act within a reasonable time of being notified of a problem means that a landlord may well be aware of a problem and have a long gap before being required to act. A landlord may well be aware of an inherent defect relating to failing damp proof course but this problem can often be hidden with decoration. For example, where a tenant takes a tenancy commencing in the summer months they may not be aware of problems relating to damp for some months until the damp and mould become evident in late autumn or winter. This issue of emergence of inherent problems is illustrated in research carried out by Shelter and Crisis in which second and third wave interviews conducted in the winter revealed a deterioration from the first wave summer interviews (Smith *et al*, 2014). The tenant must notify the landlord in writing in order to trigger the duty on the landlord to undertake certain repairs within a 'reasonable time'. The meaning 'reasonable time' is not defined in the legislation, so it is necessary to look at case law to ascertain what is meant.[12] Isaksen found that 2 in 5 tenants wait longer for repairs that the timescales proposed by the landlord accreditation schemes, leading to many tenants simply giving up and fixing the disrepair themselves or arranging and paying for the repair to be fixed (Isaksen, 2017). [13]Around a third of tenants did nothing beyond complaining to their landlord and letting agent (Isaksen, 2017).

Until recently, the law has not provided tenants with a remedy even where the conditions in which they have been living have been extremely poor. This is often embodied in the famous quotation from *Robbins v Jones* that 'there is no law against letting a tumble down house'.[14] While the new provisions generated by the H(FHH)A 2018 require that a home be provided in a state of fitness for habitation they do not prevent a landlord from 'letting a tumble down house'. A tenant may certainly now bring a civil action, independent of the local authority when he or she becomes aware of the poor state of repair. However, tenants will need to be aware of the law, provide written notice and either patiently wait for the landlord to carry out

the repairs, carry out the repairs themselves, escalate the matter to either the local authority or commence court action. This problem has led some experts to suggest that a more proactive approach to fitness is necessary. Rugg and Rhodes have suggested that in order to let a property, landlords should obtain an 'MOT' certificate from an independent inspector to indicate the fitness of the property, in the same way that car owners obtain an annual MOT to demonstrate the safety of their vehicle (Rugg and Rhodes, 2018). Their suggestion is that this should be a tax-deductible expense. This certificate would need to be renewed annually. This suggestion would go a long way to improving the position of tenants in properties where landlords decorate to hide inherent problems or otherwise undertake insufficient repairs rather than dealing with the property's inherent problems.

Modes of dispute resolution

It is argued that it is not only the law that fails tenants, the current modes of dispute resolution are also inadequate. The main mode of redress for tenants in the PRS is bringing a claim in the county court. The procedure is much more complicated than other types of county court housing claim, notably possession, because of the need for evidence. The Pre-Action Protocol for Housing Disrepair Cases envisages the instruction of experts and completion of a Schedule of Disrepair. Claims of under £10,000 are dealt with by the small claims procedure which assumes litigants will be acting without legal advice. However, litigants in person struggle to know whether they have a claim in the first place without initial legal advice regarding the merits of their claim (Baldwin, 2003). The complex nature of the law and procedure makes legal advice necessary for many tenants even though the value of the claims may be small. Legal aid is only available for tenants where there is evidence that disrepair results in serious risk of harm to health,[15] is limited to orders for repair and does not cover compensation, nor does cover any action after obtaining a court order. Even if legal aid is available, it may be impossible to find a local lawyer. In research into 'legal aid deserts,' the Law Society found that over a third of the population of England and Wales live in a local authority with no legal aid providers (The Law Society, 2019). Research has found that only 1% of tenants whose landlord had taken longer than expected to complete a repair involved the courts (Isaksen, 2017).

While housing association tenants who have an issue concerning disrepair can complain to the Housing Ombudsman Service (HOS) and council tenants can raise issues with the Local Government Ombudsman, most tenants in the PRS do not have access to alternative dispute

resolution. Private landlords can join an ombudsman scheme but very few do (MHCLG, 2018; The Housing Ombudsman Service, 2019). Ombudsman services are free to the tenant and are designed to provide a quicker and less adversarial approach to settling disputes between landlord and tenant.

Lack of professionalism and power imbalance

Most landlords in the private rented sector do not make a living from rental income alone. Many of these are 'hobby landlords' (Law Commission, 2006) or 'accidental landlords' (Faulkner, 2016) who own only a small number of properties. This issue is exacerbated by the fact that there is no requirement for training, and landlords are difficult to communicate with as a group because lack of registration in England means that it is not possible to identify who private landlords are. According to the Landlord Survey 2018, only a quarter of landlords were or had previously been a member of a professional organisation (MHCLG, 2019). It is likely therefore that even well-meaning landlords when faced with a complaint from a tenant may be unclear about their legal obligations (O'Connor, 2014). Some experts have called for compulsory licensing as a way to address the lack of professionalism in the sector (Rugg and Rhodes, 2008).

In addition to the lack of professionalism in the sector, limited security of tenure and paucity of supply of rented homes make tenants disinclined to complain. With only a two month notice period on the expiration of the fixed term[16] tenants are often fearful that if they complain the landlord will retaliate by evicting them. Retaliatory eviction occurs where a landlord responds to a tenant's requests for repair by serving a notice terminating the tenancy. If tenants are evicted they may struggle to find other suitable housing particularly if they fall within a class of tenant that landlords may be reluctant to accommodate; most notably tenants on housing benefit, but also tenants with pets and/ or children. Provisions within the Deregulation Act 2015 were designed to put an end to retaliatory eviction. However, the drafting of the provisions is such that they have a limited effect. The provisions will only protect a tenant who has either succeeded in getting the local authority to issue a 'relevant notice' or the tenant has complained in writing to the landlord and the landlord has either not responded or provided an adequate response. Local authorities rarely issue improvement notices often resolving even quite serious issues with an informal dialogue (Generation Rent, 2019). This approach leaves tenants vulnerable to eviction. Citizen's Advice found that tenants who complained to their landlord had a 31% chance of being served with a section 21 notice within 6 months, rising to 47% of

those who complained to their local authority and 56% who complained to a redress scheme (Rogers, Iskasen and Brindle, 2018). In some instances research has found that when tenants complain landlords can become quite threatening or aggressive (Rogers, Isaksen and Brindle, 2018). Bevan argues that the H(FHH)A 2018 'offers the very real potential to transform tenants' lives and to reset the power imbalance between landlords and tenants' (Bevan, 2018). However, it is argued that, in the light of the lack of security of tenure and actual and emotional cost of redress, not to mention the lack of access to legal advice, this is a significant overstatement of its potential. Until tenants living in the PRS have security of tenure, many will not have the confidence to exercise their legal rights concerning repair.

Part II – Procedural Justice and Claims for Disrepair in the Courts and by ADR

It has been argued, that the notional availability of legal remedies does not in practice provide solutions to the problems faced by tenants. Proposals for reform must therefore consider the likely level of tenant engagement with the mode of redress, as well as whether landlords will adhere to the outcomes. In order to analyse the likely impact of the three proposals on tenant engagement and landlord adherence, this article utilises the theoretical model of procedural justice, frequently employed in both laboratory and field studies, as a lens through which to assess the proposals. Procedural justice research explores the link between procedural fairness and satisfaction with outcome and concludes that parties are more willing to accept and adhere to outcomes that they perceive as fair, regardless of whether the outcome is favourable to them (Lind and Tyler, 1988).

Procedural justice has been applied to various settings, notably policing (Tyler and Folger, 1980), litigation (Tyler, 1984) and criminal trials (MacCoun and Tyler, 1988) but also to different techniques of ADR including mediation and even to negotiation (Hollander-Blumoff and Tyler, 2008). When looking to apply the theory to a new legal redress mechanism the question arises as to the factors that impact on parties' perception of procedural justice. Tyler identified four such factors: participation (voice), neutrality, courtesy and respect, and trust (Tyler, 2002). First, parties value the opportunity to state their arguments and to be listened to and be heard. Second, they appreciate an unbiased and factual decision-making process in which the application of rules is consistent. Third, they would like to be treated with dignity and courtesy. Finally, they want to deal with people whom they believe to be acting in good faith (Hollander-Blumoff, 2017). Interestingly, timeliness is not among the factors outlined above, yet that timeliness of repair is important, because where a landlord does not act promptly

the tenant will often carry out the repair themselves rather than take further action. In procedural justice studies on customer service, speed is considered an important variable in satisfaction (Wirtz and Mattila, 2004) and it is a factor worthy of further research when looking at tenant perceptions of procedural justice. Various explanations have been expounded to explain the power of procedural justice over distributive justice (that is, the fairness of the outcome) without consensus having been reached (Hollander-Blumoff, 2017). First, the instrumentalist view that individuals preferred fairer processes because they led to fairer outcomes (Thibaut and Walker, 1975). Second, the fact that fairer processes bolstered the self-esteem of parties by conveying messages about their status in society (Tyler and Lind, 1992). Finally, the 'fairness heuristic theory' described by Lind et al as 'a psychological shortcut used to decide whether to accept or reject the directives of people in positions of authority' (Lind *et al*, 1993).

Part III – Proposals for Reform

Compulsory redress schemes

In 2019 the government announced that private landlords would be legally required to become members of one of the existing property/ housing redress schemes via a new Housing Complaints Resolution Service, the aim of which is to provide a straightforward way for tenants to access help with disputes. The three existing schemes are the Housing Ombudsman Service (THO), the Property Ombudsman (TPO), and the Property Redress Scheme. Some insight into the likely success of this proposal can be gained by looking at the existing schemes, most notably the Housing Ombudsman as this redress scheme, unlike the other two, already deals with issues of disrepair. The three property/ housing ombudsmen work in a broadly similar way. This paper will consider the process adopted by THO as this could, to some extent, be replicated in the PRS. There are a number of steps to be undertaken before the ombudsman becomes involved. The tenant must make a formal written complaint to the landlord and give the landlord time to respond and, if necessary, rectify the issue. If the complaint is not successfully resolved the tenant can either contact a 'designated person', who can assist the tenant in obtaining a solution, or wait eight weeks from the landlord's final response to the complaint before involving the ombudsman. If the tenant chooses the 'designated person' route and this does not resolve the matter then it can be referred to the ombudsman. Once referred to the ombudsman THO allows for 'local resolution' where the matter is resolved without entering the formal remit of the ombudsman. Where the matter cannot be resolved informally, the

ombudsman will investigate. This may involve further information being requested from the parties in order that the ombudsman can reach a determination. More than three times as many issues referred to THO are resolved by local resolution than a formal resolution (the Housing Ombudsman Service, 2019). THO provides a further opportunity for a relatively swift resolution with the early resolution procedure, which allows for resolution without a formal investigation, however, this is rarely used. The ombudsman can make findings of maladministration or reasonable redress and can make orders requiring the landlord to rectify the issue. Although the orders of the ombudsman are unenforceable, the THO reports a high level of compliance with 97% of orders implemented within three months (The Housing Ombudsman Service, 2019). The main challenges with using a similar scheme for private tenants are time, compliance and, reluctance of private tenants to use the scheme. THO works well for tenants if it acts as a trigger for early resolution. However, where an early resolution is not reached and a full investigation is required, the process is quite slow. THO states that it completes 99% of cases within 12 months and six months on average (The Housing Ombudsman Service, 2020). This time scale does not take into account the time taken for the tenant to informally and then formally complain to the landlord. For a tenant in the social sector where the duration of occupancy is likely to be longer, it might be worth the wait, but for a tenant in the PRS with limited security of tenure, this is likely to be too slow. Although THO reports a high level of compliance, compliance in the PRS would likely be much lower. The THO can report the member to ‘any appropriate regulatory agency’ or publish the fact in its annual report (The Housing Ombudsman Service, 2018). Naming and shaming can be an effective method of enforcement against commercial organisations facing reputational damage. However, in the PRS, in many areas of the country, the demand for private rented accommodation outstrips supply and many landlords have no business reputation to damage. Therefore, landlords have little to lose by refusing to cooperate with the ombudsman process.

Procedural justice research has been less prevalent in the area of ombudsmen than other forms of ADR. However, Creutzfedlt (2018) has undertaken a detailed examination of user satisfaction with ombudsmen through the procedural justice lens. She found that procedural justice concerns were important motivations in bringing a complaint. Around 75% of UK respondents believed that being heard and receiving an impartial view were either 'most important' or 'important' and 70% similarly valued being treated with respect and dignity. However, UK participants were rarely willing to accept a decision where the outcome was unfavourable to them (Creutzfedlt, 2018). Outcome favourability predicted perceptions of

procedural justice to a larger extent than has been found in other studies, such as Tyler's study of traffic misdemeanour cases (1984), or Lind et al's study of tort litigants (1993), where perceptions of procedural justice more heavily mediated outcome favourability. Creutzfedlt speculates that this may be because complainants lack experience with ombudsmen as opposed to, for example, the police. The fairness heuristic theory suggests that the perceived fairness of the authority is used as an indicator of whether they acting fairly in the specific circumstances in question (Lind *et al*, 1993). Lack of experience of ombudsmen may according to this theory make complainants less likely to trust ombudsmen than the court system, which is more widely understood by the public.

Creutzfedlt also considers whether the purpose of the complaint might alter the relationship between outcome and perceptions of procedural justice. The purpose of a complaint to the ombudsman may simply be the desire to obtain a refund rather than broader justice-related goals (Creutzfedlt, 2018). The absence of an opportunity to speak in a formal setting may negatively impact the perception of procedural justice in the case of ombudsman schemes where the process is largely paper-based. That is not to say that because litigants appreciate their 'day in court' as an opportunity to tell their story, it is the best mechanism for resolving the dispute, but rather the impact absence of this opportunity may need to be mitigated within the process.

Another key procedural justice concern with private ombudsman is neutrality. The various property and housing ombudsman services are funded by membership fees and this is likely to affect perceived independence (Creutzfedlt, 2018). Satisfaction with the existing property/ housing ombudsman varies with THO scoring much higher satisfaction than TPO. In 2018, THO had overall satisfaction of 98% satisfaction for landlords and 80% for tenants at the local resolution stage and 99% satisfaction for landlords and 71% for complainants at the determination stage. This compares to decision satisfaction of 82% for agents and only 51% for consumers for TPO. If ombudsman schemes are to provide a solution for tenants facing disrepair the reasons for this low level of satisfaction will need to be considered in more detail. Clearly for the existing ombudsmen schemes to engage tenants they will need to ensure that they are neutral and that tenants trust in this neutrality.

Tenants' concerns will need to be given voice in a way that treats them with dignity and respect. There also needs to be an opportunity for swift resolution where possible but for thorough investigation where this is not possible. Landlords will need to trust the process and from the

customer satisfaction statistics on the existing ombudsmen, it seems that this will be easier to achieve than tenant satisfaction. However, the existing property ombudsman schemes deal with businesses rather than private individuals and the latter have far less to lose from failing to engage. Compliance would need to be monitored and, in the absence of the reputational risk felt by larger landlords, there will need to be a way of ensuring that hobby landlords feel compelled to comply. This could be through losing their licence to let their property.

A Housing Court or Tribunal for repairs

The Ministry of Housing, Communities and Local Government ran a consultation to consider the case for a specialist Housing Court in 2018/19, and at the date of writing the report is awaited (MHCLG, 2018). The Law Commission had previously reviewed the resolution of residential property disputes and the case for the establishment of a housing court was part of this agenda. In the resultant report 'Housing: Proportionate Dispute Resolution' (Law Commission, 2008) the Law Commission stated that they saw no prospect of government being willing to create a specialist housing court. Instead, it recommended that cases brought by tenants alleging a breach of the implied covenant to repair in the LTA1985, section 11 should be dealt with by the new First-tier Tribunal. However, on creating the new two-tier tribunal structure in 2008 the jurisdiction of the previous Residential Property Tribunal Service was transferred to the new system but stand-alone tenant repair cases were not added to the jurisdiction of the First-tier Tribunal.

The two main advantages of having a specific housing court for repair claims over the existing county court procedure are that a housing court would have expert judges and that the process would be quicker. Whether or not county court judges have sufficient expertise to deal with housing cases is also contested. In qualitative research undertaken on behalf of the MHCLG some stakeholders, including legal representatives, found that some judges in county courts lacked 'specialist' experience of housing cases (MHCLG, 2018b). Specialist expertise is particularly important where litigants are unrepresented (Civil Justice Council, 2016) which, as a result of the limited availability of legal aid, is often the case in disrepair cases. The more informal approach of the Tribunal system is arguably more appropriate for litigants in person and this coupled with the presence of surveyors on the panel can reduce the need for expert witnesses (MHCLG, 2018b). One of the aims of the government consultation was to consider whether housing disputes could be dealt with more quickly by a dedicated housing court but it

is unclear how creating a housing court would in itself be quicker than the county court unless additional resources were allocated to it.

ADR is often lauded as an alternative that is not only cheaper and quicker than litigation but also more popular with litigants. These assumptions have been based in part on the fact that direct participation of the litigant (valued in procedural justice research) is more limited in a formal trial when compared to other dispute resolution processes. However, procedural justice research studies do not conclusively find a preference for ADR. An oft-cited study carried out in the United States by Lind et al compared the experiences of tort litigants in four different dispute resolution settings; trial, court-annexed arbitration, settlement conference, and bilateral conference (Lind *et al*, 1990). Previous research had suggested that settlement resulted in greater satisfaction because litigants could be more involved in the process (McEwen and Maiman, 1981; 1982; 1984; 1986). However, the research carried out by Lind et al found that litigants accorded higher procedural fairness to non-binding arbitration and trial than to judicial settlement conferences. Preference for authoritative justice has also been noted by Vidmar (Vidmar, 1992). However, other research has found that disputants favour forms of ADR such as mediation over litigation (Peirce and Pruitt, 1993; Heuer & Penrod, 1986). Further research has suggested that what disputants value most is choice, so being forced to mediate as part of a court process may reduce the sense of self-determination and in turn the level of procedural justice (Shestowsky, 2008). Provision of a choice between ADR and a judicial process is likely to be necessary for tenants in the UK as Article 6 of the European Convention on Human rights provides for a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Erosion of this choice was heavily criticised by those opposing the Housing Dispute Service proposed by Justice (Justice, 2020).

The four factors identified by Tyler as impacting perceptions of procedural justice are apparent in subsequent research and are valuable in assessing the proposal for a housing court versus the use of the first-Tier Tribunal. The need for meaningful participation sometimes referred to as 'voice' (MacCoun, 2005) has been shown to be important in various (Lind *et al*, 1990). While proponents of ADR argue that traditional trials can be alienating and meditation enables participants to tell their stories, more formal settings enable litigants to not only speak but also be heard (Hensler, 2002). One could argue that the need for participation may be better satisfied in the first-Tier Tribunal than the county court. The relative informality and lack of legal representation enable the tenant to tell their own story. However, Genn argues that while disputants might value the freedom to 'speak for themselves' in an unrepresented informal

court setting there are dangers associated with this freedom (Genn, 1993). The stories told may not contain the facts relevant to the legal case being made. The law concerning repair is complicated and, without an understanding of the law, a tenant cannot be expected to understand which facts and evidence may be important in their case. Lind et al also note that litigants in a court-based process appreciate the dignity of the process and the fact that the matter is deemed important enough to be heard in a court can increase the perception of procedural justice. A less formal court process might therefore increase participation but decrease perceptions of respect. It is worth noting that disrepair claims have been heard in a tribunal setting in Scotland since 2017. While there does not appear to much analysis of the success of the Tribunal in repair matters a 2019 blog on Shelter Scotland's website suggests that the Tribunal is proving a useful tool for tenants (Mullaney, 2019).

Part IV – Conclusion

Despite recent improvements in the law, problems of disrepair in the private rented sector subsist. Although the law now states that residential property must be fit for human habitation at the commencement of the tenancy, in practice there is nothing to prevent the landlord from letting a property that is known to be unfit and then waiting for the tenant to complain. Fearful of eviction, confused by the law, and without access to legal advice, the tenant faces a disincentive to do anything other than ask the landlord if he/ she will carry out the necessary repairs. When the landlord fails to do so, the tenant is stuck. Complaints to the local authority can be ineffective and increase the risk of eviction, and the county court procedure may be too complicated or slow.

Perhaps the most important proposed change in the law is the end of no-fault eviction promised by the government. This will give tenants much more confidence in requesting repairs and, more importantly, taking action beyond merely requesting the repairs. However, tenants still need a redress mechanism that is cost and time effective. Ombudsman schemes appear to be well placed to provide this service. The THO appears relatively successful but for such a scheme work in the private rented sector, landlords would need to be licensed and ideally be a member of a professional association. Any ombudsman scheme used would need to afford adequate opportunity for early resolution. Compulsory membership of a professional association would provide considerable benefits to hobby landlords and their tenants. Access to training and information regarding the operation of the law relating to repairs including guidance on how quickly issues should be addressed would help to professionalise the sector.

However, the ombudsman will only work if tenants are confident of their neutrality and are provided with a meaningful opportunity to participate in the process. Creutzfeldt's empirical study of Ombudsmen provides a basis upon which further specific research could be undertaken.

In the interests of justice, tenants must also have access to a judicial mechanism to resolve their dispute. This should not be dependent on a failure of the landlord to comply with a determination of the ombudsman but should be a choice available to the tenant as both an alternative. Procedural justice research shows that choice is important and the ECHR requires access to a fair hearing. The first-Tier Tribunal or a housing court would provide tenants with the opportunity to tell their story and would afford them the dignity, respect, and neutrality valued by procedural justice theory. The housing court could take some of the benefits of the Tribunal system in terms of speed and specialisation but only if properly funded. The housing court may also have the advantage of enabling tenants to obtain legal aid, currently not available to litigants in the Tribunal system. However, the Scottish model demonstrates that a Tribunal can be a cost-effective mode of redress for tenants in disrepair cases and combine experts with a trusted formal dispute resolution model. To date there appears to be no analysis of the effectiveness of customer satisfaction in the First-tier Tribunal (Housing and Property Chamber) and further research would be welcomed.

Whilst security of tenure and a choice between an ombudsman and a specialist court will improve redress for tenants, what tenants really need is a mechanism that ensures their home is fit for use at the commencement of the tenancy. Tenants in the private rented sector may be considered consumers of a very expensive product or service. Indeed both the Law Commission and the Government have been keen to characterise tenants in this way (Law Commission, 2006; MHCLG, 2018). On this basis, tenants need assurance that the home they are renting is fit for purpose at the commencement of the term and the only way to be sure of this is for there to be a requirement for a licence to be obtained conditional on an annual fitness certificate. This process would weed out properties that are not fit for habitation and also ensure that landlords carry out ongoing maintenance and repairs.

References

Baldwin J. (2003), 'Is there a limit to the expansion of small claims', *Current Legal Problems,* Vol. 56 No. 1, pp.313-343.

Bevan C. (2019), 'Improving housing conditions in the private and social rented sectors: The Homes (Fit for Human Habitation) Act 2018 – fit for habitation but fit for purpose', *Modern Law Review,* Vol. 82 No. 5, pp.897-921.

Burridge R. and Ormandy D. (2007), 'Health and safety at home: private and public responsibility for unsatisfactory housing conditions', *Journal of Law and Society,* Vol. 34 No. 4, pp.544-566.

Burdette A. M., Hill T. D, and Hale L. (2011), 'Household disrepair and the mental health of low-income urban women' *Journal of Urban Health: Bulletin of the New York Academy of Medicine*, Vol. 88 No.1, pp.142-153.

Carr H., Cowan D., Kirton-Darling E. and Burtonshaw-Gunn E. (2017), 'Closing the gaps: health and safety at home', available at: https://england.shelter.org.uk/__data/assets/pdf_file/0010/1457551/2017_11_14_Closing_the_Gaps_-_Health_and_Safety_at_Home.pdf.

Civil Justice Council (2016), 'Interim report of the working group on property disputes in the courts and tribunals', available at: https://www.judiciary.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf.

Creutzfeldt, N. (2018), *Ombudsmen and ADR a comparative study of informal justice in Europe*, Palgrave Macmillan.

Faulkner K. (2016), 'The impact of accidental landlords on the private rented sector', available at: http://tdsfoundation.org.uk/wp-content/uploads/2014/03/TDSCF-report-2-The-impact-of-accidental-Landlords-on-the-PRS-final-Aug-16.pdf.

Generation Rent (2019), 'Private renters denied protection from revenge eviction', available at: https://www.generationrent.org/private_renters_denied_protection_from_revenge_eviction.

Genn H. (1993), 'Tribunals and informal justice', *Modern Law Review,* Vol. 56 No. 3, pp. 393-411.

Gibson M., Thomson H., Kearns A. and Petticrew M. (2011), 'Understanding the Psychosocial impacts of housing type: qualitative evidence from a housing and regeneration intervention' *Housing Studies* Vol. 26 No. 4, pp.555-573.

Hensler, D. R. (2002), 'Suppose it's not true: challenging mediation ideology' *Journal of Dispute Resolution*, Vol. 2002 No. 1, pp. 81-100.

Heuer L. B. and Penrod S. (1986), 'Procedural preference as a function of conflict intensity', *Journal of Personality and Social Psychology,* Vol. 51 pp.700-710.

Hollander-Blumoff R. (2017), ‘Formation of procedural justice judgements in legal negotiation’, *Group Decision and Negotiation,* Vol. 26, pp.19-43.

Hollander-Blumoff R. and Tyler T. R. (2008), ‘Procedural justice in negotiation: procedural fairness, outcome acceptance, and integrative potential’, *Law and Social Inquiry,* Vol. 33, pp. 473-500.

Housing Ombudsman Service (2018), ‘policy on dealing with non-compliance with the Ombudsman’s orders’, available at: https://www.housing-ombudsman.org.uk/wp-content/uploads/2018/12/Policy-on-non-compliance-with-orders.pdf.

Housing Ombudsman Service (2019), ‘The housing ombudsman annual report and accounts 2018-19’, available at: https://www.housing-ombudsman.org.uk/2019/07/23/annual-report-2018-19-published/.

Isaksen M. (2017), ‘It’s broke, let’s fix it improving redress for private renters’, available at: https://www.citizensadvice.org.uk/Global/CitizensAdvice/Its%20broke%20lets%20fix%20it%20-%20Citizens%20Advice.pdf.

Justice (2020), ‘Solving Housing Disputes’, available at: https://justice.org.uk/our-work/civil-justice-system/solving-housing-disputes/

Law Commission (2006), ‘Renting homes the final report: Volume 1,’ (Law Com No 297, 2006), available at: https://www.lawcom.gov.uk/project/renting-homes/.

Law Commission (2008), ‘Housing: proportionate dispute resolution’ (Law Com No 309), available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc309_Housing_Proportionate_Dispute_Resolution.pdf.

Lind E. A. and Tyler T. R. (1988), *The Social Psychology of Procedural Justice,* Plenum, New York.

Lind E. A., Maccoun, R. J., Ebener, P. A. and Felstiner, W. L. F. (1990), ‘In the eye of the beholder: tort litigants’ evaluations of their experiences in the civil justice system’, *Law and Society Review*, Vol. 24 No. 4, pp. 953-996.

Lind, E. A., Kulik, C. T., Ambrose, A. and de Vera Park, M. (1993), ‘Individual and corporate dispute resolution: using procedural fairness as a decision heruistic’ *Administrative Science Quarterly*, Vol. 38 No. 2, pp.224-251.

MacCoun R. J. and Tyler T. R. (1988), ‘The basis of citizens’ perceptions of the criminal jury: procedural fairness, accuracy and efficiency’, *Law and Human Behaviour,* Vol. 12 No. 3, pp.333-352.

MacCoun R. J. (2005), ‘Voice, control and belonging: the double-edged sword of procedural fairness’, *Annual Review of Law and Social Science*, Vol. 1, pp. 171-201.

Marsh A., Gordon D., Heslop P. and Pantazis C., (2000), ‘Housing deprivation and health: a longitudinal analysis’ *Housing Studies,* Vol. 15 No. 3, pp 411-428.

McEwen C. A. and Maiman R. J. (1981), 'Small claims mediation in Maine: an empirical assessment', *Maine Law Review,* Vol. 33. pp.237-268.

McEwen C. A. and Maiman R. J. (1982), 'Arbitration and mediation as alternatives to court', *Policy Studies Journal*, Vol. 10 No. 4, pp.712-726.

McEwen C. A. and Maiman R. J. (1984), 'Mediation in small claims court: achieving compliance through consent', *Law & Society Review,* Vol. 18 No. 1 pp.11-49.

McEwen C. A and R J Maiman R. J. (1986), 'The relative significance of disputing forum and dispute characteristics of outcome and compliance', *Law & Society Review,* Vol. 20 No. 3, pp. 439-447.

Department for Communities and Local Government (2006), 'A Decent Home: Definition and Guidance for Implementation', available at: https://www.gov.uk/government/publications/a-decent-home-definition-and-guidance

Ministry of Housing Communities and Local Government (2018), 'Strengthening consumer redress in the housing market a consultation', available at: https://www.gov.uk/government/consultations/strengthening-consumer-redress-in-housing.

Ministry of Housing, Communities and Local Government (2018), 'A qualitative research investigation of the factors influencing the progress timescales and outcomes of housing cases in county courts', available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755025/Factors_influencing_housing_case_progress_and_outcomes_in_county_courts_research_report.pdf

Ministry of Housing, Communities and Local Government (2018b), 'Considering the case for a housing court a call for evidence', available at: https://www.gov.uk/government/consultations/considering-the-case-for-a-housing-court-call-for-evidence.

Ministry of Housing Communities and Local Government (2019), 'English Private Landlord Survey 2018 Main Report', available at: https://www.gov.uk/government/publications/english-private-landlord-survey-2018-main-report.

Ministry of Housing, Communities and Local Government (2019) 'English Housing Survey, Headline Report 2017-18' available at: https://www.gov.uk/government/statistics/english-housing-survey-2017-to-2018-headline-report.

Ministry of Housing, Communities and Local Government (2019) 'English Housing Survey, Headline Report 2018-19' available at: https://www.gov.uk/government/statistics/english-housing-survey-2018-to-2019-headline-report

Mullaney J. (2019), 'Tribunal wins for private tenants who powers of new rules', available at: https://blog.scotland.shelter.org.uk/tribunal-wins-private-tenants-show-powers-new-rules/.

O’Connor J. (2014), ‘Issues in the management of private rented accommodation’ in L. Sirr (Ed.), *Renting in Ireland: the Social, Voluntary and Private Sectors,* Institute of Public Administration, Dublin.

Peirce R. S. and Pruitt D. G. (1993), ‘complainant-respondent differences in procedural choice’, *International Journal of Conflict Management,* Vol. 4. No. 3, pp. 199-222.

Pidgeon C. (2016), ‘Rogue landlords in London: a survey of local authority enforcement in the private rented sector’, available at: https://www.london.gov.uk/sites/default/files/rogue_landlords_in_london_-_a_survey_of_local_authority_enforcement_in_the_private_rented_sector.pdf.

Rogers C., Isaksen M. and Brindle B. (2018), ‘Touch and go how to protect private renters from retaliatory eviction in England’, available at: https://www.citizensadvice.org.uk/Global/CitizensAdvice/Housing%20Publications/Touch%20and%20go%20-%20final.pdf.

Rugg J. and Rhodes D. (2008), ‘The private rented sector: its contribution and potential’, available at: https://www.york.ac.uk/media/chp/documents/2008/prsreviewweb.pdf.

Rugg J. and Rhodes D. (2018), ‘The evolving private rented sector: it’s contribution and potential’, available at: http://www.nationwidefoundation.org.uk/wp-content/uploads/2018/09/Private-Rented-Sector-report.pdf.

Shestowsky D. (2008), ‘Disputants preferences for court-connected dispute resolution procedures: why we should care and why we know so little’, *Ohio State Journal on Dispute Resolution* Vol. 23 No. 3 pp.549-625.

Smith M., Albanese F. and Truder J. (2014), ‘A roof over my head: the final report of the sustain project’, available at: https://england.shelter.org.uk/__data/assets/pdf_file/0005/760514/6424_Sustain_Final_Report_for_web.pdf.

The Law Society (2019), ‘Parliamentary briefing housing legal aid deserts’, available at: https://www.lawsociety.org.uk/policy-campaigns/public-affairs/parliamentary-briefing/legal-aid-deserts/.

Thibaut J. and Walker L. (1975), *Procedural Justice: a Psychological Analysis*, Lawrence Erlbaum Associates, Hillsdale.

Tyler T. R. (1984) ‘The role of perceived injustice in defendant’s evaluations of their courtroom experience’, *Law and Society Review,* Vol. 18 No. 1, pp.51-74.

Tyler T. R. (2002), ‘Social justice: outcome and procedure’, *International Journal of Psychology,* Vol. 35 No. 2, pp.117-125.

Tyler T. R. and Folger R. (1980), ‘Distributional and procedural aspects of satisfaction with citizen-police encounters’, *Basic and Applied Social Psychology,* Vol. 99 No. 1, pp.281-292.

Tyler T. R. and Lind E. A. (1992), 'A relational model of authority in groups', *Advances in Experimental Social Psychology,* Vol. 25 pp.115-191.

Van den Bos K., Lind E. A., Vermunt R. and Wilke H. (1997), 'How do I judge my outcome when I do not know the outcome of others? The psychology of the fair process effect', 72 *Journal of Personality and Social Psychology*, Vol. 72 No. 5, pp.1034-1046.

Vidmar N. (1992), 'Commentary: procedural justice and alternative dispute resolution', *Psychological Science,* Vol. 3 No. 4, pp.224-228.

Wirtz, J. and Mattila, A. (2004), 'Consumer responses to compensation, speed of recovery and apology after a service failure', *International Journal of Service Industry Management*, Vol. 15 No. 2, pp. 150-166.

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[1] *Quick v Taff-Ely Borough Council* [1986] QB 809; *Lee v Leeds City Council* [2002] EWCA Civ 6; *Southwark LBC v McIntosh* [2002] 1 EGLR 25; *Staves & Staves v Leeds City Council* [1992] 29 EG 119.
[2] Per Dillon LD *Quick v Taff-Ely Borough Council* [1986] QB 809 at 815.
[3] *Brewer v Andrews* [1997] EGCS 19.
[4] *McGreal v Wake* (1984) 13 HLR 107.
[5] *Dinefwr BC v Jones* (1987) 19 HLR 445.
[6] The Housing Health and Safety Rating System (England) Regulations 2005 SI No 3208.
[7] Defined in the Housing Act 2004 s2(1).
[8] Housing Act 2004, ss 11-19.
[9] Housing Act 2004, ss 11-19.
[10] Landlord and Tenant Act 1985 s 9A inserted by the Homes (Fitness for Habitation) Act 2018 s 1(3).
[11] Landlord and Tenant Act s 10(1) inserted by the Homes (Fitness for Habitation) Act 2018 s 1(4).
[12] *Green v Gales* (1841) 2 QB 255; *O'Brien v Robinson* [1973] AC 912; *Calabar Properties Ltd v Stitcher* [1984] 1 WLR 287.
[13] The accreditation schemes reviewed by Isaksen were those of the Residential Landlords Association, the National Landlords Association, and the Private Rented Accreditation Scheme.
[14] [1863] 15 CB (NS) 221 at 240.
[15] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch 1, para 35.
[16] Housing Act 1988, s 21.