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Ensuring Compliance: The Case of the Private Rented Sector

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Ensuring Compliance: The Case of the Private Rented Sector

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Introduction

Professor Martin Partington
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The papers in this collection were presented at a workshop held in London on 23 March 2006. The workshop concerned the regulation of the private rented sector in England and Wales or, as one of the participants put it, how best to ensure responsible renting. It was arranged by the Centre for Market and Public Organisation, University of Bristol, with the assistance of the Law Commission for England and Wales. The topic is a key part of the programme of work currently being undertaken by the Law Commission on the reform of housing law - see generally:
http://www.lawcom.gov.uk/renting_homes.htm
http://www.lawcom.gov.uk/docs/issues_paper.pdf
http://www.lawcom.gov.uk/housing_renting.htm

The workshop brought together a group of leading academics from a range of disciplines, who were invited to apply their different disciplinary insights onto the issue of how should private renting be regulated. It was not necessary that speakers should know a lot about the rented housing market. Rather we wanted to encourage them to share their understanding of regulation acquired in other areas of activity and explore how insights from other contexts might apply to the private rented sector.

When organising this event, we hoped that there would be a series of presentations, which would both inform the ongoing work of the Law Commission but also offer important contributions in their own right. The contributors fully matched up to this expectation, and this is why we are publishing this volume now. All the presentations given at the workshop appear in this collection except that of Professor Michael Ball, who has generously allowed us to reprint his powerpoint slides which appear in an annex at the end of this collection.

Housing studies has been called a ‘destination subject’ (that is, a subject in which different disciplines can bring their knowledge and perspectives). The issue of compliance with regulation is, of course, one with a varied interdisciplinary and disciplinary history. However, housing studies have not always been best placed to take on those interdisciplinary perspectives. While there have been several important studies – for example, about the effect of rent control – all too often they have focussed on a single issue, rather than considering the particular housing tenure in the round. In this Working Paper, our authors draw on their own perspectives on the generic issue of regulation and techniques for encouraging compliance with the law, with a view to applying them in the context of the private rented sector.

The private rented sector has been the subject of different regulatory emphases over time. Historically, in the nineteenth and early twentieth centuries, it was the predominant tenure for the majority of people, but largely unregulated by the state. Sharp increases in demand for accommodation, especially during wartime, lead to unsustainably high rents being charged by landlords, particularly in areas of high housing demand. This led in the twentieth century to the introduction of different

techniques to control or regulate rents. In addition, occupiers were given security of tenure, which limited landlords' ability to evict occupiers. The effect of these forms of regulation, combined with rising prosperity leading to huge increases in owner-occupation, resulted in the private rented sector going into sharp decline and becoming regarded as a pariah tenure. Since the mid-1980s successive governments have sought to revive its fortunes, seeing the sector as an important mediator between owner-occupation and the social rented sector.

Governments have sought to revive the sector by providing some economic incentives (such as the former Business Expansion Scheme) to induce potential large-scale landlords into this market-place. However, the most successful schemes in recent times have been lead by private lenders and small-scale landlords engaging in 'buy-to-let'. Private sector landlords have always tended to operate on a small-scale. What we have, then, is a largely amateur sector with a large number of small-scale landlords.

The strength of the private rented sector is its flexibility; it offers housing opportunities to many who would not qualify for social housing. But it is still the case that much privately rented accommodation is of poor quality. The practices of some landlords do not accord with the rules prescribed by Parliament. Particular concerns have been raised about 'houses in multiple occupation'. Over the last 20 years, the sector has been the subject both of deregulation and regulation – deregulation of security of tenure and rents, combined (more recently) with regulation of quality through, for example, new licensing schemes.

The Law Commission's housing law reform programme is seeking to change traditional approaches to the landlord-occupier relationship through applying a 'consumer perspective' to occupation contracts. Many institutional investors see this as a key factor in creating a more professional approach to renting, and thus encouraging large-scale investors (the pension funds) to take investment in residential accommodation as seriously as investment in commercial property. The Law Commission is also currently consulting on the development of different approaches to dispute resolution.

Here, we consider how best to ensure compliance with regulation – which tools are most appropriate to be used and which should be discarded. The diversity of the sector makes this a difficult problem. There is at present no single regulator who can be charged with ensuring compliance or encouraging responsible renting behaviour. There are apparently few incentives for landlords to know or comply with the law. That is the problem stated. The workshop was designed to stimulate the creative approaches and innovative ideas which might address the problem.

Workshops do not, unfortunately, run themselves. This event would not have been possible without the work of Daniel Bovensiepen at the Law Commission, the willingness of the speakers to give up their time and be involved in this project, as well as other participants who engaged with our project on the day. The Law Commission would welcome comments and feedback on the issues raised in these papers. Please contact: (email) public@lawcommission.gsi.gov.uk
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Private renting: The regulatory challenge

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Abstract

The law governing relations between landlord and tenant in the private rented sector is complex and fragmented, with obligations on both parties arising from contract, statute and common law. The roles that the sector plays in the contemporary housing market place a question mark over whether market discipline will be sufficient to ensure that contracts are self-enforcing. We do not, however, have a clear picture of the extent of non-compliance by either landlords or tenants.

This paper reviews the characteristics of the sector and their implications for the fulfilment of landlord and tenant obligations. It then addresses the 'puzzle' of voluntary compliance identified by economists who approach the compliance decision from a rational actor perspective. The latter part of the paper argues that parallel strands in the contemporary literature have the potential to open up new perspectives on the regulatory debate. The first strand of literature is associated with debates over tax compliance, an area in which the high level of 'voluntary' compliance is seen as a puzzle, and the second strand is that associated with cultural economy, which poses the question as to why some social transactions come to be seen as part of 'the economy', while others do not. The paper argues that these literatures can provide, on the one hand, resources to bolster arguments in favour of self-regulation and, on the other, an invitation to broaden thinking about regulatory mechanisms available to promote compliance.

Introduction

The last 25 years have been an extended period over which the dominant narrative in private renting has focused on the need for deregulation to restore the health of the sector, and the success in achieving this objective through decreased regulation. Direct regulation of the traditional concerns in the sector – rents and security of tenure – has been relaxed, although it could be argued that indirect regulation, through housing benefit ceilings for example, has reasserted external control over the terms on which landlord-tenant transact in certain parts of the market.

We now live in a period of cross-party political consensus – in England at least – that general registration or licensing of private landlords would be undesirable because it would represent an unwarranted intrusion and unsustainable burden upon landlords.[1] This is an argument made in the abstract – in the sense that widespread regulation is ruled out in the absence of any detail or proposals regarding the regulatory burden any such scheme might impose. There is concern that any move to widespread regulation

[1] The situation in Scotland is rather different: nationwide registration – though not licensing – has just arrived.

will lead to a significant negative supply response in a context where government now relies upon private renting to assist in meeting housing need. These concerns are expressed in the absence of any very robust evidence on the supply response to regulation, which would in any case differ depending on the detail of the regulatory scheme implemented. In this context, landlords might be characterised as possessing what Friedrich (1937) referred to as the rule of anticipated reaction: there is a reluctance on the part of government to propose particularly significant change because of the fear of the negative reaction that is anticipated, without the necessity for landlords to (re)articulate negative sentiments about regulation.

However, the operation of the sector is such that Government has not deemed it appropriate to leave things entirely to the market: we are currently witnessing the implementation of more focused interventions – licensing of HMOs, selective area-based licensing, statutory tenancy deposit schemes – to address problems that are constructed as localised and particular.

Whether it is appropriate to assume that, beyond these specific problems/issues, the private rented sector will perform satisfactorily on the basis of private bargaining and contract enforcement is, for the purposes of this paper, the point at issue. Do landlords and tenants typically fulfil their obligations toward each other? If not, then how might a higher level of compliance be ensured?

This paper has three objectives that have a bearing upon this issue. First, it briefly reviews the nature of the sector and the problems that can flow from these characteristics in terms of enforcement of obligations. Second, it notes that there are considerable difficulties in determining whether the problems experienced within the sector are of sufficient scale to represent a serious compliance issue. In this context, the difficulty in identifying what might constitute a proportionate regulatory response is magnified. Third, it sets out the argument that when thinking about mechanisms for regulating landlord-tenant relationship it is essential to embed our understanding of this ‘economic’ transaction in its social context. By doing so we broaden out the range of potential mechanisms through which to work upon the behaviour of landlords and tenants, should that be deemed desirable.

The nature of the sector and the issues faced

Private landlordism in England is dominated by small scale landlords, many of whom are involved in the sector on an amateur basis as a sideline activity. In 2001 two thirds of lettings were owned by private individuals or couples (ODPM, 2003), and the subsequent growth of Buy to Let landlordism is likely to have shifted the balance further toward the small scale landlord. There is also a degree of fluidity in the private rented stock, with properties passing between tenures, particularly from owner occupation to private renting and back again.

While small-scale landlords dominate the ownership structure, this does not read across directly to the structure of management in the sector because many of these lettings are made through letting agents. It is estimated that half of private lettings are managed by the approximately 12,000 letting agents in England.

Despite a desire on the part of government to see greater institutional involvement in, and the professionalisation of, the sector - and repeated attempts to encourage institutions into the market - institutional landlords continue to play a subsidiary role in the market sector. In part this is because, while the returns to investing in residential property have improved since the deregulation of the late 1980s, they are still not particularly attractive when compared to other more liquid and lower maintenance investments. Returns are constrained to some degree by what has been characterised as the 'central dilemma' of the sector (HCEC, 1982): the rents required to offer landlords an attractive return are higher than those that many of the households seeking accommodation in the sector are able or willing to pay.

The private rented sector is not a unified market but fulfils a range of functions within the broader housing market. Some of these functions, in particular the provision of tied accommodation and the provision of accommodation to older people who are lifetime renters, are in decline. The key roles played by the sector in the contemporary market are as a form of easy access accommodation for transient populations of various types (students, newly forming households, migrant workers) and as residual housing for those who do not have the resources to access owner occupation or the household characteristics that would mean they could be considered for social housing. A relatively high proportion of tenants are as a consequence young, single person households. In 2004 70% of household renting privately had a household reference person aged below 45 years. 51% of households with a household reference person aged 16-24 years were living in private rented accommodation, with the proportion of households in the sector progressively declining with each age group up to 67-74 years, in which age group only 4% rented privately. There has also been a marked shift toward renting in the 16-24 age group since 1991 (ODPM, 2005a). Private tenants are by no means predominantly poor, certainly not in comparison with social rented sector residents, but a significant minority rely upon housing benefit to assist them in meeting at least part of their rent.

The private rented sector has also come relatively recently to perform a further role: as an escape or refuge from social housing. In the former case, households who would be eligible for social housing prefer alternative accommodation in the private rented sector because it allows them to escape the stigma that can be associated with living in social housing (Kemp and Keoghan, 2001). In the latter case, private renting is accommodating households that have been excluded from social housing. Here there is a concern that perceived problems of anti-social behaviour are being exported from the social to the private sector, raising the possibility of major negative impacts upon areas of private sector housing.

The deregulatory initiatives of the 1980s and 1990s have transformed the terms upon which the majority of tenants occupy their properties. It would not be over-dramatic to characterise this as a switch from a situation in which tenants had the status of 'immovability' to one in which security of tenure is strictly constrained. The assured shorthold tenancy has become the dominant agreement used for market lettings, and the majority of such tenancies are for six months. Much of the restructuring of tenancies toward assured shortholds took place in the early years following their introduction in 1989.

The private rented sector is characterised by relatively high turnover. In 2003/04 some 940,000 private tenancy groups interviewed as part of the Survey of English Housing had moved to their current tenancy in the last 12 months (ODPM, 2005b), the majority (61%) from another private tenancy. At the same time some 279,000 households have moved out of the sector during the preceding 12 months.

Enforcing obligations

The salient characteristics of the sector as follows:

- The law embodying the obligations on landlords and tenants is fragmented and diffuse, with origins in contract, statute and common law. Provisions that are potentially relevant to, for example, the behavioural obligations on tenants are not found in 'housing' law as such.
- Not all landlords are well-informed about the obligations placed upon them by statute or common law nor do they necessarily appreciate the nature of the obligations they place upon themselves through contract.
- Many tenants are not well-informed about the contents of their tenancy agreement. They are even less likely to understand implied obligations upon themselves or landlords. They are not well placed to determine whether the terms included in a tenancy agreement they are asked to sign is in accord with the law.
- The costs (psychic and delay, as much as financial) for landlords and tenants seeking to enforce their rights/the other party's obligations can be substantial. Court proceedings in cases of alleged harassment, for example, may not be concluded until well after an assured shorthold tenancy has ended.
- The available remedies may not yield the outcome that this sought. The desired outcome may be simply that the other party desists from particular behaviours, not necessarily that they should be punished.
- The availability of affordable, specialist assistance to tenants in seeking to enforce their landlord's obligations depends heavily upon where they live, and may be non-existent.
- With no offence of retaliatory eviction, tenants may be reluctant to assert their rights if the net effect is that they lose their home.
- The punishment a landlord may receive if found guilty of a breach of the criminal law such as harassment or unlawful eviction will generally be relatively modest.

In the light of these characteristics, the law plays a relatively minor role in the regulation of most landlord-tenant relations. Relatively few tenants will pursue action against their landlords, and those that do often do not persist with the process to its conclusion. It is easier to solve a problem through moving to another tenancy. Or, if alternative tenancies are scarce, it may be easier to live with the inconvenience of disrepair, for example. Similarly, landlords may be tempted to adopt unlawful tactics because of frustrations with the delays associated with following prescribed processes.

We could ask whether this matters. Should we even be concerned about an apparent absence of reference to the law? Given that this is a market sector, is not the threat of exit by tenants sufficient to discipline landlords into providing adequate standards of

property and service? More subtly, if there is demand for the properties that are available and no overt dissatisfaction on the part of tenants, might it be the case that the problem is that the legal obligations upon landlords are overly onerous and that landlords are satisfactorily meeting market demands even though that might, in some technical sense, represent an unlawful practice?

I don't propose to engage with these arguments in detail here. The former argument may be valid, but relies on a close understanding of market structure, and this will vary by location. Is the private rented sector genuinely competitive? Or do search costs, asymmetries of information, and the fact that private rented housing is at some level an experience good mean that consumers are not well placed to discern the profile of the market and the nature of the product on offer prior to entering a contract? There is also the question of how the disciplining mechanism might work; in the sense that the most obvious mechanism is through reputational effects, but within the current institutional framework these play a limited role. The latter argument requires engagement with a series of questions around appropriate minimum standards and how/at what level they are set, merit good arguments (and the spectre of paternalism), questions around information asymmetries and the question of whether the problem is a failure in the housing market or a problem of income maldistribution.

If we take the view that, in the current situation, neither private law remedies nor market forces are likely to be sufficient to enforce obligations, the characteristics of the private rented sector also pose problems for attempts at third party enforcement. In the absence of a comprehensive and compulsory registration system, identifying who should be subject to some form of regulatory scrutiny is a challenge. This is particularly acute in the resident landlord sector, where landlordism can be an occasional rather than a continuous activity.

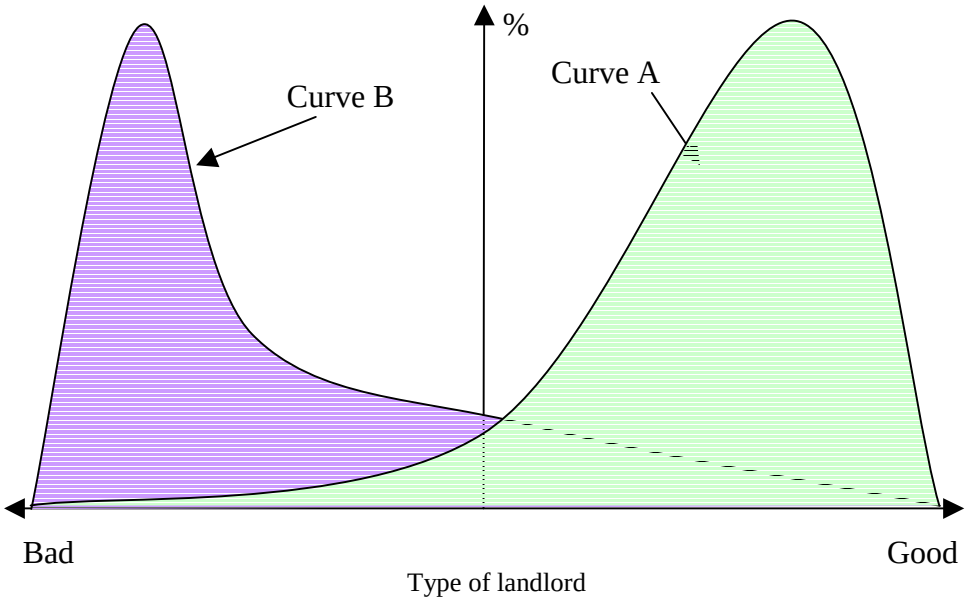
How big is the compliance problem?

While there are good reasons for thinking that the private rented sector is subject to compliance problems, the available data is inadequate to confirm this. We know that disrepair is greater in the private rented sector than elsewhere and we know that there are significant problems with the alleged unjustified withholding of tenancy deposits by landlords. National surveys tell us that a minority of tenants report that their relationship with their landlord is not positive and that this is frequently as a result of failure to carry out repairs, either at all or within a reasonable timescale. But interpreting such figures as *necessarily* signifying a breach of legal obligations requires something of a leap of faith. On the other hand, we know that very few cases of unlawful eviction are processed to a prosecution by the courts – but to conclude therefore that unlawful eviction is not a problem would be to ignore the complex dynamics of the process by which a breach of obligations finds it way as far as a judicial decision, and the attrition that occurs at every stage along the way. Similarly, the absence of dispute between landlord and tenant or of a problem being recognised by one or other party cannot be taken as indicating that all legal obligations are necessarily being fulfilled.

It is precisely the characteristics of the sector that mean that compliance problems might be expected that also mean that problematic situations encountered by landlord or tenant are unlikely to show up in the statistical record.

The absence of a particularly robust evidence base for the extent of compliance problems opens up a significant space for debate over the profile of compliance cultures in the sector. The Government, for example, in the Housing Green Paper (DETR/DSS, 2000, para 5.4) offered the binary distinction between the 'many good and well-intentioned landlords' and 'a small minority of private landlords [who] set out to exploit their tenants and the community at large in flagrant disregard of the law'. It then goes on to suggest that many breaches of the law by landlords are inadvertent, which might be taken to imply that 'good and well-intentioned' does not coincide fully with non-law breaking. This characterisation would find a considerable degree of support among landlord representatives. While it acknowledges compliance problems, it minimises their quantitative significance. This is the view represented by Curve A in Figure 1, which illustrates the distribution of landlord types on a continuum from good to bad. An alternative view, that one is more likely to encounter in the housing advice world, for example, is that the majority of landlords are actually rather more likely to act unlawfully and that a sizeable proportion are to be found towards the left hand side of the continuum, as in Curve B.

Figure 1 Distribution of landlord types – two views



Yet, this classification across a single dimension is too broad brush to be of great value. The picture is more complex: for example, there are 'good' landlords who knowingly engage in 'bad' behaviour (such as unlawful eviction) but rationalize it with 'good' reasons (such as protecting of neighbours from a disruptive tenant) (Marsh *et al*, 2000). The Green Paper's account also suggests that less desirable behaviour, including failure to fulfil obligations, is associated with smaller, amateur landlords rather than larger or more organised concerns. This is an idea that has long been associated with the argument that professionalisation will enhance quality in the sector. While this is intuitively plausible, it isn't entirely clear how well the argument would withstand detailed scrutiny.

Hence, one further, slightly more refined, way to look at this issue is illustrated in Table 1. There have been a number of attempts to classify types of landlord and the table adopts that offered originally by Crook *et al* (2000) because there are empirical estimates of the profile of landlords on the basis of this classification. It tabulates landlord type against the classification of compliance cultures used by Baldwin (1995) in his study the way in which employers approached health and safety at work. I would suggest that the classification is sufficiently general to be applied equally to private landlords. Baldwin identified well-intentioned and well-informed employers as more likely to be large; ill-intentioned and ill-informed as more likely to be small or medium sized; and the more marginal, small scale or itinerant employers as likely to be problematic. Baldwin's key point was that the regulatory strategies adopted in respect of breaches by firms with different compliance cultures were different, with the reference to formal law occurring more explicitly and earlier in the process as the employers were perceived to be more ill-intentioned or problematic. My point is rather more straightforward: we have a relatively good idea of the column marginals – the distribution of landlord types – but very little information on the row marginals – the profile of compliance cultures and hence on how these interact to populate the cells of the table.

Table 1 Compliance culture by type of landlord

Compliance culture**	Type of landlord*				
	Business	Sideline investor	Sideline non-investor	Institutional	
Well-intentioned and well-informed	?	?	?	?	?
Well-intentioned and ill-informed	?	?	?	?	?
Ill-intentioned and ill-informed	?	?	?	?	?
Problematic	?	?	?	?	?
Percentage***	15%	45%	18%	22%	100%

Notes: * - Classification of landlord types drawn from Crook et al (2000)
** - Classification of compliance culture drawn from Baldwin (1995)
*** - Percentage distribution from ODPM (2003)

The 'puzzle' of voluntary compliance

Problems of compliance are clearly not restricted to the private rented sector. There is a considerable economic literature covering the topic of regulatory compliance in a variety of settings. A concern with compliance as a matter of rational calculation – as a product of setting the rewards for non-compliance against the probability and cost of detection – has developed in the wake of Becker's (1968) seminal work on the economics of crime. Rational actor models of this type tend to lead to the conclusion that in many contexts the likelihood of detection is so low and the penalties for non-compliance are so modest that non-compliance would be expected to be prevalent.

Working from this perspective then leads to the 'puzzle' that in practice the prevalence of non-compliance is typically much lower than might be anticipated on the basis of theory. Various solutions to this puzzle that retain as far as possible the core rational actor assumption can be offered. Heyes (1998), for example, in his discussion of firms' compliance with environmental standards suggests a number of possibilities: that firms misjudge the likelihood of their non-compliance being detected and hence comply when they could have got away with non-compliance; that compliance delivers market-based benefits (eg. reputation effects) or that being caught not complying delivers market penalties that are significant but not easy to model; that in a long term relationship non-compliance would subsequently attract more detailed and costly regulatory attention and hence compliance is a rational strategy to minimize costs in the longer run; that (over)compliance in one area might be part of a broader relationship and be part of 'regulatory dealing' under which the regulator turns a blind eye to non-compliance elsewhere. There are undoubtedly others.

Embedding economic transactions

While it is possible to provide explanations for 'voluntary' compliance that are framed in terms of rational and self-interested decisions on the part of individual firms or individuals, I would like to suggest that there is perhaps a more fruitful line of enquiry and one which brings developments in economics closer to contemporary thinking in other disciplines. As far as I'm aware, this discussion has advanced farthest in the literature on tax morale and tax compliance - a policy field in which the same problem is encountered: despite the fact that under many tax regimes the risks associated with non-compliance are very low, high levels of compliance are observed.

A strand of the literature that builds upon Akerlof's (1980) theory of social custom argues that the individual's decision to comply or not with a tax regime is not simply a function of the financial costs and benefits to them as individuals, but is also conditioned by the tax compliance culture in which they are embedded (see Torgler, 2002; Ratto *et al*, 2005). That is, they are subject to the social norms of their peer group and if those norms favour compliance then the costs of non-compliance are high, whereas if the prevailing norm is for non-compliance than that alters the calculus for the individual. In theory both high and low compliance equilibria are possible and stable, and models indicate that small changes to tax policy may result it significant changes in the rate of compliance. A more general discussion of models of this type is provided by Bowles (2004). Other innovative developments in economic theory are potentially relevant here: I have in mind, for example, the recent exploration of economics and identity by Akerlof and Kranton (2000) or the economics of esteem by Brennan and Pettit (2004). A richer picture of motivation – going beyond narrow self- and pecuniary interest – is progressively being elaborated.

Clearly the integration of social norms into economic explanation in itself moves economics closer to the concerns of other social science disciplines. Conversely, social scientists from other disciplines have become increasingly interested in phenomena that are more traditionally the preserve of economists. The collection edited by Callon (1998) was as key moment in these developments. Diverse contributions have subsequently been grouped under the loose banner of 'cultural economy' (Amin and Thrift, 2004). The recent paper by Smith *et al* (2006) is an attempt to explore the owner occupied sector of the housing market from a perspective informed by these developments.

For my purposes the interesting feature of this literature is its central preoccupation: how do some social phenomena or social exchanges come to be thought of as 'economic' or part of 'the economy' while others do not? And in this process of disembedding do we not lose some of the richness and complexity of the phenomona in question? Economic theory may portray 'economic' transactions as based upon unemotional self-interested calculation, but many transactions deemed 'economic' are in reality infused with a whole range of emotions and broader social significance that, it is argued, cannot sensibly be ignored if we wish to achieve an adequate understanding.

Reflection upon private renting would suggest that approaching the sector from this perspective could be illuminating. Many of the issues in the resident landlord sector are the result of the entanglement of what is an 'economic' transaction with the emotional process of letting a non-family member – possibly a relative stranger – share your home, with all that can imply for reconciling differing styles of living.

Landlords who move from a property and, rather than selling up, rent it out – as was common for 'slump' landlords in the early 1990s – often view the new tenants as living in 'their' home and believe that the tenants should look after it as such. This can lead to unreasonable expectations around upkeep, and hence tensions between landlord and tenant, or a failure to understand or accept the implications of granting someone else exclusive possession, and hence to problems of harassment.

Implications for regulation

Key problems for traditional command and control approaches to the regulation of the private rented sector are the dispersed nature of those who might be regulated and the problems associated with their identification. This needs to be set alongside the resource constraints upon those charged with regulating landlords and tenants. The lack of knowledge of the relevant law, and the reluctance on all sides to invoke law to deal with problems that arise in the landlord-tenant relationship, similarly pose challenges for any approach to regulation that focuses on the law. In addition, the character of the sector means that focusing primarily upon remedying disputes once they arise will only ever be a partial solution to compliance problems. I would suggest that it is necessary to focus just as much attention on decentralised means of regulating – in the broadest sense of the term – through shaping behaviour in ways that mean that the likelihood of disputes emerging is minimised.

From a regulatory perspective, to avoid excessive regulatory costs and secure effective regulatory oversight it would be desirable to adopt a tiered approach: to agglomerate the subjects of regulation and regulate the agglomerations. The agglomerations might be landlord associations. Drawing the analogy with the tax compliance literature, one way forward would be to focus more attention upon the peer groups within which landlord are embedded. However, peer groups can have both positive and negative effects upon behaviour, depending on prevailing social norms. Hence, connecting landlords to positive peer groups would be desirable. This could suggest a regulatory role in determining which peer groups are positive eg. those landlord associations that not only set out codes of practice but demonstrably enforce them.

The regulatory structure would not necessarily revolve around one statutorily approved association. Competing associations could offer services in particular localities (cf. Ogus, 1995), although the incentives associated with competition here would need to be worked through carefully. Reputational effects would have to be relatively powerful to avoid either (i) the incentive to soft-pedal on non-complying landlords in order to attract business or (ii) the need for strong regulatory oversight. A similar argument would apply if policy were to pursue the requirement that all property owned by landlords below a certain size should be let through agencies.

Individual landlords will have different susceptibility to peer pressure. I would suggest that membership of an appropriately operated trade body is likely to improve average quality of landlord performance. However, there is the well-known issue that voluntary membership of associations or accreditation schemes tends to result in the participation of the relatively well-intentioned and does nothing to reach the problematic cases. Enforced membership might bring the most problematic landlords

into membership and, if that were achieved, then the association's concerns for its reputation would come into play. Of course, the problem then becomes ensuring that everyone joins and/or identifying those who do not.

It strikes me that the concern in the cultural economy literature with the social embedding of economic transactions opens up options for exploring new regulatory possibilities. For example, the lack of professionalism in the landlord sector in Britain is conventionally considered a problem. Attempts to professionalise have not been conspicuously successful. Could the lack of professionalism, therefore, be turned to advantage in seeking to shape landlord behaviour through greater consideration of the emotional and social dimensions of the landlord-tenant transactions? The potential significance of these dimensions is acknowledged in the recent consultation paper on the impending system of landlord registration in Scotland. At the consultation stage the argument was advanced that resident landlords should be exempt because they already had a range of motivations – not purely 'economic' – for looking after the property because it was their home (Scottish Executive, 2005, para 34). The literature demonstrates that many landlords are relatively insensitive to conventional economic/monetary incentives, there are perhaps other 'social' levers that regulators could pull to greater effect.

Conclusion

This brief paper has covered three related themes. First, it has highlighted the characteristics of the private rented sector and suggested that these render formal law of marginal significance in understanding the way the sector works in practice. Second, it has noted that these same sector characteristics mean that there is a gap in our knowledge of the distribution of compliance cultures within the sector. We are not well placed to say how big the compliance problem actually is. Third, it has noted two parallel developments in the contemporary literature. Within economics it has noted the development of a literature invoking social norms as an important element in understanding compliance, with particular reference to tax compliance. In the broader social science literature it has noted the emergence of the cultural economy perspective and the argument that economic transactions cannot be decoupled from their social context. I would suggest that these parallel developments are complementary and point to the need, when thinking about routes forward for regulatory reform, to maintain a broad perspective and an appreciation that the levers for influencing behaviour are varied and subtle. Given the notable failure of traditional law-based regulation to make a significant impression on much of the activity within the sector, the private rented sector would seem to be a field in which it is not only desirable but essential to pursue alternative avenues.

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The private rented sector: The regulatory landscape

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The origins of private sector rent regulation

As with many other countries (see below) the adoption of rent control in Britain was a forced response to the distortion of supply of, and demand for, housing which resulted from the First World War.[2] More specifically, it was the creation of an effective monopoly in favour of the landlords in Glasgow by the influx of some twenty thousand munitions workers to the City and its environs that precipitated the passage of the Increase of Rent and Mortgage Interest (War Restriction) Act 1915. Attempts to exploit this situation led to fierce agitation by these workers and to a series of rent strikes.[3] On November 17, 1915 at the Small Debts Court of the Glasgow Sheriff Court the trial of eighteen rent striking munitions workers was held while between ten and twenty thousand protesters awaited the outcome in the surrounding streets. The trial judge, Sheriff Lee, captured the mood of the workers in this statement that it was not that they felt the law to be against them, rather that "there was no law that had been applied to their case at all". After receiving a deputation of rent strike leaders in Chambers, the Sheriff urged the petitioner to prevent trouble by postponing all claims against the strikers. The event provided the opportunity to issue an ultimatum to Asquith – rent freeze or general strike. With rent strikes occurring elsewhere in the United Kingdom, the bill was introduced on November 25, receiving royal assent two days before Christmas. The effective challenge to the legal system posed by the Glasgow tenants left Walter Long, the President of the Local Government Board, with no option but to introduce legislation with which he plainly disagreed. The role of the tenants' action in producing the legislative changes is a matter of some debate amongst Marxist and other historians,[4] but looking to the experiences of other countries it seems likely that rent control would have been introduced eventually either as part of war time rent control or to curb post war housing emergencies.

The Armistice brought the same problems to Britain as elsewhere in Europe. While demand soared the reduced wartime supply could not be made good immediately. At

[2] For a more general review of shortages and controls during and after the First World War see: Broadberry S.N., "The Emergence of Mass Unemployment: Explaining Macro-Economic Trends in Britain During the Trans World-War 1 Period" (1990) 43(2) *Economic History Review* 271.

[3] For background on the Clydebank rent strikes – see the work of Sean Damer and , for example, Damer S "Striking out on Red Clyde" in Goodwin J and Grant C (ed) *Built to Last* (London, Shelter/Roof, 1997); see also Melling J *Rent Strikes: People's Struggle for Housing in West Scotland*, 1890-1916, (Edinburgh, Polygon 1983) and Melling J "The Glasgow Rent Strike and Clydeside Labour: Some Problems of Interpretation" (1979) 13 *Journal of Scottish Labour History* 39. For an auto biographical account see Gallagher W, *Revolt on the Clyde* (London, Lawrence and Wishart, 1936 republished 1978).

[4] See the coverage of the strikes in Castells M, *The City and the Grassroots: A Cross-Cultural Theory of Urban Social Movements* (Berkeley, University of California Press, 1984) and see review by Zukin S at (1987) 93 *American Journal of Sociology* 459.

the same time, the increasing politicisation of the working classes[5] generated pressure not merely for sufficient housing, but also for improved housing standards. It became clear that only new building could solve the housing problem.[6] New building had previously meant building by private investment,[7] but rent control posed an obvious disincentive upon building to let. As with price control generally, the longer it remained, the more difficult it would be to remove rent control. However, the 1915 Act was due to lapse six months after the end of the war, by which time there would be a short-fall of nine hundred thousand dwellings as against households. Whatever good economics dictated, there was only one political possibility and that was to prolong rent control.

By 1923, fears of revolution were not quite so pressing, but in the run up to the decontrol provisions, the Government was shaken by the strength of reaction to the Rent Restrictions (Notice of Increase) Act 1923 – a curious but rarely considered piece of legislation. The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 as part of the *quid pro quo* for the retention (and indeed extension) of rent control, allowed to landlords a rent increase, which broadly approximated to forty percent, and a form of notice of increase was contained in the Schedule to the Act. Such increases were intended to apply to premises subject to rent restriction and the wording used in section 3(1) of the 1920 Act was as follows:

> "Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession."

In the case of fixed term which had expired, this posed no problem if the tenant remained as statutory tenant, but in the case of weekly or monthly tenancies, which were common at the lower end of the market, problems did arise. Ordinarily, the landlord would only be entitled to obtain possession following a week's (or month's) notice, so that the question arose as to whether the landlord's increase was valid – even if the statutory form of increase was used – if correct (albeit ineffective) notice to quit had not been served.

A series of English cases decided that a valid notice to quit was a pre-requisite. Since the practice in England and the East of Scotland seems to have been to serve notice, such cases were uncontroversial. However in West Scotland, and particularly Glasgow, this was not the practice and, from there, a case, Kerr v Bryde[8] reached the House of Lords. By a majority of three to two, in line with earlier cases, the necessity of notice to quit was agreed. In the course of this litigation, in courts from the Sheriff Substitute to the First Division of the Court of Session and through to the House of Lords, it was unanimously decided that notice to quit was necessary – the only dissent being in the House of Lords, by Lord Dunedin and Lord Wrenbury. The point was also covered by dicta of the Divisional Court in Hill v Halser in July of that year,[9] prior to confirmation of this line of authority by the Court of Appeal in Newell v

[5] See Savage M and Miles A, *The Remaking of the British Working Class 1850-1940* (London, Routledge, 1994) for an account of the influence of social mobility and urban change in this respect.
[6] And such a programme of public housing began under the Housing Act 1919 – the 'Addison Act'.
[7] Rodger R, *Housing in Urban Britain 1780 – 1914* (Cambridge, Cambridge UP, 1995).
[8] [1923] AC 16
[9] [1921] 3 K. B. 643

Crayford Cottage Society early in 1922.[10] Consequently, many tenants in Scotland had been paying increases illegally demanded for the previous two and a half years. Although the 1915 Act had provided no mechanism for the reclaiming of overpayment of rent, this had been made possible by virtue of s5 of the Courts (Emergency Powers) Act 1917. The Scottish Labour Housing Association produced a circular explaining to tenants their entitlement to begin off-setting rent overpaid against future rent – a move wrongly described in Parliament as a rent strike.

The landlords had requested retrospective legislation following the decision in the Scottish Courts but the Minister refused to intervene "until all the avenues of the law had been exhausted". When the House of Lords' finally ruled against the landlords, in answer to a question from his own back benches, the Prime Minister, Bonar Law, threatened legislation to reverse the decision retrospectively stating that this policy was in line with earlier assurances of a rent increase, Since the announcement was reported some twelve days prior to the 1022 election, it may also have assisted the return to Parliament of 17 Scottish Labour Members – 13 from Glasgow. Following the election, the Prime Minister, Bonar Law, in line with earlier assurances given to the landlords by the Secretary of State for Scotland, legislative provision was made.[11] The Act was retrospective, but it was not merely an entitlement "to a group of property owners to repudiate their debt" since it did more than simply cancel that debt. Because the Glasgow tenants had been offsetting amounts overpaid against current rents – as they were legally entitled to do – the Act allowed landlords to recover some of these sums (described in Parliament as "arrears"). As from the time the Prime Minister had answered the question on this topic (twelve weeks prior to the introduction of the Bill) a tenant was given "express notice that if he went on refusing (payment of increase) it was at his own risk".

A consequence of this bizarre view based on the Prime Minister's "perfunctory off-hand aside" was that many Glasgow tenants who had acted perfectly lawfully found themselves in three months arrears – assuming they promptly recommenced payment on the introduction of the Bill. The anger of the Labour Opposition and the danger of the Government's path show up clearly in the debate upon the third reading. John Wheatley remarked that the legislation was:

> "A piece of sordid unromantic robbery…the robbery of the weak by the strong. I do not think that…the House questions the legal rights of the tenants to increases which were improperly imposed. Their legal right to those increases at the moment is as strong as the right of any Hon. Gentleman to his capital, or to any Hon. Gentleman opposite to his land…In future are we to be at liberty to say that the mere possession of a thing is not sufficient justification for its retention."

In a similar vein MacDonald argued:

> "Where are we going to have any feeling of security now in the administration of law which is not commonly accepted, which is the subject of agitation, which is the subject of protest?...Your Law Courts' decisions are no longer

[10] [1922] 1 K. B. 656
[11] The Rent Restrictions (Notice of Increase) Act 1923

secure. We can go back on them. We have got a thousand and one grievances of this kind."

This episode is fascinating not least in terms of the insights that it offers into the regulation of private renting. Rent restriction is borne out of wider economic pressures that prove irresistible. Market economics tell us that left alone, the price increases promoted by the excess of demand over available supply will generate new providers of housing stock, but given the time lag in increasing the available supply, governments are driven to the conclusion that there is an event of market failure necessitating intervention in the form of rent controls. Of course, the cure may prove worse than the disease, since once imposed controls are notoriously difficult to remove, and while they remain, landlords will be most conscious that they are being denied the rent available in a free market. As we see from the examples above, regulation becomes the site of opposition between landlord and tenant. Where these disputes reached the courts, it was not unusual in the history of British rent control to see the courts giving preference to the property rights of the landlord notwithstanding their limitation in order to enhance the social welfare of the tenant.[12] The incidence of the imposition of rent controls and of decontrol form patterns during the Twentieth Century across the western world,[13] and these are worthy of consideration in assessing where we have arrived in terms of present day regulation of the housing market in Britain.

The macroeconomics of rent controls

A study of rent control discloses a clear and indisputable pattern.[14] There are essentially two species of control – those with wartime and those with peacetime origins. These are labelled first and second-generation controls,[15] but this fails to fully convey the very different nature of the two sets of provisions. The distinction is between rent freeze and fair rent systems. Rent freezes were necessitated by wartime housing difficulties. In the main these resulted from shortages of stock in the growing urban areas which could not be made up due to a cessation of construction and repair, whilst demand grew as wartime income rose, population shifted, and the numbers of households increased. In addition certain countries faced particular difficulties – as with the Swiss immigration problem of 1914. It was a feature of both wars that housing shortages persisted into peacetime and in the case of the First World War

[12] This opposition to rent control is clear from an early stage as evidenced by the dicta as early as 1921 in Remon v City of London Real Property Co of Scrutton LJ:

> "The policy of the statute is a matter for Parliament and not for me, but those who ask for and pass such legislation should not be surprised if, as one of the effects, existing houses are not let, but only offered for sale and no fresh houses are built by private enterprise."

[13] This is not to say that controls were unknown before this time – see Willis J, 'A Short History of Rent Control Laws' (1950) 36 *Cornell LQ* 54

[14] For some of the theoretical writing on patterns of rent control see: Hayek F A et al *Verdict on Rent Control* (1972) Institute of Economic Affairs; Walker M A (ed) *Rent Control; a Popular Paradox* (1975) Fraser Institute Vancouver; Albon R (ed) *Rent Control; Costs and Consequences* (1980) Centre for Independent Studies (Australia); Block W and Olsen E (eds) *Rent Control Myths and Realities* (1981) Fraser Institute, Vancouver.

[15] This classification has been as too simplistic a typification of rent controls that are said to vary further depending upon the scope of controls and the extent of tenant protection – see Lind H, 'Rent Regulation: A Conceptual and Comparative Analysis' (2001) *European Journal of Housing Policy* 41

many controls were introduced following the termination of hostilities. The impact of the Second World War was more dramatic with the immediate adoption of control throughout the whole of the Western World.

Owing to the emergency status of the legislation, rent freezes were imposed. Unrefined devices, these assumed that the rental figure at the time of the freeze reflected the true market future. At the time of the First World War there was some legitimate expectation that this was so, since the markets were free from previous control, and individual hardships caused by the policy could be justified under the emergency legislation. At the time of the Second World War, however, many countries adopted rent freeze notwithstanding prolonged intervention in the market – sometimes in the form of rent reduction. It is fair to view security of tenure as ancillary to many of the rent freeze policies. Certainly in the Second World War rent control formed a part of a universal and comprehensive price control programme in many countries so that the legislation was passed in advance of tenant protests concerning rising rents or growing rates of evictions. However, decisions on the retention of control following both wars should be viewed as social rather than economic, since these periods saw the greatest pressures on the private rented markets and the highest eviction rates.

In almost every case rent control was professed to be "temporary". Few measures were, but the word conveyed hope of governments that normality of housing supply could be quickly restored. In the sense that rent control measures were abandoned once this objective was achieved, they were temporary, but the length of time taken in most countries to overcome the dislocation caused by war renders the word inappropriate. In some countries rent control could only be described as a permanent feature of housing policy, and it is undoubtedly true that the longer control is retained the harder decontrol becomes. This aspect of the legislation was infamous following the experience of the twenties and thirties, but it did not prevent the universal adoption of rent control programmes at the outbreak of the Second World War or encourage immediate decontrol in 1945. It is altogether too simplistic to describe governments faced with acute housing shortage refusing to take action to decontrol as "lacking in courage and vision".[16]

The variety of methods of decontrol reflects the careful consideration given to the problem across many countries. Basically, however, there were three forms of decontrol. The first – used in larger countries or countries with large populations – was decontrol by geographical area. When feasible, this method has the advantage of freeing large areas from control comparatively quickly. Where regional distinctions in housing stress did not exist an alternative method, tending to emphasise the social nature of rent control, was decontrol according to rent levels. Again this allowed a large number of more expensive properties to be decontrolled without undue hardship. Both methods are rational in their view of the operation of the housing market – it being a geographical entity to which ability to compete will be governed by available income. Both approaches seek to protect the vulnerable households whilst returning to a more open market in rented property, and the gradual extension of both types of decontrol became increasingly possible. The third solution is less rational however.

[16] Per Funnar Mydral quoted in Rydenfelt S The Rise and Fall of Swedish Rent Control in Walker M (ed) Rent Control: A Popular Paradox (1975) Fraser Institute p 182 also in Introduction to Albon R (ed) *Rent Control: Costs and Consequences* (1980, St Leonards, Centre for Independent Studies)..

Decontrol upon vacant possession is obviously haphazard and uneven in its application. It produces disincentives to mobility on the part of tenants fearing forfeiture of their place in the favoured controlled market on moving and leads to over-consumption/under occupation of housing – though in part some of this is inherent in any form of partial decontrol. Also vacancy decontrol incites the landlord to gain possession by fair means or foul.

Whatever the legislative provision, decontrol was a slow process, not merely because of continuing shortages but also because of changing expectations of housing expenditure on the part of the tenant and subsequent resistance to decontrol. Where mal-distribution occurred some countries such as Germany and the Netherlands sought to overcome this problem by allocation policies. These and other instruments such as building subsidies have had a dramatic impact upon the eventual shape of the housing market in such countries. Since there was some recession in the private rented sector generally in the post war period, all laws which tended to retain the stock within this sector (such as restrictions on conversation or demolition), the maintenance of housing quality, and anti-harassment legislation) become significant. Because this was realised, housing law as it applied to the private rented sector became increasingly sophisticated.

Gradually, however, most countries achieved a substantial level of decontrol whilst nurturing the private rented sector. By the sixties if control remained it applied only to residual locations or groups of dwellings. The re-emergence of control in the form of fair rent systems must seem surprising in view of the long haul of decontrol. The universal nature of second-generation rent control must lead to the assumption of economic difficulties pervading the different national housing markets. Rising rent levels caused by inflation would seem to be the major source of difficulty. Although often condemned as an unnecessary form of protection against such inflation the second generation of rent controls, not unlike its war-time predecessor, had its origins in price control in the form of counter inflation policies. Thereafter, however, the fair rent systems developed as tenant protection measures for two reasons. Not only was it commonly the case that those dwelling in the private sector were particularly vulnerable to the adverse effects of high inflation, but they faced eviction as landlords viewed rising capital values as an incentive to sell with vacant possession.

Rent regulation gained ground as tenant pressure grew. Opponents of rent control were no less vocal but were politically less successful. The opposition continues in spite of the fact that often rents under the policies would claim to represent a fair return on the landlord's investment. As owner occupation increases – even in countries like Sweden which has little tradition of home ownership – it seems that landlords react more strongly to the inability to change the nature of their investment by quitting the market. Yet it is precisely the fear that they will do so that has fuelled to growth of second-generation controls. In a sense this is one of the great lessons of rent control. Once intervention, on grounds of economic necessity, takes place in the private rented sectors, a considerable body of law, also interventionist in nature, becomes vital to ensure the maintenance of quality stock. It is difficult to compare experiences across countries or talk of countries with more successful policies than others, but one possible conclusion is this.

Most countries found it impossible to retain a free market in private rented housing in the Twentieth Century. Once control was adopted it seemed to be the countries whose housing laws encompassed a greater interventionist approach – in the form of building subsidies, housing allowances, harmonization programmes, wider tenant protection measures and greater control of quality and maintenance – that managed more successfully to retain their private rented stock. Towards the end of the Twentieth Century, however, inflationary pressures that fuelled second generation controls abated in many jurisdictions including England and Wales, allowing the return to something akin to the free market. In this context, given the struggle in gaining decontrol, one must be wary indeed of further market regulation. The history explains why, in the words of the briefing paper: "current policy consensus is that rents should be market-determined and security of tenure, having been reduced in the 1980s, is not in need of further strengthening."[17]

The current state of the private rented sector

Reflecting on this experience we can see that we move from about 90% of housing in the privately rented sector in 1900 to one of the lowest levels of private rented stock in Europe of less than 10% by 1990 – although this figure has now grown to around 12%. The decline of private sector housing is not necessarily a matter for regret. Social housing after World War 1 brought considerably higher housing and space standards, delivered in a highly efficient manner through the ability to pool rents across large estate holdings especially in metropolitan areas. As the Twentieth Century progresses greater affluence, the growth of the middle class and, latterly, the positive encouragement of a 'property owning democracy' through taxation policies and through stock transfer under the 'right to buy' all help shift housing tenure much more towards owner-occupation. Similar transfers of stock from private renting to owner-occupation occurred especially from the post-Rachman 1960s accelerating with the passage of the Rent Act 1974.

The point at which this trend was reversed was arguably the passage of the Housing Act 1988 and the creation of assured and assured shorthold tenancies, the latter restoring open market rents and the former claiming to do so. Alongside this, less obviously, Business Expansion Scheme Companies were allowed to invest in a manner that had both favourable income tax and capital gains tax consequences in lower value residential property. Coinciding with the property recession of the early 1990s, the Scheme proved useful in dealing with repossessed properties, and Collett[18] estimates that 200,000 units were added to the private rented sector in the 1990s. What made the return to market rents under the 1988 Act possible was the move to a low inflation economy on the back of Thatcherite monetary policy. As is shown above, second generation rent controls were driven by problems of inflation. Combating the threat of inflation involved considerable hikes in interest rates leading in turn to the property recession, the fall in house prices and problems of negative equity. This probably also contributed to properties moving from owner occupation to

[17] Centre for Market and Public Organisation and the Law Commission, *Ensuring Compliance: The Case of the Private Rented Sector* (2003).
[18] Colett A, 'Prospects for Investment in the Private Rented Sector' (2000) 18(4) *Journal of Property Investment and Finance* 507.

private renting as owners unwilling to sell at a loss rented their property in the hope (reasonably soon realised) of a price recovery. That price recovery was also to have consequences for the restoration of the private rented sector as house price inflation easily outstripped that in the economy at large by the mid 1990s. This period saw the availability of mortgages via the Council for Mortgage Lenders' schemes of buy-to-let mortgages, and these proved popular with small investors, accounting for £4.5 billion pounds of borrowing to support the private rented sector in the years 1997 to 1999. Although the move of the private renting tenure group from 10 to 12% of housing stock may seem small, it represents the growth of one fifth in provision over a short period of time. It may well indicate also that owner occupation has reached a natural ceiling in percentage terms and that future provision may be relatively more important in the private rented sector.

Part of the argument here is that there are developments in the population at large that drive the demand side of the equation. One such factor would be the increase in mobility of younger people. Student numbers in higher education in the UK almost doubled between 1991 and 2001 from 1,195,000 to 2,086,080.[19] These students will form households at a much later point in age than ever was the case in the Twentieth Century. Of people forming a household between 16 and 24 years of age over 50% are in the private rented sector.[20] The proportion of one-person households almost doubled from 17% in 1971 to 31% in 2001,[21] inevitably reducing the overall average household size, and creating a demand for more housing units. Some of this demand, for example in the event of marital breakdown, might be short term and best served by the private rental sector. Indeed one third of people quitting the owner occupied sector do so in consequence of marital breakdown, and only 5% of married families occupy privately rented housing, some 85% being owner occupiers.[22] As there seems little likelihood of these trends reversing, it seems reasonable to conclude that there will continue to be a modest growth in private sector renting.

This growth is to be welcomed especially if it occurs in the South East of England. It is already clear that there are particular problems of affordability[23] of housing in this region and that this may have reached the point where this might inhibit workers in key areas of the economy from pursuing job opportunities in the region. At the same time, and possibly because of skills' shortages, the region plays an important role in providing a foot on the employment ladder for young workers. Young workers are increasingly vital in an ageing population and because of the fragmentation of employment opportunities. The labour market is now subject to considerable expansion of part time or short-term contract opportunities, with an estimated one quarter of jobs in the UK market other than in full time employment. In this context,

[19] 1991/92 figures from HESA's "Higher Education Statistics for the United Kingdom 1992/93", 2001/02 figures from HESA's "Students in HEIs 2001/02"
[20] ODPM, *Housing in England 2003/04:Trends in Tenure and Cross Tenure Topics,* (ODPM, London, 2005).
[21] Office of National Statistics, *Living in Britain 2001,* (ONS, London, 2003)
[22] ODPM, *Housing in England 2003/04* (supra); Holmans A, *Divorce, Remarriage and Housing* (DETR, London, 2000); and Kemp P and Keoghan M, 'Movement into and out of the private rented sector in England' (2001) 16 *Housing Studies* 21.
[23] The problem is now more complex than simple housing need such that it is important to focus upon the amount of household income that must be expended on housing according to Whitehead C 'From Need to Affordability: An analysis of UK Housing Objectives' (1991) 28 *Urban Studies* 871.

the flexibility offered by the private rental sector becomes more important and possibly security of tenure matters less than in earlier job markets.

Interestingly, the yield on smaller rental properties is markedly higher, and that on a one bedroom flat is likely to be almost double that for a four bedroom house.[24] Provision of smaller housing units is therefore relatively more profitable[25] and may provide another reason for any readiness to meet such demand. In relation to yields, in the past under rent regulation, it was not that landlords failed to make a return on investments, but this return would be in the form of limiting expenditure on the property in relation to rent and taking the return in the form of a capital gain on sale at the point of vacant possession. With a return to market rents the income potential of private rented housing begins to rank alongside capital gain as a reason for investment.[26] Interestingly, however, this has not yet reached a point at which institutional investors have been attracted into the private rental market in any great numbers, and two thirds of landlords are small private investors owning an average of two units.[27] Older (pre 1919) housing stock is better represented in the private rented sector which accounts for over 40% of such properties, while newer (post 1964) properties are less well represented than in any other housing sector including public sector renting.[28]

Privatisation, deregulation and liberalisation

Arguably, the Thatcherite privatisation programme began with housing as 1979 saw the introduction of the Bill that became the Housing Act 1980 and introduced the right to buy. This policy had all of the elements that came to be associated with wider policies of privatisation in raising finance for the public purse while reducing both public expenditure and limiting rolling back the frontiers of State control. Although involving the transfer of the equity in the stock, it was also seen as transfer management responsibility, financial obligations and financial risk.[29] It aimed to increase consumer choice and promote productive efficiency by extending the private housing market. Alongside this, developments such as the reform of financial services provision provided ready access to funds to support the move towards owner occupation, rendering largely redundant plans for local authority financial provision to support the right to buy. Just as privatisation of utilities sought to encourage share ownership, the right to buy was part of a wider move to promote a property owning democracy – seen somewhat cynically as more likely to support the Conservative agenda.

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[24] Rhodes D, *JRF Index of Private Rents and Yields* (Joseph Rowntree Foundation, 1996)

[25] And dwellings in the private rented sector are on average smaller than in other sectors with a greater prevalence of flats – see Welsh Assembly Government, *Review of the Private Rented Sector in Wales* (WAG, Cardiff 2002).

[26] But see Welsh Assembly Government, *Review of the Private Rented Sector in Wales* (supra), which suggests that yields continue to fall.

[27] Colett A, 'Prospects for Investment in the Private Rented Sector' (supra).

[28] ODPM, *Housing in England 2003/04* (supra).

[29] See Whitehead C, 'Privatizing Housing: An Assessment of the UK Experience' (1993) 4(1) *Housing Policy Debate* 101 and see the review of this in Linneman P and Megbolugbe I, 'Privatisation and Housing Policy' (1994) 31 *Urban Studies* 635. Without the advantage of hindsight now allowed to us, Whitehead's remarkable work charted the developments that are reviewed here at a very early stage.

The rolling back of the State had other consequences not necessarily addressed as part of housing policy but which were to have profound impacts upon it. Under this head we might include the narrowing of the of local government and wider dismantling of the welfare state in which the middle class outgrew a residual group of the population, beginning a process now widely referred to as social exclusion. Alongside reductions in welfare came reductions in direct taxation and a broad simplification of the taxation system in which housing was in some ways preferenced (such as the absence of tax on the capital gains made on homes) but in which subsidy through taxation (e.g. of mortgage tax relief) dwindled. Interestingly, by the housing recession of the 1990s, it became clear that for home-owners this was not a risk free enterprise and that financing of property in this context carries no safeguards, being exposed to market risk.[30] Nonetheless this does not appear to have deterred longer-term entry into the sector, with owner occupation continuing to be seen as the most favoured tenure.

The shift from public to private sector housing certainly did not render housing cheaper. It is generally the case that a greater proportion of income needs to be spent on housing, but owner occupiers are prepared to regard the sums expended as a form of investment. This cannot be true of the private rented sector, however, but the policies of liberalisation here, described above in terms of the effect of the Housing Act 1988, also saw an increase in costs as previously regulated rents shifted to a market figure. In addition, the steady rise in the capital value of property, often outstripping inflation in other sectors of the economy, moved that market rent level upwards. The effect has probably been to increase the importance of housing benefit in this sector[31] and to considerably deepen the poverty trap for those not in receipt of benefit.

Nonetheless, if we consider the overall effect on the private rented sector, we would have to say that it is in a healthier condition than any time, arguably, since the outbreak of the Second World War from which point decline seems to have been well established in the sector. The resurgence of the sector seems to have been led by small rather than large investors, which in spite of numerous efforts have yet to take investment in the sector very seriously. Notwithstanding inheritance tax levels it might be that the cascading down of finance from inherited housing might well promote increased small-scale investment in the sector. When political parties talk of the consensus that re-regulation of the private rented sector is not on the political agenda, in the light of the history of regulation considered above, this is a significant assurance in negating the political risk that might otherwise attach to investment. There can be no doubt that if either the regulation of rents or restrictions on gaining possession of property were mooted a fragile confidence might be lost. The more difficult question is what level of regulation not directly in the area of rent levels or security of tenure might begin to inhibit investment in the sector.

Market failure and regulation

[30] Gentle C, Dorling D and Cornford J, "Negative Equity and British Housing in the 1990s:Cause and Effect" (1994) 31 *Urban Studies* 181.

[31] Also because there is less subsidised public sector stock available for those on lower incomes.

Frank Stephen rehearses in his paper the expectation of economists that it will be some event of market failure that drives the move away from market provision and towards regulation.[32] We saw in the example of rent control discussed above that rather than seeking to protect property rights, the Government felt compelled at the time of the First World War to intervene to promote collective behaviour (restraining rents in the wider public interest) because it felt more certain that it could better enforce co-operation to this end by regulation. The more difficult question to answer is whether this intervention actually promoted social welfare. It may have been a benevolent action, but it generated costs as private landlords disinvested in housing and it produced a form of regulation that once introduced proved almost impossible to remove.

Having moved to a situation in which a large number of private tenancy agreements are now a matter of contractual negotiation between landlord and tenant, what events of market failure might induce further regulation? Before examining this it is worth adding that this is not an acceptance that there is a free market presently. Assured shorthold tenancies are a form of regulation and they may change the way in which landlord and tenant regulate their affairs. For example, until the Housing Act 1996, the tenancy would have to be for a term certain of at least six months. In practice many were for six months only as landlords cautiously chose the minimum term. But from the point of view of one or both parties, the short nature of the term limits the amount that it seems sensible to expend on transaction costs such as legal advice or assistance. So we see that even a quite simple regulatory requirement might inhibit efficient outcomes by influencing the completeness of the information underpinning the transaction.

If we ask what events of market failure might necessitate intervention in the contractual relationships between landlord and tenant, there is little suggestion that, in general terms across England and Wales, there is any form of monopolistic power in the hands of landlords such that conditions for adequate pricing of housing cannot be met. Nor, in spite of their particular features in terms of the availability of land and the time taken to construct new housing, would we say that houses somehow constitute public not private goods. It seems therefore that if we are to make out any case for intervention one possibility might be for informational reasons – say an asymmetry in information between landlord and tenant. It is difficult to make out this case as there is no real reason to believe that the tenant is not in a position to assess what is on offer from local landlords. It may be that as a repeat player, the landlord has a better understanding of the legal rights and responsibilities inherent in the contract, but the danger is that regulation of the contract will increase and not eliminate any such difficulties.

A remaining possibility of market failure may arise out of the externalities arising out of the transaction. While there may be some form of societal interest in the quality of housing stock available to rent, there is no reason to think that the contractual negotiations cannot take account of quality issues. Indeed it does seem that better quality accommodation does offer a better yield to the landlord. The most likely form of externality might take the form of anti social behaviour that affects a much wider

[32] Stephen F 'Regulation of Private Rented Housing: A Law and Economics Perspective' Paper for Law Commission Workshop, 23 March 2006.

group of people in the locality. But there is no reason to believe that the contractual relationship between landlord and tenant would encourage this. It is obvious that the anti-social behaviour may be that of the landlord (harassment, disrepair, etc) or that of the tenant (nuisance, vandalism, etc). The case of low demand housing (below) may suggest that bad behaviour on the part of one may be reciprocated on the part of the other. It is interesting to note, however, that covenants in leases tend to mirror obligations, so that the landlord will maintain the premises in good repair while the tenant will not commit waste, or the landlord will guarantee quiet enjoyment while the premises is used in a tenant-like manner and in the absence of nuisance.

There is a balance in the legal provisions therefore, and the landlord will have contractual remedies leading to the right to recover possession from the tenant in circumstances in which there is anti-social behaviour since the covenants in the agreement invariably make provision for this. That said if the average length of tenancies is short and turnover of them is rapid, then this may not assist in curbing problems of anti-social behaviour. The tenant does not view occupation as long term and may know that no enforcement action can be taken any more promptly than the (say) six month period of the tenancy in any case. While not wishing to re-open questions of security of tenure, the promotion of an expectation of longer term tenancies may be an effective break on anti social behaviour by the tenant. Nonetheless it is vital to stress that the mechanisms for ensuring compliance exist in the contract, suggesting that rather than any generalised market failure we may need to consider whether the cost of utilising those mechanisms is the real problem.

If one was to look for an event of market failure then the nearest that one can come might be in relation to the problem of 'low demand'[33] that has given rise to regulatory intervention under Part 3 of the Housing Act 2004. The explanatory note to these provisions states that:

> "Low house prices in areas of low demand have resulted in an influx of unprofessional landlords purchasing properties to rent. These people frequently show no interest in managing their properties properly, often letting to anti-social tenants who cause a range of problems. This, in turn, can create misery for the local community and cause further destabilisation of these areas."

Coming from an area in which this has been seen as problematic,[34] housing issues here are a symptom of industrial decline and the marginalisation of a community in areas where demand for property has collapsed – in places to the point at which abandonment is a problem. Here intervention seems appropriate, though while there are licensing powers available to local housing authorities, much as also been done through the taxation system through VAT and stamp duty reductions and the effective use of capital allowances in an attempt to produce incentives for re-investment. Such problems are localised, however, and not nationwide. If we are happy that this is an event of market failure, might not regulatory intervention take a much tougher form than registration? One possibility might be the compulsory purchase of problem properties and their transfer into the voluntary or public sector. Outside of such areas, rather than saying then that there are obvious events of market failure arising out of

[33] Holmans A and Simpson M, *Low demand: Separating fact from fiction* (Coventry, JRF/Chartered Institute of Housing, 1999).
[34] See Stirling T and Inkson S, *Home is Where the Heart is: Low Demand Housing in the South Wales Valleys* (Bevan Foundation, Tredegar, 2004).

present transactions between landlord and tenant, it would seem more reasonable to suggest that our legitimate interest lies in the effective enforcement of the contractual mechanisms provided.

Another pertinent question is whether we believe that private law is somehow incapable of ensuring that both landlord and tenant meet their obligations. If we are to regulate – say by licensing all landlords by reference to 'fit and proper persons' criteria – not only might this produce a hurdle to market entry even for potential landlords that would meet the criteria, but the consequence might well be to shift remedies from private to public law. Although the courts are most active in the arena of judicial review – say of local authorities discharging their regulatory function – it is by no means clear that these remedies are any more accessible – say to an aggrieved tenant – than contractual remedies already available. We might say that the local authority is now charged with enforcement issues and not the tenant, but these authorities will not act costlessly and quite possibly will not act at all except in the face of tenant persistence – which time might then be better-spent pursuing direct remedies in private law.

Rugg and Rhodes[35] have argued that there will never be consensus on the measures needed to further regulate the private housing sector in order to allow it to provide better quality and quantity of housing. In general terms, however, we know that we are dealing with a sector in which there is a good deal of small scale investment, which may need to be nurtured. We must be wary of over regulation that might nip in the bud the re-growth of the sector. In this context, we might look towards softer rather than harder processes of regulation – bearing in mind Ogus' view that even self-regulation is a form of regulation that ought to be justified by clear events of market failure.[36] The most obvious places to look are at the beginning and end of the contract. Do we do what we can to support a clear understanding of what the contract says; what its obligations are; and what the consequences of breach will be? Because of the relatively short term of many contracts one cannot expect the tenant in particular to invest much in advice through the negotiation process, so lifting the burden of transacting by the provision of useful advice and information would seem a welcome beginning. The more transparent we can make the obligations on all sides, especially if some are only implied into the contract or are laid down in statutory regimes to which the paperwork makes no reference, the less likely the room for breach without recourse to remedies.

As for such remedies, prompt and easy access to justice remains vital. In 2004, the Citizens Advice Bureaux painted a grim picture of 'housing advice deserts' arising out of the process of legal aid funding.[37] The situation since then has become worse rather than better and on16 January 2006, the Legal Services Commission (LSC) announced that it intends to abolish, as from July, one of its most successful schemes for providing specialist legal assistance, the 'Specialist Support Project', which in the housing field has provided cost free specialist help over the telephone. It seems a little curious to discuss more effective regulation of private renting when such false

[35] Rugg J and Rhodes D 'Between a Rock and a Hard Place: The Failure to Agree on Regulation for the Private Rented Sector' (2003) 18(6) *Housing Studies* 937.
[36] Ogus A, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97
[37] CABx, Home Remedies: The challenges facing publicly funded Housing Advice (CABx, London 2004).

economies are likely to undermine the contractual framework already in place. It would be interesting to know the costs of allowing wrongful eviction to go unchallenged, but one might easily speculate that these will be considerably in excess of telephone advice lines that might prevent this.

The licensing provisions of the Housing Act 2004 proceed from the premise that it is not the entire sector that requires regulation but that problems arise at the bottom end of the market. The licensing of houses in multiple occupation (HMOs) is arbitrary in drawing the cut-off points in its attempt to target poorer landlords, not all of whom by any means will fall into the HMO net. Accreditation schemes are a mechanism available to try and raise standards elsewhere in the sector. Such schemes can clearly be beneficial in assisting consumer choice and to the extent that accreditation governs choice, landlords will seek to retain accreditation by meeting necessary standards. If the majority of landlords are prepared to offer good accommodation on reasonable contract terms, which they undertake to meet, then they may come to believe that accreditation will offer them some market advantage. Although there are schemes for student housing, many other schemes are local authority led, and according to Rugg and Rhodes, local authorities are often regarded as 'heavy handed inflexible and inconsistent.'[38] There would clearly seem to be room for much wider accreditation schemes backed by national codes of practice[39] to which scheme members would subscribe.

Although self-regulation has not always been well received by lawyers and/or economists, it could be that there could be some advantages. Ogus[40] has suggested that the more homogeneous and collectively minded the community subject to regulation, the more that can be achieved and there is room in such situations for consensual approaches to the promotion of better standards. This is not unproblematic; the notion of accreditation harnesses market forces. As we have already seen it may be at the lower end of the market in situations of low housing demand where market forces may be less effectively operative. There too tenants whose choices are already more restricted because of their dependence on housing benefit may gain less from accreditation. This also touches upon the thorny issue of how well other areas of regulation interact with private sector renting. If there are continual problems for landlords in relation to benefit payments then landlords will inevitably be less attracted to this sector and rather than see the attraction of guaranteed payments, view the benefits system as cumbersome, bureaucratic and unreliable and to be avoided.

Conclusion

Since beginning a study of housing regulation thirty years ago, housing policy has unquestionably come a long way. The journey has not always been politically to my liking but it does seem to have delivered some positive consequences. As a student of housing law, neither my texts nor an examination of the case law suggested any

[38] Rugg and Rhodes (*supra*) p.944.
[39] Crook A and Kemp P, *Financial Institutions and PrivateRented Housing* (Joseph Rowntree Foundation, York 1999).
[40] Op. cit. n 24.

remedy for complaint against openly capricious systems of housing allocation in the public sector and no requirement for a local authority to adduce evidence as to why it wished to regain possession from the tenant.[41] In the private rented sector there was open judicial hostility at times to rent regulation[42] rather than an even handed attempt to support the legislative protections afforded to the tenant. This would not now be true for the most part. The opening up of judicial review of administrative action and the development of administrative law firstly in terms of fairness and latterly as against human rights criteria make the lack of local authority accountability in the 1970s unthinkable in the present climate.

In the private sector, we have finally shaken off the dead hand of rent controls and in return we begin to see the fragile re-generation of the private rented sector. All is not well with it. It consists of fragmented populations of landlords and tenants diverse in nature and therefore difficult to regulate. It houses some of the more vulnerable groups in the poorest of the housing stock. The private landlord suffers still from a poor image – if not Rachman then at least Rigsby[43] – and is distrustful of regulation and most wary that investments might be jeopardised by the return of regulation. It is hard to know at what point additional regulation might curb the enthusiasms of those market entrants that might buy to let or induce existing players to realise a capital gain through sale, given the ease of regaining possession.

It is in this context that a light regulatory touch is suggested. Just as in the public sector transparency in information regarding council house allocations together with recourse to ombudsman and other remedies caused local authorities to revise their behaviour, so too I believe that softer legal instruments might promote a healthier climate in the private rented sector. These consist of support for present contractual structures by opening up consumer choice, by providing better information on rights and responsibilities, by increasing access to justice, by procedural reform and by rewarding good behaviour. It is not the contractual framework of landlord and tenant that most commonly fails one or other party. More usually it is the lack of effective recourse in the event of the breach of the contract. It cannot be beyond us to improve contractual compliance and promote enforcement of the bargain.

[41] See for example *Bristol City Council v Clark* [1975] 3 All ER 976 (CA).
[42] Or to that "welter of chaotic verbiage which may be cited together as the Rent and Mortgage (Interest) Restriction Acts…" per McKinnon LJ in *Vaughan v Shaw* [1945 1 KB 400 at 401.
[43] See Rugg and Rhodes n.35 *supra.*

Regulation of private rented housing: A law and economics perspective

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Introduction

This paper is presented as a first attempt by someone who has little professional knowledge of research on the rented housing sector who has been asked to examine what insights on the problems of the sector might be obtained from using the economic analysis of the law as represented in the law and economics literature. It relies on Alex Marsh's (2006) paper for information on the regulation of the private rented sector

Regulation and Market Failure

Economists generally begin from the premise that any economic activity should be free of regulation (or at least regulated only by the market) unless it can be shown that it is subject to *market failure*: left unregulated it will not generate socially efficient levels of output. The socially efficient level of output is usually taken to be that which maximises the sum of the net benefits of the activity to producers and consumers. Market failure arises when the sum of these net benefits is below the maximum attainable with the existing level of resources in the economy.

Market failure can arise from a number of sources which can be brought together under two main headings: (i) Structural Reasons; (ii) Missing or Incomplete Markets.

The main structural reasons for market failure are the existence of *market power* and *incomplete information*. The competitive process which generates efficiency requires that no single producer of a good or service (or group of co-ordinated producers) controls a sufficiently large share of that market that it can determine, by its own decision, the equilibrium combination of price and output for the market. The market power exerted by such a dominant producer (or group of producers) results in prices being higher and output lower than in a truly competitive market. A major function of competition policy in modern market economies is that of forestalling the creation of a market structure which generates market power (through mergers or collusion/restrictive practices) or where the potential already exists due to historic or technological reasons (e.g. economies of scale) restraining its exercise (see Neumann, 2001; Sutton, 2003).

A less obvious source of market failure for structural reasons is incomplete information. The competitive process will only generate an efficient outcome for a market if all actors in that market have full information as to market possibilities and alternatives. Producers require access to the same technology (and hence costs) while

consumers need to have well ordered preferences over the alternatives. In particular, consumers must know what is available from different producers in the market and be in a position to make judgements about the nature of the goods or services provided including the price/quality trade off. Incomplete information of consumers gives rise to an asymmetry of information between consumers and suppliers which is often presented as the justification for the regulation of professional service markets (See Stephen and Love, 2000).

Market failure arises from missing (or incomplete) markets when there are spillover effects on a party who is not engaged in the market transaction. These spillovers may take the form of benefits or costs to the third parties. Economists refer to these as externalities. Pollution is an external cost imposed on society by the producers of waste 'dumped' into rivers, lakes or the atmosphere. These costs are not borne by those involved in the market transaction (the producer of the polluting good and its consumers) but are imposed on others. The market transactions associated with the pollution generating activity do not include those associated with the market. Thus they are incomplete. Usually this is because the medium through which the pollution is transmitted is not owned by anyone and thus the market for its use is missing.

It would not appear to be the case that the justification for the regulation of private rented housing market is based on any of these sources of market failure. Marsh (2003) suggests that the sector is in general regulated via the market. For example, rents in this sector are determined by market forces except for the 'traditional' sector defined as covering 'lifetime renters […..] whose properties are likely to be covered by [….] the Rent Act 1977' (p. 17). The regulatory issue which is the focus of the current project is that of landlord and tenant compliance with their respective obligations under their written contracts, or as implied in common law or under the statutory obligations of landlords. The nature of these contracts and the circumstances in which they are made do not appear to make them self-enforcing. It is possible that if a large number of these contractual failures occurred in a given location and resulted in a deterioration of the properties concerned there would be a negative externality generated for other residents and property owners which might justify a regulatory intervention. However, there is no suggestion in Marsh (2006) that this is a current problem and thus it is not discussed further here. The present paper is a first attempt by the author to examine why contractual failure might arise in this sector and to suggest some mechanisms by which these contracts could be made more likely to be self-enforcing.

Contracts

Consider the case of a contract freely entered into by a landlord and a tenant. Economists would tend to argue that such a contract must be to the mutual advantage of both parties, otherwise, as rational individuals, they would not have entered into it. If this is the case, why would they not meet their obligations? Why breach the contract? The simple answer, to an economist, is that it is in the breaching party's interest to do so. They would be better off under breach than compliance.

Take the case of a landlord failing to undertake necessary repairs. The specific repairs may not have been anticipated at the time of entering into the contract. The rent

agreed may not then cover their cost as well as the other costs (including mortgage payments) from which the landlord cannot escape. The landlord therefore fails to undertake the repairs and is better off by the amount which it would have cost to undertake the repairs. Note here that we do not necessarily imply that the landlord never intended to undertake repairs but that insufficient allowance had been made for them in arriving at the agreed rent. Of course, some landlords might never have intended to undertake repairs. The point simply is that during the life of the contract the landlord fails to comply with his/her obligations under the contract.

Let the landlord's income from the rent be P, the financing costs be F and the net anticipated profit be Π i.e. at the time of entering into the contract:

$$\Pi = P - F$$

If the unanticipated repair costs are R then incurring them implies that the landlord's profits will be reduced to $(\Pi - R)$. However, under the contract the tenant is entitled to take some enforcement action. For simplicity let us assume that such action is certain of being successful and that all of the costs of enforcement incurred by the tenant (T) are recoverable (with certainty) from the landlord. Then the costs to the landlord of non-compliance $(R + T)$ are greater than the costs of compliance which are R. In these circumstances a rational landlord will comply because (s)he is better off when complying.

However, even in the simplest scenario this result only holds if enforcement is instantaneous when the repair is needed. Any delay in enforcement reduces the cost of non-compliance to the landlord who can earn a return on investing R during the delay in enforcement. Let r be the investment return per time period and n be the number of time periods that it takes for enforcement. The sum achieved by investing R will be:

$$R(1+r)^n$$

Non-compliance will be rational if;

$$R(1+r)^n > R + T$$
$$((1 + r)^n - 1) > T/R$$

i.e. the compound interest from investing R during the delay exceeds T/R. Clearly the longer the delay in achieving enforcement and the lower are the costs of enforcement relative to the cost of repair the more likely it is that non-compliance is rational for the landlord.

Furthermore, enforcement is not certain because not all tenants are likely to take enforcement action or because a court (or other third party enforcer) may not enforce with certainty. If ρ is the probability that enforcement takes place then non-compliance is rational if

$$(1 + r)^n - 1) > \rho(T/R)$$

Where $\rho(T/R)$ can be interpreted as the Expected Cost of Breach to the landlord and ρ lies between zero and one.

Thus non-compliance is more likely the larger R is relative to T, the longer the delay in enforcement and the lower the probability of enforcement. It should be noted that the value of ρ is not independent of n. The longer it takes to enforce compliance the less likely the tenant is to take enforcement action. In particular, the nearer n is to the remaining life of the tenancy agreement the less likely the tenant is to take enforcement action. Thus the longer the tenancy agreement the more likely the tenant is to take enforcement action and the less likely it will be for the landlord to breach.

Note that one way to reduce the likelihood of rational breach on the part of the landlord is for there to be a penalty for breach beyond merely the tenant's cost of enforcement action. In other words the cost of breach becomes

$$\rho((T + Q)/R)$$

where Q is the penalty. Thus rational breach will take place if:

$$((1 + r)^n - 1) > \rho((T + Q)/R)$$

Rational breach is more likely the higher the interest rate, the longer it takes for enforcement, the lower the probability of the tenant seeking enforcement and the lower is the sum of enforcement costs and the penalty relative to the rent being paid. The matter is complicated because these factors are not wholly independent of each other. It is likely that ρ will be higher the longer the lease has to run and the lower is T. Thus enforcement costs have two effects acting in opposite directions and it is not possible to say *a priori* which will dominate. Note that the factors which may be susceptible to policy manipulation here are the length of the lease, the tenant's costs of enforcement and the penalty for breach.

Game Theory

A weakness of the discussion so far is the implicit assumption that the only action taken by the tenant is that of (probabilistically) seeking enforcement. This may not be the case. The tenant's likelihood of complying with his/her obligations under the lease are likely to be influenced his/her expectation that the landlord will comply and *vice versa*. The decisions of each party are influenced by their expectations of the behaviour of the other. Game theory can be used to provide some insights in such circumstances. For an elementary introduction to game theory see Frank (2000), 454-462.

Consider the following hypothetical situation: There is a one period rental contract between a landlord and a tenant which is mutually beneficial. However, if the landlord does not undertake external repairs (s)he is better off by 1 while the tenant is worse off by 1.25 because of the loss of amenity. On the other hand if the tenant fails to maintain the property (s)he saves 1 and the landlord looses value of 1.25. Each party makes the decision without knowing what the other is going to do. The alternative outcomes may be summarised in Table 1.

Each cell of the Table shows the impact on the parties of each course of action. The impact on the landlord is shown first and that of the tenant second. If both parties comply with their obligations there will be no change from that anticipated. This is shown in the top left cell. However if the landlord undertakes the repairs but the tenant does not maintain the property the landlord will suffer a loss of 1.25 (lost benefit from the maintenance) and the tenant will be better off by 1 which is the saving from not maintaining the property. This is shown in the top right cell. If neither party complies the position will be as in the bottom right cell. The landlord will save 1 from not repairing but will also loose 1.25 because the tenant did not maintain the property. Thus the landlord's net position will be a loss of 0.25 compared with both complying. Similarly, the tenant will be worse off by 0.25. How then should each behave in their own best interest when they don't know for certain what the other will do?

Table 1
Landlord-Tenant Game: Prisoners' Dilemma

		Tenant	
		Maintain	**Not maintain**
Landlord	**Repair**	0, 0	-1.25, 1
	Not repair	1, -1.25	-0.25, -0.25

Consider the tenant's options: if the landlord undertakes the repairs the tenant will be better of by 1 if (s)he does not maintain the property and in a neutral position if (s)he does. A self-interested tenant would not then maintain the property. If the landlord does not maintain the property the tenant's best position is achieved by not undertaking maintenance. Thus regardless of which choice the landlord makes the tenant's best position is attained by not maintaining the property. Similarly, the landlord's best position is attained by not undertaking the repairs regardless of what action is taken by the tenant. Thus the outcome of each party deciding whether to comply without knowing the other's decision is that neither complies and each is worse off than if both had complied. This is an example of the 'Prisoners' Dilemma' in a non-co-operative game. Note that not only is each party worse off than if they had complied, their combined position is worse than if they had complied.

The situation changes if it is known with certainty that the breached-against party will take enforcement action which will be successful and full costs of the action awarded against the breaching party. Let the cost of enforcement action for each breached

against party be 0.25. The pay-off for the two parties now becomes that shown in Table 2.

If one party breaches and the other does not, the breaching party will be worse off by 0.25, the cost incurred by the other party in enforcing the agreement. If both parties breach they will each be worse off by 0.25 (regardless of whether the court enforces the contract or not). In these circumstances, with perfect enforcement and full costs being awarded each party's best move is to comply regardless of what the other's decision is. Consequently, both parties comply. The contract is self-enforcing.

Table 2
Landlord-Tenant Game: Perfect Enforcement

		Tenant	
		Maintain	**Not maintain**
Landlord	**Repair**	0, 0	0, -0.25
	Not repair	-0.25, 0	-0.25, -0.25

However, if enforcement is imperfect, the situation shown in Table 2 will not be achieved. Let us say that the probability of the breached against party taking enforcement action is 0.5. In this case the pay-off matrix is that shown in Table 3.

Table 3
Landlord-Tenant Game: Imperfect Enforcement

	Tenant	
	Maintain	**Not maintain**
Repair	0, 0	-0.625, 0.375

Landlord			
	Not repair	0.375, -0.625	-0.25, -0.25

In this case the breaching party's expected benefit from breaching will be 0.375 (i.e. 0.5x1 - 0.5x0.25) and the breached against party worse off by 0.625 (i.e. 0.5x[-1.25] + 0.5x0). Each party is better off by not complying regardless of the other party's action. Thus neither party complies. Incomplete enforcement leads us back to the Prisoners' Dilemma situation.

The game theory literature classifies the sort of situation we have been examining as a 'one-shot non-co-operative game'. Experimental evidence suggests that if the two parties infinitely repeat the game it is likely to be transformed from a non-co-operative game to a co-operative game where each party complies. A 'tit-for-tat' strategy may evolve under which each party co-operates until the other party breaches after which the breached against party will breach. Both parties then learn that their not breaching will ensure that the other party does not breach and both parties comply. However, such a co-operative strategy will unwind if the game is finite rather than infinite since it will be an advantage to be the party who breaches in the last round. Thus if the game is finite, backward induction will induce each party not to co-operate.

Implications for Policy

What implications does this discussion have for policy towards the private rented sector? Both the initial discussion of incentives to breach and the discussion of game theory point to certainty of enforcement and speed of enforcement as ways of discouraging breach and avoiding the Prisoners' Dilemma. More fundamentally, any policy which can be seen as a way of transforming the non-co-operative nature of the landlord/tenant game into a co-operative game is to be welcomed. The likelihood of either approach being feasible depends on which part of the private rented sector is being examined.

Small-scale landlords (Marsh, 2006, p.13) interacting with transient, often young, tenants (p. 16) might be seen as a sector where the market functions as one shot non-co-operative games susceptible to non-compliance problems. In the case of landlords breach may often arise from unanticipated repair costs or faulty planning, while tenants may only be short–term renters with low incentives to enforce and thus more likely to breach on their side of the contract. Assured shorthold tenancies of six months may contribute to this one shot game mentality. This combination of large numbers of one-property landlords and large numbers of shifting tenants makes it unlikely that either party will be engaged in a co-operative game.

One mechanism by which this series of independent one-shot games could be transformed into a more co-operative or at least repeated game format is through a mechanism such as reputation. Pooling of information across a population of short-term tenants might induce co-operative behaviour by landlords who would then develop a reputation for fairness which would elicit compliance on the part of tenants.

Where the rental market is dominated by a student population this might be feasible through student and or university organisations with rating of landlords or blacklisting of non-complying landlords and non-complying student tenants.

Reputation mechanisms can also be developed through the use of letting agents. Such agents may be seen as repeat players with a landlord who uses shorthold tenancies and also with tenants renting from a succession of landlords. Both the individual landlord and the individual tenant may be repeat players with the agent but not with each other. Failure of either tenant or landlord to comply with their obligations may result in them being dropped by the agent whilst compliance could result in a co-operative solution. Of course, having one managing agent would maximise the leverage of this reputational mechanism but it would open the market to manipulation by the agent. It would be necessary to ensure sufficient competition among agents to restrain the exercise of monopoly power while at the same time having a large enough share of the market to generate the reputation effect. Clearly such services come at a cost to both landlords and tenants.

Conclusions

This brief foray into the law and economics of house renting contracts using a law and economics perspective suggests that the likelihood compliance depends on the length of the contract, the cost of enforcement, the probability of enforcement. An examination of the incentives to comply using a simple one shot non-co-operative game framework reinforces the importance of the probability of enforcement action being taken as a determinant of compliance. The significance of reputation in enhancing compliance was also examined. This pointed to the role which might be played by managing agents in generating reputation effects and thus converting a series of one-shot non-co-operative games into an infinite co-operative game which results in self-enforcing compliance.

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Governing the ungovernable

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Abstract

In this paper, we argue that the 'crime control housing crisis' which has engulfed social housing is qualitatively different from most previous and current understandings of housing crisis (which have been of a quantitative nature, or been resolved to that). By contrast, the crime control housing crisis is a crisis precisely because it appears insoluble. All housing problems and policies now have to be legitimated by reference to this crime control housing crisis. The gaze of this crisis has been upon the 'social' sector, but that has also caused reflection on how to placate the crime control housing crisis in the private sector. It is this latter area which is the focus of the case study in the second part of this paper and starkly raises the central, deceptively simple, problematisation for government: how to govern the ungovernable without being seen to govern. The case study concerns regulations promulgated by the Northern Ireland Housing Executive regarding the licensing of houses in multiple occupation. We argue that this regulation is symptomatic of a mutated 'housing crisis' in which the old questions of the adequacy of provision have been supplanted by new questions of responsibility for deviant behaviour.

Introduction

The multi-disciplinary re-discovery of regulatory life beyond the state has been the point of departure for a significant, and growing, number of studies. For example, criminologists have found that the numbers of employees in the private security industry dwarf those in the public police force (Johnston, 1992). If we switch our focus to the various studies of regulation, there is an increasing recognition of a hybridisation of the state, the 'decentred' state, and 'self-regulation' (Black, 2001; Scott, 2001). Similarly, governance studies, inspired by the work of Michel Foucault, draw on broader understandings of self-regulation to illustrate how we have become implicated in, and responsible for, our own regulated security. Classically in this mould, Shearing and Stenning (1985) refer to 'the embedded features that characterize disciplinary control' through the consumer controls operating at Disney World.

It is the purpose of this paper to think about some of the key insights from these literatures in relation to a rather mundane case study allied to a rather more ambitious project of setting out what has become a new version, or problematisation, of 'housing crisis'. This new version lashes up crime control with housing. The novelty of this can

be overstated for it harks back to the foundations of housing policy in the nineteenth century and concerns with pauperised deviance (Cowan & McDermont, forthcoming) – but the point taken in this paper is that it is qualitatively different from other housing crises. Indeed, this qualitative element is what marks it out as a *crisis* per se. It has divided tenures, and, rather than considering housing issues at a general level, required us to conceive of specific problems in specific tenures. Social housing, being managed housing, has been a successful focus of intervention (Carr & Cowan, forthcoming). But this has only lead on to how to placate the crime control housing crisis in the private sector. It is this latter area which is the focus of the second part of this paper and starkly raises the central, deceptively simple, problematisation for government: *how to govern the ungovernable without being seen to govern*.

The case study is a recent (unsuccessful) attempt by the Northern Ireland Housing Executive (NIHE) to regulate the behaviour of private renters in Houses in Multiple Occupation by placing obligations on their landlords to deal with anti-social behaviour. Private landlords were required in this scheme to become intermediators between the state, the occupiers, their guests, and the 'area'. This ended with what appears to have been a landmark decision of the High Court in Northern Ireland, which struck down that scheme on limited grounds under the Human Rights Act. What will be argued is that this regulation is symptomatic of a mutated 'housing crisis' in which the old questions of the adequacy of provision have been supplanted by new questions of responsibility for deviant behaviour. We have no preference as to whether we talk about this as 'decentred responsibility', 'responsibility beyond the state', 'responsibility at a distance', or even 'licensed responsibility'.

That, however, anticipates the analysis in this paper. This paper has two broad sections. In the first section, we set out what we mean by this new housing crisis both by reference to previous incarnations as well as the causes of this current position. In particular, attention will be drawn to a series of problematisations and contestations which permeate this current version of housing crisis. In the second section, we use the NIHE problem as a case study of this housing crisis. A word of comfort should preface that discussion - the paper is not particularly interested in formal, doctrinal law. It is centrally interested in the contestation around who has responsibility for the actions of others, and the ways in which a governable space has been hollowed out of what has hitherto appeared to be a series of localised, ungovernable spaces. What has been most remarkable has been the processes of resistance through which landlords have paradoxically become responsiblized into their own self-regulation.

On housing 'problems', 'questions' and 'crisis'

In this part of the paper, the argument is that there has been a shift in housing policy away from thinking about problems or questions to crisis. A more tentative proposition is that that there have been shifts in the identification, the label, around which housing policy has problematised itself. Early incarnations refer to the housing question, or the problems of housing policy. We now talk about housing crisis. Yet, housing crises have generally all had the same characteristics as the problems or questions of before. The history of housing policy can be seen as having two broad thrusts, both emerging from Victorian social policy.

The Victorian period, a time of paradoxically rich intervention in relationships between landlord and tenant, against a backdrop of liberal government underpinned by *laissez faire* economics and ideology, posed this question in characteristically stark terms. Put broadly, the question was how to house the population in more sanitary housing and cure the overcrowding problem, which in turn resolved itself to questions about the economics of landlordism and capitalism, as well as the capacity of the private landlord to build the required suitable housing. Put this way the question was one of quantity. Underpinning these problems/questions of quantity was, however, a second concern about moral regulation. As Marion Bowley, one of the founding parents of academic analysis of housing policy, put it in opening her seminal text:

> Interest in housing as a social problem was not an independent growth; it had sprung from [concerns with sanitation]. … The reformers would have swept the towns clean, if they could: they rampaged destructively through the congested centres of the industrial town tearing down the rookeries. … The forces of law and order and the churches were behind them. It had been noticed that, as well as disease, crime and vice accumulated in the labyrinths of the slums. The police and the priest were as unable to penetrate as the sunshine. (Bowley, 1945: 2)

A subtle shift in focus, or emphasis, occurred from the external structures to the internal structures of the family and immorality. The concern for 'health' was not simply the elimination of physical disease, but encompassed the moral and social health of the 'dangerous classes' (Harloe, 1995: 16). James Hole, for example, in his influential study of *The Homes of the Working Classes* (1866), equally links the physical structure to 'moral evils'. By so doing he makes sites of housing for the poor criminogenic. In a telling footnote (on p 21), Hole reminds his audience of 'one of the frightful consequences of the horrible conditions under which vast numbers of the population live there is a vast amount of illegitimacy and infanticide'. Enid Gauldie (1974: 267) in her classic history of housing notes the following observation about slum clearance and improvement schemes

> The acknowledged purpose of the new Act, the 'improvement' of our cities, the creation of better public health by the removal of the focus of disease, was almost unanimously approved. It was, in fact, for most people, if not for the immediate instigators of reform, not the real reason why they were prepared to suffer bureaucratic interference with private property. The first and most sweeping improvement schemes were deliberately driven through the most criminal areas, with the dispersal of criminals from their haunts, and the suppression of crime as the first motive. The fact that these haunts were in most cases also the most insanitary parts of the cities was a secondary consideration. The frequency with which the emotive phrase 'dens of vice' crops up is some indication of attitude.

There was a concern about the ungovernability of the occupiers. In these publications, the 'fear of the moral descent of poverty into pauperism' (Dean, 1992: 241) is palpable. The concern was that pauperised households were congregating together with the impoverished, each feeding off the other, as the cause of social danger. As Rush points out: 'The language is not that of barriers but of borders ('threshold' and 'verge') which are always liable to crossing. So paupers exist in a perishing

relationship to criminal classes; criminals are dangerous to paupers and to honest labourers who themselves exist in a perishing relationship to the pauper' (Rush, 2002:149). So whilst poverty was regarded as an inevitability – indeed, something that was useful and necessary in the project of wealth - pauperism symbolised 'a series of *different forms of conduct*, namely those which are not amenable to the project of socialization which is being elaborated' (Procacci, 1991: 160). Indeed, the 'poor', in this scenario, were 'virtuous examples of renunciation of pauperism and adhesion to the values of well-being' (ibid: 159). What was important was to prevent destructive mutual influence between social classes which was the cause of the increase in crime. The interests of private property were subservient to the public interest in reducing the increase in crime.

The framing of the problem/question as one of quantity obscured the moral regulationist underpinnings of the policy. A similar approach pervaded housing policy in the aftermath of the First World War. At this time and, indeed, for the next 60 years, the housing problem/question was generally concerned only with numbers, the quantity of new units of accommodation. It was, for example, only after assessments of housing need (in the quantitative sense) were drawn that the state began falteringly to become involved in the management of housing. The assumption at this stage was that the private sector could not economically provide the level of housing required; and, in any event, had shown in the pre-war period that it was incapable of doing so responsibly. The involvement of the state created a new series of problematisations intimately connected with bureaucracy and accountability, perhaps best exemplified by the technicisation of housing selection and allocations in the latter part of that century (see CHAC, 1969; Cowan & Marsh, 2005). But the problem/question posed was fundamentally *quantitative*, if only superficially. That quantitative question, of course, obscured the moral judgments being made on households and the different strategies of moral regulation that were imposed on those households. Nonetheless the ambitions of the state were the elimination of social problems through increased provision. Quantity therefore becomes synonymous with the social state.

A good example of this apparent focus on the quantitative comes with the affairs surrounding the notorious slum landlord, Perec Rachman. Rachman operated as a landlord at a time when the regulation of private renting shifted towards decontrol. Although little is in fact known about his actual business practices (for what is known, see Milner Holland, 1965: 250-2), he became emblematic of the problematic landlord who, by a variety of different means (both lawful and unlawful), got rid of occupiers of controlled properties. As a result, the new occupiers took under agreements which were largely unregulated. His business affairs became the subject of 'crisis' as a result of his implication in the Profumo affair. A significant focus of the Royal Commission report after that affair (Milner Holland, 1965) was on how best the private rented sector should be regulated to ensure that there was sufficient housing for Greater London. In other words, the issue became reduced from a qualitative problem at the heart of landlordism to one of quantity. Nevertheless, the word 'rachmanism' has become part of the English language, appearing in dictionaries which usually refer to practices of charging exorbitant rents and engaging in intimidation. Thus, rachmanism performs a function in language, which links landlordism with particular unsavoury practices.

The phrase ‘housing crisis’ was used particularly from the 1970s to refer to public expenditure cuts, an under-supply of accommodation to meet housing needs, and levels of disrepair (Malpass, 1986); or to the crisis in the management of council housing (Audit Commission, 1989). In the early 1990s, the housing crisis was tenure specific, concerned with the problem of how to stem the level of (re-)possessions by mortgage lenders of owner-occupied stock. Crisis management was epitomised here by the approach of the Major government to ‘mortgage rescue’ schemes and other innovations created as a result of the ‘understanding’ between the government and the mortgage industry. The homelessness crisis, the bed and breakfast crisis – the list of housing crises is endless – all of these could be resolved by providing more money or more accommodation. As Malpass notes, they are not particularly different from the earlier problems/questions. They are, perhaps, marked out by their severity as a result of a quasi-market economics. But, like practically all the housing questions of the last 150 years, they have been framed quantitatively.

When we talk about some housing crisis or other now, we are generally talking about issues which can be met with a quantitative response. Perhaps the classic example of that is the ongoing ‘crisis’ of housing supply, now conceptualised as ‘housing need’ (and, more particularly, need for owner-occupation) (see the Treasury/economics-inspired report of Kate Barker, 2004). They are thus made capable of solution, if only there was sufficient money available.

The modern housing crisis

Crime control crisis

The crisis with which this paper is concerned reflects that second strand of the Victorian discourse which became obscured by the focus on quantity, but which now rears its head as part of a bigger concern with crime control. Thoughtful analysts of housing have, for some time, argued that housing policy interventions are relatively superficial unless they take account of the broader fluctuations in employment and welfare policy (see, for example, Malpass, 1999; 2005). Little has been discussed until recently about the interactions between housing and crime control (although see Murie, 1997, and the work of the environmental criminologists discussed in Bottoms & Wiles, 2002). Yet, it can be argued that this has become the central, underpinning – indeed, legitimating – problematisation of housing policy.

The crime control housing crisis is a broader problematisation than concerns simply about anti-social behaviour, although that is the most visible and outstanding exemplar of this concern. In contrast to previous housing problems/questions/crises, the current problematisation is perhaps most interesting because it is not about numbers or costs. This change in focus is a key indicator of advanced liberalism or later modernity, as it both derives from and is a consequence of the collapse of confidence in the post-welfare social consensus. It is primarily qualitative and, in some respects, it is critical to its self-generation that the problem does not have a quantitative solution.. You can’t throw money at it. It is more about appeals to common sense notions of crime and deviance, with faux statistics used to bolster its credibility and appeal (Carr & Cowan, forthcoming). It is self-generating, working

through and on risk, fear, and insecurity. In this sense, it is insidious. It is the policy equivalent of obsessive compulsive disorder. As opposed to earlier, objective analyses of housing policy, this crisis is based upon subjective experience and fears. It cuts across the barriers between public and private space – although, in truth, those barriers have only ever existed in the minds of those able to afford such nice distinctions. The poor have always been the subjects of intrusive governance.

A specific problem: Security in the private sector

Social housing has been a relatively easy site for crime control intervention, particularly of a low level variety, as it has always been managed housing and the hierarchical relationships of manager/occupier are relatively embedded in the functions of the tenure (Carr & Cowan, forthcoming). It is a soft target because of the marginalisation of its occupants (Murie, 1997). The emerging problematisation is how to replicate this series of controls within private sector housing. The importance of this new problematisation lies in the difference between social housing, which enables control through segregation and the private rental sector which is dispersed. The criminal classes are no longer limited to estates. They are living amongst the rest of us.. The fear of contagion is therefore reignited.

Nixon *et al* examined the problems of enforcement action, in the context of partnership working, amongst private sector landlords:

> Developing partnerships with private landlords can be very difficult. They are not a homogeneous group; some people become landlords by default, for example as a result of inheritance or change of circumstance, while others have made a decision to invest in property. While some landlords may avoid all contact with statutory agencies, others would welcome greater information and support in dealing with anti-social tenants but are unsure of where to go for help. (2003: 80)

This seems to be one of the central problems within the housing crisis – governing the ungovernable. It is the very amorphousness of this shifting body of individuals, their lack of homogeneity as a group, their lack of need for community relations, and indeed, their amateurishness which creates problems of governance. If, as Cowan and McDermont (2006) argue, obscurity is a key tool of governance, governance cannot be controlled when the community itself is obscure and unidentifiable; and therefore seemingly ungovernable. The only method of governing available is the contract which is agreed individually between landlord and tenant, supplemented by legislation.

In this context, the first task in governing is to make visible a regulatory community (McDermont, 2005). We are used to housing academics referring to there being no single private rented sector but a multiplicity of private rented sectors depending on various criteria. A particular problem has arisen as a result of the ‘buy-to-let’ schemes as a result of which a new generation of private landlords, generally amateurish by nature (Scanlon & Whitehead, 2005), has come into the market in search of profit.

The Housing Green Paper (DETR/DSS, 2000) sought to construct regulatory communities through a binary division between the 'many good and well-intentioned landlords' and 'a small minority of private landlords [who] set out to exploit their tenants and the community at large in flagrant disregard of the law' (para 5.4). This division has been the subject of some criticism (Blandy, 2001; Cowan and Marsh, unpublished), but can conversely be regarded as a valuable technique of government in constructing such regulatory communities. After all, this was the first attempt by government to refine the space requiring some form of regulation. It is crude, of course, but strategic and framed as common sense. As Cowan and Marsh (Unpublished) argue:

> The dividing strategy has both moral and ethical overtones. The regulatory strategies proposed for each group diverge sharply. For the former, the hallmarks of ethopolitics - responsible self-government, community regulation and self-policing (voluntary licensing, accreditation, kitemarks) - are appropriate. For the latter, an array of more intrusive, disciplinary regulation is prescribed – licensing, housing benefit restrictions, risk-based regulation of property quality.

When there is a scientific knowledge deficit, common sense becomes a powerful technology of government (Valverde, 2003).

In classic neo-liberal governmental style, the concern is to establish that landlords should take responsibility not only for their own behaviour but also that of their tenants. However, private landlords have been voraciously resistant to regulation of any form, arguing that they are already over-regulated and over-controlled. The problems of poor image as a result of the Rachman affair have given way to a realisation on the part of successive governments that they need to work with them. In particular, successive Conservative and New Labour governments have enjoined the private landlord into the process of rehousing the homeless.

No longer are they rachmanite, rent-seeking individuals; rather, they are partners in meeting housing need with a legitimate desire for a reasonable profit (Cowan & Marsh, 2001). Hence, they already have considerable policy 'voice' despite their apparent lack of organisation. The clearest example of this policy voice lies in the attempt in the Green Paper to placate their regulatory concerns (DETR/DSS, 2000: para 5.2):

> Landlords can be assured that we intend no change in the present structure of assured and assured shorthold tenancies, which is working well. Nor is there any question of our re-introducing rent controls in the deregulated market. Our many good landlords deserve support and encouragement – to help them improve their position in the market-place and to help them deal with tenants who misbehave or refuse to pay the rent.

Thus, the question is completed, the circle squared – it is not just how to govern the ungovernable, but how to do this without being seen to be governing.

The relationship envisaged in the Green Paper, and enacted in the Housing Act 2004 appears to bear a family resemblance with other tools of governance, most notably

licensing. The occupier is licensed by the landlord to use the property, and failure to use that property appropriately is a breach of the licence. Valverde's work demonstrates (2003: 236) how licensing is a valuable, flexible technology of rule that:

> … allows governments to ensure that certain spaces, activities and people are under constant surveillance and are subject to immediate disciplinary measures, but without state officials or centralized state knowledges being involved in this micro-management.

In narrowing the permissible field of governmental action to the small minority of exploitative landlords and tenants, there is no carte blanche for the good landlords. Rather, the binary allows for seepage between categories – indeed, this is essential as the boundaries themselves are permeable because they are ill-defined. It is assumed, for example, the good landlords are more easily reached because they are willing to take part in forums and voluntary schemes; but that assumption can easily be outweighed by more concrete evidence. And it is not just landlords, but also their relationship with their properties, which provides the focus of intervention. Some properties (Houses in Multiple Occupation) are simply too risky, too insecure, and are also defined in (whichever side of the divide the landlord sits).

Then there are the tenants. One reason for the focus on private renting must be the realisation that, once excluded or evicted from social housing, households generally have a single choice left open to them; and that is to find accommodation in the private rented sector. That fact combines with a suspicion, a further assumption, on the part of government that it is not just the landlords which can be bad. In true New Labour third way style, they have sought to draw tenants into the fold. This is both a discursive and practical tool, for in blaming the tenants as well, they cannot be accused of focusing only on landlords. There are, it seems, two types of tenant in need of regulation – the exploitative and the criminal. The exploitative sometimes works with the landlord to defraud the state through housing benefit scams; the criminal uses their property as a base for their, or their friends' crimes. As regards the former, the 2000 Green Paper drew a parallel with the use of financial mechanisms to discipline landlords when it floated the possibility of using the Housing Benefit system as means of enforcing conformity to desirable norms: those tenants exhibiting anti-social behaviour would have their benefit entitlement restricted. The rights/responsibilities dichotomy has explicitly been proffered as the rationale for making the payment of housing benefit condition on the tenant's behaviour (DWP, 2003: para 1). The essential question posed by this document is why the state should offer financial support to people 'who behave without regard to their neighbours' (para 9). As regards the criminal occupier, wider powers of eviction embracing not only their own behaviour but also that of their visitors have become an important tool. As Mele (2005: 129) notes in discussing similar provisions in the USA, such 'affirmative obligations' compel the responsibilization process as 'tenants are contractually obligated to control and monitor the sets of social relationships they and their guests engage in and to assume the risks associated with those relationships' to achieve the desired goal of security.

The 2000 Green Paper has been followed by legislation in the Housing Act 2004. The Act, and in particular Part 2 (which is due to come into force in April 2006), lends considerable substance to these divisions. It draws on existing regulatory tools –

licensing, regulation, codes of practice, and the creation of standards. It offers partly a targeted form of control (houses in multiple occupation and selective licensing of all houses in particularly problematic areas), and partly general (tenancy deposits and housing conditions). Although these appear property and/or person specific, they have a further use in that they can be turned to the control of criminality. This is true on their face as well as in the thought behind their creation and in their potential as tools for crime control – that is the nature of the crime control housing crisis. Thus, the selective licensing Consultation Paper described the problem as follows

> Areas of low housing demand face severe and complex problems … This often attracts unscrupulous, even criminal, landlords and anti-social tenants, who may have been evicted from social housing. Together they may force out law-abiding tenants and owner-occupiers. (DTLR, 2001: para 3)

And the HMO part of the 2004 Act limits the type of person who can manage such places by reference to their past acts. These uses preface the case study in the next section.

By way of summary, we might say that the private rented sector has been constructed into a divided set of regulatory communities. The divisions are broad and generalised and their boundaries are permeable. However, government has relatively successfully so far mapped out a regulatory space in which neo-liberal governmental strategies of self-regulation have been mixed with more authoritarian, sovereign forms of control. Both are essential – as has often been remarked, the purpose of the workhouse and prisons was not only to regulate the behaviour of those inside but also those outside. That kind of apparent architectural regulation has given way to more subtle, technical forms of regulation. Both forms of government rely on some form of developed or developing regulatory community which serves to include and exclude individuals.

A Case Study: Houses in Multiple Occupation (HMOs)

As indicated above, HMOs have been a site of regulation for many years because they were seen as a site of risk (of health and safety) for occupiers. Accordingly regulation has traditionally focused on the quality of the HMO for the residents, rather than the effect of the HMO on surrounding neighbours. One form of control was the power for local authorities to adopt registration schemes of HMOs. Reflecting Government concern with the control of behaviour, the current provisions in the Housing Act 1985 (soon to be superseded by the licensing provisions of the Housing Act 2004), were amended in 1996 to permit authorities to include in HMO registration schemes special control provisions, i.e. “provisions for preventing houses in multiple occupation, by reason of their existence or the behaviour of their residents, from adversely affecting the amenity or character of the area in which they are situated”. Unless complying with a model scheme issued by the Secretary of State, all registration schemes require his confirmation. The Secretary of State has not issued any model registration scheme including special control provisions, and although on the statute books they have not been adopted by local authorities.

Our case study concerns the early stage development of a governable community of landlords out of resistance to compulsory licensing schemes. The paradox here is that

this resistance has made these landlords more visible, and thus governable, whilst at the same time forming their own landlord community which seeks to influence the regulation of the sector as a whole. Although central government has clearly sought to implicate landlords in a variety of mechanisms designed to provide accommodation for households in need (discussed, for example, in Cowan, 1999: ch 2; Cowan & McDermont, 2006: ch 7), until 2004 it had not developed schemes for the regulation of those landlords beyond voluntary and local schemes. Knowledge about landlords is, in fact, rather poor as a result. Thus, the case study demonstrates the ways in which resistance and government can work together; at the same time, it demonstrates the potential for decentred, or self-, regulation as techniques of government. Finally, the case study also raises concerns about the effects that one important set of powerful influences can have over government.

Context

The case study begins in Northern Ireland, although the point we make is more general and related to England, Wales and Northern Ireland as a whole. It is this more general location in which this governable community has been formed. The specificity of the Northern Ireland context, however, does need to be recognised. There are three points which concern us: the historically contested nature of housing in Northern Ireland; the different development of tenure in Northern Ireland, compared to England and Wales; and housing policy development in Northern Ireland in relation to the private rented sector – in particular, the nature of the consumers. It is this latter point which directly leads in to the case study itself.

First, the production and consumption of housing in Northern Ireland has been a particularly contested arena in which there has, at times, been strong pulls towards segmentation and/or segregation along sectarian lines (see, for example, Singleton, 1983; Boal, 1996; Murtagh, 1998). Indeed, housing in Northern Ireland has been perhaps a more contested arena than in England and Wales, and access to public sector housing was regarded as a principal cause of the civil disturbance in the 1960s (Cameron Commission, 1969: paras 128-31). There has been continual contestation around the creation of enclaves for Catholic households and discrimination (in the production and consumption of housing) concerning the size of Catholic families. This caused the creation in 1971 of the first pan-regional public housing body, the Northern Ireland Housing Executive, which took responsibility for the housing function (including both public sector and regulation of private sector housing). It adopted bureaucratic and technocratic approaches to allocation of its own housing stock in an attempt to avoid the problems of the past (Murtagh, 2001).

Even so, as Paris (1995: 1637) notes, ‘the impact of the so-called Troubles … can be difficult to disentangle from economic and social factors’. Paddy Hillyard (1984: 5), in his classic study of the implementation of new regulations in 1978, noted that the scale of the housing problem in Northern Ireland had been exacerbated by the failure of both public and private authorities to build new properties, as well as high levels of unemployment combined with low income levels. These factors were responsible for high levels of unfitness and disrepair in the private rented sector in the 1970s. As with England and Wales, these conditions have been most prominent in the private rented sector, with particular concerns given over to the HMO sector particularly due to the

higher risk factors associated with these properties. Hillyard (1984: 7) goes on to note that

> Another factor which, of course, has exacerbated the housing problem in Northern Ireland, is the continuing unrest. Bombings, shootings and riots have not only had an impact on the condition of the dwellings but, together with intimidation, have forced people to move out of particular areas leading to a general decline of the area and an increase in overcrowding elsewhere.

The second point concerns the different development of tenure in Northern Ireland compared with England and Wales during the twentieth century. In the inter-war period, for example, whilst housebuilding for owner-occupation increased substantially in England and Wales and private renting declined, it was not until the 1960s that private renting in Northern Ireland declined at which point it did so quite dramatically (Murie, 2001; Gray *et al*, 2002: para 2.1). By the 1990s, in fact, the decline of private renting in Northern Ireland, as a share of the tenure, had been more significant than in other parts of England and Wales. As a proportion, private renting was estimated to account for just three per cent of tenure in Northern Ireland, as opposed to around 10 per cent in the rest of England and Wales. Since that point, as with the rest of England and Wales, there has been an increase in the sector as a result of various growth factors such as demand and availability of mortgage finance specifically for this sector. However, the sector is still small by comparison (approximately five per cent of the total stock: see Gray *et al*, 2002). Two factors emerge as significant in explaining the increase in the sector in recent years – first, the increasing size of the student body in Northern Ireland which makes up a considerable proportion of the total occupants of the sector (up to 12,000 units per annum are used by students in particular University areas, with increases after the development of the Magee site); and secondly, the decreasing size and desirability of public sector housing stock (as a result of a decline in public sector housebuilding and the use of the right to buy), which has lead to a concomitant increase in potentially vulnerable households living in rented accommodation and, indeed, a recognition of its reliance upon that sector by the NIHE (see, for example, NIHE, 2003a; 2004a).

The third point concerns the nature of housing policy in Northern Ireland. Until recently, it would be fair to say that the regulation of the private rented sector was largely out of kilter with that pertaining in England and Wales. This can be explained partly by failed experiments by the Ulster government in the mid-twentieth century. Hillyard described this phase as follows:

> In broad terms, rent legislation is a history of successive Unionist governments attempting to uphold the principle of a free market in rented housing, but finding that the scarcity of housing and the ability of landlords to charge exorbitant rents, meant that in practice some form of control was necessary. … The rent restriction legislation therefore provided the governments at Stormont with a very subtle and sensitive method of political control of particular groups of tenants. (at p 8)

It was this very subtlety that caused an impractical, illogical, and incoherent system of protections, restrictions, regulations combined with completely uncontrolled sectors of the private rented sector. Indeed, today, much of the sector is uncontrolled and

unregulated, and occupiers lack security of tenure even for the limited period enjoyed by assured shorthold tenants in England and Wales.

Nevertheless, housing policy in Northern Ireland has been influenced by similar concerns as with the broader UK. And, as Paris *et al* (2003) have noted, one of the paradoxical results of the Good Friday/Belfast agreement has been the convergence of housing policy between England and Wales, and Northern Ireland. This is not the place for an analysis of post-devolution housing policies, but one thing appears to be clear – Scotland has been both more progressive as well as more radical in restructuring housing tenure (for example, changes to occupation agreements, homelessness, and landlord obligations). Whilst the UK generally has particular problems with disrepair and management standards in HMOs, Scotland has lead the way in developing compulsory registration, while New Labour in England and Wales dithered (finally succumbing to such a scheme in its 2004 Housing Act).

A compulsory HMO registration scheme was touted in Northern Ireland in 1999, although it began with a voluntary scheme in 2001. The schemes have always been combined with grant aid to act as an incentive towards registration as well as aiming to filter up standards. The strategic principles have always been both enforcement and encouragement (NIHE 2003b). A compulsory scheme was given regulatory authority in a 2003 Order. There is some evidence that the NIHE would have preferred to follow the Scottish model, but that the suspension of devolved powers meant that they ended up with the system which had been applied in England and Wales under the 1985 Housing Act. The difference from the 1985 Act was that the NIHE scheme used a more modern definition of an HMO, after the English and Welsh courts had effectively destroyed any protection which might have been offered to a substantial number of groups (such as students). One should not suppose that this was an experiment foisted on the NIHE (like the way Scotland was used as a test bed for the poll tax by the Thatcher government). Indeed, rather than synchronising the law between Northern Ireland and England and Wales, in fact the 2004 Housing Act now imposes a compulsory *licensing* scheme in England and Wales, offering significantly greater regulation of landlords than the *registration* scheme in Northern Ireland.

The compulsory registration scheme was brought into effect in May 2004 (NIHE, 2004b). The scheme included special control provisions. Clause 10(4) included as a condition of registration:

> "the person having control of the house, or the person managing the house, shall take such steps as are reasonably practicable to prevent the existence of the house of the behaviour of its residents from adversely affecting the amenity or character of the area in which the house is situated, or to reduce any such adverse effect."

A Good Management Practice Guide (NIHE, 2004c) allied to the scheme stated that registration could be revoked or refused where the amenity and character of an area was adversely affected by a range of issues including excessive noise within the HMO, anti-social behaviour by occupants and guests of the occupants in the area in which the HMO is situated, etc. Information would normally be supplied to the NIHE by the police or Environmental Health department. Landlords were required to take reasonable practicable steps, including: having clauses relating to behaviour in the

written tenancy agreement to set the parameters and boundaries of the behaviour at the outset; the inclusion of clauses in the tenancy agreement whereby the tenant agrees to keep the garden and curtilage free from litter, and so on. Additionally, in Northern Ireland, private landlords have the power to obtain injunctions against anti-social behaviour. These practices fit into a general pattern in which the NIHE has sought to responsibilise and work with private landlords. These rules were promulgated at the same time as the NIHE put forward a more general strategic policy to deal with the private rented sector in which, like in England and Wales, distinctions were made between the 'good' and the 'bad' landlord (see Blandy, 2001) and in which the NIHE made clear its determination to 'work with' private landlords, in particular the local association (Landlord Association of Northern Ireland – LANI). This fitted in with the aim of the NIHE to be 'the strategic facilitator of improvements' in the sector (NIHE, 2003a: p 9). It was said

> Too often legislation can actually be restrictive, therefore the emphasis of this strategy is to encourage, support and enable … Prevention is better than cure and the emphasis will be placed on what can be achieved voluntarily working in partnership to raise standards. (at pp 9-10)

Thus the amendments in England, which although never effectively implemented and the scheme in Northern Ireland can be seen as a hijacking of the HMO scheme for the purpose of dealing with criminality. All the policy literature has concerned the safety of HMOs – they are risky buildings, which therefore require competent management. Here, though, the scheme was being used explicitly as a crime control mechanism. And it was apparently particularly aimed at the behaviour of one particular set of consumers, students. The processes of 'studentification' can be responsible for increases in incidents of low level anti-social behaviour which have combined with calls for strategic, partnership approaches (Universities UK, 2006). It was noticeable that, despite the case discussed below being about the issues generically within HMOS, it took place against the backdrop of contestation between long-term residents and students particularly in the Holyland area of Belfast ('Crackdown on "rowdy students"': BBC News, 1 October 2004). Reports of the case related it directly to this contestation, leading to headlines such as 'Landlords not liable for students' (BBC News, 11 March 2005).

Thus, despite the specificity of the context of Northern Ireland, these HMO regulations form a clear part of the crime control housing crisis. This is because they are both responsibilising landlords into the web of crime control as well as justified by reference to this crisis.

The judgment

On 14 March 2005, the High Court of Justice of Northern Ireland overturned the NIHE scheme.

The problem identified by the judge was that under clause 10, the 'area' was undefined (and could not have been used to affect registration) – it was a 'generalised imprecise condition' that fell foul of both common law and the 1998 Human Rights Act. Indeed, the whole HMO registration scheme was required to be reconsidered as

the NIHE had failed to consider the impact of its terms on private landlords in accordance with Article 1 of the First Protocol to the European Convention. With a final flourish, the Judge, Girvan J, made the policy pronouncement that

> Legislation of this nature has profound effects on property rights and has the potential capacity to deleteriously distort property developments. An ill-formulated scheme may (inter alia) have the undesirable and unintended impact of reducing the number of HMOs available to provide accommodation for persons in need of it. It could dissuade owners from providing accommodation in circumstances where this may produce undesirable social results. (para 51)

The regulation-as-burden policy argument is a regular judicial discursive outing, in defence of private property. Here, it taps in to the prevailing private landlord discursive narrative about the problems of over-regulation.

Clause 10 explicitly required the landlord to be responsible for policing their tenants' behaviour beyond their property. Girvan J made clear that it *was* permissible to require the landlord to police the behaviour of their residents 'which has such a close nexus or connection with the demised property that it could be said that the nuisance or impact on third parties flows from the resident's residence in the demised premises' (para 54). Indeed, the special value of the contract in this context becomes germane as that was the place where the acceptable behaviour can be set out and thus sets the boundaries of self-regulation and self-policing. It creates a contractual community based on the self-interest of both landlords and occupiers, as well as those occupying surrounding properties.

It is where that self-regulation breaks down that the true meat of the scheme becomes relevant. What was being proposed, and can still be given only slightly more limited effect, was effectively that landlords would obtain licenses from the NIHE and, rather like the pub licensee, this license could be revoked where criminality results from their property. The license-holder becomes responsibilised into the obligation of ensuring the maintenance of civility in their properties by their residents and guests. The license-holder occupies an intermediate role between the state and the occupier, responsible for crime control. In this regard it may be noted that the new licensing scheme for HMOs and for selective licensing of all houses in certain areas contained in the Housing Act 2004 permits local authorities to impose licence conditions "requiring the taking of reasonable steps [by the licence holder] to prevent or reduce anti-social behaviour by persons occupying or visiting the house."

Creating governing communities

It has regularly been observed that communities join together in adversity. So, for example, the creation of community in Tower Hamlets as they sought to resist pressure to create a Housing Action Trust (Woodward, 1991). What is perhaps most striking about the NIHE case is a quite remarkable paradox which has been set in action. The paradox is that a governable community is being formed out of resistance to the NIHE, where previously there was only obscurity. It has provided an answer to government's question about the ungovernability of the private rented sector. This is,

as we suggest, a process currently in action and it is by no means complete. Here we draw on published comments used by the different organisations involved in the Northern Ireland case which they have made publicly to their membership either by way of speech at a gathering or by way of written communication with members about the case. Data has been gathered from a variety of sources including websites, press releases, and personal communications.

It is true that localised fora do exist in which private landlords meet and mix with varying degrees of formality and timing. Some local authorities have preferential lists of private landlords, who obtain speedier housing benefit decision-making as a result of being accredited by their local authority. And there are certain trade bodies with a national community, such as the National Federation of Residential Landlords ("the NFRL") and the National Landlords Association ("the NLA", formerly the Small Landlords Association), but these trade bodies themselves operate in a hybridised relation to each other. The NFRL was established in 1996 and comprises some 40 affiliated member-landlords' associations representing over 14,000 landlords with an estimated 126,000 properties under active management in the UK. Both bodies have their own Codes of Practice available at their websites (http://www.help4landlords.org/homepage.htm; http://www.landlords.org.uk/code_practice.asp). Together with other bodies, such as the National Association of Estate Agents, which was also involved in the case, one of their aims is to create a professionalized self-regulatory community.

The NIHE case was initially brought by the LANI (although, for technical reasons, this was withdrawn in favour of certain named individuals), but it was bankrolled by donations from a range of local associations, organised by the national landlord organisations as well as the National Association of Estate Agents and the Royal Institute for Chartered Surveyors. A 'fighting fund' of £100,000 (£50,000 of which was put together by the NFRL) was put together in this way. The NFRL chair, Mike Stimpson, 'consider[s] this [successful case] to be the most significant achievement to date for landlords, and in which NFRL has participated'.

In similar vein, David Salusbury, the NLA chair, said in a press release that

> "The NIHE has been high-handed in the extreme by imposing this law without consultation, in the belief that affected landlords in Northern Ireland didn't have the will or resources to fight.
> With financial and technical support from the National Landlords Association, plus the National Association of Estate Agents, RICS and other organisations, LANI has succeeded in over-turning this unfair law. It's a triumph for common sense and for the rights of the private landlord."

More than this kindred spirit creation, though, is the incipient construction of assumed shared norms. Mike Stimpson, for example, wrote in a memorandum to members appended to the case that:

> It is clear that no landlord can be made responsible for the anti-social behaviour of a tenant or a tenant's friends if it is carried out beyond the curtilage of the property. It is a different matter if the anti-social behaviour is carried out within the property and offends neighbours through noise or

> nuisance. I am sure that most member associations and their members will understand the difference

Similarly, David Salusbury commented that

> "While we absolutely deplore anti-social behaviour in all its forms and do everything we can to prevent it, this law sought to pass the buck unfairly to private landlords to stamp it out. Clearly, responsibility must sit firmly and squarely with the police and the courts. The suggestion that landlords should be required to operate what would be effectively a private police force to supervise the behaviour of tenants and their guests outside the rented premises was quite unacceptable and iniquitous."

It is this kind of shared practice as to the nature of the landlord's responsibilities regarding the behaviour of their occupiers that not only sets their parameters but also suggests that the case has been a catalyst for new governing communities. Private occupation agreements have generally contained similar clauses, relating to nuisance behaviour of the occupiers. What seems different here, though, is an acceptance that the more coercive surveillance powers implied by licensing conditions are being touted, and accepted.

The NFRL, Stimpson says, is going to use the case to 'to ensure reasonable regulation for the rest of the United Kingdom landlords' and they will challenge the ODPM's proposals on selective licensing on this basis. Similarly, the reason for backing the case given by the other groups was the potential for broadening the NIHE scheme out to the rest of England and Wales (different regulations apply in Scotland). It is precisely this supra-organisational joint working which can be productive of 'community' and through which they can offer a shared voice in 'regulatory conversation' with government, as well as develop their own self-regulating community. It is not only their own Codes of Practice which facilitate this kind of voluntary assumption of responsibility on behalf of their members, but also their engagement with other aspects of government policy. For example, they are also the types of organisations which will run the new tenancy deposit schemes (indeed, some already do so on a voluntary basis).

Conclusion: From rachmanites to partners to governors

It may be a more measured analysis to suggest that, in an age of hyperbole, there has been a separation out of different types of housing crises. We would not wish to argue that the crime control housing crisis is the only housing crisis out there. However, what we would argue is that the salience of this particular crisis lies in the apparent use, fit and justification of housing policies as tools of crime control. The crime control housing crisis is, however, different in important ways from what has gone on before. It is, for example, not based upon statistical, scientific logic, but upon common sense and the subjective constructed experiences of crime, fear and security. In this way, it is a self-generating complex; it is difficult to deny and swallows up the non-believers in its inexorable logic. Although there is considerable focus on anti-social behaviour at the levels of both policy and critique (Squires & Stephen, 2005), in particular as a result of the 'Respect' agenda, this is but one important constituent

element of the complex that is the crime control housing crisis. The point is that the crime control crisis goes beyond the anti-social behaviour reflex and implicates the heart of housing policy within the crime control matrix.

It also creates a new set of problematisations, which have been prevalent in the social sector albeit somewhat obscured by other crises, but which have a particular salience in the private sector. The key emerging problematisation is how to transpose a similar range of controls into the private sector. The issue here is that there is no defined housing management role which incorporates the task of governance beyond an individual enforcement of the contract. Although it is a commonplace assertion that the private rented sector is deregulated and decontrolled, the types of control and regulation which exist in the sector have been dispersed through, for example, controls on housing benefit, property quality, and, less so, security of tenure. We have sought to demonstrate how these existing tools are now being used as tools of crime control.

What seems equally important is that out of this morass of control and regulation, governing communities are in the process of formation and re-formation. There is an apparent consensus out of this that private landlords are responsible through contracts and other controls for the behaviour of their occupiers. The only question where there is dissonance is about the range of that control. Although there are still questions about the ability of private landlords to shed their image of rachmanism, it is clear that they are regarded as crucial providers in policy terms, particularly where there is pressure on the social stock. In this sense, they have become partners in meeting housing need with local authorities (Cowan & Marsh, 2001). What is relatively novel is a reawakening of the landlord role as governors. Partly, this is through the individual contract, but landlords are now seen as governor-mediators between the state and the occupier.

In particular, our paper highlights the important lash-ups which occur in the regulatory process. It is usually assumed by landlords and at least some academic disciplines (such as law) that regulation is something that is done to people. Our work suggests a much more complex reality in which regulatory networks are made and re-made, which include landlords or their representative organisations. Regulation, then, is a dynamic process which brings in a variety of knowledge and expertises, which are then spewed out into regulatory forms and enforcement.

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Ensuring compliance: the case of the private rented sector - some concluding reflections

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What struck me most about the papers was the implication that the market was an important means of achieving objectives and that government intervention to enforce or to incentivise compliance was likely to be needed only at the margin.

What was also interesting in the papers is that society's policy objectives were rarely stated and I think it is important to consider what these might be before coming to conclusions about the need for securing compliance whether through regulation or, for example, an incentive structure such as through the tax or grant system.

A possible set of objectives is that we want a private rented sector of housing that offers the attributes of flexibility to its occupiers and with reasonable security, affordability and decent standards. We might also want a sector where all present, whether landlords or tenants are there by choice rather than through want of securing homes elsewhere or being locked into an otherwise unprofitable investment.

Is the market likely to secure all these outcomes? Probably not, for all the reasons covered in the papers especially with respect to externalities. But in addition, there are demand side and neighbourhood problems which make it unlikely that the market will generate signals that potentially lead to socially optimal outcomes and ones that lead landlords to react in ways that achieve them.

This strikes me as crucial because it may mean that we need a mixture of tools to achieve agreed objectives, including reliance on market signals but also private enforcement of contracts, public enforcement of standards and grants to secure desirable outcomes.

This can be illustrated by considering the findings of some work we carried out on the relationship between physical standards and market rents (Crook et al, 2000, Crook & Hughes, 2001). We found that market rents were related to a set of locational and dwelling attributes but not to physical standards, except at the 'top end'. We suggested that this finding reflects' tenants likely valuation of the attributes. They value location, size, furnishings and 'white goods', but are not apparently concerned about the overall state of repair of their home. This is probably because they are predominantly short stay tenants. Although rents are not related to condition, market values (and landlords spending on repairs are). The better the conditions, the greater the open market values and the more landlords' spending on repairs. As a result, gross and net income rates of return are greater the worse the condition of the property. This gives landlords little incentive to spend on repairs. Moreover although landlords would seem to be able to get a return from increased capital values the worst properties are in the least desirable locations. They are also more likely to be owned by landlords seeking an investment return. Properties in good condition are more

likely to be owned by landlords with stewardship attitudes to property and to be found in better neighbourhoods.

The evidence suggests therefore that many private landlords of poor condition property have no rational incentive to repair because the market simply does not give them the signals, since their tenants don't place a value on occupying property in a good state of repair and the neighbourhood 'deprives' them of potential returns through higher capital values. What happens therefore is that the poor properties get worst and the best get better.

Yet society does have an interest in securing good physical standards for a wide range of externality reasons, including the health and safety consequences to occupiers of substandard dwellings and the likely spill-over costs on neighbourhoods as a whole as a result of rational action by neighbouring owners of poor quality property faced with decisions to improve or not and uncertain about what owners of neighbouring property will do.

In the meantime properties in good condition in better neighbourhoods are well maintained because their owners, including the new buy to let landlords primarily seeking capital gains, can get returns from improved market values even if the market will not generate higher rents as a result of their repairs and improvement spending.

All this suggests that our instruments need to be carefully designed and importantly to take account of market conditions and hence with an ability to operate differentially in different market segments and different demand conditions. At the 'top end', we may be able to rely on private contract and private enforcement. At the bottom end, we may need public enforcement of standards allied to grant aid.

One final comment. One of the complexities of addressing this sector is that it is essentially a 'cottage industry' (Crook, 2002a). Most landlords are small scale and part time – we labelled them the 'sideline landlords'. There are few with stocks of a sufficient size and geographical spread to enable them to achieve economies of scale and manage market risk through diversification. This suggests that the market may well not deliver the modernized system of landlords with significant corporate ownership and institutional investment that governments have sought so keenly to create in recent years, despite several attempts to stimulate such an outcome (Crook & Kemp 2002b).

This is likely to mean that tomorrow's sector is likely to be much like today's (Crook, 2002a). It will consist of small scale ownership by mainly amateur landlords. They will lack information and be largely devoid of professional expertise to manage their stock. They probably don't think of themselves as landlords and have short term investment horizons. This is a very different sector from the one often envisaged as the future: large scale landlords with professional management achieving efficiencies through economies of scale and seeking income returns over the long term. The latter needs a very different regulatory framework than the system we have today.

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This, as well as how the sector generates market signals within the complex mosaic of neighbourhoods is another key factor that the design of a compliance framework will need to take into account.

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Annex A: Powerpoint slides - Professor Michael Ball

REGULATION & THE PRIVATELY RENTED SECTOR
MARKETS & REGULATION

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Issues

•What should the changing characteristics of the PRS imply for regulation?

•How does market as opposed to legal regulation operate?

•Are there good economic cases via market failure for regulation?

The growth of UK private renting 1990-2005

•Most of privately rented sector growth in early 1990s

- **Tenancy growth**
  - 1990-2004 31%
  - 1998-2004 4%

Privately rented sector has been changing internally

•***Free market 'assured' tenancies slowly replacing other tenancies***

- **especially non-public & regulated**

Growth of the small landlord

•*Small landlords replacing corporates*

–Individuals owned almost two-thirds of tenancies in 2001

–More now

•*2005 new lettings* *(ARLA survey results)*

- 60% Buy-to-Let
- 25% Other individual landlords
- 10% Corporate landlords

Market rental sector has grown in value much faster than in number

•House price boom from mid-1990s has greatly increased the value of privately rented sector

•A third increase in value in 2003/04 alone!

•Unlikely to continue

Profits & returns

•Supply on the basis of profit motive: "expected return"

•Profit breaks down into risk & return

•Overall return profile has to be as good as for investment elsewhere

–Higher than average expected returns: investment flows into PRS

–Lower than average expected returns, investment flows out of PRS

Investment risks in renting

•Risks

–Rents & costs (income risk)

–Capital values (asset value risk)

•Risk affected by liquidity

–How easy is it to sell?

–Liquidity poor relative to most financial assets

•Overall return

– Risk free rate + income risk + asset value risk + liquidity risk

•Investing in PRS gives relatively moderate returns over long-term as relatively low risk investment

Regulation through market competition

- ***Tenants move from bad deals***

–**If pay the market price, always alternative accommodation options**

- ***Landlords refuse to house bad tenants***

- ***Affects quality***

- ***Influences behaviour***

- ***Does not require complex contracts***

- ***Does need limited security of tenure***

Market competition not affected by landlord or market types

- ***Much institutional variety has little effect on market parameters***

–**Quality of accommodation & market rents determined through competition, not landlord characteristics**

–**Landlord investment motives have no systematic effect on rents or quality either**

- ***Market outcomes product of supply and demand interactions (at the margin)***

Tenants are those gaining most from tenure's characteristics

- ***Younger people***
  - **Over half household heads under 34**
  - **In owner occupation, only 15% under 34**
- ***Highly mobile***
  - **Over 520 moves in a year per 1000 households**
  - **In owner occupation, only 70 moves in a year per 1000 households**
  - **Over 75% tenants are either couple no kids, sharers or singles**
- ***Mobility scale means market regulation continuously working***
  - **Most tenants have low transactions costs (self-selection?)**

Legal regulation is a second best, at best

- ***Raises costs***

–**Lower net returns**

- ***Increases risks***

–**Particularly income & liquidity risks**

- ***If expected return falls & risks rise because of regulation***

–**Investment falls**

–**All rents rise**

- ***Long run costs of regulation tend to fall on tenants***

–**Through higher effective rents & less choice**

- ***Legal regulation is a redistribution of costs & benefits between tenants***

–**Rather than between tenants and landlords**

Case studies 1: "Creating professional landlords"

•*Registration of landlords*

–**Seen as way of getting rid of ‘cowboys’**

–**Raising standards e.g. HMOs**

•*How?*

–**Cowboys by definition do not obey rules**

- Then why should they obey extra ones, including registration?

–Monitoring & compliance costs high

•*Results likely to be poor*

–Less choice, higher rents,

–Limited change in landlord behaviour, more informal renting

•*No evidence that larger landlords are more efficient*

–Limited economies of scale

–Their activities more likely to fall within tax net e.g. VAT

Case study 2: “Landlord & tenant tribunals”

•*Aim: cheap, quick mediation service to avoid courts*

•*Problems*

–If doesn’t exist in other spheres, why in housing?

–Creeping regulation e.g. Ireland’s tribunals now part of ‘fair rent’ & security of tenure measures

–Cost & who pays?

–Investor disincentives

Case study 3: “Tenant deposit scheme”

•*Information asymmetries on both sides*

–For tenant and landlord

•*Not solved by general competition, because bilateral situation*

•*TDS makes sense, as long as low cost*

–Need no deposit option

Regulation rarely evaluated sufficiently

•***Need Cost-Benefit Analysis***

–**Not done, especially wider market impact**

•***Do not know supply-side responses***

–**Without them hard to judge whether a piece of regulation will be good or bad**

Conclusions

•***What should the changing characteristics of the PRS imply for regulation?***

–**Very little**

•***How does market as opposed to legal regulation operate?***

–**Generally much better but usually underrated**

•***Are there good economic cases via market failure for regulation?***

–**Usually not: true failures limited, feedback effects on market potentially large**