

Unreasonable restrictions on children and other occupants in rental housing

TU briefing paper – October 2014

Most residential tenancy agreements set a maximum number of persons – including children – who may ordinarily live at the rented premises.

Under the current law, there is nothing to stop landlords from setting an unreasonably low and restrictive maximum number. In our experience it is common for the maximum number of persons to simply reflect the number of persons in the application for the tenancy – and not the size of the property.

This means that tenants may have to ask for their landlords' consent before an additional occupant – such as a partner, spouse or even a new baby – moves in.

The TU is aware of cases where landlords have refused to allow children to join a household, and have given termination notices because a child breaches the maximum number of persons allowed.

We propose that the law be changed to provide that the maximum number of residents must not be unreasonable, and that the term should not be able to be used to restrict the addition of a partner or child to the household.

Background

The *Residential Tenancies Act 2010* (NSW) (RT Act 2010) provides that a landlord may specify, as a term of a residential tenancy agreement, a maximum number of persons who may reside at the premises, in the following terms.

51 Use of premises by tenant

(1) A tenant must not do any of the following: ...

(e) cause or permit a number of persons to reside in the residential premises that exceeds any number specified in the residential tenancy agreement. ...

(5) This section is a term of every residential tenancy agreement.

Accordingly, the standard form of agreement prescribed by the Residential Tenancies Regulation 2010 contains the following term:

No more than [blank] persons may ordinarily live in the premises at any one time.

Prior to the RT Act 2010, an identical term was included in the standard form of tenancy agreement prescribed by Regulations under the *Residential Tenancies Act 1987* (the RT Act 1987, now repealed). However, the RT Act 1987 did not itself prescribe such a term. There is no proviso in the RT Act 2010 that the maximum number of persons residing must reflect the size of the premises or otherwise be reasonable. There is also no provision for a tenant to seek a variation of the term, other than by asking for the landlord's consent.

The problem

In our experience, it is common for landlords and real estate agents to make the maximum number of occupants the same as the number of persons noted in the tenant's application for the tenancy – so, for example, where the applicants are a couple with one child, the maximum number of occupants will be three persons, notwithstanding that the premises may reasonably accommodate more persons, and that it is foreseeable that the household may want to grow.

Case study 1

In preparing the present paper, the TU asked the Illawarra and South Coast Tenants Advice and Advocacy Service (ISCTAAS) to review each new client file it had opened in the previous week for the number of bedrooms in the premises, the number of occupants at the commencement of the tenancy, and the maximum number of residents allowed under the tenancy agreement. ISCTAAS reported the following results:

Client 1: 2 bedrooms, 2 occupants at commencement, **maximum of 2 occupants**

Client 2: 2 bedrooms, 1 occupant at commencement, **maximum of 1 occupant**

Client 3: 4 bedrooms, 2 occupants at commencement, **maximum of 2 occupants**

Client 4: 2 bedrooms, 1 occupant at commencement, **maximum of 1 occupant**

In each of the four cases reviewed, the maximum number of residents was the same as the number of occupants at commencement. In three of the four cases, the maximum number of residents was lower than the number of bedrooms.

We are aware of cases in which landlords have refused tenants' requests to allow occupants – including children – above the maximum number. We are also aware of cases in which landlords have taken termination proceedings against tenants for breach of the term setting the maximum number of occupants, including where the additional occupant is a child.

Case study 2

B and C were a couple considering becoming foster carers. They lived in a five-bedroom house, but their tenancy agreement restricted the maximum number of occupants to just two persons. B and C asked their landlord if she would consent to two foster children moving in. The landlord refused.

Case study 3

D and two of her children moved into a three-bedroom house; the tenancy agreement set the maximum number of residents at three. During the tenancy, D made an arrangement with her ex-partner for the shared care of a third child, who had a disability. The child and the ex-partner would stay a few days each week – the ex-partner on a bed made up in the lounge room.

During an inspection the landlord noted the presence of the third child and the extra bed. He gave D a termination notice for breach and commenced termination proceedings in the Tribunal. D was questioned in the Tribunal about her relationship with her ex-partner and the personal details of persons visiting her and the lengths of their visits. D felt humiliated by the questioning.

The Tribunal determined that the third child and the ex-partner were allowed at the premises, provided they were there temporarily. The Tribunal declined to terminate the tenancy, but made a specific performance order against D that she not breach the term setting the maximum number of persons.

The cases indicate that the provision for a term setting a maximum number of residents is being misused. Unreasonably low and restrictive maximum numbers are being set and, in some cases, enforced. The law allows landlords to interfere in personal decisions by tenants about their households, in ways that humiliate tenants.

The solution

We propose that the RT Act 2010 be amended to provide that the maximum number of residents must not be unreasonable, and must not restrict against the inclusion of a partner or child in the tenant's household.

In particular, s 51(1)(e) should be amended as indicated below (in *italics*):

51 Use of premises by tenant

(l) A tenant must not do any of the following: ...

(e) cause or permit a number of persons to reside in the residential premises that exceeds any number specified in the residential tenancy agreement, *provided the number specified is reasonable, considering the size of the premises and the number of bedrooms.*

Also, a new subsection (s 51(1A)) should be added, to the following effect:

Notwithstanding section 51(1)(e), a tenant is not in breach of the term where the maximum number is exceeded only because of the inclusion of a partner or child in the tenant's household.

If there is a question of whether the inclusion of a partner or child results in a nuisance, or interference with neighbours, or damage to the premises (per section 51(1)(b), (c) and (d) respectively), the landlord should be prepared to show evidence of breach of one or more of those terms, rather than show merely that the maximum number of residents is exceeded.