Submission

No 24

INTERNATIONAL STUDENT ACCOMMODATION IN NEW SOUTH WALES

Organisation: Tenants' Union of NSW

Name: Dr Chris Martin

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The Tenants' Union of NSW (TU) is the State's peak non-government organisation for tenants and other persons who rent their housing. We are a community legal centre with our own specialist legal practice in residential tenancy law, and the principal resource service for the network of Tenants Advice and Advocacy Services (TAASs), which direct advice and advocacy to tenants and other renters throughout New South Wales.

We know about the issues and problems faced by international students in relation to their accommodation through our own casework, the casework of the TAASs, and our contact with student organisations.

Many international students find accommodation outside the mainstream rental sector, particularly in share housing, boarding houses, lodgements in private residences and educational halls of residence. Each of these forms of accommodation is part of what is called the 'marginal rental sector'. The marginal rental sector also accommodates persons other than international students, and includes other forms of accommodation, such as refuges and crisis accommodation.

The marginal rental sector is, therefore, a diverse sector. What marginal renters have in common is that they are excluded from the State's residential tenancies legislation, which means they have relatively few legal rights and little access to dispute resolution. They are also often vulnerable because they have little economic power and inadequate connections to sources of advocacy and support. They also often endure accommodation that is in a poor state of repair, and managed in a disorganised way.

The matters under consideration by the Inquiry are, therefore, of high importance to international students. They are also of high importance to other marginal renters.

In the present submission, we focus on the matter of standards in marginal rental accommodation, and particularly how standards may be improved through two reforms:

- a system of registration and accreditation for legitimate boarding houses and other residential services; and
- law reform for 'occupancy agreements' between marginal renters and their landlords.

The TU submits that these two reforms are crucial to the better regulation and operation of marginal rental accommodation, including the accommodation in which so many international students live.

Tenants' Union of New South Wales

Suite 201, 55 Holt Street
Surry Hills NSW 2010
phone 02 8117 3700
fax 02 8117 3777
ABN 88 984 223 164

Submission to the

Social Policy Committee of the Legislative Assembly, Parliament of NSW

Inquiry into International Student Accommodation in New South Wales

October 2011

About the Tenants' Union of NSW

The Tenants' Union of NSW (TU) is the State's peak non-government organisation for tenants and other persons who rent their housing. We are a community legal centre with our own specialist legal practice in residential tenancy law, and the principal resource service for the network of Tenants Advice and Advocacy Services (TAASs), which direct advice and advocacy to tenants and other renters throughout New South Wales.

We know about the issues and problems faced by international students in relation to their accommodation through our own casework, the casework of the TAASs, and our contact with student organisations.

International students and marginal renting

International students represent only a small proportion of the clients of the TU's legal practice and the casework of the TAASs (though we note that the Eastern Area Tenants Service, in the eastern suburbs of Sydney, advises that three per cent of all inquiries it receives are from international students); however, the issues international students raise are important, and they experience some of the most unfair and abusive practice by landlords in the New South Wales rental housing system. We present below three case studies from the recent casework of the TAASs.

B and C are Chinese students attending university in regional New South Wales, and sharing a room rented from a private landlord. The landlord charges *each* of them $140 per week for the room, plus $80 for internet access and $70 for electricity, and a bond. When the landlord informs them that the rent would increase the following week by $45 each, B and C object to the increase and query the amounts they are charged for internet access and electricity. The landlord replies that 'this is the law in Australia, you better get used to it' and gives four days' notice of termination.

B and C seek assistance from their local TAAS, which demands the landlord return the students' bond. Concerned at the prospect of adverse publicity, the landlord pays up.

*

D is studying at a university in Sydney and shares a house with nine other persons – he shares a bedroom with two of them. Each of the residents has a separate agreement (a single A4 sheet stating the rent and a list of house rules) with the landlord, who appears to operate several similar properties.

The house is in a very poor state of repair. All of the house is damp and mouldy, there are rats in the kitchen, no oven and the back door to the property cannot be locked. There is a single smoke alarm for the whole property. In D's room, the ceiling leaks, and there are exposed wires by the door: D has been told by an electrician acquaintance that they are live.

D's local TAAS advises that he is most likely a lodger, and as such has little prospect of getting the necessary repairs done, and that his best option is to look for safer accommodation elsewhere.

*

E is a student who rents a room for $220 per week in premises that accommodate 14 to 20 persons on similar terms. Kitchen and bathroom facilities are shared, linen is provided and the landlord's agent lives on the premises.

E's agreement states that if E wants to move out, he must find another person to take his place, and that he should recover the bond he paid – $880 – from this person, not the landlord. E is concerned that if he raises an objection now to the terms of the agreement, the landlord's agent will lock him out and put his possession on the street.

E finds two people to replace him, but the landlord refuses to accept either person. By now E has had enough and moves out, and asks for the return of his bond. The landlord refuses, and threatens to have E's visa revoked. E's local TAAS advises that lodgers do not have straightforward access to the Consumer, Trader and Tenancy Tribunal, and that E may have to pursue the return of his bond through the courts.

As the case studies indicate, many international students find accommodation outside the mainstream rental sector, particularly in share housing, boarding houses, lodgements in private residences and educational halls of residence. Each of these forms of accommodation is part of what is called the 'marginal rental sector'. The marginal rental sector also accommodates persons other than international students, and includes other forms of accommodation, such as refuges and crisis accommodation.

The marginal rental sector is, therefore, a diverse sector. What marginal renters have in common is that they are excluded from the State's residential tenancies legislation, which means they have relatively few legal rights and little access to dispute

resolution. They are also often vulnerable because they have little economic power and inadequate connections to sources of advocacy and support. They also often endure accommodation that is in a poor state of repair, and managed in a disorganised way.

All international students who are marginal renters experience these problems to at least some degree – and some experience these problems acutely. The worst affected are those who share bedrooms – sometimes with several other students – in houses or apartments that have been informally subdivided and turned unlawfully into boarding houses: these students may have few legal rights, little economic power and little knowledge as to local conditions and sources of support; and they endure overcrowded, uncomfortable and unsafe housing conditions and other forms of exploitation from some of the worst landlords in the State. Even those in relatively well-managed legitimate boarding houses and halls of residence are at a disadvantage in terms of their legal rights and access to dispute resolution.

The matters under consideration by the Inquiry are, therefore, of high importance to international students. They are also of high importance to other marginal renters.

In the present submission, we focus on the matter of standards in marginal rental accommodation, and particularly how standards may be improved through two reforms:

- a system of registration and accreditation for legitimate boarding houses and other residential services; and
- law reform for 'occupancy agreements' between marginal renters and their landlords.

The TU has discussed and made recommendations in relation to each of these reforms in our recent policy paper, 'Reforming Marginal Renting' (attachment 1). The present submission reflects those recommendations; in relation to registration and accreditation, the present submission presents more detailed recommendations.

On the other hand, we do not focus in the present submission on the matter of the supply of international student accommodation or marginal rental accommodation more generally. However, we point out that our 'Reforming Marginal Renting' paper does make recommendations for measures to better ensure the viability of the boarding house sector, including a boost to the Boarding House Financial Assistance Program, which would assist in the retention and growth of those providers of international student accommodation.

We also emphasise that our recommendations in relation both to registration and accreditation, and to occupancy agreements, have been formulated with the viability of legitimate operators in mind. Indeed, we submit that our recommendations would not only be to the benefit of international students and other marginal renters, but would also assist legitimate operators in managing their businesses in a better organised, and hence more viable, way.

Improved standards through registration and accreditation

The Inquiry's Terms of Reference refer to the Environmental Planning and Assessment Amendment (Boarding Houses) Bill 2010 ('the Dominello Bill'), which would have, amongst other things, required that boarding houses (as defined in the Bill) be entered onto a register maintained by the NSW Department of Services,

Technology and Administration. Because operators would, presumably, register only boarding houses that were operating lawfully (that is, with the appropriate land use consents), the register would be one of legitimate boarding houses, and it would be available for use by persons – particularly international students – to check if any particular boarding house was registered and legitimate. The Bill would also have provided local councils with additional powers to investigate suspected cases of non-compliance with the requirement to register and/or breach of permitted land use.

We understand, therefore, the Dominello Bill's objectives to be the provision of a measure of consumer protection for prospective boarding house residents, and the taking of more effective action against unlawful boarding house operators. We support these objectives, and submit that the Dominello Bill's scheme for a register of boarding houses could be enhanced to achieve other objectives, including improved standards in accommodation and other services, and more effective engagement between legitimate operators and government.

Some of these other objectives are indicated in another proposal for boarding house sector reform, made shortly after the introduction of the Dominello Bill, by the NSW State Government's Interdepartmental Committee (IDC) on Reform of Shared Private Residential Services. In its discussion paper of December 2010, the IDC sets out a number of objectives for boarding house sector reform, including:

- better protection of residents' rights (including occupancy rights);
- improved access to support and social inclusion programs for vulnerable persons;
- improved viability and streamlined regulation for legitimate boarding house operators; and
- the creation of a flexible, outcomes-focused and cost effective regulatory framework for the sector (IDC, 2010: 9).

The IDC also indicates its preferred options for such a regulatory framework, including a legislative scheme for the registration of boarding houses. The IDC envisages a scheme with the following elements:

> **… Registration**
> A differential registration system for boarding houses that takes into account the differing needs of clients.
>
> … **Accommodation and Operational Standards**
> Accommodation and operational standards for all boarding houses contained in one key piece of legislation specific to boarding houses where this is appropriate and feasible.
>
> … **Service Standards for Residents with a Disability**
> Service standards for proprietors providing accommodation services to vulnerable residents (IDC, 2010: 11-12).

In other words, all boarding houses would be required to be registered, and all boarding houses would be required to comply with certain common standards, and some boarding houses – those with 'vulnerable residents'[1] – would also be required

[1] In consultations on the discussion paper, the IDC has indicated its definition of 'vulnerable resident': 'A person is considered vulnerable if, due to intellectual, physical, mental or sensory disability, age-related frailty or other disability, they are susceptible to physical, verbal or emotional abuse, harm, neglect and/or persuasion in relation to [their] body, health skills, emotional wellbeing, funds or possessions.' This vulnerability, therefore, is of a different order to that of international students.

to comply with certain service standards. Whether a particular boarding house would be required to comply with the additional service standards would be determined as part of the registration process (hence 'a differential registration system').

The TU supports these objectives too. We submit that these objectives, and those of the Dominello Bill, can be achieved together in a single registration and accreditation scheme, provided it makes sufficiently differentiated provision for the different types of services it would cover.

We present our own preferred registration and accreditation scheme below. In doing so, we draw on those of the Dominello Bill, the IDC's discussion paper, and the Queensland *Residential Services (Accreditation) Act 2002* ('the Queensland Act').

We propose a stand-alone piece of legislation, which we suggest should be called the *Residential Services Act*, comprising the following elements:

- *A broad definition of 'residential services'*. We suggest that a residential service exists where an operator grants to a person, for value, a right to occupy premises, or part of premises, for use as a residence and where:
    - the person is to share a bedroom with two or more persons (any one of whom occupies by separate grant of the operator); or
    - the person is to share the premises, or share kitchen, dining, bathroom or living facilities, with four or more other persons (any one of whom occupies by separate grant of the operator); or
    - the premises are one of several adjoining or collocated premises (such as in a strata scheme), to which the operator provides food or personal care services.

  This definition means that the registration and accreditation scheme would include not only boarding houses, but also students' halls of residence, crisis accommodation and refuges, and serviced rental housing arrangements along the lines of 'SunnyCove' villages. There should be specific exclusions for retirement villages covered by the *Retirement Villages Act 1999* (NSW), and genuine share housing arrangements (that is, where the premises are subject to a residential tenancy agreement, and the right to occupy is granted by one or more tenants who reside at the premises).

- *A requirement that all residential services be registered* on a register maintained by the Residential Services Registrar (we discuss this office below). It would be an offence to operate an unregistered residential service, and registration could be refused where the operator is not a fit and proper person (including because of previous breaches of the Act). (Note that land use consent decisions about residential services would remain with local councils or other relevant development consent authorities.) Eligibility for government incentives, such as the land tax exemption, residential rating and the Boarding House Financial Assistance Program, would be conditional on registration. The registration process would collect information about the residential service for the purpose of identifying an appropriate 'Service Description' and an appropriate class or classes of 'Accreditation' (we discuss these terms below). Operators would be required to periodically re-register, in order that information is kept up to date and any changes in the way they operate may be identified. The register would be publicly available (including on the internet), and the entry for each residential service would include the address of the premises, the name of its operator, its Service Description and

Accreditations (except for refuges, which would not appear on the public register).

- *Provision for various Service Descriptions*, including Student Accommodation, Boarding House, Crisis Accommodation, Refuge, and such other descriptions as may be prescribed by regulation. The purpose of these descriptions would be to better inform persons perusing the register – whether they are prospective users of residential services, or government and non-government agencies planning their work with residential services.

- *A requirement that residential services be accredited* within a specified period (we suggest six months, as under the Queensland Act) of either becoming registered or commencing the provision of the relevant service. We submit that when the registration scheme commences, already existing residential services should have to register immediately, but then have some time (say, one year) to become accredited (except for Licensed Residential Centres, which should be deemed accredited, and have to apply for re-accreditation, immediately). It would be an offence to operate a service without the appropriate accreditation after the period for accreditation: penalties would include loss of accreditation and/or registration; prohibitions on operating a residential service; and criminal penalties.

- *Provision for different classes of Accreditation*, being Accommodation Service, Food Service and Personal Care Service. Every registered residential service would be required to be accredited as an Accommodation Service; depending on the services it provides, a residential service may have to be accredited as neither, one or both of the other classes (Licensed Residential Centres would be accredited as all three.)

- *Accommodation Services*. To be accredited as an Accommodation Service, a residential service would have to show compliance with certain Accommodation Standards. These would include the standards currently at Part 1, Schedule 2 of the Local Government (General) Regulation 2005 (NSW), a standard that requires use of either residential tenancy agreements or occupancy agreements in the appropriate form (see the second part of this submission for more on occupancy agreements) and such other standards as may be prescribed by regulation. It would be an offence to breach the Accommodation Standards.

- *Food Services*. A residential service that provides one or more meals each day would be required to be accredited as a Food Service, and as such would have to show compliance with additional Food Service Standards, as may be prescribed by regulation.

- *Personal Care Services*. A residential service that provides 'personal care services' – being services that are addressed to the support needs of vulnerable persons, including management of finances or medication – would be required to be accredited as a Personal Care Service. As such the residential service would have to show compliance with additional Personal Care Service Standards. These would reflect the obligations currently at Part 2 of the Youth and Community Services Regulation 2010 (NSW) (with a strengthened obligation to ensure residents' access to advocacy services), and such other standards as may be prescribed by regulation.

- *The Residential Services Registrar*. The Act would establish the Residential Services Registrar as an independent statutory authority, with responsibility for maintaining the register, assessing applications for registration and accreditation, monitoring compliance with standards, cancelling accreditations and registrations, and referring more serious breaches for prosecution.

- The Registrar would also produce resources to help operators with registration and accreditation, promote best practice, liaise with operators and inform government policy-making. We suggest the Registrar's office might also become a 'one-stop shop' for operators' dealings with government: for example, applications for land tax exemptions and Boarding House Financial Assistance Program grants.

It is useful to consider a couple of examples of how the Registrar's registration and accreditation processes would work in practice. First, say a boarding house is registered and accredited as an Accommodation Service only, and the operator decides to start offering meals as part of the service. The operator would have six months to get the meals service going in a way that complies with the Food Service Standards. If the boarding house receives Food Service accreditation, the meals can continue; if not, the meals must stop and the boarding house can continue to operate as an Accommodation Service.

Secondly, say a boarding house is registered and accredited as an Accommodation Service only, but when the operator fills out the forms to renew the registration, the information they give indicates (and this is confirmed by a phone call from the Registrar's office) that for one resident the operator holds money and helps manage their spending. This is an activity of a Personal Care Service. The Registrar could treat this as a breach of the Act, but instead decides to advise the operator that the activity is one that requires accreditation and supplies the operator with materials to assist in the development of the operator's practices and application for accreditation.

As for international students, we indicated earlier in this submission that many are accommodated in lodgements in private residences, share housing, boarding houses and educational halls of residence. Under the scheme we propose, virtually all lodgements in private residences and genuine share housing arrangements would not meet the definition of a residential service and would not be registrable. On the other hand, virtually all boarding houses and educational halls of residences would be required to be registered. All those registered would be required to be accredited as Accommodation Services; we submit that some would also be required to be accredited as Food Services, and none would be required to be accredited as Personal Care Services. Operators who do not register their premises – particularly unlawful boarding houses – would be liable to prosecution.

So, to give a third example: say a property owner is letting rooms in an unlawfully subdivided house, particularly to international students. A total of eight persons are accommodated: three sharing one room, two each in another two rooms, and an agent of the property owner in a fourth room. This fits the definition of a residential service in two ways –the three persons sharing a bedroom, and the total number of persons sharing the premises – and it is not a genuine share house, because each of the persons occupies by separate grant of the property owner. The Registrar receives a complaint about the residential service, notes that it is unregistered and prosecutes the operator for breach of the Act. The local council may also prosecute under its regulation of land uses.

Improved standards through occupancy agreements

Improved standards in international students' accommodation, and other forms of marginal rental accommodation, should be pursued not only through the establishment of a legislated scheme for the registration and accreditation of residential services, but also through law reform to make marginal renters' contracts fairer and more effective.

Current NSW residential tenancies legislation excludes boarders and lodgers (*Residential Tenancies Act 2010* (NSW) s 8(1)(c)), occupants in share houses who do not have a written agreement (s 10), residents of educational halls of residence (Residential Tenancies Regulation 2010 (NSW) cl 20), as well as numerous other renters. These marginal renters are not covered by any alternative legislative regime with respect to their housing, and instead have mere common law licenses, the law of which has changed little since the nineteenth century and offers few practical rights or remedies.

The TU recommends law reform on the lines of the 'occupancy agreements' model, which the Australian Capital Territory implemented in amendments to its residential tenancies legislation in 2005. We refer to this model in our paper, 'Reforming Marginal Renting', and discuss it in detail in our briefing papers, 'Occupancy Agreements: law reform for marginal renters in NSW' (attachment 2) and 'Occupancy Principles: part of the occupancy agreements model of law reform' (attachment 3); we give a brief account of it below, particularly as it would relate both to international students and to the registration and accreditation scheme.

We propose legislation for occupancy agreements, either as a stand-alone Act or as part of the *Residential Tenancies Act 2010* (NSW), comprising the following elements:

- *Broad coverage*. We submit that occupancy agreements legislation should apply wherever a person ('the grantor') grants to another ('the occupant'), a right for value to occupy premises for use as a residence, and the agreement is not otherwise covered by residential tenancies legislation. This means it would apply not only to boarding houses, or to the wider category of 'residential services' as defined above, but to all marginal rental accommodation, including share housing, lodgements in private residences, crisis accommodation and refuges.

- *Occupancy principles*. Because it applies to a diverse range of forms of accommodation, the occupancy agreements model does not prescribe in detail all of the terms of occupancy agreements. Instead, it sets out a number of 'occupancy principles', which are generally-stated and non-prescriptive. The terms of occupancy agreements would have to be consistent with the occupancy principles, but otherwise more flexibility and variation would be allowed than under mainstream residential tenancies legislation. For example, in relation to rent increases, occupancy agreements legislation would not prescribe a certain period of notice (contrast the *Residential Tenancies Act 2010* (NSW), which prescribes not less than 60 days' notice). Instead, the relevant occupancy principle would be that the occupant is entitled to 'reasonable notice' and to know what the period of notice is before they enter the agreement; otherwise, the period of notice would be left to the grantor – and

such standard terms as may be prescribed by regulation (see below). The TU has drafted a set of 12 occupancy principles, based on the occupancy principles in the ACT's legislation: see our paper 'Occupancy Principles: part of the occupancy agreements model of law reform'.

- *Standards terms* prescribed by regulation. Occupancy agreements legislation would allow more specific rights and obligations to be prescribed by regulation as standard terms for different classes of occupancy agreements. This would allow standard terms to be tailored to the different ways in which different forms of accommodation operate. For example, there might be a set of standard terms specifically for boarding houses, another set for students' halls of residence, and another for Personal Care Services (as defined under the proposed Residential Services Act, above). We propose that these sets of standard terms should be developed in consultation with operators' and resident' respective representatives and other relevant stakeholders – indeed, these stakeholders might be encouraged to draft model standard form occupancy agreements for 'road-testing' before incorporation in a regulation.

- *Dispute resolution* through the Consumer, Trader and Tenancy Tribunal. For example, an occupant who disputes the validity of a termination notice or an eviction would be able to apply to the Tribunal for relevant orders; similarly, a grantor would be able to apply for a money order against an occupant who has failed to pay rent.

The TU submits that these two reforms – a legislated scheme of registration and accreditation for residential services, and law reform for occupancy agreements – are crucial to the better regulation and operation of marginal rental accommodation, including the accommodation in which so many international students live.

Tenants' Union of New South Wales

Suite 201, 55 Holt St, Surry Hills NSW 2010
Phone: 02 8117 3700
Fax: 02 8117 3777
tunsw@clc.net.au

Reforming marginal renting

A policy paper by the Tenants' Union of NSW
March 2011

Most renters in New South Wales are covered by residential tenancies legislation. Some renters, however, are not covered.

These 'marginal renters' come from different walks of life, and live in a wide variety of different forms of accommodation, including boarding houses, lodgements in private residences, share houses, and supported accommodation. What marginal renters have in common is that they are excluded from mainstream residential tenancies legislation, and they are often disadvantaged in other ways too.

Marginal rental accommodation is a small but important part of the housing system in New South Wales. Despite the important roles it plays, the marginal rental sector is in bad shape.

Legal relations between marginal renters and landlords are governed by unregulated common law contracts, with no fair mechanism for resolving disputes.

Existing measures to encourage the operation of boarding houses have not delivered satisfactory outcomes for investors or the community generally.

Renters in boarding houses are often socially isolated, and so are some landlords.

The accommodation and support provided to people with disability by licensed residential centres is generally unsatisfactory, and at its worst is abusive and exploitative.

Marginal renters deserve better. The marginal rental sector needs reform. In this paper, the TU draws on the experiences and positions of the leading organisations in the community sector to propose a comprehensive four-point plan for reforming marginal renting.

A four-point plan for reforming marginal renting

1. Law reform to create 'occupancy agreements'
2. Measures for more viable boarding houses
3. Services to promote social inclusion
4. Appropriate housing and support for people with disability

What is marginal rental accommodation?

For the purposes of this paper, marginal rental accommodation comprises a variety of forms of residential accommodation that are exempt from residential tenancies legislation. Many of these forms of accommodation operate differently from mainstream residential tenancies,

and from each other; most provide accommodation particularly to disadvantaged persons. Marginal rental accommodation includes:

- boarding houses;
- licensed boarding houses (or licensed residential centres (LRCs));
- lodgements in private residences;
- residential accommodation in hotels, motels, backpacker hostels, serviced apartments, and pubs and clubs;
- educational institutions and residential colleges;
- refuges, crisis accommodation and supported accommodation;
- caravans in residential parks (where excluded from the *Residential Parks Act 1998* (NSW) by cl 4 of the Residential Parks Regulation 2006);
- share houses (where the occupants have do not have written residential tenancy agreements, per s 10 of the *Residential Tenancies Act 2010*).

As these examples indicate, the persons and organisations that provide marginal rental accommodation vary widely. Some are relatively large institutions; some are community organisations; some are small businesses and some are individual persons. Some operate on an enduring basis; some operate on an informal, impermanent or ad hoc basis. Some are strictly commercial operations; some are not-for-profit; some operate on a subsistence basis.

The marginal rental sector is small relative to the mainstream residential tenancy sector. Table 1 gives an indication of the size of the marginal rental sector and the various types of accommodation that comprise it.

Table 1. NSW marginal and mainstream rental sectors at the Census of Population and Housing, 2006

Accommodation type	Premises	Persons
Marginal rental accommodation		
'Boarding house, private hotel'	465	6,093
'Hostel for the disabled'	236	3,621
'Residential college, hall of residence'	122	13,841
'Hostel for the homeless, night shelter, refuge'	164	1,468
Total	**987**	**25,023**
Mainstream residential tenancies		
Private rental plus social housing	687,431	1,622,486

Source: Australian Bureau of Statistics

It should be noted, however, that it is difficult to say accurately how many persons live in marginal rental accommodation, because measures such as the Census tend to undercount marginal rental properties and the persons residing in them. In particular, some boarding

houses – particularly those outside inner city area – are not counted because their external appearance is the same as other suburban houses. Similarly, the Census undercounts persons residing in supported accommodation. In the same year as the Census, the Supported Accommodation Assistance Program database recorded 5110 residents – the Census recorded only 1468 residents in the equivalent category.

Who are marginal renters?

The following case studies from the files of the TU and the Tenants Advice and Advocacy Services illustrate typically the people who live in marginal rental accommodation, and the issues and problems they face.

B is a homeowner, but she and her children have left the home to escape B's violent partner. B cannot afford private rental, so now shares a room with her children in a small private hotel. B has raised concerns about the cleanliness of the shared bathroom and kitchen, and been told by the caretaker that if she does not like it, she and her children can leave.

C moved into a farming property as a lodger, on the understanding that he could have the room for $40 per week and doing some work on the property, and that most of the time he would have the place to himself. Subsequently C found that the landlord was always at the property, and the landlord, complaining that C did not do enough work, increased the rent to $90 per week. Tensions escalated; C and the landlord each applied for Apprehended Violence Orders; C suffered a recurrence of mental illness and was hospitalised. C now lives in his car.

D has lived in a boarding house in inner Sydney for 30 years, and is happy to call it home. The caretaker, however, has given D and the 14 other residents seven days notice to vacate, because the premises have been sold and the purchaser requires vacant possession (he intends to renovate and move in). Some of the residents, including D, are elderly, and some have a mental illness. With the help of an advocate they negotiate for 30 days in which to find alternative accommodation.

E is an international student who rents a room in a house with four other international students. Each has an 'accommodation agreement' with the landlord, the terms of which include:

- a fee of $10 for each day rent is paid late;
- a fee of $10 each week if the student uses a heater;
- a fee of $20 if the student does not keep the premises clean;
- a requirement that students vacating during November and December give two months notice; and
- a provision that the rent may be adjusted 'from time to time' and 'at the accommodation provider's discretion.'

E's landlord advises, 'that's the way it's done here in Australia.'

F lives in a licensed boarding house for people with disability. The rent is 85 per cent of F's disability support pension, and after other service charges are subtracted F is left with $12.50 per week to spend as he wishes. F is concerned that the boarding house manager is not forwarding mail to residents, but is too scared to raise the matter personally. As he explained in a letter to an advocate, 'if they find out I wrote to you they could make things very hard for me and I'm in the process of leaving here… and they could try to find a reason to keep me here.'

1. Law reform to create 'occupancy agreements'

Because marginal renters are not covered by residential tenancies legislation, they instead have only common law contracts with their landlords.

For marginal renters, the common law is an unsatisfactory regime. The common law does not oblige landlords to provide standardised contracts for marginal rental accommodation, nor compel them to do even the most basic things – such as providing a receipt when rent is paid. Many marginal rental contracts contain no terms relating to the landlord's obligations and many marginal renters do not receive a written copy of their contract. Confusion as to parties' contractual rights and obligations often leads to disputes between marginal renters and landlords.

The common law also fails to provide a fair or realistic mechanism for dispute resolution. Some marginal renters may be able to initiate proceedings against their landlords under the *Consumer Claims Act 1993* (NSW) in the General Division of the Consumer, Trader and Tenancy Tribunal. However, this course of action is only available to marginal renters whose landlords fit the legal definition of being 'in business'; otherwise, they have to initiate proceedings in the courts, which is not a realistic option. Marginal landlords, on the other hand, have no access to the Tribunal, and the courts are not a realistic option for them either. All too often, disputes end with landlords summarily evicting marginal renters.

Most other Australian states and territories have enacted legislation that covers some categories of marginal rental accommodation. The approach taken in Queensland, South Australia, Tasmania and Victoria has been to legislate on a relatively narrow and prescriptive basis: that is, their legislation applies narrowly to boarding houses (or rooming houses, or boarding premises – the language varies from State to State) of a certain size (where there is room for three residents or more, or four residents or more – the threshold varies from State to State), and the legislation prescribes in detail the terms of agreements and any notice periods for rent increases and terminations.

The shortcoming of this approach is that many categories of marginal renters – notably lodgers in private residences, students in residential colleges, residents of small boarding houses and residents of crisis accommodation – remain uncovered. Furthermore, if this sort of legislation was extended to cover other categories of marginal rental accommodation, the details prescribed may not be suitable to the very different living arrangements they provide.

The TU believes that the better model of legislation is the 'occupancy agreements' model implemented by the Australian Capital Territory (Part 5 A of the *Residential Tenancies Act 1997* (ACT)). The key features of the ACT model of legislation are:

- Broad coverage. All rental contracts for residential purposes not otherwise covered by residential tenancies legislation are covered. These contracts are known as 'occupancy agreements'; marginal renters are known as 'occupants' and their landlords as 'grantors'.
- Occupancy principles. Occupancy agreements are required to comply with certain 'occupancy principles'. These principles are very basic and non-prescriptive, and so accommodate the different ways in which different types of marginal rental accommodation operate. The TU's proposed occupancy principles are reproduced below.
- Provision for standard terms by regulation. Standard terms would be more prescriptive than the occupancy principles, but they would not apply to all occupancy agreements –

just the specific types to which they are tailored. Standard terms would not be in the legislation itself, and would instead be prescribed in regulations developed in consultation with stakeholders.

- Dispute resolution through the Tribunal. Both landlords and occupants may apply to the tribunal for resolution of a dispute arising from an occupancy agreement. The Tribunal is required to apply the occupancy principles when it determines disputes. Landlords are not required to apply to the Tribunal for termination of an occupancy agreement, but an occupant who disputes a termination may apply.

We propose the following 12 occupancy principles, based closely on the nine principles in the ACT legislation:

1. An occupant is entitled to live in premises that are—

   a. reasonably clean; and

   b. in a reasonable state of repair; and

   c. reasonably secure.

2. A grantor is entitled to set reasonable rules of the premises, and an occupant is entitled to know the rules of the premises before moving in.

3. An occupant is entitled to have the occupancy agreement, and receipts for payment of any monies, in writing.

4. An occupant is entitled to quiet enjoyment of the premises.

5. A grantor is entitled to enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes.

6. An occupant is entitled to reasonable notice before the grantor increases the amount to be paid for the right to occupy the premises, and to know before moving in how much notice will be given.

7. An occupant is not liable to pay a penalty or fee for breach of any term of the agreement or any of the rules of the premises.

8. A grantor is entitled to charge for use of a utility, provided that the amount charged is determined according to the cost to the grantor of providing the utility and a reasonable measure or estimate of the occupant's use of the utility.

9. A grantor is entitled to require the payment of a bond equivalent to not more than two weeks' rent, and must lodge any bond monies with the Rental Bond Board.

10. An occupant is entitled to know why and how the occupancy may be terminated, including how much notice will be given before eviction.

11. An occupant must not be evicted without reasonable notice.

12. A grantor and occupant should try to resolve disputes using reasonable dispute resolution processes.

Recommendation

Enact legislation for occupancy agreements on the ACT model, incorporating the TU's proposed occupancy principles.

Further information

TU (2011) 'Occupancy agreements: a briefing paper'

TU (2011) 'Occupancy principles: a briefing paper'

2. Measures for more viable boarding houses

Boarding houses (in particular, 'unlicensed' boarding houses, as distinct from Licensed Residential Centres, which are discussed at Point 4) are a major provider of marginal rental accommodation. Boarding houses are important primarily because they provide accessible temporary accommodation, but for some marginal renters, boarding houses provide relatively affordable permanent accommodation.

Over a long period, the supply of boarding house accommodation in New South Wales has been in decline. Many traditional boarding house landlords have retired from the industry and boarding house properties have been converted to other uses, notably tourist accommodation and private residences.

Boarding houses can, however, operate as profitable businesses. According to modelling conducted by Hill PDA for its 2007 report, 'NSW DoH Boarding Accommodation Study' (the Hill PDA Report), this is particularly so where a boarding house is of sufficient scale and the operator takes advantage of a combination of the incentives available to existing and prospective investors in boarding houses. These incentives currently include:

- Land tax exemption. Boarding houses are eligible for exemption from land tax if more than 80 per cent of the accommodation provided is for long-term residents and rents are below certain thresholds.

- Boarding House Financial Assistance Program (BHFAP). This program, administered by Housing NSW, provides grants to boarding house landlords for fire safety work and, under an expansion of the program announced in November 2010, for the construction of new boarding houses or the addition of rooms to existing boarding houses.

- Council rate concessions. Under the *Local Government Act 1993*, boarding houses may be rated as residential, rather than commercial premises, if their tariffs are less than certain prescribed amounts, and councils may provide for further reductions in rates.

- Affordable Rental Housing State Environmental Planning Policy (ARHSEPP). This new SEPP was implemented in 2009 and provides, amongst other things, floor-space ratio bonuses for boarding house developments.

There appear, however, to be problems with the take-up of at least some of these incentives. Boarding house landlords surveyed in the Hill PDA report said the land tax exemption was the most important subsidy available to them but, strangely, only two-thirds said they claimed the exemption, complaining that the application process is difficult. Only 10 per cent of boarding house landlords in the Hill PDA report said they had used the BHFAP for fire safety upgrades – perhaps because of the narrow purpose of the program (that is, prior to its 2010 expansion) and the payment of grants as reimbursements in instalments over five years. In relation to council rate concessions, at present only Waverley Council further reduces rates for boarding houses.

Accordingly, the Hill PDA report recommends simplifying the land tax exemption; extending the BHFAP to include a suite of grants, loans and subsidies and reducing its administrative burdens; and providing more council rate rebates. It also recommends that the NSW State Government more pro-actively promote incentives to boarding house landlords, and to that end it recommends the establishment of a Register of boarding houses,

and the appointment of a 'Boarding House Champion' to promote awareness of boarding house issues within government.

The TU generally supports these recommendations, and propose that they might be further developed and strengthened in the following ways.

As noted, the BHFAP has recently been expanded to allow grants for new rooms and buildings. We support this expansion, and propose that there should be a five-year, $15 million boost to the BHFAP to pilot further expansions to the program. Under the BHFAP Boost, grants might be made to boarding house operators and other organisations for the following purposes:

- Grants to boarding house operators to help pay for upgrades that improve (non-fire) safety and accessibility; recurrent costs associated with fire and other safety upgrades, such as the cost of running checks on safety systems; and training courses for boarding house operators and employees, such as in first aid, mental health awareness and business management.

- Grants to local councils to reimburse rate reductions afforded to boarding house operators as part of a strategy by the council to retain strategically significant boarding houses.

- Grants to community housing organisations to purchase or headlease strategically significant boarding houses.

- Grants to community organisations to provide capacity-building programs or resources to boarding house operators, employees and residents.

Each of the expanded purposes of the BHFAP Boost should be reviewed and considered for inclusion in the BHFAP on a permanent basis.

We also propose that a Boarding Houses Register should be established, and its chief officer ('the Boarding Houses Registrar') should also be responsible for 'championing' the boarding house sector. In this role the Registrar would liaise with stakeholders in the boarding house sector to better inform the State Government and local councils as to the present state of the sector, and allow them to better plan and more readily promote incentives, services and other opportunities directly to boarding house landlords.

We also propose that, over time, the registration process should be developed into an accreditation process that requires registered boarding house landlords to show that their practices are sound (for example, they provide written occupancy agreements, per Point 1) and that they are maintaining relevant professional skills and qualifications (for example, current first aid certificates). Accreditation would be a measure of consumer protection for boarding house residents and an aid to viability: for example, accreditation may help decrease the cost of insurance for boarding house landlords. Responsibility for monitoring compliance with health and safety standards for boarding houses might also be transferred from local councils to the Registrar.

We also submit that the NSW State Government may need to work with boarding house landlords to get them sufficiently organised to take advantage of these incentives. We propose that the NSW State Government should provide business mentoring to boarding house landlords through Industry and Investment NSW's business mentoring program.

Finally, recognising that from time to time boarding house operators will seek to exit the sector, the NSW State Government should plan to provide a co-ordinated response to pending boarding house closures. We propose that there should be an 'Assistance Protocol for Boarding House Closures', along the lines of Housing NSW's 'Assistance Protocol for Residential Parks Closures', to co-ordinate the provision of information and assistance to boarding house residents who must find alternative accommodation because of a pending closure. The Protocol should also direct relevant agencies to consider whether a boarding house that is proposed to be closed might be suitable for acquisition by a community housing organisation under the BHFAP Boost.

Recommendations

- Expand the BHFAP with a five year, $15 million BHFAP Boost to make grants for additional purposes, including the recurrent costs of safety systems, reductions in rates by local councils for strategic significant boarding houses; and acquisitions of strategically significant boarding houses by community housing organisations.
- Establish a Boarding Houses Register to better plan and actively promote incentives and services.
- Develop the registration process into an accreditation process.
- Provide business mentoring for boarding house landlords.
- Establish an Assistance Protocol for Boarding House Closures, including a process for considering the possibility of acquisition under the BHFAP Boost.

Further information

Hill PDA (2007) 'NSW DoH boarding accommodation study'

3. Services to promote social inclusion in boarding houses

Many boarding house residents are socially isolated and excluded, because of unemployment, old age, lack of mobility, disability, mental illness, or institutionalisation. Many boarding house landlords, too, are at risk of isolation and exclusion: some are aged and need support themselves; some others have taken over the operation of a boarding house from an aged or deceased family member, have limited experience or knowledge of the sector and its clientele, and also need support.

There is currently no State-level program to promote social inclusion in 'unlicensed' boarding houses (as distinct from Licensed Residential Centres, as discussed at Point 4 of this paper). The Boarding House Outreach Program, which opened for tenders in November 2010, proposes to do this sort of work, but only in the City of Sydney, Canterbury, Leichhardt and Marrickville local government areas. Otherwise, when this work is done at all it is usually by community workers in local non-government organisations, such as community centres, in the course of their general operations or in an ad hoc way.

The benefits of providing services with a specific focus on boarding houses is demonstrated by Newtown Neighbourhood Centre's Boarding House Project. This project supports frail-aged and young persons with disability who live in unlicensed boarding houses in the Marrickville Local Government Area, connecting these persons with home care, health and other services. The project also provides opportunities for residents to participate in sport, music and art. An important factor in its success is the project's employment of dedicated boarding house workers and volunteers who know the local boarding houses and have come to be trusted by residents and landlords as a welcome source of support.

An important part of the Boarding House Project's work is convening the Boarding House Assistance Group (BHAG), an interagency group of local non-government social service providers. As well as helping to inform and co-ordinate members' delivery of services to boarding houses, BHAG organises regular forums for boarding house residents and landlords respectively.

BHAG's boarding house landlords' forums, in particular, are a real innovation, providing landlords with the opportunity to discuss ways to improve their own practices. The forums have also encouraged the establishment of helpful connections between landlords and local service providers.

At the State level, the NSW State Government should also conduct a review of programs for the provision of subsidies, rebates and other assistance to reduce the cost of living or hardship for eligible persons, and where possible ensure that boarding house residents are able to access assistance. For example, the Energy Accounts Payment Assistance (EAPA) scheme provides vouchers to persons in hardship to help pay energy bills – but they are not available to boarding house residents who pay their landlords for energy and do not have accounts with the energy suppliers in the scheme.

Recommendations

- Establish a Boarding Houses Social Inclusion Program to fund, in several locations throughout the State, local community organisations to employ community workers for dedicated work in boarding houses.
- Convene, as part of work under the program, local boarding house interagency groups, to facilitate communication and delivery of services.
- Review, and where possible ensure that boarding house residents are included in, programs for subsidies, rebates and other assistance that reduce the cost of living or hardship.

Further information

Newtown Neighbourhood Centre (2003) 'Opening these doors: Boarders and lodgers project report'

Leigh Connell & Carolyn Frost (2009) 'BHAG of support', *Parity*, vol 22 no 5

4. Appropriate housing and support for people with disability

The boarding house sector includes a small subsector of licensed residential centres (LRCs, sometimes called 'licensed boarding houses') that specifically house people with disability. Licensed residential centres are privately owned and operated for profit, and are licensed by NSW Ageing, Disability and Home Care (ADHC) under the *Youth and Community Services Act 1973*.

The LRC subsector first grew in response to the early phases of deinstitutionalisation in the 1970s and 1980s, which saw people with disability relocated from accommodation in asylums and hospitals – and, in many cases, the staff of these institutions re-employed as owners and staff of LRCs. For some years now, the LRC subsector has been in decline. There are presently just 31 LRCs in operation, and in total they provide accommodation for just under 700 persons.

In addition to ADHC's licensing regime, LRCs are also the subject of ADHC's Boarding House Reform Program (BHRP), which since 1998 has attempted to divert and relocate persons with high support needs away from LRCs to residential disability and aged care facilities, and to connect LRC residents to the wider community through the activities of NGOs funded under the Active Linking Initiative.

Despite the licensing regime and the BHRP, longstanding concerns about the quality of services provided by LRCs remain. Disability advocates report that many LRC residents pay more than 80 per cent of their incomes in rent and other charges to their landlords, and some residents are left with just $5 per week as 'comfort' money. Many LRCs provide shared bedrooms only, and some residents share 4-6 persons to a bedroom. The BHRP has not relocated all high-needs residents away from LRCs, and assessment of current residents' needs has not been repeated (so some residents initially assessed as having low needs might now have high needs). In the last 10 years, the NSW Ombudsman has twice investigated ADHC's licensing and monitoring of LRCs and found them deficient in numerous respects.

The recent implementation of a new Youth and Community Services Regulation 2010 has improved the legal enforceability of licence conditions, but fundamental problems remain. The licence conditions still do not adequately ensure that LRC residents may access support and advocacy services without retribution, and People With Disability (PWD), which delivers the Boarding House Advocacy Program under the BHRP, reports that its advocates have been prevented by some LRC managers from associating with residents. There also remains a conflict of interest in the licensing regime, because ADHC is responsible both for prosecuting breaches and cancelling licences, and for the cost of providing accommodation and services to residents where such action results in the closure of an LRC.

The TU believes that boarding house accommodation should be available to people with disability, like any other citizens, should they want or need it. However, LRCs, particularly where they house large numbers of people with disability, may end up like other congregated residential institutions for people with disability – segregated, isolating, and all too often abusive and exploitative. We also believe that people with disability in need of support or care should receive it as a matter of right – and that this right is compromised where the support or care is paid for from the pensions of low-income people with disability and delivered by private, for-profit landlords operating on an institutional model.

For these reasons, we believe that private, for-profit LRCs should not have a long-term place in strategies for the provision of appropriate housing and support for people with disability.

We propose that the BHRP should be amended with the express objective of closing private, for-profit LRCs by attrition, and providing accommodation and support for current LRC residents through funded, not-for-profit service providers.

While they continue to operate, LRCs should continue to be licensed and monitored for compliance, but under a reformed regime. As recommended by PWD in its 2010 report 'Rights Denied: towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairment', an Independent Quality Assurance Agency for Disability Services should be established to develop quality assurance resources, monitor compliance, prosecute breaches and cancel licences. There should also be provision for LRC residents and other stakeholders to seek review of licensing decisions, including by application to the Administrative Decisions Tribunal. Access to advocates without retribution should be ensured. Occupancy agreements in LRCs should include prescribed standard terms (see point 1) that are consistent with this regime.

As LRCs close, high-needs residents should be accommodated in ADHC-funded group homes, and other LRC residents accommodated in social housing with funded support, as provided by the Housing and Accommodation Support Initiative (HASI) of Housing NSW, NSW Health and their NGO partners. In some cases – in particular, where the closing LRC is a small property that does not congregate a large number of people of disability – it may be appropriate for a community housing organisation to acquire the property under the Boarding House Financial Assistance Program Boost (proposed at point 2), and for the residents to remain in place, with support delivered by funded service providers.

Recommendations

- Establish an Independent Quality Assurance Agency for Disability Services with responsibility for LRC licences.
- Allow LRC residents and other stakeholders to seek review of licensing decisions.
- Ensure LRC residents have access to advocates without retribution.
- Prescribe standard terms for LRC occupancy agreements.
- Plan for private, for-profit LRCs to close by attrition.
- Accommodate and support LRC residents in ADHC-funded group homes, or in social housing with support delivered by funded service providers – including in appropriately small ex-LRC properties acquired by community housing organisations under the BHFAP Boost.

Further information

PWD (2010) 'Rights denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairment'

NSW Ombudsman (2006) 'DADHC: Monitoring standards in boarding houses'

NSW Ombudsman (2004) 'DADHC: Investigation of the monitoring and enforcement of licensing conditions for residential centres for handicapped persons'

Allen Consulting Group (2003) 'Shared accommodation for people with a disability'

Four-point plan for reforming marginal renting: Summary of recommendations

1. Law reform to create 'occupancy agreements'

- Enact legislation for occupancy agreements on the ACT model, incorporating the TU's proposed occupancy principles.

2. Measures for more viable boarding houses

- Expand the BHFAP with a five year, $15 million BHFAP Boost to make grants for additional purposes, including the recurrent costs of safety systems, reductions in rates by local councils for strategic significant boarding houses; and acquisitions of strategically significant boarding houses by community housing organisations.
- Establish a Boarding Houses Register to better plan and actively promote incentives and services.
- Develop the registration process into an accreditation process.
- Provide business mentoring for boarding house landlords.
- Establish an Assistance Protocol for Boarding House Closures, including a process for considering the possibility of acquisition under the BHFAP Boost.

3. Services to promote social inclusion

- Establish a Boarding Houses Social Inclusion Program to fund, in several locations throughout the State, local community organisations to employ community workers for dedicated work in boarding houses.
- Convene, as part of work under the program, local boarding house interagency groups, to facilitate communication and delivery of services.
- Review, and where possible ensure that boarding house residents are included in, programs for subsidies, rebates and other assistance that reduce the cost of living or hardship.

4. Appropriate housing and support for people with disability

- Establish an Independent Quality Assurance Agency for Disability Services with responsibility for LRC licences.
- Allow LRC residents and other stakeholders to seek review of licensing decisions.
- Ensure LRC residents have access to advocates without retribution.
- Prescribe standard terms for LRC occupancy agreements.
- Plan for private, for-profit LRCs to close by attrition.
- Accommodate and support LRC residents in ADHC-funded group homes, or in social housing with support delivered by funded service providers – including in appropriately small ex-LRC properties acquired by community housing organisations under the BHFAP Boost.

Tenants' Union of New South Wales

Suite 201, 55 Holt Street
Surry Hills NSW 2010
phone 02 8117 3700
fax 02 8117 3777
ABN 88 984 223 164

Occupancy agreements

Law reform for marginal renters in New South Wales

Most New South Wales renters are covered by the *Residential Tenancies Act 2010* (NSW), which sets out important legal rights and obligations and provides effective dispute resolution through the Consumer, Trader and Tenancy Tribunal.

Some renters, however, are not covered by the *Residential Tenancies Act 2010* or any similar legislation. These marginal renters – including boarders, lodgers and many share house occupants – have no legislated rights in relation to their housing and no means of dispute resolution through the Tribunal. Instead, marginal renters must rely on the common law of contract for the terms of their rental agreements, and the Supreme Court for dispute resolution.

In practice, the law of New South Wales is of no use to marginal renters, who are some of the most vulnerable people in our community.

The TU proposes that New South Wales should implement new legislation for marginal renters. This model is based on legislation in the Australian Capital Territory for 'occupancy agreements' (*Residential Tenancies Amendment Act 2004* (ACT), Part 5A).

The elements of this new model of law reform are:
- broad application
- some basic, non-prescriptive legislated rights
- provision for the creation of standard terms by Regulation
- dispute resolution by the Tribunal.

Who are marginal renters?

Marginal renters are not covered by residential tenancies legislation and include:

- Boarders and lodgers
- Residents of Licensed Residential Centres
- Occupants of rooms in hotels, motels, pubs and backpacker hostels
- Occupants of crisis accommodation, refuges and supported accommodation
- Students in residential colleges
- Share house occupants excluded by s 10 of the *Residential Tenancies Act 2010*
- Occupants of caravans in residential parks excluded by cl 4 of the *Residential Parks Regulation 2006*

Some marginal renters' stories

B is a homeowner, but she and her children have left the home to escape B's violent partner. B cannot afford private rental, so now shares a room with her children in a small private hotel. B has raised concerns about the cleanliness of the shared bathroom and kitchen, and been told by the caretaker that if she does not like it, she and her children can leave.

*

C moved into a farming property as a lodger, on the understanding that he could have the room for $40 per week and doing some work on the property, and that most of the time he would have the place to himself. Subsequently C found that the landlord was always at the property, and the landlord, complaining that C did not do enough work, increased the rent to $90 per week. Tensions escalated; C and the landlord each applied for Apprehended Violence Orders; C suffered a recurrence of mental illness and was hospitalised. C now lives in his car.

*

D has lived in a boarding house in inner Sydney for 30 years, and is happy to call it home. The caretaker, however, has given D and the 14 other residents seven days notice to vacate, because the premises have been sold and the purchaser requires vacant possession (he intends to renovate and move in). Some of the residents, including D, are elderly; some suffer from mental illness. With the help of an advocate they negotiate for 30 days in which to find alternative accommodation.

The occupancy agreements model of law reform

This model of law reform creates a scheme of enforceable agreements for all renters not covered by current residential tenancies legislation, and a process for the creation of specific standard terms, each made according to the different conditions of the class of accommodation to which it applies.

Following the ACT legislation, we refer to this as the *occupancy agreements model*. Its elements are:

Broad application

In New South Wales, occupancy legislation would apply generally where a person contracts, for value, for a right to occupy premises as a residence and where the Residential Tenancies Act 2010 or similar legislation (such as the *Residential Parks Act 1998*, the *Retirement Villages Act 1999* and the *Landlord and Tenant Amendment Act 1948*) does not apply.

This avoids the inequity of some classes of persons being covered while other similar persons are not, and discourages landlords from manipulating definitional loopholes to escape coverage.

Some basic, non-prescriptive, legislated rights

Referred to as 'occupancy principles' in the ACT legislation, these basic provisions are deemed to be part of all occupancy agreements.

In contrast to the prescriptive approach taken in other residential tenancies legislation, by which specific notice periods and other details are fixed for all parties, these principles are less prescriptive.

Some of these occupancy principles are:

- the premises should be reasonably clean and in a reasonable state of repair;
- the landlord is entitled to enter the premises at a reasonable time and on reasonable grounds;
- an occupant is entitled to know the rules of the premises before moving in;
- the occupant is entitled to know how an agreement may be terminated, and to 'reasonable notice' of the termination.

In each case, what is 'reasonable' may depend on the circumstances of the agreement and the type of accommodation provided.

Provision for standard terms by Regulation

These standard terms would provide the detailed contents of agreements between parties, such as notice periods, grounds for termination and other matters not specified in the occupancy principles. This aspect of the model balances its broad application by allowing for different standard terms to apply to different sorts of accommodation. For example, one set of standard terms might be created for licensed residential centres, another for unlicensed lodging houses, and yet another set for student accommodation.

Dispute resolution by the Tribunal

This provision would afford both parties to an agreement the relatively cheap, quick and accessible dispute resolution processes of the Consumer, Trader and Tenancy Tribunal.

Some marginal renters' stories

E is an international student who rents a room in a house with four other international students. Each has an 'accommodation agreement' with the landlord, the terms of which include:

- a fee of $10 for each day rent is paid late;
- a fee of $10 each week if the student uses a heater;
- a fee of $20 if the student does not keep the premises clean;
- a requirement that students vacating during November and December give two months notice; and
- a provision that the rent may be adjusted 'from time to time' and 'at the accommodation provider's discretion.'

E's landlord advises, 'that's the way it's done here in Australia.'

*

F lives in a licensed boarding house for people with disability. The rent is 85 per cent of F's disability support pension, and after other service charges are subtracted F is left with $12.50 per week to spend as he wishes. F is concerned that the boarding house manager is not forwarding mail to residents, but is too scared to raise the matter personally. As he explained in a letter to an advocate, 'if they find out I wrote to you they could make things very hard for me and I'm in the process of leaving here… and they could try to find a reason to keep me here.'

The law in other States and Territories

New South Wales lags behind other Australian States and Territories, most of which have legislation that covers at least some marginal renters.

So, for example, the Queensland *Residential Tenancies and Rooming Accommodation Act 2008* has specific provisions for occupants of 'rooming accommodation', and the Victorian *Residential Tenancies Act 1998* has specific provisions for occupants of 'rooming houses'.

With the exception of the Australian Capital Territory, these jurisdictions have implemented a model of law reform that is similar to that of residential tenancies legislation: that is, a *prescribed regime* of rights and responsibilities, which applies to a *prescribed class* of residents, premises or agreements.

While law reform of this sort is better than none, there are problems with the model.

First, it tends towards the lowest common denominator, because it prescribes the same rights and responsibilities for everyone it covers.

Second, it is narrow: some marginal renters remain excluded from legislation.

Legislation for occupancy agreements, as implemented in the ACT, offers a better model of law reform.

The ACT legislation – positive signs

A positive sign of the benefits of the occupancy agreements model is the development of standard occupancy agreements for accommodation provided by Supported Accommodation Assistance Program (SAAP) services in the ACT.

Two sets of standard terms have been developed – one for overnight accommodation, the other for longer-term accommodation – by the SAAP sector in consultation with representatives of SAAP clients.

These two sets of standards terms are being 'road-tested' through use by SAAP services and their clients, before possible adoption as Regulations under the ACT legislation.

Reforming marginal renting: further information

For more on marginal renting, see:

- TU (2011) 'Reforming Marginal Renting: a Four Point Plan for Reform'.
- TU (2011) 'Occupancy Principles: a part of the "occupancy agreements" model of law reform'.

Chris Martin

Senior Policy Officer, Tenants' Union of NSW

(02) 8117 3700

Tenants' Union of New South Wales

Suite 201, 55 Holt Street
Surry Hills NSW 2010
phone 02 8117 3700
fax 02 8117 3777
ABN 88 984 223 164

Occupancy principles

A part of the 'occupancy agreements' model of law reform

'Occupancy principles' are part of the occupancy agreements model of law reform implemented by the Australian Capital Territory in its *Residential Tenancies Act 1997* (ACT). The TU believes that the model is a sound model of law reform for marginal renting in New South Wales.

Occupancy agreements are agreements that are not residential tenancy agreements and that would not otherwise be subject to residential tenancies legislation. Occupancy agreements include agreements for boarding and lodging, student accommodation and supported accommodation.

This discussion paper presents the occupancy principles, along with notations by the TU. For an introduction to the occupancy agreements model of law reform, see the TU's paper 'Occupancy Agreements: a model of law reform for marginal renting in New South Wales'. For more on marginal renting, see the TU's paper 'Reforming Marginal Renting: a Four Point Plan for Reform'.

Residential tenancy agreements and occupancy agreements

Like New South Wales, the Australian Capital Territory has a Residential Tenancies Act. Each Act takes a similar approach to dealing with residential tenancy agreements. The approach is prescriptive: a standard form of residential tenancy agreement is prescribed, as are most of the terms of residential tenancy agreements. The way in which rent may be increased is prescribed, including the amount of notice required and the way in which it is given. The ways in which residential tenancy agreements may be terminated are also prescribed, including the amount of notice required for grounds of termination, and the process for obtaining possession.

Unlike New South Wales, the Australian Capital Territory also has provisions relating to 'occupancy agreements' for renters who do not have residential tenancy agreements. These provisions include the *occupancy principles*, which are different from the provisions relating to residential tenancy agreements. The occupancy principles are less prescriptive and more modest than the provisions relating to residential tenancy agreements.

As a consequence, occupancy agreements are very different from residential tenancy agreements. Occupancy agreements are allowed much more variation than residential tenancy agreements. This is important, because there is greater variation between the sorts of housing services provided under occupancy agreements (for example, a students' residential college is very different from a domestic violence refuge).

The occupancy principles

There are nine occupancy principles set out at section 71E (1)(a)-(i) of the *Residential Tenancies Act 1997* (ACT). Under that Act, a person who agrees to occupy premises is called an 'occupant', and the person or corporation who grants them the right to occupy is called a 'grantor'. Each occupancy principle is reproduced below (in italics), and is followed by a comment by the TU.

(a) an occupant is entitled to live in premises that are—

(i) reasonably clean; and

(ii) in a reasonable state of repair; and

(iii) reasonably secure;

This is a basic entitlement. The use of the word 'reasonable' is consistent with the less prescriptive approach taken in the occupancy principles generally, because 'reasonable' does not imply an absolute standard. Instead, what is 'reasonable' will vary according to the circumstances in each case (*Bankstown Foundry v Braistina* (1986) 160 CLR 301). In relation to occupancy agreements, what is reasonable would vary according to the sort of housing service provided at the premises, the amount of rent paid, and other considerations. This principle is complemented by principle (e), which deals with a grantor's right to enter the premises in order to do repairs.

(b) an occupant is entitled to know the rules of the premises before moving in;

This principle acknowledges that many premises subject to occupancy agreements have 'house rules.' The principle does not prescribe what the rules may be – this is left to each grantor. All that is required is that the rules are consistent with the other occupancy principles and that the rules are known upfront. The principle affords a degree of fairness and helps avoid disputes.

(c) an occupant is entitled to the certainty of having the occupancy agreement in writing if the occupancy continues for longer than 6 weeks;

This principle tries to balance two interests. On the one hand, written occupancy agreements are beneficial both to occupants and to grantors, because they make clear the terms of the agreement and help avoid disputes. On the other hand, providing a written occupancy agreement might seem inconvenient where the housing service provided is short-term. The TU believes that the inconvenience of providing a written agreement is really very slight, and the benefits are such that it would be better to provide that an occupant is entitled to a written occupancy agreement at the commencement of the occupancy.

(d) an occupant is entitled to quiet enjoyment of the premises;

This is a basic entitlement. 'Quiet enjoyment' means that an occupant is entitled to reside at the premises free from interference and harassment from the grantor (it does not require that the premises should be free from noise). The TU suggests that 'quiet enjoyment' in relation to occupancy agreements is probably less strong than it is in relation to residential tenancy agreements, because here it is qualified by principle (b), which expressly allows for house rules. It is also qualified by principle (e), which deals with the grantor's right to enter and inspect the premises.

(e) a grantor is entitled to enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes;

This principle confirms a grantor's right to enter premises. The right is broad – the qualifications are that the purpose of entry is 'reasonable', and that the grantor may enter at a 'reasonable' time. As with principle (a), the TU suggests that what is 'reasonable' will depend on the sort of housing service provided at the premises, and other considerations. For example, it might be reasonable to enter at night to effect an urgent repair, and to enter only during the day to effect a non-urgent repair. The principle does not prescribe that an amount of notice should be given before the entry. It also qualifies the occupant's entitlement at principles (a) and (d).

(f) an occupant is entitled to 8 weeks notice before the grantor increases the amount to be paid for the right to occupy the premises;

It is appropriate that increases in rents or agreement fees should be addressed in the occupancy principles. This principle, however, is unusual because it specifies the amount of notice required – a departure from the non-prescriptive approach of the occupancy agreements model. The TU suggests that it may be more appropriate for the principle to instead state that an occupant is entitled to know, before moving in, how the rent under an occupancy agreement may be increased, including the amount of notice that is to be given, and that the amount of notice must be reasonable.

(g) an occupant is entitled to know why and how the occupancy may be terminated, including how much notice will be given before eviction;

This is a basic, and minimal, entitlement. The principle does not prescribe grounds for termination, nor does it prescribe the amount of notice required – this is left up to each grantor, subject to principle (h), below. Significantly, the principle does not

require that the grantor apply to the Tribunal for orders to terminate the occupancy agreement. An occupant who disputes the termination of their occupancy, however, may be able to use the dispute resolution provisions (see principle (i) and 'The occupancy principles in action', below) to determine whether the occupancy agreement should end.

(h) an occupant must not be evicted without reasonable notice;

This principle does not prescribe the amount of notice required. As with other uses of the word 'reasonable', what is reasonable notice of eviction will vary according to the circumstances of the agreement, including the sort of housing service provided at the premises, and the reasons for eviction.

(i) a grantor and occupant should try to resolve disputes using reasonable dispute resolution processes.

This principle encourages occupants and grantors to use reasonable dispute resolution processes, rather than entering into threats and self-help remedies that often end unhappily for both parties. The ACT Residential Tenancies Tribunal is available to resolve disputes arising from occupancy agreements (see below). Some grantors might also establish their own dispute resolution processes, though either party always has the option of taking their dispute to the Tribunal.

The occupancy principles in action

The occupancy principles work in two ways.

First, grantors must draft the terms of their occupancy agreements so as to reflect the occupancy principles. The non-prescriptive nature of the occupancy principles gives grantors considerable latitude in drafting terms to fit the sort of accommodation they offer. They just have to ensure that their occupancy agreements address basic rights (repairs and quiet enjoyment), inform occupants about things they are entitled to know (for example, house rules and notice periods for rent increases and termination), and provide for notice periods that are reasonable.

Second, the occupancy principles are applied to the resolution of disputes. Under the ACT's *Residential Tenancies Act 1997* (ACT), persons who are party to an occupancy agreement can apply to the ACT Residential Tenancies Tribunal to have a dispute about their occupancy agreement resolved (section 71I). The Tribunal must consider the occupancy principles in resolving the dispute, and can make a wide variety of orders to resolve a dispute (section 104). So, where there is a dispute and an occupancy agreement does not comply with the occupancy principles (for example, it does not provide for the right relating to repairs, or it provides for termination on unreasonably short notice), the Tribunal can make orders that give effect to the principles (for example, that repairs be done or that a certain reasonable period of notice should be given before termination takes effect).

The TU suggests that the Consumer, Trader and Tenancy Tribunal should have the same role in relation to occupancy agreements in New South Wales.

Is anything missing from the ACT's occupancy principles?

There are a number of areas of marginal renting practice that are not addressed in the ACT's occupancy principles. These include practices relating to penalty fees, charges for utilities, and bonds.

The TU believes that the occupancy agreements model would be improved if it addressed these things. Accordingly, we propose an additional three occupancy principles:

Penalty fees

> *An occupant is not liable to pay a penalty or fee for breach of any term of the agreement or any of the rules of the premises.*

Utility charges

> *A grantor is entitled to charge for use of a utility, provided that the amount charged is determined according to the cost to the grantor of providing the utility and a reasonable measure or estimate of the occupant's use of the utility.*

Bonds

> *A grantor is entitled to require the payment of a bond equivalent to not more than two weeks' rent, and must lodge any bond monies with the Rental Bond Board.*

Occupancy principles for New South Wales

The occupancy principles work by shaping the contents of occupancy agreements, and the way disputes about occupancy agreements are resolved. They do so in a modest and generally non-prescriptive way. They are part of a sound model of law reform for marginal renting in New South Wales.

The TU proposes the following 12 occupancy principles for New South Wales, based on the ACT's occupancy principles plus (at 7, 8 and 9) three new occupancy principles.

Occupancy principles

1. An occupant is entitled to live in premises that are—
    a. reasonably clean; and
    b. in a reasonable state of repair; and
    c. reasonably secure.

2. A grantor is entitled to set reasonable rules of the premises, and an occupant is entitled to know the rules of the premises before moving in.

3. An occupant is entitled to have the occupancy agreement, and receipts for payment of any monies, in writing.

4. An occupant is entitled to quiet enjoyment of the premises.

5. A grantor is entitled to enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes.

6. An occupant is entitled to reasonable notice before the grantor increases the amount to be paid for the right to occupy the premises, and to know before moving in how much notice will be given.

7. An occupant is not liable to pay a penalty or fee for breach of any term of the agreement or any of the rules of the premises.

8. A grantor is entitled to charge for use of a utility, provided that the amount charged is determined according to the cost to the grantor of providing the utility and a reasonable measure or estimate of the occupant's use of the utility.

9. A grantor is entitled to require the payment of a bond equivalent to not more than two weeks' rent, and must lodge any bond monies with the Rental Bond Board.

10. An occupant is entitled to know why and how the occupancy may be terminated, including how much notice will be given before eviction.

11. An occupant must not be evicted without reasonable notice.

12. A grantor and occupant should try to resolve disputes using reasonable dispute resolution processes.