



Briefing

Reform of the Residential Tenancies Act 1986 – Definition of landlord's or owner's family member

Date:	12 December 2019	Security level:	In Confidence
Priority:	High	Report number:	BRF19/20100460

Action sought

	Action sought	Deadline
Hon Kris Faafoi Associate Minister of Housing (Public Housing)	Agree to the proposed definition of landlord's or owner's family member for inclusion in the Residential Tenancies Amendment Bill.	By Monday 16 December
Hon Nanaia Mahuta Minister for Māori Development Associate Minister of Housing (Māori Housing)	For your information.	

Contact for discussion

Name	Position	Telephone	1 st contact
Claire Leadbetter	Manager, Tenures and Housing Quality	04 832 2431	s 9(2)(a) ✓
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Other agencies consulted

Te Puni Kōkiri, Ministry of Pacific Peoples, Ministry of Business, Innovation and Employment, Ministry of Justice, Oranga Tamariki

Minister's office to complete

- Noted
- Seen
- Approved
- Needs change
- Not seen by Minister
- Overtaken by events
- Declined
- Referred to (specify)

Comments

As discussed @ agency meeting

Date returned to MHUD:

17/12/19



Briefing

Reform of the Residential Tenancies Act 1986 – Modernising the definition of landlord's or owner's family member

For: Hon Kris Faafoi, Associate Minister of Housing (Public Housing)
Hon Nanaia Mahuta, Minister for Māori Development and Associate Minister of Housing (Māori Housing)

Date: 12 December 2019 **Security level:** In Confidence

Priority: Medium **Report number:** BRF19/20100460

Purpose

1. This briefing seeks your agreement to amendments to the definition in the Residential Tenancies Act 1986 (RTA) of “member of the landlord's or owner's family” to greater reflect the diverse concepts of family in New Zealand.

Executive Summary

2. Cabinet agreed to amend the RTA to improve security of tenure and to strengthen enforcement [SWC-19-MIN-0142]. The Cabinet paper notes that we will provide the Associate Minister of Housing (Public Housing) with advice on whether the definition of family member needs any modernisation.
3. The current definition in the RTA has a specific list, and a general ‘catch-all’ element of the definition. The catch-all appears wide, however, it is limited to a person who is related “by blood or marriage” to the landlord, owner or their partner.
4. The current definition:
 - a. does not reflect concepts of family in a number of cultures, including Māori and Pasifika cultures
 - b. is inconsistent in referring to spouses, civil union partners and de facto partners in one part, but solely to “marriage” in another part
 - c. may not include children who are not related to the landlord/owner or their partner who have been cared for in a family, but have since become adults
 - d. is complicated and confusing.
5. We have identified four options – use the current definition, remove the definition, amend the current definition or replace the current definition. We consider the best approach is to replace the current definition, while retaining one element of the current definition.
6. We propose replacing the current definition with the definition from the Family Violence Act 2018 (Family Violence Act):

family member, in relation to a person, means—

 - (a) *any other person who is or has been related to the person—*
 - (i) *by blood; or*
 - (ii) *by or through marriage, a civil union, or a de facto relationship; or*

(iii) by adoption:

(b) any other person who is a member of the person's whānau or other culturally recognised family group.

7. We also suggest including the following element from the current definition: "Any other child who is being cared for on a continuous basis by the landlord/owner or the landlord/owner's partner". This will ensure that different types of caregiving arrangements are included in the definition.

Recommended actions

8. It is recommended that you:

- a) **Note** that Cabinet has agreed to reform the Residential Tenancies Act 1986 and a Bill to implement the reform is currently being drafted.
- b) **Note** that Cabinet authorised you to make minor policy decisions on issues arising during the drafting process [SWC-19-MIN-0142].
- c) **Note** the definition of member of landlord's or owner's family does not reflect the diverse concepts of family in New Zealand, in particular, Māori and Pasifika concepts of family.
- d) **Agree** to replace the current definition of member of landlord's or owner's family with the definition of "family member" in the Family Violence Act 2018, with one additional element of "any other child who is being cared for on a continuous basis by the landlord/owner or the landlord/owner's partner".
- e) **Note** that, subject to your agreement, Parliamentary Counsel Office will incorporate these amendments in the draft Bill.

Noted

Noted

Noted

Agree / Disagree

Noted

C. D. Leadbetter

Claire Leadbetter
Manager, Tenures and Housing Quality

12/12/19



Hon Kris Faafoi
Associate Minister of Housing (Public Housing)

14/12/19

Cabinet has agreed to amendments to the Residential Tenancies Act 1986

9. On 30 September 2019, Cabinet agreed to amend the RTA to improve security of tenure and to strengthen enforcement [SWC-19-MIN-0142]. Amongst other changes, Cabinet agreed that the existing ground enabling a periodic tenancy to be terminated so that an owner or member of their family can be moved in is amended. Following the amendment, this ground will only be exercised in circumstances where the owner or family member intends to use the property as their principal place of residence for a minimum of 90 days.
10. During agency consultation on the draft Cabinet paper, Te Puni Kōkiri raised concerns about possible changes to narrow the definition of family member. The purpose of narrowing the definition was to address potential misuse of the termination ground. We did not propose narrowing the definition, as we considered that tenants would have sufficient protection from the minimum residence requirement, and from the new penalties for intentionally misusing this provision.
11. We agreed to continue to work with Te Puni Kōkiri. The Cabinet paper notes that we will provide the Associate Minister of Housing (Public Housing) with advice on whether the definition of family member needs any modernisation. Cabinet has authorised you as the Associate Minister of Housing (Public Housing) to make minor policy decisions on issues arising in the drafting process [SWC-19-MIN-0142].
12. We have been working with Parliamentary Counsel Office (PCO) to draft a Bill to implement the policy decisions. You are aiming to introduce the Bill in February 2020.

The definition of family member does not reflect the variety of families in New Zealand

The definition has changed little since introduction

13. Member of the landlord's or owner's family is defined in section 2(1) of the RTA as:
 - ...any of the following:*
 - a. *The landlord's or owner's spouse or civil union partner:*
 - b. *The landlord's or owner's de facto partner:*
 - c. *Any child of the landlord or owner or of any person referred to in paragraph (a) or (b):*
 - d. *Any other child who is being, or is to be, cared for on a continuous basis by the landlord or owner or any person referred to in paragraph (a) or (b):*
 - e. *Any parent of the landlord or owner or of any person referred to in paragraph (a) or (b):*
 - f. *Any other person who is related (whether by blood or marriage) to the landlord or owner or to any person referred to in paragraph (a) or (b) and is residing, or is to reside, in the landlord or owner's premises in accordance with an arrangement between that person and the landlord or the owner of a predominantly domestic or family nature rather than a predominantly commercial nature.*
14. Parliament has previously amended the definition as follows:
 - a. the Residential Tenancies Amendment Act 2010 included owners as well as landlords.
 - b. the Relationships (Statutory References) Act 2005 included references to civil union partners and updated references to de facto partners.

15. The definition of family member includes:
 - a. the landlord's or owner's partner,¹
 - b. their children or their parents (or their partner's children or parents),
 - c. or any child that is being cared for on a continuous basis by the landlord/owner or the landlord/owner's partner.
16. The final part of the definition is fairly wide, as it refers to any other person who is related to the landlord, owner or their partner. However, it is limited to a person who is related "by blood or marriage" to the landlord, owner or their partner.

The definition is used in several contexts in the Residential Tenancies Act 1986

17. The definition of landlord's or owner's family is important. It is used in three contexts in the RTA:
 - a. The grounds for termination discussed above – when the landlord, owner or their family needs the property as their residence.
 - b. The RTA does not apply where the premises continue to be used during the tenancy principally as a residence by the landlord, owner or by any member of the landlord's or owner's family (section 5).
 - c. The Tribunal can make an order terminating the tenancy if the tenant has assaulted or threaten to assault various people, including any member of the landlord's or owner's family (section 55).
18. The tenancy market is a closed system. Therefore, if a change benefits one party, it will usually disadvantage the other party. If the definition is widened, this favours landlords by widening the circumstances in which they can use the grounds for termination or rely on the exemption to the RTA noted above. Any change must be assessed for the potential impact on both landlords and tenants.

The definition does not reflect the different concepts of family and whānau in New Zealand

19. The current definition:
 - a. does not reflect concepts of family in a number of cultures, including Māori and Pasifika cultures
 - b. is inconsistent in referring to spouses, civil union partners and de facto partners in paragraphs (a) and (b), but solely to "marriage" in paragraph (f)
 - c. may not include children who are not related to the landlord/owner or their partner who have been cared for in a family, but have since become adults
 - d. is complicated and confusing.

¹ Whether a spouse, civil union partner or de facto partner.

20. A view of whānau according to te ao Māori is based on interconnecting obligations and relationships. A whānau is more than a nuclear family of parent/s and their children. While whānau often share whakapapa, whānau includes whāngai children. Whāngai usually involves a child being raised by its whānau or extended family (although a child can also be raised by someone unrelated). This arrangement can be short-term, long-term or permanent. Whāngai is an informal process and is arranged between the birth parents and the mātua whāngai (the family who will raise the child).
21. Paragraph (d) of the current definition includes any child who is being, or is to be, cared for on a continuous basis by the landlord or owner or their partner. This would include whāngai children while they are minors. However, when they are adult, they will no longer be a “child” and will not require care so will not fit under paragraph (d). Because they are not related by blood or marriage, they will not be included under paragraph (f). We understand that people would consider they still have family obligations to a whāngai child when adult.
22. The requirement in paragraph (f) that a relationship must be by blood or marriage distinguishes between family on the basis of marital status. An example of this in practice is that the current definition could include a landlord’s brother’s wife or husband, but not a landlord’s brother’s de facto partner. This different treatment on the basis of marital status may amount to discrimination on a prohibited ground under the Human Rights Act 1993.
23. The definition is also difficult to navigate, with references in paragraphs (c) – (f) referring back to paragraphs (a) and (b). We consider the definition could be made more simple.

It is unclear how many landlords are affected by this definition

24. We do not have information on how many landlords may have whāngai children, or the marital status of their family members.
25. A recent survey by BRANZ² provides some indication of the ethnicity of landlords in New Zealand. In that survey:
 - a. four percent were Māori
 - b. one percent were Samoan
 - c. one percent were Tongan
 - d. one percent were other Pacific ethnicities
 - e. four percent were Indian
 - f. three percent were Chinese, and
 - g. one percent were other Asian ethnicities.
26. This indicates that Māori and Pasifika are a small percentage of landlords, with slightly more landlords of Asian/Indian descent. However, the survey had a small sample size of 406 landlords and may not be representative.

We propose replacing the definition to modernise it

We have identified four options

27. We have identified four options: use the current definition, remove the definition, amend the current definition or replace the current definition. We consider the best approach is to replace the current definition (with one element of the current definition).

² BRANZ, New Zealand Rental Sector Survey, 2017.

28. We have considered and rejected the following options:
- a. Removing the definition altogether. The RTA would still need to refer to family even though the term would be undefined, which would create considerable uncertainty for landlords and tenants. Landlords may see the removal of the definition to indicate the term family is extremely wide, which undermines the purpose of the provisions. Without a definition, it is likely that the meaning of the term “family” would develop over time in Tenancy Tribunal decisions. If landlords and tenants wanted clarity, they could increase the number of cases being taken to the Tribunal.
 - b. The status quo. The current definition does not reflect the different concepts of family and whānau in New Zealand. While the proposed amendments widen the definition, we consider the amendments ensure the definition is fit for purpose. The potential impacts on tenants are justified to ensure that the diverse concepts of New Zealand families are included.

We propose replacing the definition

We consider the definition in the Family Violence Act 2018 has many advantages

29. As noted above, we considered making amendments to the definition, while maintaining its current structure. This would provide familiarity for those who already rely on the definition. However, the definition is confusing to navigate, with the specific elements, then an apparently wide element. Adding further complexity would make it difficult for landlords and tenants to understand when it applies.
30. Instead, we propose replacing the definition with a more modern definition of family member, with one addition. We propose the definition from the Family Violence Act:

family member, in relation to a person, means—

(a) any other person who is or has been related to the person—

(i) by blood; or

(ii) by or through marriage, a civil union, or a de facto relationship; or

(iii) by adoption;

(b) any other person who is a member of the person’s whānau or other culturally recognised family group.

31. This definition has the following advantages:
- a. It includes “whānau”, which brings in Māori and Pasifika cultural understandings of familial relationships, such as whāngai.
 - b. It includes “other culturally recognised family group”, which ensures that other cultural understandings of family can be included, for example, from Pasifika or Asian cultures.
 - c. It refers equally to civil unions, de facto relationships as to marriage. This is consistent with the Human Rights Act 1993 and New Zealand Bill of Rights Act 1990.
 - d. It is less confusing than the current definition.

We proposed to include one element from the current definition in the new definition

32. We consider that the proposed definition captures most of the elements of the current definition. We note that the wording does not map exactly. However, legal commentary on interpretation of “family member of partner” indicate the courts have held that each partner is a “family member”, through the other partner, of any person who is related to the other partner by blood, marriage or adoption. In other words, the family members of a partner become the other partner’s family.
33. An element of the current definition that may be missing from the proposed definition is: “Any other child who is being cared for on a continuous basis by the landlord/owner or the

landlord/owner's partner". While the proposed definition as it stands would certainly include whāngai, it may not include children who are cared for through caregiving arrangements such as permanent care (Home for Life). We suggest this element of the current definition is carried over into the proposed definition to ensure these children continue to be included.

34. However, we note that a person who fits under the "continuous care" provision may not be included when they are adult, as they will no longer be a "child" and will not require care. This is subject to an existing mechanism for children in Oranga Tamariki care to live with a caregiver up until they are 21 years. Under both the current and proposed definitions, a landlord could terminate a tenancy in order for a young person in their care who has exercised this entitlement to move in.
35. The definition in the Family Violence Act is similar to other definitions of family member in recent legislation, such as in the Harassment Act 1997 and the Oranga Tamariki Act 1989. In addition, the reference to "whānau or other culturally recognised family group" is also used in the Coroners Act 2006, the Sentencing Act 2002 and the Human Tissue Act 2008.

Risks of the proposed definition

36. Changing the definition presents some risks. The definition is being widened. As noted above, increasing landlords' rights will impact on tenants. There may potentially be more terminations of tenancies on this ground than there are currently. Given that we consider that the new definition is appropriate to reflect modern New Zealand families, an increase in terminations is not a concern in itself. It may indicate the new definition is now including all family members.
37. With any new legislation, there is a period of uncertainty while people work out what it means in practice. The terms "member of the person's whānau or other culturally recognised family group" may in particular create some uncertainty. Over time, this uncertainty will reduce through the development of understanding by the Tenancy Tribunal. Parties could also consider how these phrases have been interpreted in other legislation for guidance.
38. We would be concerned if landlords used the new definition to "stretch" it beyond the intended reach. For example, paragraph (a) does not set out how close the relationship must be. In addition, the phrase "culturally recognised family group" could be manipulated. If a landlord and tenant did not share the same culture, it could be difficult for the tenant to know what the landlord's culture considers to be a family member.
39. We recognise these risks, but consider the benefits of the new definition outweigh the risks. The initial uncertainty about the definition can be partially mitigated through providing guidance from other legislation, or from the Tenancy Tribunal decisions, as they are made. While it may be difficult for a tenant to confirm if someone is a member of a culturally recognised family group, this could be tested at the Tenancy Tribunal. As decisions are reported, the Regulator could provide information about how that aspect of the definition develops.
40. In respect of a landlord who "stretches" the definition, it will be an unlawful act to intentionally misuse the termination grounds. This will include a landlord or owner who is presenting someone as a family member who is not actually a family member.

Overall, the proposed amendments are an improvement on the status quo

41. The following table is a brief assessment of how these amendments compare to the status quo. The proposed amendments are measured against the criteria set out in the Regulatory Impact Assessment for the Cabinet paper *Reform of the Residential Tenancies Act 1986: Improving Fairness in the Act* [SWC-19-SUB-0142 refers].

Criteria	Proposed amendments compared to status quo
Effectiveness (improve security of tenure and maintain protection of landlord interest)	Improved – protects landlords'/owners' interests by ensuring that the people considered to be family members by the landlord/owner or their cultural group <i>are</i> included. Ensures equal treatment, regardless of marital status. Ensuring that landlords have the ability to terminate tenancies for legitimate reasons balances their property rights with tenant's security of tenure.
Efficiency	Somewhat improved – landlords/owners will be clearer about whether a particular person fits in the definition of family/whānau. This will reduce administrative burden on landlords/owners. Unchanged - for tenants, clarity depends on if they know a landlord/owner's particular family situation.
Certainty	Somewhat improved – landlords/owners will be clearer about whether a particular person fits in the definition of family/whānau. Clarity may not improve for tenants, if they do not know a landlord/owner's particular family situation.
Proportionality	Unchanged – the amendments are intended so that the definition reflects the different forms of families in New Zealand. While the amendments would broaden the definition, the definition still relates to family members (rather than, for example, friends). This is proportional, especially as the definition is part of one of the termination grounds, used to balance against the removal of no cause terminations.
Flexibility	Unchanged – the amendments should be flexible in either a “hot” or “cool” market. There may be concern that a landlord or owner could use the amendments to “stretch” the definition in hot markets. However, other elements of the proposals mean this is unlikely: the requirement that the person will live in the property for a minimum of 90 days, and the introduction of an unlawful act for an intentional misuse of termination grounds.
Fairness	Somewhat improved – current definition is unfair to landlords/owners who have obligations to family members, but consider they may not fall within the current definition. The proposals seek to improve this. However, the proposed definition may allow for landlords/owners to use it in situations where the person proposed to be a family member is not.

Consultation

42. This briefing has been prepared in consultation with Te Puni Kōkiri, the Ministry for Pacific Peoples, Oranga Tamariki, the Ministry of Business, Innovation and Employment (Housing and Tenancy Services) and the Ministry of Justice (Civil Law and Human Rights team).

Next steps

43. If you agree to the proposed amendments to the definition of landlord's or owner's family, we will issue drafting instructions to PCO to implement the amendments in the Bill currently being drafted.