'Bedroom tax': an update on challenges

The ‘social sector under-occupancy charge’, the ‘bedroom tax’ or the ‘removal of the spare room subsidy’ – whatever you call it, it has made headlines for many reasons since its introduction in April 2013. Fiona Seymour considers the issues it raises and highlights the ongoing challenges.

In April 2013, the government introduced new regulations for calculating HB in social housing, similar to the LHA size criteria for the private rented sector.1

The changes applied to accommodation let by a local authority, registered housing association or other registered provider to those claimants of working age, although there were some exemptions (e.g. for shared ownership properties or supported ‘exempt’ accommodation).

The regulations state that claimants found to have more bedrooms than they are entitled to under the size criteria rules (calculated in a similar way to the LHA rules for the private sector) have a percentage deduction applied to their eligible rent when HB is calculated. This is:

- 14% if they have one spare bedroom; and
- 25% if they have two or more spare bedrooms.

The charge applied from April 2013 to all new and existing claimants. There was no transitional protection.

Since its introduction there have been, and continue to be, many challenges to the charge and it is important for advisers to keep up to date with current developments. At the time of writing there had been no Upper Tribunal decisions on any of these issues, but that will not be the case for long.

Bedroom size

The legislation does not define what is meant by a bedroom. There is no definition of a minimum bedroom size set out in regulations, and government guidance to local authorities initially stated it would be up to the landlords to accurately describe the property in line with the tenancy agreement.2

However, there have been decisions at the First Tier Tribunal3 that have decided that ‘bedrooms’ should not be classed as such if the size was smaller than that used when determining if a household was overcrowded for the purposes of housing under Section 326 Housing Act 1985 (i.e. less than 70 sq ft for an adult, or 50 sq ft for a child).

As one of the main reasons for introducing the charge was to free up accommodation for larger families, it would be inconsistent with that policy if such a family could not be re-housed in that accommodation anyway if it would be regarded as too small. However, care needs to be taken if a claimant is requesting that the statutory overcrowding provisions should be relied on to determine bedroom size for HB, as the overcrowding provisions also specifically allow for a living room to be treated as a bedroom.

Decisions of the First Tier Tribunal are not binding so cannot be relied upon in subsequent First Tier Tribunals (but of course, there is nothing to prevent a claimant from making the same argument and hoping their First Tier Tribunal arrives at the same conclusion). DWP have said they will appeal any such decisions4 so, even if claimants are successful, it is likely the case will be taken to the Upper Tribunal (in which case the decision of the First Tier Tribunal will not be implemented until the outcome of
the Upper Tribunal appeal is known).

DWP guidance to local authorities states that the only criteria that local authorities should consider is how the property is classified by the landlord. But if the ‘bedroom’ is not large enough to hold a single bed, then the landlord should re-assess whether that room should be classed as a bedroom.5

Bedroom usage
As there is no definition of a bedroom within regulations, there have also been successful challenges at First Tier Tribunal6 from claimants seeking to argue that the ‘bedroom’ has in fact never been used as such and so should not count as one when deciding the size criteria (e.g. if it is used as a dining room where there is no other room to eat in).

DWP guidance again states that if a landlord classes a property as having a certain number of bedrooms then that is the size which is used ‘notwithstanding that the tenant may argue that it has been habitually used for something else’.7

There have been Upper Tribunal decisions on the meaning of ‘bedroom’ under the LHA regulations when considering the case of an overnight carer. CH/140/2013 held that if a room could be used for sleeping in (in this case, a folding bed in the lounge) then it did count as a bedroom for the carer. And, in CH/1940/2012, the Upper Tribunal held that if a room could not be and was not used for sleeping in then it was unlikely it could be classed as a bedroom for an overnight carer. However, care needs to be taken when trying to rely on these decisions for the under-occupancy charge, as they were decided in the different context of additional bedrooms for overnight carers.

Shared care of children
The size criteria rules allow for a bedroom in respect of each person who ‘occupies’ the property. Claimants who have ‘shared care’ of their children will find that they are not entitled to a bedroom in respect of the child, unless they are the recipient of Child Benefit.

Case law has consistently upheld such a principle, with any discrimination found to be justified on the grounds of administrative convenience and a reasonable assertion that the state should not make double provision for children.8 However, the campaign group ‘Liberty’ have now been granted permission for a judicial review of this issue9 so claimants in similar positions may still wish to submit challenges even though such appeals will almost certainly be stayed pending the outcome of the judicial review.

Pre-1996 claims
Claimants who had lived at the same address (apart from any period when a fire, flood, explosion or natural catastrophe rendered the property uninhabitable), and been in receipt of Housing Benefit, since 1 January 1996 (although some breaks in entitlement are allowed10) should not initially have been subject to the under-occupancy charge when it was introduced in April 2013.

Any claimants who are covered by this provision, and were wrongly subject to the charge from April 2013, should request a revision of that decision. This can be done at any time as the decision contained an ‘official error’.

However, the government later stated that they had never intended this to be the case and so passed amending legislation to make such claimants subject to the charge from 3 March 2014.11 Claimants who may have had discretionary housing payments (DHPs) in the meantime cannot have any HB arrears due to them being reduced to pay these back. However, local authorities may decide to try and recover the DHP by other means if they feel the conditions for recovery are satisfied (i.e. that ‘an error has been made when determining the application for a payment’12).

Disability issues
The size criteria requires two children of the same sex, under the age of 16, to share a bedroom (or two children of either sex under the age of 10). The government had previously accepted a decision of the Court of Appeal in relation to similar rules under the LHA scheme (the ‘Gorry’ case), which held that an extra room could be allowed if a child was unable to share a bedroom due to their disability13 and later legislated to provide for this in the social sector size criteria.14

However, the legislation states that this only applies to children who are entitled to the care component of DLA at the highest or middle rate and the local authority are satisfied that they are not reasonably able to share a bedroom with another child by virtue of their disability. It is
arguable that this is too strict an interpretation of ‘disability’ as there may well be children who are unable to share a bedroom due to disability, but nonetheless do not meet the criteria for a relevant award of DLA.

A report from the Social Security Advisory Committee recommended extension of the definition but this was rejected by the government who responded by stating that discretionary housing payments were available to those children who would otherwise not meet the criteria outlined in the legislation.

It remains open for advisers to challenge decisions which refuse to allow an extra bedroom if the child does not receive middle/high rate care, and argue that the regulation discriminates against disabled children whose disability means they are unable to share a bedroom but who do not receive DLA at the appropriate rate.

However, the legislation in any event only applies to children who are unable to share a bedroom, and not, for example to disabled couples who cannot share a room to disability. A challenge to this was heard by the Court of Appeal in February 2014 in the case of ‘MA’ but was ultimately unsuccessful. The claimants here had argued that they were unable to share a bedroom as a couple due to disability but the Court found that the ‘Gorry’ discrimination (which was accepted in the case of disabled children) did not apply to disabled adults, and the state was entitled to treat children in a more favourable way.

A wider argument was also heard by the Court at the same time (and also dismissed) that the size criteria in general was discriminatory to all disabled people. The Court held that this was too wide a group to use for arguing discrimination and the provision of discretionary housing payments was, in any event, sufficient. The claimants in the Court of Appeal case have now applied for permission to appeal to the Supreme Court, so challenges can still continue under the grounds of disability discrimination (including, for example, where the spare room is used to store disability equipment). Again, any appeals will likely be stayed pending the outcome of the Supreme Court case.

Other cases include a judicial review recently taken by Child Poverty Action Group in the case of ‘Rutherford’ 17. This case argued that the current provision of an extra room for an overnight carer for the HB claimant (or their partner) should be extended to cases where there is a need for an overnight carer of a child in the household (especially since the Court of Appeal decision in ‘MA’ which held that the state was entitled to treat children more favourably than adults). However, this challenge was also unsuccessful, with the courts again holding that DHPs were available. It is expected, however, that the claimants will appeal further.

**Discretionary housing payments**

For claimants affected by the under-occupancy charge, there is always the option of claiming discretionary housing payments to make up the shortfall between HB and rent.

The Government had provided additional funds to the DHP budget in respect of the under-occupancy charge and guidance states that disabled people should be given priority in DHPs, especially if their home has been adapted for their disability and it would be difficult for them to move. 18

The comments in the cases of ‘MA’ and ‘Rutherford’ (see above) would seem to reinforce such arguments. If local authorities refuse DHPs due to the claimants income from DLA (for example), this may well be challengeable by way of judicial review. 19

---

**FOOTNOTES**

1. SI 2012 No.3040
2. HB/CTB A4/2012
3. You can see further details of the First Tier Tribunal decisions on the ‘Nearly Legal’ website at http://nearlylegal.co.uk/blog/bedroom-tax-ftt-decisions/
4. HB U6/2013
5. ibid.
6. see note 3 above
7. see note 4 above
8. R v Swale BC HBRB ex p Marchant; CH/1608/09; CH/3000/09; CH/1926/2012 and Humphreys v HMRC [2010] EWCA Civ 56
10. Sch 3 para 4 SI 2006 No.217
11. SI 2014 No. 212
14. SI 2013 No.2828
15. http://tinyurl.com/n5tqbkq
16. MA & others v SSWP [2014] EWCA Civ 13
17. Rutherford & others v SSWP [2014] EWHC 1613
18. DHP Guidance Manual, April 2013
19. see para 45 Burnip, Trengrove & Gorry v SSWP [2012] EWCA Civ 629 and http://tinyurl.com/n8syvj4

**Fiona Seymour works for Citizens Advice Specialist Support and is a member of the Adviser editorial board.**