

Submission to the consultation on Protections for Residents of Long Term Supported Group Accommodation in NSW

March 2018

Background

Our submission is informed by our extensive work in relation to people with disability and disability services over the past 16 years – particularly in relation to people with disability living in supported group accommodation. Among other things, relevant work by our office includes:

- receiving and resolving complaints about disability services, and assisting people with disability to make complaints
- reviewing the causes and patterns of the deaths of people with disability in residential care
- coordinating the Official Community Visitor scheme
- operating the Disability Reportable Incidents scheme
- inquiring into major issues affecting people with disability and disability services – including the transfer of ADHC accommodation services to the non-government sector in relation to people with complex support needs, and
- conducting rights-based workshops and training for people with disability and their supporters to enhance their capacity to speak up in relation to matters that affect them.

We appreciate the opportunity to comment on the proposal to legislate resident rights and protections for people with disability renting in long term supported group accommodation. We note that the proposal outlined in the Technical Issues Paper on *Protection for Residents of Long Term Supported Group Accommodation in NSW* seeks to address an important gap in the suite of legislative provisions for safeguarding the rights of people with disability.

We are aware that the efforts of NSW in this regard reflect similar actions in other states to review and enhance the rights of people with disability who are residents in supported accommodation environments, ahead of the implementation of the NDIS. In particular, we note the steps taken in Victoria to review the existing protections for people living in specialist disability accommodation in its *Disability Act 2006*. While the NDIS operational framework provides some safeguards for residents, we welcome the more comprehensive formalising of residential rights in the proposal.

Statement of principles

Noting that the principles underpinning the proposal are those of the Disability Inclusion Act (s4-6) and the NDIS Act (s4), there would be benefit in the legislation making specific reference to those principles.

Understanding and signing accommodation agreements

It is important that comprehensive measures are taken to maximise the potential for residents to understand their rights, as well as the purpose and conditions of the accommodation agreements. In particular, we believe that there is a need to ensure that:

- agreements are accessible to people with disability, including easy read options, and

- residents have access to independent decision supports, to assist them to make informed decisions about whether to enter into agreements.

We note that the provision of decision supports has the additional benefit of potentially curtailing the otherwise likely increase in applications to the NSW Civil and Administrative Tribunal (NCAT) for the appointment of financial managers to sign agreements on behalf of residents, and the associated resourcing impost on the Tribunal and NSW Trustee and Guardian.

More broadly, it is critical that the introduction of any legislation or other protections for residents of supported group accommodation is accompanied by comprehensive and ongoing education and support for residents and their supporters to enable them to understand and promote the residents' rights.

Termination by accommodation provider

While we consider that there are clear advantages in setting out the rights and responsibilities of residents, the introduction of legislated rights and accommodation agreements constitutes a shift from an expectation that residents would receive secure long term accommodation, to a situation where residency is less secure.

The proposed provision allowing accommodation providers to terminate tenancies presents risks to residents – particularly those with behaviours of concern. In particular, we are concerned about the ability of providers to apply a shorter 30-day notice period in circumstances where a resident 'Cannot be supported at the property without causing serious risk to staff or other occupants'. In this regard, there is a significant risk that people with complex support needs, particularly those with complex behaviour support needs, may be evicted due to:

- actions or behaviours they may not intend or are unable to regulate
- behaviours triggered by, or resulting from, inadequate and/or inappropriate support, or other actions of providers, and
- a lack of, or delays in obtaining, comprehensive behaviour support.

While we appreciate the need to be able to take action to protect residents from harm, including abuse by other residents, we consider that there is a need to enhance safeguards to minimise the risk of unfair eviction.

In its submission to the *Rights in Specialist Disability Accommodation Review* in July 2017, the Office of the Public Advocate (OPA) in Victoria proposed strengthening safeguards through a process that would require the accommodation provider to notify a number of external parties of its intention to issue a notice for temporary relocation or to vacate – including the Senior Practitioner, the Public Advocate, the NDIA, and the person's decision supports or substitute decision-maker. The notification would then trigger a review of the resident's NDIS plan and behaviour support plan, and facilitate referral to advocacy support and an application for formal guardianship arrangements, if necessary.

OPA's submission recognises the importance of early intervention to address factors that may place a person's residency at risk. It also recognises the importance of

bringing in external parties to facilitate or provide critical interventions, and to ensure due process is followed.

In our view, the core elements of OPA's proposal warrant consideration to strengthen the protections for residents with disability against unfair evictions in NSW. In particular, we believe there is a need to include processes that involve a requirement on accommodation providers to notify the following parties of an intention to terminate an accommodation agreement:

- the Supported Independent Living (SIL) provider
- the NDIA¹
- the support coordinator
- the NDIS Quality and Safeguards Commission, and
- the person's decision support/guardian (if applicable).

Involvement of the above parties – working with the resident – would enable early action to be taken to:

- review the current circumstances and living and support arrangements to identify any modifiable reasons for the intended termination
- identify actions that are required to seek to resolve the situation and maintain the tenancy (such as a review of the NDIS plan, enhanced staffing, clinical intervention)
- implement additional and/or changed supports, and
- oversight and monitor the process to ensure that appropriate actions are taken to uphold the resident's rights.

On a separate but related note, we support the proposed inclusion of a requirement that the accommodation provider must apply to the Tribunal for termination if the resident is in hospital or detention. It is important that residents in these circumstances have protections against eviction, to help to maintain their tenancy and to minimise the potential that they will be released or discharged into homelessness or have to remain in custody or hospital due to a lack of community-based supported accommodation options.

NCAT's role in protecting resident rights

We note that the proposal allows a resident to appeal a termination notice made by the accommodation provider to NCAT. While this does provide an important safeguard for residents, it is heavily reliant on a resident having the awareness, ability, and support to lodge an appeal to the Tribunal.

In this context, we believe there is need to enhance NCAT's role in considering requests to terminate residencies in supported group accommodation. It should have a broad discretion to consider matters, seek solutions from parties to assist residents to maintain their tenancy, and be able to make orders to stop termination of accommodation agreements. In addition, there might be benefit in requiring mediation of matters before they proceed to a formal hearing. This could maximise

¹ For residents in the Continuity of Support program, the Commonwealth Department of Health would need to be notified instead of the NDIA.

the opportunity for early resolution of the issues that placed the tenancy in jeopardy, and minimise the potentially distressing experience of a formal hearing.

There is also a need to ensure that NCAT hearings support the full participation of people with disability. Consideration should be given to requiring hearings to be conducted in a manner similar to those of the Guardianship Division, including:

- by panels that include members with disability expertise
- in as informal an environment and manner as possible, and
- providing sufficient time to work through the issues, hear all relevant evidence, and enable residents and their supporters to understand the process and be heard.

In our view, there would also be merit in facilitating appropriate legal representation for residents, consistent with the approach by the Mental Health Review Tribunal.

Responsibility for property damage

Residents of supported group accommodation may exhibit behaviours that result in damage to property. The damage inflicted by the resident would not always be caused intentionally or knowingly, and the reasons for their actions may be complex, and linked to the actions or inactions of support providers. As a result, there is a risk that residents may be unfairly charged for the cost of damage in circumstances where:

- they may have no understanding of their actions
- they are unable to regulate their behaviour or have complex behaviour support needs
- there has been inadequate and/or inappropriate behaviour support, and
- the actions or inactions of support providers have directly contributed to the behaviour that resulted in the damage.

In our opinion, there would be merit in the legislation articulating those conditions under which residents may be personally liable for damages. Given the complex interplay between the actions of residents and other factors, including support provision, it will also be important to ensure that any claims by accommodation providers for damages are only made following a review of the circumstances by an independent party. Residents and their supporters should also be able to bring such matters to NCAT for an independent hearing.

Modifications to the property

We welcome the position in the proposed policy that an accommodation provider must not unreasonably withhold consent to a fixture or alteration that increases the accessibility of the home for the resident, or which is specified and funded in the resident's NDIS plan as a reasonable and necessary support. We also support the provision for residents and their supporters to apply to the Tribunal, where necessary, to make orders for the accommodation provider to install the fixture or make the alteration.

However, we do not support the inclusion in the proposed policy that the accommodation provider may require the resident to remove the fixture, at the resident's cost, when they vacate the premises. In this regard, we note that the NDIS does not fund removal of equipment; the equipment or modifications may be appropriate for another resident who wishes to reside in the accommodation; and it is likely that many residents would not have the capability or resources to arrange the removal of the fixture.

Other issues

Bond

We do not support the proposed inclusion of bonds in the accommodation agreements. It is not clear to us why the imposing a bond on residents would be necessary, particularly given that accommodation providers would typically receive payments directly from the NDIA. In our view, the likely negative impact on residents of bonds outweighs the potential benefit.

Accommodation provider access to the property

The provisions in the proposal for the accommodation provider to access the property appear to be reasonable. We note that particular arrangements for visiting or accessing a property may be necessary for people with complex health or behaviour support needs. However, there would be merit in requiring the accommodation provider to consult with the residents and the SIL provider on when and how access should be obtained.

Urgent maintenance

In certain circumstances, it may be necessary for the SIL provider or resident to arrange urgent repairs or maintenance immediately in order to ensure the safety of residents. This may be particularly the case where security arrangements, such as fences, security doors, and toughened glass, need repair or replacement. We believe that it would be reasonable for the accommodation provider to reimburse the SIL provider or resident in those situations.

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