

Submission to the Statutory Review of the *Boarding Houses Act 2012*

October 2019

Background

The NSW Ageing and Disability Commission (ADC) commenced on 1 July 2019. The ADC is an independent statutory body, which is focused on protecting adults with disability and older adults from abuse, neglect and exploitation, and protecting and promoting their rights. Its roles include:

- Responding to allegations of abuse, neglect and exploitation of adults with disability (18 years and over) and older adults (65 years and over or, if Aboriginal and/or Torres Strait Islander, 50 years and over), including by providing advice, making referrals and conducting investigations.
- Following an investigation, taking further action that is necessary to protect the adult from abuse, neglect and exploitation.
- Raising awareness and educating the public about matters relating to the abuse, neglect and exploitation of adults with disability and older adults.
- Inquiring into and reporting on systemic issues relating to the protection and promotion of the rights, or the abuse, neglect and exploitation, of adults with disability and older adults.
- Meeting other obligations as outlined in the *Ageing and Disability Commissioner Act 2019*.

The ADC also has a general oversight and coordination role in relation to the Official Community Visitor (OCV) scheme in NSW. Responsibility for administering the OCV scheme transferred from the NSW Ombudsman's office to the ADC in August 2019. OCVs are independent Ministerial appointees who visit accommodation services providing full-time care to:

- children and young people in residential out-of-home care
- people with disability in supported accommodation
- people in assisted boarding houses.

Our submission has been informed by the OCVs who visit assisted boarding houses, and the work of Visitors over many years in relation to the boarding house sector.

Scope of the Boarding Houses Act 2012

The exclusion of NDIS-funded Specialist Disability Accommodation (SDA) from the *Boarding Houses Act 2012* (the Act) is appropriate, and reflects the nature of SDA, the complex and high support needs of the people who are eligible for this accommodation, and the existing NDIS regulatory arrangements.

The discussion paper queries whether the exclusion that currently applies to SDA should be extended to other NDIS service types, such as where residents are in receipt of Supported Independent Living (SIL) packages. It is not clear to what extent premises accommodating people with additional needs in receipt of NDIS funding are already excluded. In this regard, we note that s5(3)(p) of the Act excludes 'accommodation for persons with additional needs, that is provided by a public authority, council or any other body or organisation and that is wholly or partly funded by the Commonwealth or the State (or an agency of the Commonwealth or the State)'.

In our view, there would be merit in closely examining the range of accommodation arrangements for people with additional needs that are funded (directly or indirectly) by the State or Commonwealth (such as the NDIS), to ascertain:

- whether they are currently included or excluded from the scope of the Boarding Houses Act
- the extent to which they are covered by State and/or Commonwealth regulatory regimes
- whether there are gaps that need to be covered and, if so, whether the boarding houses legislation is the appropriate mechanism.

Occupancy agreements and principles

OCVs have advised that they see occupancy agreements in residents' files at assisted boarding houses. However, it is the 'House Rules' that assisted boarding house residents tend to recognise and understand rather than an occupancy agreement or the occupancy principles. Visitors note that residents do not tend to demonstrate an understanding of their rights, or the term 'occupancy principles'.

We note that the Boarding Houses Regulation 2013 (the Regulation) requires:

- certain information to be provided to prospective assisted boarding house residents before an occupancy agreement is entered into – including the room number, the services that will be provided, the fees, and the complaint handling procedures of the boarding house
- certain information to be displayed in a conspicuous position at the assisted boarding house – including the conditions the boarding house is subject to, a copy of the boarding house rules, an itemised schedule of standard fees and fees for services, and a copy of any current compliance notice issued in relation to the boarding house.

However, in light of the additional needs of many assisted boarding house residents, it is important that further measures are taken to maximise the potential for residents to understand the occupancy principles and their rights under the legislation. In particular, there would be merit in:

- plain English and Easy English/pictorial versions of the occupancy agreement and principles being developed and made available to boarding houses to use (separate to the standard agreement)
- requiring assisted boarding houses to have an Easy English/ pictorial version of the occupancy principles displayed in a location that is visible and accessible to residents
- requiring support to be provided to an assisted boarding house resident to assist them to understand the occupancy agreement (and the other information they are required to be provided) before they sign it.

We support the suggestions in the discussion paper relating to the provision of other information to new boarding house residents (such as a fact sheet with information about key services), and to boarding house operators (such as a fact sheet outlining their responsibilities).

Terminations and evictions

Reasonable notice

The occupancy principles outlined in Schedule 1 of the Act state that a resident must not be evicted without reasonable written notice. However, it is left to proprietors to determine what is 'reasonable', taking into account their own safety, and the safety of residents and the boarding house manager. In our view, this provides too much scope for proprietors to evict residents with additional needs on the basis of perceived 'safety' issues, with little (or no) notice.

While the standard occupancy agreement provides suggested 'reasonable' notice periods for residents associated with termination by the proprietor, most of the suggested periods are very short (including immediate eviction, one day and three days) and do not provide adequate notice to enable transition planning and the location of suitable alternative accommodation. The existing provisions place additional needs residents at risk of eviction without adequate grounds, and at risk of homelessness.

In practice, we recognise that assisted boarding house proprietors tend to seek the assistance of NSW Police, the Ambulance Service, and/or the local mental health team in response to concerns about safety risks presented by an additional needs resident, rather than immediate eviction. However, the

review of the Act provides a valuable opportunity to strengthen the protections for residents and reduce the likelihood of unfair evictions through, for example:

- providing greater clarity in the legislation about 'reasonable notice', with appropriate weighting given to the vulnerability of residents with additional needs
- requiring proprietors to provide reasons for the intended termination.

Notifying relevant parties of the intended termination of an additional needs resident

Clause 18 of the Regulation requires authorised operators to notify the Secretary of (now) Department of Communities and Justice (DCJ) 'that an additional needs resident is being evicted within 3 days after the resident has been issued with an eviction notice or immediately after the resident has been evicted, whichever occurs first.' The wording of clause 18 enables authorised operators to notify the Secretary about the eviction of a person with additional needs after the fact. In our view, this does not provide sufficient safeguards for residents with additional needs. It is important that, prior to the eviction occurring, the Secretary is notified by an operator of the *intention* to evict a person with additional needs.

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 of residents with additional needs. In particular, there is a need for an approach that appropriately recognises the importance of early intervention to address factors that may place the person's residency at risk, and the need to bring in external parties to facilitate or provide critical interventions, and to ensure due process is followed.

In this regard, there would be merit in strengthening safeguards through a process in which the proprietor is required to notify the Secretary and other relevant external parties of the proprietor's intention to issue a notice of eviction to an additional needs resident. Depending on the additional needs resident, relevant external parties may include, for example, the resident's support coordinator, the NDIA, the NDIS Quality and Safeguards Commission, and the person's decision support/ substitute decision-maker (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 occupancy (such as clinical intervention)
- implement additional and/or changed supports
- oversight and monitor the process to ensure that appropriate actions are taken to uphold the resident's rights.

Dispute resolution

The occupancy principles include that boarding house proprietors and residents 'should try to resolve disputes using reasonable dispute resolution processes.' Currently, boarding house residents are required to seek to informally resolve disputes about the occupancy principles directly with the boarding house proprietor. If they are unable to resolve the issues, the Act provides for the resident (or their authorised representative) or the proprietor to take the matter to the NSW Civil and Administrative Tribunal (NCAT).

We note that there are many factors that make this an unrealistic process for assisted boarding house residents, including that:

- there tends to be a significant power imbalance between residents and proprietors, resulting in residents being highly unlikely to seek to raise occupancy principle compliance issues directly with the proprietor, and facing considerable challenges in achieving a positive outcome through conciliation
- few residents would have a practical understanding of the occupancy principles to identify compliance issues, or the ability to pursue the issues (informally or formally) without substantial assistance and support
- the application fee of \$51 (\$13 if eligible for the reduced or concession fee) presents a barrier for some residents, and would affect their decision as to whether to pursue the matter.

In our view, for assisted boarding houses, compliance with the occupancy principles should form part of the prescribed conditions for boarding house authorisations in Division 4 of the Regulation. This would enable the DCJ boarding house enforcement officers to monitor compliance with the occupancy principles and take action where there are identified issues (including where issues are raised by residents or others, such as OCVs). Given the vulnerability and additional support needs of many assisted boarding house residents, all efforts should be made to ensure that occupancy principles are upheld, and that actions to address any compliance issue are not unfairly reliant on the resident.

Assisted boarding houses

Accommodation of people with additional needs in general boarding houses

The Boarding Houses Act and Regulation introduced enhanced standards and requirements in relation to assisted boarding houses. These were much-needed reforms, as highlighted by the NSW Ombudsman's special report to Parliament in August 2011: [*More than board and lodging: the need for boarding house reform*](#), which incorporated the findings from its preceding inquiries and investigations in relation to (then) licensed boarding houses, and the issues raised over many years by OCVs.

The additional safeguards afforded to people living in assisted boarding houses are important, and reflect the vulnerability of many of the residents and their need for support. We recognise that there are people with additional needs who reside in general boarding houses and do not have access to the same safeguards and standards. Our preference is that all boarding houses, including general boarding houses, are required to meet acceptable standards and are monitored for compliance, to enable greater choice and safer options.

We are conscious that an appropriate focus needs to be put on the will and preference of the person with additional needs. The scope of 'additional needs' in the Act is broad, and includes people who would be able to make their own informed decisions (with support or otherwise). In our view, consideration as to whether an additional needs resident should be 'allowed' to reside in a general boarding house should take into account the individual circumstances, will and preference, and support needs of the individual, as well as mechanisms for mitigating risks and meeting their needs.

At a minimum, we consider that requirements relating to the screening of actual and proposed additional needs residents should be extended to include any additional needs resident who seeks to reside at a general boarding house. Consistent with clause 14 of the Regulation, the screening tool should be applied before the person is permitted to reside at the boarding house, and at any point after entry in response to changes in their health or other needs. If the screening tool identifies that the boarding house is unsuitable as a residence for the additional needs resident ('having regard to the health, comfort, safety and proper care of the person and other residents'), appropriate measures would need to be taken to discuss the matter with the person, ascertain their wishes and whether they are able to make an informed decision on this issue, notify the Secretary of DCJ, assist the person to connect with relevant and necessary supports (eg: NDIS or aged care supports), and take other actions

necessary to uphold the person's rights and protect them from abuse, neglect and exploitation.

Regulatory arrangements in relation to assisted boarding houses

In addition to the role of the Department of Fair Trading and councils in relation to all registrable boarding houses, there are specific safeguards and regulatory arrangements that apply to assisted boarding houses. These safeguards and arrangements are provided by a range of agencies, with duplication and cross-over in some areas:

- NSW Department of Communities and Justice – handles complaints and monitors compliance against standards and legislative requirements (including reportable incidents)
- NSW Ombudsman – handles complaints, reviews the deaths of residents, and has a range of other functions under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, including conducting inquiries into issues affecting residents or assisted boarding houses, and reviewing the circumstances of residents
- NDIS Quality and Safeguards Commission – handles complaints (if the assisted boarding house is a registered or unregistered NDIS provider), oversees the handling of reportable incidents, including the deaths of residents who were NDIS participants, and monitors compliance against standards and legislative requirements (if a registered NDIS provider)
- NSW Ageing and Disability Commission – administers and coordinates the Official Community Visitor scheme, which includes assisted boarding houses; and receives and responds to reports about adults with disability and older adults who are subject to, at risk of, or in circumstances that will result in, abuse, neglect and exploitation (including boarding house residents).

In the main, there is good liaison between the involved oversight and regulatory agencies to seek to minimise duplication. In this regard, we note that the NSW Ombudsman and the NDIS Commission have processes to minimise duplication in relation to complaints and reviews of deaths; the NSW Ombudsman liaises with DCJ in relation to issues concerning assisted boarding houses to inform its actions in response to complaints and other matters; and our office is in the process of finalising information sharing arrangements with the NSW Ombudsman and the NDIS Commission.

However, the review of the boarding houses legislation provides a useful opportunity to explore options to reduce duplication and confusion in relation to the regulatory arrangements for assisted boarding houses, and provide clear and uncomplicated pathways for residents and others.

Boarding Houses Regulation 2013

The introduction of the standards for authorised boarding houses in the Regulation has resulted in improvements to assisted boarding houses in NSW, including an increase in the number of residents with their own room, and reductions in the overall number of residents accommodated in each boarding house. OCVs visiting assisted boarding houses have particularly noted improvements in the smaller assisted boarding houses, identifying that they are significantly more individualised in their approach.

OCVs have advised that in the larger boarding houses, there remains substantial room for improvement, including that there can be an institutional feel and approach. This can include cafeteria-style queuing for meals, and a lack of flexibility to meet the needs of individual residents – for example, difficulty obtaining a meal/food if a resident misses the dinner time set by the boarding house.

While the standards have enabled changes to improve the living arrangements and quality of care to additional needs residents, there is a need to review and tighten up the language to provide greater clarity as to what the boarding house operators are required to do. In some areas, the requirements are very broad, and appear to enable compliance to be achieved with no discernible outcome for the resident. For example, in relation to choice and access to health care providers, clause 30 requires that

additional needs residents must be 'provided with reasonable support to access' their own health care providers in a timely way. The Regulation identifies that it is sufficient compliance if:

- preferred health care providers are identified by residents and included in their health records, and
- residents are assisted, as far as possible, with making appointments and with transport arrangements to attend appointments with health care providers, and
- residents are encouraged to access health care promptly if any sign of deterioration in their health status appears.

It is not clear what 'assisting' residents with making appointments and transport arrangements, or 'encouraging' them to access health care promptly, comprises. In practice, many additional needs residents require more active and proactive intervention than just encouragement to access health care, and assistance with appointments. In our assessment, it would be easy for assisted boarding house operators to demonstrate compliance with this requirement, despite no evident support, access to necessary services, or improvement for residents.

Screening tool

We consider that there remains a need for a screening tool. However, in light of changes to access to disability supports for residents who are NDIS participants, we believe that consideration of whether an assisted boarding house is suitable for an individual with additional needs should take into account the will and preference of the person (and whether they are making an informed decision), the supports that are available to them, including disability, aged care, and/or health supports, and achievable options for mitigating risks and meeting their needs.

The screening tool would provide a useful mechanism to identify the person's support needs and risks, and to trigger actions by relevant external agencies – with the person – to review the person's circumstances and to look at options for appropriately meeting their needs. Among other things, this may include whether their needs can be appropriately met within the boarding house with additional and/or changed supports (if consistent with their stated and informed views).

OCVs have advised that, while the Regulation requires additional needs residents to be re-assessed in response to a significant change in their health or support needs, this has generally not been evident from their visits to assisted boarding houses. At times, the health and other support needs of residents have changed to the extent that they would no longer be eligible for entry to the assisted boarding house if they were a new applicant, but there is no indication that the screening tool has been reapplied.

Abuse and neglect

Under the boarding houses legislation, assisted boarding houses are required to notify the Secretary of DCJ of certain incidents, including alleged physical assault, sexual assault, neglect or ill-treatment of a resident, and the death of a resident. Failure to report is an offence under the Act and Regulation. We support the mandatory requirement for assisted boarding house managers to report the identified serious incidents; we consider that there should also be a requirement to report allegations of financial abuse and exploitation involving residents.

However, we note that, while the Act requires the manager to report deaths and alleged sexual assaults to police as soon as reasonably practicable after becoming aware of the incident, there is no such requirement in the Regulation in relation to alleged physical assaults. In addition to reporting alleged assaults to the Secretary, assisted boarding house managers should be required to notify police of these matters as soon as possible after becoming aware of the incident/ allegation. It is important that potential criminal offences are reported to police without delay; it should not be dependent on DCJ

making the report.

In our view, it is not imperative that abuse and neglect is defined in the legislation (these terms are also not defined in the *Ageing and Disability Commissioner Act 2019*). However, there would be merit in:

- including all of the reporting requirements together in one section (rather than separate sections of the Act and Regulation)
- including a requirement for authorised operators to develop, maintain and implement a policy on ‘identifying and responding to abuse, neglect and exploitation’ (an addition to the list of policy areas under clause 16 of the Regulation).

The Ageing and Disability Commission is happy to provide input and assistance to DCJ to develop a model policy for assisted boarding house operators to use in relation to this area.

Protection of financial affairs

There is significant scope to improve protections for assisted boarding house residents in relation to financial abuse and exploitation. While there are provisions in the Regulation that are intended to provide safeguards in relation to the management of residents’ financial affairs, there are also weaknesses and gaps in the existing arrangements that leave residents with additional needs vulnerable to financial abuse and exploitation.

The discussion paper notes that a proprietor’s obligation to provide receipts is covered under occupancy agreements, not under the sections of the Act or Regulation that relate to assisted boarding houses. As a result, the failure (or refusal) of a proprietor to issue a receipt can only be addressed as a dispute under the occupancy principles, not a breach of the Regulation. Consistent with our earlier comments, in our view, compliance with the occupancy principles should form part of the prescribed conditions for boarding house authorisations in Division 4 of the Regulation. If this is not pursued, we would support the inclusion of a specific clause in the Regulation relating to the issuing of receipts (as outlined in the discussion paper).

Clauses 23(1) and (2) of the Regulation require that each additional needs resident of an authorised boarding house ‘must be given support so that the resident has the opportunity to independently operate his or her bank account and manage his or her financial affairs’ and, in the event that they are unable to do so, they ‘must be given support in arranging for such assistance as is required to operate the account or manage the affairs’. In practice, this is not the case. Indeed, in some cases, boarding house proprietors have put barriers in the way of additional needs residents developing the capacity to independently operate their bank account and manage their financial affairs. In this context, there would be merit in:

- providing greater specificity and clarity as to the nature of the ‘support’ that is required to be provided, and by whom (and what evidence is required to demonstrate compliance)
- requiring assisted boarding house managers to engage with the additional needs resident and their appointed or informal financial managers (and any other relevant supporters, such as the resident’s NDIS support coordinator) to jointly identify and implement actions to prevent financial abuse and exploitation – this may include, for example:
 - how the resident can be best supported to independently and safely access and use their money
 - the financial controls that will be put in place to mitigate risks and uphold the resident’s rights (for example, the resident’s key card is kept in a locked drawer in their bedroom)
 - how the agreed actions will be monitored and reviewed
- adding allegations of financial abuse and exploitation as reportable incidents involving residents in clause 26 of the Regulation.

Records

The record keeping requirements that were introduced in the Regulation have resulted in some improvements to the overall records kept by assisted boarding houses, although the information is still minimal. OCVs have noted that while records are kept by assisted boarding houses, the information is not always current. There would be merit in including references in the Regulation to authorised boarding houses needing to ensure that records are regularly updated to reflect changes to a resident's circumstances and information.

It is not clear why the discussion paper indicates that occupancy agreements are not included in the records that are required to be maintained by the licensee of an assisted boarding house and available for inspection by a DCJ boarding house enforcement officer. Clause 22 of the Regulation requires certain records to be kept concerning any occupancy agreement or rental agreement entered into in relation to an additional needs resident or an authorised boarding house, including a copy of the agreement and any written amendments to the agreement. We agree that the DCJ enforcement officers should have access to this information.

The discussion paper queries whether required records should also include NDIS plans, NDIS service agreements, and payments to a service provider under the NDIS plan. Where the authorised boarding house provides supports or services to the resident under the NDIS, we agree that the NDIS service agreement should be required to be kept in the boarding house records, and available to enforcement officers. OCVs advise that they already see some NDIS service agreements in the files of assisted boarding houses. However, the NDIS plan belongs to the resident, not the boarding house; and payments to providers under the NDIS plan are captured through the NDIS portal.