

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

Legal Aid NSW submission to the
Department of Customer Service

17 October 2019

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Legal Aid 
NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. This submission draws on the casework experience of our civil lawyers in providing these services.

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to NSW Fair Trading for the Statutory Review of the *Boarding Houses Act 2012* (NSW) (**BH Act**). While the introduction of the BH Act improved conditions in a previously unregulated market, in our view it is inadequate to protect the interests of the vulnerable population who live in boarding houses.

People living in boarding houses are considered to be homeless by the Australian Bureau of Statistics, because of the lack of security in this form of accommodation.¹ The number of people living in boarding houses has significantly increased over recent years, particularly in NSW. On census night in 2016, there were an estimated 7,000 people living in boarding houses in NSW, a 19 per cent increase from 2011.² The majority of people living in boarding houses are male (73 per cent), and tend to be older than the general homeless population, with 48 per cent of people living in boarding houses aged 45 years and over, compared to 28 per cent of homeless people being in that age bracket.³

Legal Aid NSW's clients who live in boarding houses experience vulnerability and social exclusion. They are often reliant on social security and are unable to access the mainstream rental market because they cannot afford to rent privately and are either ineligible for social housing, or are on a social housing waiting list. Many of our clients who live in boarding houses have complex needs including mental illness or disabilities.

Our submission is organised thematically and focuses on the issues of most significance to our clients.

Occupancy principles (questions 9 -22)

Legal Aid NSW supports the inclusion of the occupancy principles in the BH Act, which provide boarding house residents with defined rights that they did not have prior to the introduction of the BH Act. However, in our experience the occupancy principles do not go far enough and do not provide adequate protections for residents.

The most significant problems experienced by our clients are little or no protection from unfair or unlawful eviction (including retaliatory eviction), poor physical conditions of the boarding house and a lack of meaningful dispute resolution processes.

¹ Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness 2016 Explanatory Notes*, 14 March 2018, available at <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/2049.0Explanatory%20Notes12016?OpenDocument>.

² Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness 2016 Key Findings*, 14 March 2018, available at <https://www.abs.gov.au/ausstats/abs@.nsf/mf/2049.0>.

³ Ibid.

Termination

The occupancy principles do not provide adequate protection from unfair termination of occupancy agreements and eviction, and the protections that are included in the occupancy principles are often not complied with by proprietors.

Occupancy principles 9 and 10 state that a proprietor must advise a resident why and how the agreement can be terminated, and give reasonable notice when evicting a resident. However, in practice proprietors often do not comply with these requirements. While the standard occupancy agreement suggests notice periods for different grounds of eviction, residents need greater certainty about the amount of notice they are entitled to. We submit that the grounds for eviction should be legislated, along with the specific notice periods for each ground.

The BH Act does not require proprietors to seek an order from the NSW Civil and Administrative Tribunal (**NCAT**) to validly terminate an agreement, or to recover possession of a room under an occupancy agreement. We submit that proprietors should be required to seek an order for termination from NCAT before evicting a resident. This would provide external oversight of the eviction process and encourage compliance with the BH Act. We also suggest that NCAT should be given a corresponding power to suspend the date for vacant possession, taking into account the circumstances of both the proprietor and the resident. This would allow NCAT to recognise that boarding houses are often the last stop before acute homelessness (rough sleeping) for many people, who often have very limited options for alternative accommodation.

In addition, we submit that before a termination notice is issued, proprietors should be required to make reasonable efforts to address the underlying issues that have given rise to the issue of a termination notice. In our experience these issues are often:

- in general boarding houses: an interpersonal dispute with another resident, and
- in assisted boarding houses: behaviours associated with, or issues that arise because of, the resident's disability.

In aid of this, greater emphasis should be placed on occupancy principle 11, which requires the use of alternative dispute resolution (**ADR**). We submit that ADR should be compulsory before the proprietor can terminate, or apply to NCAT to terminate the accommodation contract, and greater powers should be given to either NCAT or another body to facilitate this.

In our view proprietors of assisted boarding houses should also be required to make reasonable efforts to find an alternative suitable equivalent accommodation option for a resident before applying to NCAT to terminate an accommodation contract.

Repairs

Many residents of boarding houses are faced with extremely poor physical conditions of the property, and a failure of proprietors to comply with their obligations under occupancy principle 1.⁴

In our experience, most residents do not seek orders for repair from NCAT because they are fearful of retaliatory eviction. This is supported by NCAT data, which shows that very few applications are made to the Tribunal under the BH Act. In the January - March 2019 quarter, only four applications were made under the BH Act by a resident.⁵

Introducing specific legislated grounds and timeframes for eviction, and a requirement to seek orders from NCAT before evicting a resident, would address residents' concerns of retaliatory eviction to some extent. Greater support for councils to take enforcement action against proprietors who are in breach of their obligations would also assist in improving the physical conditions of boarding houses. Despite being given substantial regulatory enforcement responsibilities under the BH Act, local councils were not given additional resources to manage increased workload.⁶

Assisted Boarding Houses

An especially vulnerable population live in assisted boarding houses, including people who are National Disability Insurance Scheme (**NDIS**) participants. The lack of adequate protections under the BH Act is particularly problematic for this group.

While the BH Act specifically excludes premises used for accommodation that is provided by a registered provider of specialist disability accommodation (**SDA**) for the purpose of the NDIS (section 37(2)(o1)), NDIS participants live in premises that meet the definition of an assisted boarding house under the BH Act, including where:

- The premises accommodate two or more people with Supported Independent Living (**SIL**) packages funded under the NDIS, but the premises are not specialist disability accommodation. These people would not have SDA in their NDIS plans.
- People who are eligible for the NDIS, but are not currently receiving supports, who are living in assisted boarding houses.

⁴ Occupancy principle 1 provides that “a resident is entitled to live in premises that are (a) reasonably clean, and (b) in a reasonable state of repair, and (c) reasonably secure.”

⁵ NSW Civil and Administrative Tribunal, Consumer and Commercial Division, *Quarterly Management Report*, Consultative Forum, January - March 2019, p 9.

⁶ *Evaluation of the Boarding Houses Act 2012: Final Report*, Associate Professor Gabrielle Drake, February 2018, pp 14-15 and 31, available at <https://www.newtowncentre.org/uploads/5/1/5/0/51502997/evaluation-of-the-boarding-houses-act-2012-report-4-and-final-report-2018.pdf>.

Legal Aid NSW is concerned that there may be NDIS participants who have been living in assisted boarding houses, who have been forced into acute homelessness including rough sleeping after their accommodation contracts have been terminated with short notice, for example in response to behaviours associated with, or issues that arise because of, the resident's disability. For this group of people there is often very limited or no safe and suitable alternative accommodation available, particularly at short notice. Neither the BH Act nor consumer law provide adequate protection for people in these circumstances.

We submit that assisted boarding houses should be regulated separately to general boarding houses, and greater and more transparent protections for residents should be introduced. This would recognise the high level of vulnerability experienced by people living in assisted boarding houses, and the lack of alternative accommodation options available to them. We submit that people living in assisted boarding houses should have the same protection as those contemplated by the Department of Communities and Justice's (formerly FACS) 2018 Technical Issues Paper,⁷ and the subsequent Report on Consultations⁸ on protections for people living in long term supported group accommodation.⁹

Alternatively, if assisted boarding houses continue to be regulated by the BH Act, greater protections should be built into the occupancy principles. This should include our suggestions outlined above:

- legislating grounds for eviction and corresponding notice periods
- requiring proprietors to apply to NCAT to terminate an accommodation contract
- requiring proprietors to attempt ADR before applying to terminate an accommodation agreement, and
- requiring proprietors of assisted boarding houses to make reasonable efforts to find an alternative suitable equivalent accommodation option for a resident before applying to NCAT to terminate an accommodation contract.

⁷ *Technical Issues Paper: Protections for Residents of Long Term Supported group Accommodation in NSW*, FACS, January 2018, available at https://www.facs.nsw.gov.au/__data/assets/pdf_file/0008/546776/Resident-rights-Technical-Issues-Paper.pdf.

⁸ *Protections for Residents of Long Term Supported Accommodation in NSW: Report on Consultations*, FACS, September 2018, available at <https://www.facs.nsw.gov.au/download?file=630087>.

⁹ The Technical Issues Paper contemplated that these protections would be introduced as amendments to the *Residential Tenancies Act 2010* (NSW).