

19 March 2018

Mr Michael Coutts-Trotter  
Secretary  
Department of Family and Community Services  
Level 13, 4-6 Bligh St  
SYDNEY NSW 2000

Dear Mr Coutts-Trotter

### **Resident Rights Consultation Process**

Thank you for the opportunity to share our views on proposed legislative protections for residents of long term supported group accommodation.

Legal Aid NSW welcomes the proposal to provide people with disability living in long term supported group accommodation with similar rights and protections as tenants under the *Residential Tenancies Act 2010* (NSW), including the provision of access to the NSW Civil and Administrative Tribunal (**NCAT**) to hear matters raised by either the resident or the accommodation provider.

Across both its civil and criminal divisions, Legal Aid NSW acts on behalf of a significant number of vulnerable clients with a disability living in NDIS funded specialist disability accommodation (**SDA**). These clients typically have complex, specialised or high intensity needs, and/or challenging behaviours. They are at increased risk of homelessness, interaction with the criminal justice system and incarceration as a result of the transition to the NDIS market. Our concerns in this regard are detailed in our recent submission to the Joint Standing Committee into the NDIS's Inquiry into Market Readiness.

In light of these concerns we consider that additional legislative safeguards are needed to address the particular complexity and vulnerability of residents of SDA accommodation. We highlight the following issues in response to FACS' *Technical Issues Paper* (January 2018):

- the potential for conflict of interest when a resident who lacks capacity is negotiating the terms of an accommodation agreement

- the imposition of bonds on accommodation agreements, and
- the termination of accommodation agreements.

### Conflict of interest

It is vital that people seeking to enter SDA be provided with the necessary support to communicate their decisions and negotiate their proposed terms of residence with SDA providers. There is a potential for a conflict of interest when the organisation that provides Supported Independent Living services (**SIL provider**) also provides the SDA. If the resident has NDIS funding for a support coordinator, that coordinator is, in our experience, usually employed by the SIL provider. The coordinator is then in the position of purportedly acting as the resident's advocate, while being employed by the person's landlord. Support coordinators are then placed in a difficult position both when negotiating the terms of an accommodation agreement and in the event of a dispute as to its terms.

This conflict of interest gives rise to similar concerns in the context of negotiations or litigation as to rent, including where a resident who lacks capacity seeks to challenge the amount of discretionary rent contributions when services have been reduced or withdrawn. The ability to challenge provisions of a contract, including provisions relating to rent, can be illusory for such residents, whose only means of challenging rent provisions is via the person's supported coordinator (employed by the SDA provider).

Such a conflict can be avoided if the person has family or other support to assist with negotiating the agreement. The NSW Public Guardian will be appointed for some residents of SDAs without capacity. Unlike other states such as Victoria and Queensland however, the NSW Public Guardian does not have advocacy functions.

In a number of recent matters in which Legal Aid NSW has acted on behalf of clients in SDA, the NSW Public Guardian has not provided much needed support for, and advocacy on behalf of, the vulnerable person. Instead, the Public Guardian has made clear that its role is limited to that of substitute decision-maker, and not of advocate. In our view, those of our clients without any engaged family members, and under the care of the NSW Public Guardian and/or the NSW Trustee and Guardian, will require additional support to negotiate appropriate safeguards in any written accommodation agreement.

This could be achieved by the introduction of a Public Advocate in NSW, as is currently being considered by the NSW Law Reform Commission.<sup>1</sup> Legal Aid NSW supports that proposal.

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<sup>1</sup> NSW Law Reform Commission *Review of the Guardianship Act: Draft proposals* (2017) Proposal 9.1.

### Standard form accommodation agreement (Technical Issues Paper, Question 2.1)

We support the proposal to provide a standard form accommodation agreement in legislation. While this removes flexibility, we consider that minimum protections of SDA residents' rights should be non-negotiable, including provisions around termination. Where a person lacks capacity and has no support coordinator independent of the SDA provider, standard terms provide protection against possible exploitation. However, as noted above, residents should be provided with the necessary support to exercise their legal capacity and communicate their decisions in respect of the terms of a written accommodation agreement.

### Bonds (Technical Issues Paper, Part 3)

We do not support the imposition of rental bonds for residents of SDA.

The purpose of bonds in private rentals is to ensure there are funds available in the event that rent is unpaid or the property is damaged by the resident. We consider that bonds are unlikely to be necessary to ensure rent is paid by residents in supported group accommodation. In most circumstances, automatic, fortnightly deductions will be made from the residents' bank account for rent, and there will be little risk of non-payment of rent.

Damage to property in SDA will generally occur in the context of a person's disability, and there is considerable risk that residents who suffer from a cognitive impairment or other psychosocial disability will be unfairly penalised for damage caused by behaviour relating to their impairment or condition. We also note that a higher level of SDA funding for 'robust housing' is available for tenants who are more likely to cause damage due to the nature of their disability, including people with complex behaviour.<sup>2</sup> Therefore, SDA providers are less likely to be exposed to unreasonable repair costs.<sup>3</sup>

In these circumstances we consider the imposition of bonds on residents of SDA cannot be justified and would operate harshly on the person to pay for the damage.

### Termination (Technical Issues Paper, Part 14)

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<sup>2</sup> Rule 4.3 (d) of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* defines 'robust design' as housing that has been designed to incorporate a high level of physical access provision and to be very resilient, reducing the likelihood of reactive maintenance and reducing the risk to the participant and the community.

<sup>3</sup> See Victorian Council of Social Service (VCOSS) *Submission to the Victorian Government's review of rights in SDA* (June 2017).

Termination of accommodation is of particular concern to Legal Aid NSW, as a number of our clients face termination of their residential accommodation without notice when they are in custody. We therefore welcome the proposal that where a resident is in detention or hospital, the accommodation provider must apply to NCAT to terminate the accommodation agreement.

However, we do not support the proposal that an accommodation provider can terminate the agreement after providing a 30 day period of notice where *'The resident cannot be supported at the property without causing serious risk to staff or other occupants.'* When a service provider accepts a resident into its care, they are usually on notice of the existence of complex and challenging behaviour. As noted above, the resident's support coordinator may also be employed by the accommodation provider. The resident may have no advocate, and there is a real possibility of homelessness where an agreement is terminated on the basis of conduct related to complex and challenging behaviour.

External scrutiny of a decision to terminate in these circumstances is desirable. We therefore consider that in this circumstance the accommodation provider should be required to apply to NCAT for termination of the agreement.

Legal Aid NSW further considers that the accommodation provider should be required to assist the resident to locate suitable alternative accommodation before terminating the accommodation agreement, for whatever reason. This would be consistent with the proposal at Part 11 of the Technical Issues Paper (residents' requirements for modifications to properties) that the accommodation provider should assist the resident to locate alternative accommodation where modifications to a property cannot be made.

Again, thank you for the opportunity to contribute to the consultation process. We would welcome the opportunity to be consulted further on this important reform.

If you have any questions, please contact Robyn Gilbert, Senior Law Reform Officer, Strategic Law Reform Unit, on (02) 9213 5207 or at [robyn.gilbert@legalaid.nsw.gov.au](mailto:robyn.gilbert@legalaid.nsw.gov.au).

Yours sincerely



Brendan Thomas  
**Chief Executive Officer**