Office of the Public Advocate

Submission to the Rights in Specialist Disability Accommodation Review

July 2017

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Abbreviations

ACL	Australian Consumer Law
EPA	Enduring Power of Attorney
GAA	*Guardianship and Administration Act 1986* (Vic)
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
OPA	Office of the Public Advocate
SDA	Specialist Disability Accommodation
SIL	Support for Independent Living
VCAT	Victorian Civil and Administrative Tribunal

Recommendations

Recommendation 1

That careful consideration is given to the benefits and drawbacks of placing new provisions relating to SDA tenancy in the Residential Tenancies Act as opposed to the Disability Act. Considerations should include constitutional law ramifications and skills and capacity of respective VCAT lists.

Recommendation 2

That detailed consideration be given to OPA's proposed framework (Chapter 4) for Victorian rights protections for participants in SDA under full scheme.

Recommendation 3

That all of the rights protections and benefits of OPA's proposed framework be realised for participants living in SDA, even if this is under an alternative safeguarding framework yet to be developed.

Recommendation 4

That the Disability Act be reviewed in light of the NDIS.

Recommendation 5

That the current breadth of functions given to Community Visitors be retained to encompass standards of accommodation and service provision.

Recommendation 6

That the Community Visitor Program is funded to continue their safeguarding functions post June 2019.

Recommendation 7

That the new legislation in relation to SDA tenancy includes a provision empowering Community Visitors to visit all Victorian SDA (which are receiving SDA payments from the NDIA). Participants living on their own should have the right to refuse entry to Community Visitors, and participants in shared homes should have the right to refuse entry to their rooms.

Recommendation 8

That the standard tenancy agreement for participants in SDA (between the landlord and the participant) includes in it recognition of the participant's right to request a visit from a Community Visitor.

Recommendation 9

That legislation includes an obligation on the SDA landlord to provide a statement of rights to the participant, which includes the right to access a Community Visitor.

Recommendation 10

That legislation includes an obligation on the SDA landlord to display contact details for the Office of the Public Advocate and Community Visitors, and to facilitate contact with Community Visitors within a reasonable timeframe (for example, 7 days) where the participant requests it.

Recommendation 11

That Community Visitors are entitled to see copies of all documentation related to the participant's SDA tenancy arrangements as well as the documents they are currently entitled to see when visiting (as specified in the Disability Act).

Recommendation 12

That Community Visitors are able to raise concerns with the SDA provider (and/or the SIL provider) in the first instance. Where they are not satisfied by the response, or if the concern requires immediate action or is of a very serious nature, that Community Visitors can raise their concerns with the NDIS Quality and Safeguards Commission and/or the CEO of the NDIA.

Recommendation 13

That Community Visitors be protected from NDIS information-sharing laws to the extent necessary to advocate for participants and raise concerns with relevant complaints bodies.

Recommendation 14

That there should be a standard SDA tenancy agreement, as there is a standard tenancy agreement in the Residential Tenancies Act. The agreement should include any additional protective clauses deemed to be relevant to the circumstances of SDA tenants.

Recommendation 15

That SDA participants not be required to pay a bond.

Recommendation 16

That the tenancy agreement between SDA landlord and participant detail the conditions, if any, under which the participant can be made personally liable for property damage.

Recommendation 17

That where participants are eligible for ‘robust’ SDA that they should not be liable in any way for property damage. And that this be reflected in the SDA tenancy agreement.

Recommendation 18

That where damage results from a participant’s inability to regulate their behaviour, that they not be held personally liable for property damage. And that this be reflected in the SDA tenancy agreement.

Recommendation 19

That, under circumstances where a participant may be held personally liable, they can only be held liable to the extent that the damage was caused “knowingly and intentionally” and does not constitute “fair wear and tear”.

Recommendation 20

That participants have recourse to VCAT in relation to maintenance and repair issues.

1. Introduction

The Office of the Public Advocate (OPA) welcomes the opportunity to respond to the *Rights in Specialist Disability Accommodation Consultation Paper*. It congratulates the Victorian Government on their engagement with the issue of protecting the rights of people with disability in Specialist Disability Accommodation (SDA) under the NDIS full roll-out. As outlined in this submission, OPA contends that thoughtful legislative amendments are absolutely necessary to protect the tenancy rights of Victorians with disability, and, in particular, the rights of participants who exhibit behaviours of concern.

As the Consultation Paper identifies, parts of the *Disability Act 2006* will be modified or repealed on transition to the NDIS National Quality and Safeguarding Framework. OPA contends that without legislative amendment on the part of the State, such as we propose in this submission, transition to the National Framework will destroy many existing protections and safeguards currently available to people in Victorian SDA.

OPA also recognises that the protective framework that it is proposing would not be workable without agreements being reached between the Victorian Government and the National Disability Insurance Agency (NDIA) in regard to these state protections. OPA encourages the Victorian Government to bring the issues identified in this submission to their ongoing discussions and negotiations with the NDIA around the regulation and operation of SDA. It is OPA's understanding that solutions for the issues identified here, including the increased risk of homelessness for participants with behaviours of concern living in SDA, will need to be found across Australia, not just in Victoria.

OPA also highlights the key role that Community Visitors play, and ideally will continue to play under the NDIS, in monitoring service and accommodation delivery onsite for people with disability in supported accommodation settings. While there is uncertainty over whether such programs would continue post 2020, OPA argues they fill a safeguarding role for people in SDA who might otherwise have no contact with independent advocates.

About the Office of the Public Advocate

OPA is a statutory office, independent of government and government services, which safeguards the rights, interests and dignity of people with disability and protects them from abuse, neglect and exploitation.

OPA provides a number of services in line with these goals, including the provision of advocacy, investigation and guardianship to people with cognitive impairments and mental illness. In 2016–17 OPA was involved in 969 new guardianship matters, 317 new investigations and 240 new matters requiring advocacy.

Under the *Guardianship and Administration Act 1986* (GAA), OPA is required to arrange, coordinate and promote informed public awareness and understanding through the dissemination of information about the GAA and other legislation affecting persons with a disability.[1] For example, it has played a significant role in promoting public awareness and understanding of the new *Powers of Attorney Act 2014*.

[1] GAA, section 15(c)

The OPA Advice Service offers information and advice on a diverse range of topics affecting people with disability. The issues raised by people contacting OPA are often complex, requiring a high level of expertise. During 2016–17, OPA, through the Advice Service and reception staff, provided general advice in relation to 11,731 matters.

OPA coordinates a Community Education Program where staff address both professional and community audiences on a range of topics including the role of OPA, guardianship and administration, enduring powers of attorney and medical decision-making. Last year, the program delivered 104 presentations to a total audience of 4,873 people. The largest audience group was health and community professionals. The remaining presentations were to the general public, tertiary students, and legal and justice services.

OPA is the coordinating body of the Community Visitors Program in Victoria, in addition to three other volunteer programs, and provides support to over 900 volunteers.[2] Community Visitors are independent volunteers who safeguard the interests of people with disability in supported accommodation settings and mental health facilities. This includes Community Visitors in the Disability Services stream who visit institutions and community-based group homes for people with disability (which have been gazetted under the Disability Act).

Format for this submission

This submission will cover:

- current safeguards (that will disappear without legislative reform)
- OPA's understanding of the legal relationships relating to SDA tenancy that will be required after June 2019 (two basic models)
- legislative protections required to ensure participants who exhibit behaviours of concern that threaten their tenancy do not become homeless (OPA's proposed framework for rights protections)
- the proposed role of volunteer Community Visitors after June 2019
- other tenancy related protections, not related to behaviours of concern, that currently exist and which OPA submits are worth retaining or strengthening (including consideration of key topics identified by the Consultation paper).

[2] Other volunteer programs include Community Guardian Program, Independent Third Person Program and the Corrections Independent Support Officer Program

2. Current safeguards (that will largely disappear)

Victoria's interim arrangements governing SDA provide that Victoria's safeguards remain in operation. While OPA has some concerns in relation to operational support for these safeguards during transition, they include:

- Part 5 of the Disability Act that applies to residential services with special provisions for group homes. These concern:
    - the content of the residential statement
    - regulation of residential charges
    - notices of temporary relocation
    - steps to be take prior to issuing a Notice to Vacate, including notification of the Secretary to Department of Health and Human Services (DHHS) and the Public Advocate, and review of behaviour support plans
    - seeking the support of the Secretary of DHHS
    - termination of residency
    - notices to vacate
    - possession orders and warrants for possession
- Part 6 of the Disability Act regarding the management of residents' money in residential services, complaints processes and visits by Community Visitors
- Part 7 of the Disability Act regarding the regulation of the use of restrictive interventions and behaviour support plans.
- DHHS can be relied upon to provide a safety net for people whose residential arrangement has broken down.

Some of the benefits and protections that flow to residents in supported disability accommodation from the existing framework were detailed in the second reading speech for the Disability Act in 2006, where Minister Sherryl Garbutt noted:

> By including residential rights in the bill, we are also able to strengthen rights for all people residing in disability services residential services, as all residential services, with the exception of residential treatment facilities, will be subject to some common provisions.
>
> These include:
>
> - the right to receive a residential statement;
> - clarity about roles and responsibilities of the resident and the disability service provider; and
> - prescription about the circumstances and manner of entry to a resident's room.
>
> In addition to these common provisions, the bill will ensure that people living in community residential units have residency rights similar to those enjoyed by other members of the community who live in rental property, while acknowledging the role of the disability support provider. This will include the capacity for disability service providers to:
>
> - ensure that staff and residents respect the privacy and dignity of their fellow residents;

- determine the residential charge payable for the provision of housing and support;
- deal with damage or other behavioural issues that might affect a person's tenure;
- balance the need to respond to one resident's issues while maintaining duty-of-care responsibilities to other residents;
- make decisions about whether a person's support needs can continue to be met within a particular community residential unit;
- communicate to the owner the need for repairs or maintenance;
- ensure all residents have appropriate access to their room and shared facilities.

In addition, disability service providers must ensure that residents receive clear information about any fees or charges they are required to pay and what they receive in receipt of this payment.

Placing residential rights in the bill removes the capacity for owners to require payment of a bond and acknowledges that significant numbers of residents of community residential units[3]are not able to enter into an agreement or understand the consequences of their actions.

The bill replaces an agreement with the requirement for disability service providers to issue a residential statement that describes the rights and responsibilities of both parties and details the service and supports that will be provided.

The bill will ensure that some specific matters related to the residency of a community residential unit can appropriately be taken directly to the Victorian Civil and Administrative Tribunal. These matters relate to increases in fees or charges and the issuing of notices to vacate.[4]

However, OPA notes that the Disability Act applies because section 23 of the *Residential Tenancies Act 1997* excludes the operation of that Act to health and residential services. This, and other parts of the Disability Act, are likely to be repealed when the NDIS transitional arrangements end and Victoria moves to the NDIS National Quality and Safeguarding Framework. Indeed, the misalignment between the models of supported disability accommodation provision under DHHS and under the NDIS would require significant amendment to the parts of the Disability Act relating to residential services.

If the Victorian Government does not act to somehow retain the protections detailed above, then under the NDIS national framework the Disability Act protections and section 23 of the Residential Tenancies Act would likely be repealed, and the legal arrangements would fall within the NDIS framework, Australian consumer law and Victoria's residential (and possibly commercial) leasing laws.

OPA is concerned about the vulnerability of residents with disabilities without greater protection than that afforded by:

- Victoria's residential tenancy laws

[3] Now called Group Homes in the Disability Act and often referred to as 'shared supported accommodation'.

[4] Hansard Legislative Assembly, 1 March 2006 p.415

- Victoria's rooming house laws
- the NDIS operational framework (including the NDIS Quality and Safeguarding Framework)
- Australian Consumer Law.

Alongside the additional protections provided for under the Disability Act noted by Minister Garbutt above, the Minister also highlighted the particular need for resident protections in relation to disability-related issues (for example, behaviours of concern that may threaten the person's living arrangements):

> The Residential Tenancies Act provides for a Notice to Vacate to be issued in certain circumstances. However, this Act does not have a mechanism to recognise that many situations that may meet the criteria for a Notice to Vacate are disability-related issues that the disability service provider has responsibility to address.[5]

OPA notes that the NDIS operational framework will provide some safeguards:

- access to a dispute resolution process between the resident and the service provider
- reporting of poor behaviour by a NDIS-registered provider to the NDIA (which may impact on the provider's registration)
- access to remedies under Australian Consumer Law.

But there are problems with these safeguards for vulnerable groups. Including that:

- The dispute will often turn on the meaning of the agreement entered into between the parties. The agreements are drawn up by the providers and are biased in their favour. For example, OPA has seen agreements where the participant is required to always treat the provider's staff with respect and courtesy. The participant may have little or no capacity for such self-regulation, which may be one of the reasons they need behaviour support and, yet, an egregious breach of that condition may be the basis of an eviction.
- OPA has concerns about the ability of people with cognitive impairment to have their concerns raised in a consumer-driven complaints-based system that lacks independent advocacy, support and oversight on the ground. People with significant communication barriers and complex needs might end up isolated in privately provided SDA, without any independent support to help identify issues and get them heard by the NDIS Quality and Safeguarding Commissioner. For more information on OPA's concerns see AGAC's 2015 *Submission in relation to Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper*.[6]

[5]Hansard Legislative Assembly 1 March 2006 p. 415

[6] This submission highlights the importance of disability advocacy funding in relation to the quality of the plan and its implementation (pp 16-19). See also OPA's 2015 submission to the same proposal that speaks directly to the benefits of Community Visitor provision of well-targeted, independent oversight in supported accommodation settings (p. 9).

- Where participants do make allegations of a NDIS-registered provider's poor behaviour to the NDIA, this could lead to an investigation of that provider. However, the provider has rights to procedural fairness. Any complaint is unlikely to result in a timely resolution of matters to prevent the complainant's eviction.
- To access remedies under Australian Consumer Law (ACL), a resident (and their advocate, if they have one) would need to be supported by a lawyer. It may be that the resident will need a litigation guardian or an administrator to initiate a complaint. OPA is advised by the Consumer Action Law Centre that ACL processes can be drawn out.

Residents may need behaviour support to enable them to live safely and harmoniously with others and without damaging their homes. These residents, and those who advocate for them (family, disability advocates, OPA), have little or no bargaining power. Special legal measures are necessary to ensure they have a home, and that they are supported to live safely and harmoniously, in accommodation that is designed to meet their needs.

In this section, OPA has demonstrated that the NDIS national framework, and existing, Victorian, non-disability specific tenancy laws will not be sufficient to maintain or enhance current Victorian safeguards enjoyed by people in supported disability accommodation.

In particular OPA highlights the benefits of protections currently afforded through:

- Parts 5-7 of the Disability Act,
- the safety net role played by DHHS
- the clinical oversight and expertise of the Senior Practitioner
- Community Visitors' advocacy as the eyes and ears of the community
- OPA's advocacy and that of other disability advocates.

OPA considers that, once Victoria transitions to the NDIS National Quality and Safeguarding Framework, residents will need new protective rights and mechanisms to replace those that will be lost.

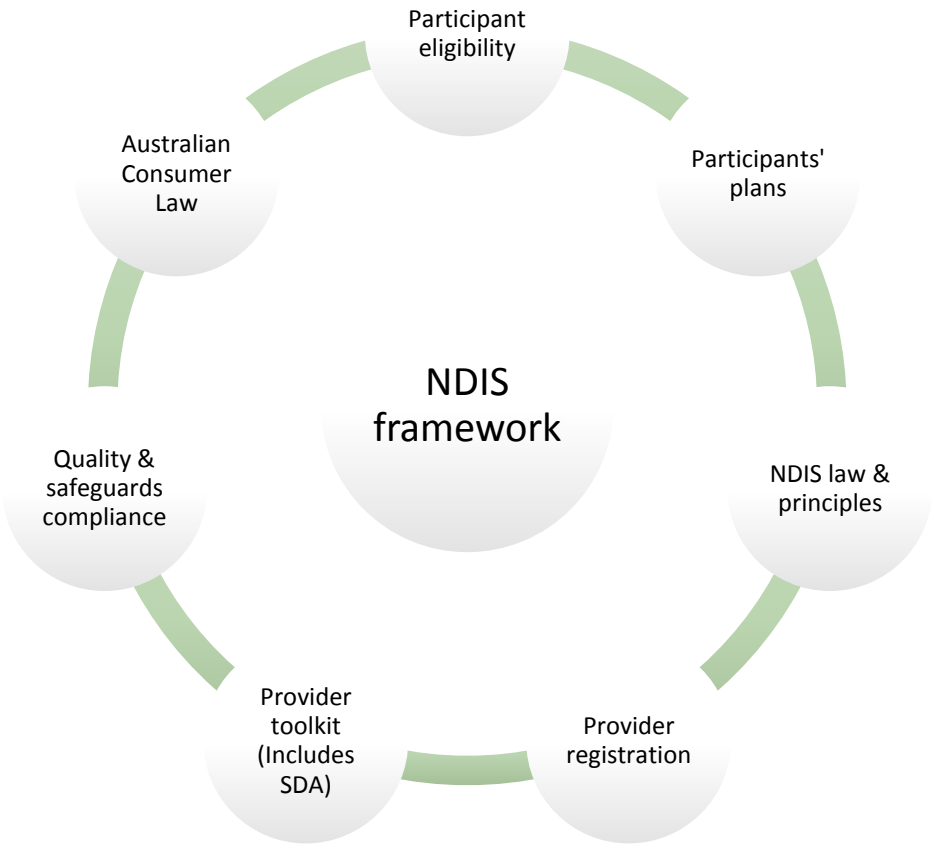
In what follows, OPA discusses and makes recommendations in relation to tenancy protections and other residential rights for participants living in SDA. OPA proposes a legislative framework to achieve this in this submission. The framework it proposes is particularly concerned with protecting tenancies threatened by participants' behaviours of concern. OPA considers that these 'replacement' protections should be set out in a new Part in the Residential Tenancies Act or placed in the Disability Act.

3. The future of SDA provision: frameworks and potential realities

The integration of SDA and domestic Victorian law is a complex exercise.

Victorian law provides protections for residents living in shared supported accommodation that are not available to people whose rights and responsibilities are governed by the Residential Tenancies Act. These extra protections are set out in Part 5 of the Disability Act.

The NDIS provides a framework through which services are provided by NDIS-registered providers to participants. This framework informs and, to some extent, regulates the way participants engage in SDA. Some of this framework has yet to be 'nailed down' and, as such, many of the questions asked by this review are difficult to answer at this point. Proposals presented here represent our understanding at this point and may need to be reviewed in light of further legislative and policy developments.



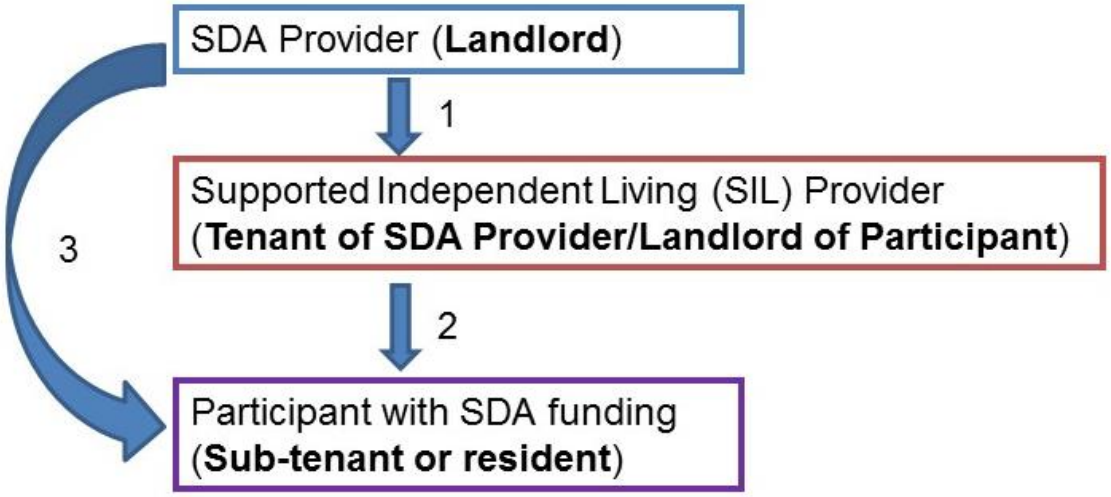
In the discussion below, OPA considers that SDA will be provided to residents living in shared supported accommodation in two ways (called 'models 1 and 2'). They are discussed below.

Model 1 – Status quo (The support provider is the participant's landlord)

In model 1, the landlord of the premises enters into an agreement with a Supported Independent Living (SIL) provider to provide services to the residents of the premises. This would create a landlord-tenant relationship between the landlord and the SIL provider.

It is the SIL provider who determines who will be a resident. Prior to joining the household, a resident would agree that the SIL provider would be their service provider for household and supported independent living services.

Where the house is designated as SDA, there is a requirement under NDIS that the landlord must have an agreement with the participant.[7] However, this agreement does not have to be a landlord-tenant relationship.



This is the model that is closest to the current arrangements in shared supported accommodation. For example, Company Y (a SIL provider) may lease a property:

- That lease may be a residential tenancy agreement or a commercial tenancy agreement.
- The property would be gazetted a 'group home' under the Disability Act.
- A resident joins the home and enters into a residential arrangement with Company Y. The residential arrangement is regulated under Part 5 of the Disability Act.

OPA suspects that, despite the ultimate goal of the NDIS to separate the provision of accommodation from the provision of services, this model creating a landlord-tenant type relationship between the SIL provider and the participant will continue to exist. This is because the economies-of-scale pressures on SDA provision will continue to ensure that many SDA are group homes as opposed to single or dual occupancy homes. To achieve these economies of scale, either participants will have to get

[7] Provider Toolkit Module 3 p. 9 "Registered Providers are required to include all of the terms below in the written service agreement, or proposed agreement in alignment with any legislation, unless State or Territory legislation prevents a term from applying …"

together and agree jointly on a support provider to employ or SIL providers will take the initiative and set up properties that they will then service as SDA. Where the SIL takes the initiative, they will be the landlord and model 1 will apply.

Proposed legal agreements required

As seen in the diagram on page 13 there will be three legal relationships under this model which will need to be specified through agreements.

Agreements documenting relationship 1 – SDA provider to SIL provider

a. A collaboration agreement to manage the SDA property for people with disability **which also creates a landlord-tenant arrangement between the SDA provider and the SIL provider** *or*
b. A collaboration agreement to manage the Specialist Disability Accommodation property for people with disability **plus** a commercial lease or residential lease.

Agreements documenting relationship 2 – SIL Provider with Participant

a. a service agreement (as required by the NDIS legislation and regulated under the NDIS)
b. a residential sub-lease (or other arrangement that sets the SIL up as the participant's landlord). The law underpinning this arrangement and the terms of such an agreement would be found in new SDA provisions in either the Residential Tenancies Act or the Disability Act. This is explored further in the section on SDA tenancy rights under Victorian Law below.

Agreement documenting relationship 3 – SDA provider with participant

a. a service agreement as required by the NDIS (SDA) Rules 2016 and specified in more detail in Module 3 of the Provider Toolkit (p.15)

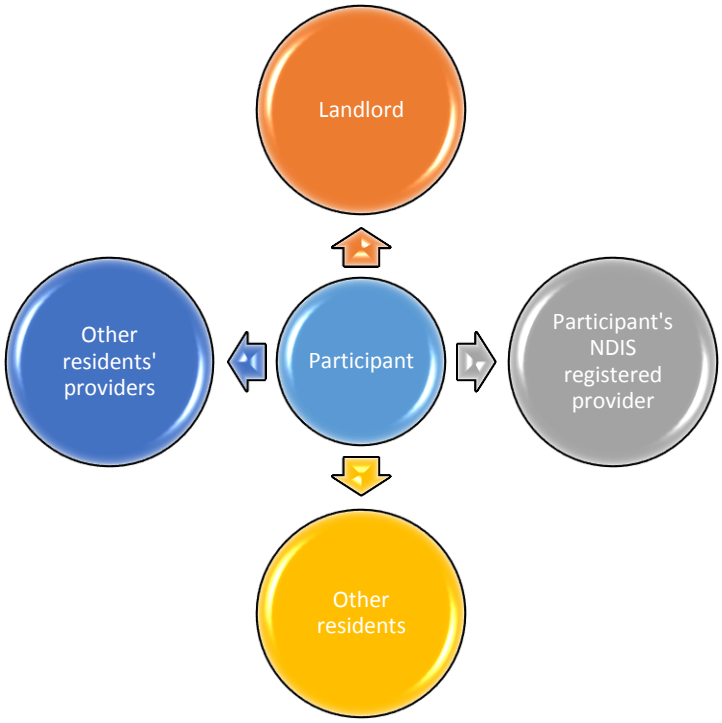
This agreement would be subject to, and could not contain any provisions contradicting, the residents' rights held pursuant to the new SDA tenancy provisions.

Model 2 – NDIS market model (SDA provider is the participant's landlord)

In this model, the participant would seek out a place to live and engage a NDIS-registered provider to provide relevant supported independent living services, either on their own or jointly with other SDA eligible participants.

For example, a participant may need accommodation (the fabric of which is robust) to cope with the participant's behaviours. Such a residence exists and the participant enters into an agreement with the landlord of the building. According to the participant's plan, the participant is entitled to services to help with most activities of daily living, with behaviour support and also to attend a day placement. The participant agrees that these services will be provided by a NDIS-registered provider.

In some cases the resident would not be the only person living in the accommodation; she would have co-tenants.



Model 2 is characterised by the fact that the SIL provider (or potentially providers where there is more than one resident) is **not** the landlord in relation to the participants.

There may be just one participant in the house or, as in the example above, or there may be more than one. Where there is more than one, the participants may share a SIL provider or they may have different SIL providers than their co-residents. Further, individuals may employ more than one SIL provider in line with their NDIS plan.

Proposed legal agreements required

As seen in the diagram above, there will be different legal relationships under this model which require specification through agreements (the number will depend on the number of participants and the number of SIL providers). OPA considers the following agreements will be required either by the current NDIS framework or by the new SDA laws in either the Residential Tenancies Act or the Disability Act.

Agreement documenting relationship between SDA provider (landlord) and participant.

a. a service agreement as required by the NDIS (SDA) Rules 2016 and specified in more detail in Module 3 of the Provider Toolkit; and
b. a lease agreement in the prescribed form specified under the new Residential Tenancies Act or Disability Act section on SDA. (The content of the terms of

the lease is explored more fully in the section on SDA tenancy rights under Victorian Law below. In relation to eviction, it will include the giving of notices of temporary relocation, notices to vacate and requirements going to behaviour support.)

Agreement documenting relationship between SIL Provider/s and Participant

a. a service agreement (as required by the NDIS Act/Rules and regulated under the NDIS)

Note: In the section on SDA tenancy rights under Victorian Law below, OPA proposes that SIL providers will still have responsibilities in relation to Behaviour Support and Restrictive Interventions and, so, even though they will not be issuing notices of temporary relocation or to vacate, there will be a mechanism to trigger a review of behaviour support to be conducted by the SIL provider.

Agreement documenting relationship between participants who are co-residents (potentially required in households with more than one resident)

Such agreements may be required where the SDA provider has not chosen to operate the SDA in such a way as they provide common-area furniture, whitegoods and shared utilities as part of the landlord-tenant relationship.

OPA submits that the participants have the right to be clear about their rights and responsibilities under the various models. This includes in relation to:

- rules about how the household is run (coordination)
- how residents will treat each other
- how bills will be paid
- how fittings in common use are maintained and replaced
- the relationship between NDIS-registered providers entering the home and other residents and their NDIS-registered providers.

Agreement about these things may be part of the terms of the agreement between the landlord and the participant. However, some of these matters go beyond those canvassed in a typical lease.

Key points from this section

This section has presented a likely picture of the full range of future delivery of SDA in Victoria. In doing so, OPA hoped to bring attention to the range of relationships and agreements that are possible under these delivery options, and, hence, the possibilities to regulate or otherwise support people with disability in these relationships. OPA also sought to demonstrate how its proposal to maintain and enhance existing protections could function where SDA delivery is funded and regulated under the NDIS. And, crucially, where accommodation provision is separated from disability support service provision.

OPA's proposal for future rights protections in SDA hangs off the landlord-tenant (participant) relationship, and the new Victorian laws that could govern agreements reached by these parties. OPA's proposal, which is detailed in the following section, also highlights and draws on the protective and rights enhancing possibilities inherent in the roles of the Victorian Senior Practitioner and Victorian Community Visitors.

4. Proposed SDA tenancy rights under Victorian law

OPA believes that the existing protections under the Disability Act in relation to grounds for eviction are much stronger than existing provisions for tenants under the Residential Tenancy Act. OPA understands that the changes brought about by the NDIS will require a substantial overhaul of existing legislation to ensure that people with disability who have complex needs and exhibit behaviours of concern are not seriously disadvantaged at full scheme implementation.

OPA also acknowledges that maintaining the safeguards currently protecting Victorians with disability will not be possible without agreements between the Victorian Government and the NDIA, including an agreement around responding to time-sensitive situations where a participant's SDA tenancy is at-risk.

OPA believes that, without new legislative provisions to maintain and enhance rights protections (and the necessary supporting agreements), people with disability who exhibit behaviours of concern that could threaten their SDA tenancy will be seriously disadvantaged and subject to eviction and relocation at much higher rates than at present. Given that, under the NDIS the State Government will likely no longer provide crisis disability housing, evictions under the NDIS could well result in homelessness.

Notice to Vacate and temporary relocation

OPA has much experience in this area as, currently, disability service providers are required to notify it when they issue notices for temporary relocation (s 74) and notices to vacate (s 76). OPA's Disability Act Officer investigates the circumstances of the person affected and provides advocacy support or referral to legal supports (either OPA lawyers or external council) as required. OPA's oversight of these processes should be maintained.

Below is the bare-bones model for legislative reform that OPA believes would help ensure that full-scheme implementation does not result in diminished rights for people with disability accessing SDA into the future. It is presented below as a step-by-step process outlining how the proposed legislative framework would protect tenancy rights. The following part gives further context to the framework by outlining what OPA believes are the key requirements of the new provisions under the amended legislation.

How the process would operate in practice

Step 1

The landlord (either the SIL provider or the SDA provider, depending on the model) would identify a behaviour-related issue which, they believe, constitutes grounds to relocate or evict the participant.

Step 2

The landlord would issue a notice of temporary relocation (a new provision under the Residential Tenancies Act or Disability Act section on SDA, modelled on Section 74 of the Disability Act).

Step 3

Landlord would be required to inform:

- the tenant (participant)
- the Senior Practitioner
- the Public Advocate

- the CEO of the NDIA
- the participant's NDIA planner
- the SIL provider (if they are not the landlord in this case)
- relevant decision-making supporters and existing substitute decision-makers.

Step 4a

The Senior Practitioner must investigate the situation. The Senior Practitioner can direct the SIL provider to review or develop a Behaviour Support Plan (in circumstances where the participant's behaviours of concern are threatening their tenancy and the Senior Practitioner believes that a Behaviour Support Plan could address those threats). The Senior Practitioner may also support the SIL provider to improve or better implement the Behaviour Support Plan. The Senior Practitioner must notify the NDIA of any directions given.

Step 4b

Where directed to do so by the Senior Practitioner, the SIL provider would review the participant's Behaviour Support Plan with the intention of resolving the behavioural issues impacting the participant's tenancy in the SDA.

This step would need the collaboration of the NDIA to fund a review of the participant's plan, and the associated Behaviour Support Plan review and assessments deemed to be required to support the improvement of it. OPA considers this to be a matter for policy development between the Victorian Government and the NDIA.

Step 4c

NDIA will be aware of the potential move out of SDA by participant X (due to relocation notice provisions). The Senior Practitioner will have advised the CEO of the NDIA of their directions in relation to the participant's Behaviour Support Plan.

For the level of existing protections to be maintained (and, perhaps, strengthened further), the State Government and the NDIA will need to have an agreement in relation to communication processes between the Senior Practitioner and the NDIA and ensure funding is available in emergency situations where the participant's tenancy is threatened. This funding will need to cover costs of temporary relocation and costs associated with a Behaviour Support Plan review.

Step 4d

As it does currently, OPA could provide referrals or advocacy aimed at supporting the rights and wellbeing of the participant (including the arrangement of legal support for the participant and representation). OPA could also apply to VCAT for a temporary guardianship order if it believed this would be of assistance – for example, a guardian would be able to apply for a NDIA plan review on behalf of the participant, if this had not already happened.

Step 5

The landlord would accept the issues have been resolved (through the involvement of the Senior Practitioner or other) and the participant returns to reside in the SDA (**process ended**).

OR

The landlord issues a 'Notice to Vacate' (a new provision based on s 76 of the Disability Act). This notice gives the participant a minimum of 28 days' notice. OPA proposes that the new legislation on SDA requires all the processes required under the provisions relating to a Notice of Temporary Relocation be completed before the landlord can issue a Notice to Vacate. The new provisions will include that any

directions made by the Senior Practitioner have been complied with before a Notice to Vacate can be issued. This is a stronger provision than currently applies.

Step 6

If the resident (participant) wishes to object to the Notice to Vacate they can seek review by VCAT. (Provision modelled on s 82 Application to VCAT for review of Notice to Vacate from Disability Act)

Step 7

Currently (s 82 of the Disability Act), VCAT can only determine that the notice is valid or invalid (or dismiss the application).

OPA proposes that VCAT be given the additional grounds to determine that the Notice to Vacate should not be upheld. Where VCAT finds the notice to be valid, VCAT must also consider whether the grounds for eviction continue to apply; if they do not continue to apply then the Notice to Vacate should be dismissed.(For further details, see section on Provisions relating to VCAT oversight.)

Step 8.

The landlord applies to VCAT for a possession order. To make such an order VCAT must be satisfied that the landlord was 'entitled to give the Notice to Vacate' **and** that the grounds on which the Notice to Vacate was issued still apply (based on s 84 Disability Act).

VCAT's order would include direction to the participant to vacate the room by a specified date and direction to the principal registrar to issue a warrant of possession.

Step 9

If VCAT makes a possession order, the landlord may apply for a warrant of possession (based on s 85 of Disability Act).

Step 10

The landlord evicts the participant.

Key features of new (relocation/eviction) SDA provisions

This section includes ideas and recommendations in relation to OPA's proposed tenancy protections framework.

This includes comment on where the new provisions would be best placed – the Residential Tenancies Act or the Disability Act; and key features of provisions required to support the proposed framework.

Which Act should provide for SDA tenancy protections?

OPA is concerned that tenancy protections for people in SDA, and any additional protections styled on the current Disability Act (in relation to behaviours of concern which put a person's tenancy at risk), be protected from constitutional challenge arising from tensions between Commonwealth and State law. To this end, it submits that constitutional law experts are best placed to advise on this issue.

Notwithstanding the constitutional issues, OPA believes that there are compelling arguments in both directions. Given that the new laws will be about tenancy rights, the Residential Tenancy Act is in many ways a good fit. However, the important role played by the Senior Practitioner under OPA's proposed framework suggests that there would also be benefits to retaining tenancy protections in SDA under the Disability Act.

A second important consideration would be whether the matters arising from the new provisions would be best heard by VCAT's Residential Tenancies List or their Human Rights List (which hears matters arising from provisions in the Disability Act). It is well known that the Residential Tenancies List is the busiest list at VCAT, and, consequently, very little time is allotted to hearing individual matters. The Human Rights List is familiar with disability-related issues and regularly has extended hearings for complex matters.

Recommendation 1

That careful consideration is given to the benefits and drawbacks of placing new provisions relating to SDA tenancy in the Residential Tenancies Act as opposed to the Disability Act. Considerations should include constitutional law ramifications and skills and capacity of respective VCAT lists.

Essential new (rejuvenated) provisions

The most important provisions that need to be retained (with relevant amendments) are the Notice of Temporary Relocation (currently s 74) and the Notice to Vacate by the Landlord (currently s 76). Together, and with VCAT oversight (reviews and appeals), these provisions currently help ensure that people in disability residential services get support to address the behaviours putting their tenancies at risk before they can be evicted.

These key sections will need to be supported by an extension of the role of the Senior Practitioner (to be detailed in Section 7 of the Disability Act) in relation to these notices, and continuing provision for VCAT oversight of these matters (currently covered by ss 82–85D).

Note that the existing provisions relating to termination of residency and the effect of Notice to Vacate (ss 75, 77) inform how the process currently operates and will need to be considered, and aspects included, where necessary, to support the intent of OPA's proposed protections. For example, s 77(b) currently places an onus on the Disability Service Provider to provide alternative accommodation during periods of temporary relocation (s 74(5)) and until the end of the period specified in the Notice to Vacate.

Under the proposed framework, the SDA landlord would have the responsibility for issuing Notices of Temporary Relocation and Notice to Vacate. Depending of the legal relationships present in a given SDA, the landlord would be either the SDA provider or the SIL provider.

Role of the Senior Practitioner

Section 7 of the Disability Act would need to be amended to give the Senior Practitioner the ability to investigate matters arising from Notices of Temporary Relocation (in SDA).

This may require amendment to Section 23 of the Disability Act, to expand the responsibilities of the Senior Practitioner from a sole focus on protecting the rights of persons 'subject to restrictive interventions and compulsory treatment'. Under OPA's proposed framework, the Senior Practitioner's protective mandate needs to extend to people whose behaviours of concern are threatening their tenancy, irrespective of the need for restrictive interventions.

The Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016, for example, proposes amendment to the mandate of the Senior Practitioner, as well as the functions and special powers of the Senior Practitioner (Sections 23, 24 and 27 of

the Disability Act). These amendments would extend the ability of the Senior Practitioner to act and give directions in relation to people subject to supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. This type of amendment could be made (with links to the Residential Tenancies Act, where appropriate) so that people whose behaviours of concern were threatening their tenancy in SDA could also receive the benefit of clinical oversight from the Senior Practitioner, irrespective of their need for restrictive interventions.

This clinical oversight would promote the effectiveness of the participant's behaviour support plan, which is defined in the Disability Act as:

> "A plan developed for a person with a disability which specifies a range of strategies to be used in supporting the person's behaviour including proactive strategies to build on the person's strengths and increase their life skills". (s. 3)

This would mean that the Senior Practitioner can require that a Behaviour Support Plan be developed (or reviewed) for a person, whether or not the person's behaviours of concern require restrictive interventions.

Notice of temporary relocation (modelled on s 74)

Key aspects of provisions around Notices of Temporary Relocation:

- The conditions under which the landlord can give a participant a notice of temporary relocation.
- The landlord must notify the tenant (participant), the Senior Practitioner, the Public Advocate, the CEO of the NDIA, the participant's NDIA planner, the SIL provider (if they are not the landlord), relevant decision-making supporters and existing substitute decision-makers of the details of a Notice of Temporary Relocation. Bodies other than the participant should be notified within 24 hours of the notice being given.
- If the grounds for relocation were related to the participant's behaviours of concern, the Senior Practitioner would be required to investigate the circumstances of the resident given the notice. OPA is unsure how quickly such an investigation should be undertaken, but as the person has been relocated, it needs to be commenced urgently.
- OPA suggests that the Senior Practitioner has up to 30 days to issue directions (for example, direct the SIL to review the participant's Behaviour Support Plan), or make a determination that a review of the Behaviour Support Plan would not address the factors threatening the participant's tenancy.
- The landlord is responsible for relocating the participant to alternative accommodation for the period specified in the notice.

The protective intent of current provisions in section 74 not specifically referred to above should also be maintained by new legislation. This includes the timelines that apply to notices and what use the vacated room can be put to.

Notice to Vacate by landlord (modelled on s 76 Notice to Vacate by disability service provider)

Key aspects of provisions governing Notices to Vacate by landlord:

- Issuing of notice requires notification to the same individuals and bodies as the issuing of a Notice of Temporary Relocation: the participant, the Senior Practitioner, the Public Advocate, the CEO of the NDIA, the participant's

NDIA planner, the participant's SIL, and relevant decision-making supporters and substitute decision-makers.

- The provision includes the grounds on which a landlord may give a Notice to Vacate. In relation to this provision, OPA supports the VCOSS recommendation that legislation should "not allow a Notice to Vacate for no reason, including at the end of a fixed term agreement", on the grounds that it may mask the real reason for the eviction.
- A Notice to Vacate cannot be given on behavioural or 'participant wellbeing' grounds until after the processes in the Notice of Temporary Relocation have been complied with, or, in the absence of any directions from the Senior Practitioner, 30 days after issuing the Notice of Temporary Relocation.[8] (See below for further detail.)
- The timelines for termination dates should remain linked to the reasons for the eviction (s 76(2), (3), (4)).

To ensure that the protections inherent in the Senior Practitioner's investigation of temporary relocation matters are as effective as possible, and that any directions from the Senior Practitioner are given adequate time to take effect, OPA proposes new provisions that prevent a Notice to Vacate from being issued until the investigation has been completed and the directions complied with. For example:

A Notice to Vacate may only be issued:

(a) on completion of the Senior Practitioner's investigation, where a decision was made not to issue any directions in relation to the matter; or,
(b) on fulfilment of directions issued by the Senior Practitioner arising from an investigation of the matter; or,
(c) where no determinations or directions were made by the Senior Practitioner, after 30 days of issuing the Notice of Temporary Relocation.

Effect of Notice to Vacate (s 77) and responsibility of the landlord to provide alternative accommodation

This provision currently places the responsibility for providing alternative accommodation (where necessary) on the Disability Service Provider. OPA's proposal would see this responsibility placed on the SDA landlord – the person or body with whom the participant has a tenant/landlord relationship (under model 1 it would be the SIL provider, under model 2, the SDA provider).

OPA believes that, from a safeguarding point of view, it is essential that the participant cannot just be made homeless (in circumstances where it is not safe for them or their co-tenants to live together at that time) on issue of a Notice to Vacate or a valid Notice of Temporary Relocation. On these grounds, it is proposed that it is preferable that the landlord holds the responsibility for ensuring the participant has temporary alternative accommodation.

However, OPA realises that this position would have serious implications for the landlord, especially given that, under OPA's legislative proposal, they would be required to wait for directions from the Senior Practitioner and, in some cases, action by a third-party SIL provider.

[8] This is stronger than the existing provision s 76(2), which allows a Notice to Vacate to be given as long as a Notice of Temporary Relocation was issued on the same grounds at least 24 hours previously.

OPA proposes that, to ensure that such a safeguard against homelessness, the Victorian Government would need to negotiate an agreement with the NDIA that covers where responsibility lies to respond to situations where a participant's SDA tenancy is threatened and the participant is at risk of homelessness.

This agreement would likely include an agreed protocol between the Senior Practitioner and the NDIA in relation to such matters, and, crucially, access to emergency (timely) funding to review the participant's Behaviour Support Plan, undertake assessments to support this, and to fund temporary alternative accommodation. Ideally, the NDIA would prioritise, as a matter of policy, the review of a person's NDIS plan when they are notified of a temporary relocation or a Notice to Vacate under the new provisions OPA is proposing.

OPA suggests that homelessness arising from behaviours of concern in SDA will not only be a problem in Victoria and that a model, such as the one OPA is proposing, will be needed in every state and territory under the NDIS.

The other important protection contained in this provision is the requirement that any lodged appeal of VCAT review of the matter has been determined. OPA proposes this continues. (See more detail on VCAT oversight below).

Provisions relating to VCAT oversight: to protect the participant

This section concerns the current provisions for VCAT oversight of Notices to Vacate and eviction processes found in the Disability Act (Sections 82 through to 85D).

OPA's model proposes that the VCAT retains all of its oversight and review powers in relation to tenancy in SDA under full scheme. OPA also proposes some strengthening of the legislation in relation to these provisions.

The section, "Application to VCAT for review of Notice to Vacate" (s. 82), states that VCAT "may only determine whether or not the Notice to Vacate is valid". They may then confirm the notice or declare it invalid, or they may dismiss the application.

OPA proposes that this provision be amended to allow VCAT to further determine, when they find that the Notice to Vacate was valid, whether the grounds for the notice continue to apply. If not, then the Notice to Vacate may be dismissed on the basis that the original grounds no longer apply.

This amendment, or one to similar effect, would ensure that participants were not evicted in circumstances where the original behaviours of concern had ceased.

In the same vein, OPA submits that (in addition to current grounds) a participant be given the right to appeal a Notice to Vacate at VCAT when their reviewed Behaviour Support Plan has not been implemented or if the grounds on which the notice was issued no longer apply.

The same sort of amendment would be required in relation to provisions around possession orders (s. 84).

OPA supports the use of alternative dispute resolution (ADR) at VCAT in this instance. VCAT would provide a forum for all relevant parties to the proceeding, including a SIL provider of behaviour support who is not the participant's landlord in the matter, to come together and resolve the issues for the benefit of the participant.

To ensure the matter is focused on the rights and preferences of the participant, the participant should receive legal representation and advocacy support as required (facilitated by OPA's involvement). Along with the Senior Practitioner's power to direct the SIL to review the participant's Behaviour Support Plan, VCAT's power to

join relevant parties to such a matter is key to the safeguarding effects of OPA's proposed framework.

Nonetheless, when a resolution cannot be achieved through ADR, VCAT is empowered to determine the matter.

Provisions relating to VCAT oversight: to protect the landlord

It is possible, under the proposed legislative framework, that a SDA provider (and landlord in the relevant matter) could find themselves unable to issue a Notice to Vacate on the grounds that the participant's SIL provider has not complied with directions issued by the Senior Practitioner. In this case, the SDA provider would have no capacity to evict the participant and no ability to compel the SIL to act to bring the matter to resolution.

To prevent this scenario, the SDA provider who is prevented from issuing a Notice to Vacate by the actions or lack of action by the SIL provider, should be able to have the matter heard at VCAT. VCAT could then join the SIL as a party to the proceedings. VCAT should have the power to require the SIL provider to implement the directions of the Senior Practitioner and/or implement the participant's Behaviour Support Plan.

As the SIL providers will still have responsibilities under the Disability Act in relation to Behaviour Support and Restrictive Interventions, it is reasonable to expect them to have responsibility for undertaking plan reviews.

Recommendation 2

That detailed consideration be given to OPA's proposed framework (Chapter 4) for Victorian rights protections for participants in SDA under full scheme.

Recommendation 3

That all of the rights protections and benefits of OPA's proposed framework be realised for participants living in SDA, even if this is under an alternative safeguarding framework yet to be developed.

5. Community Visitors

Community Visitors play a vital safeguarding role, providing independent on-site monitoring of service delivery and accommodation standards, as well as relaying complaints by residents to relevant complaints bodies as required. OPA has detailed the benefits of the Community Visitor scheme in Victoria in its 2015 submission in relation to the proposed NDIS quality and safeguarding framework.[9]OPA noted in that report that "relevant state and territory legislation will also likely need amendment to enable these programs to continue to operate in an NDIS environment".[10]

OPA also notes that the Productivity Commission stated in their *Inquiry into Disability Care and Support Report* (2011) that:

> "Official Community Visitors should play an important role in promoting the rights of, an overseeing the welfare of, the most vulnerable people in the disability system (and be introduced in jurisdictions where they do not already exist)."[11]
>
> "In doing so it is desirable to replicate features of the Victorian model, including the publication of annual reports and the use of volunteers."[12]

The following recommendations are designed to maintain and strengthen the safeguarding benefits provided by Community Visitors to people with disability living in gazetted residential services (disability services accommodation including institutions and group homes) post June 2019. At that time, OPA sees these benefits being available to all participants receiving funding for SDA under their NDIS plan.

Retaining Community Visitors post 2019

The Disability Act will need to be reviewed in light of the NDIS, however, OPA proposes that it retain the intent of its provisions relating to Community Visitors into the future (ss 28–36). In particular, OPA believes that the current breadth of functions of a Community Visitor (s 30) be retained by the Disability Act. These functions include inquiry into accommodation standards, adequacy of opportunities for social inclusion, service provision, suspected abuse and neglect, restrictive interventions and compulsory treatment, and complaints by residents.

Recommendation 4

That the Disability Act be reviewed in light of the NDIS.

Recommendation 5

That the current breadth of functions given to Community Visitors be retained to encompass standards of accommodation and service provision.

Recommendation 6

That the Community Visitor Program is funded to continue their safeguarding functions post June 2019.

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[9] OPA, 2015, *Submission in relation to Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper*; see in particular Chapter 4.

[10] Ibid, p. 6.

[11] Productivity Commission, 2011, *Inquiry into Disability Care and Support,* Report No 54, Vol 1, p. 52.

[12] Ibid, p. 509.

Access to participants in SDA

In order to maintain Community Visitors access to disability supported accommodation, OPA proposes that Community Visitors be empowered to visit all SDA in Victoria with provision made for this in amendments relating to SDA tenancy protections in either the Residential Tenancies Act or the Disability Act.

OPA understands that SDA will become increasingly diverse from single occupancy homes where participants self-manage their plans to share-house style arrangements to SIL-provider-managed group homes.

Hence, OPA supports the participants' rights to refuse entry to Community Visitors when they so choose. Conversely, Community Visitors should be able to report that a participant or group pf participants is refusing entry, especially if they have concerns in relation to that SDA (see the section "Ensuring the effectiveness of Community Visitors" below).

OPA also suggests a number of provisions to promote knowledge of and access to Community Visitors among participants (and their families and supporters).

Recommendation 7

That the new legislation in relation to SDA tenancy includes a provision empowering Community Visitors to visit all Victorian SDA (which are receiving SDA payments from the NDIA). Participants living on their own should have the right to refuse entry to Community Visitors, and participants in shared homes should have the right to refuse entry to their rooms.

Recommendation 8

That the standard tenancy agreement for participants in SDA (between the landlord and the participant) includes in it recognition of the participant's right to request a visit from a Community Visitor.

Recommendation 9

That legislation includes an obligation on the SDA landlord to provide a statement of rights to the participant, which includes the right to access a Community Visitor.

Recommendation 10

That legislation includes an obligation on the SDA landlord to display contact details for the Office of the Public Advocate and Community Visitors, and to facilitate contact with Community Visitors within a reasonable timeframe (for example, 7 days) where the participant requests it.

Ensuring the effectiveness of Community Visitors

Program funding and access to SDA are essential to ensuring Community Visitors can maintain a safeguarding role in the new environment. Access to information, including a participant's SDA tenancy agreement and the types of documents they have access to (which will look different in an NDIS environment), is crucial to the ongoing effectiveness of Community Visitors.

Recommendation 11

That Community Visitors are entitled to see copies of all documentation related to the participant's SDA tenancy arrangements as well as the documents they are currently entitled to see when visiting (as specified in the Disability Act).

Community Visitors and OPA have expressed concern in the past about people living in Disability Services who are not given Notices of Temporary Relocation or Notices to Vacate, and, therefore, are not eligible for the protections triggered by these notices, on the grounds that they have 'consented' to the move.

While the workload attached to investigating each of these moves by mutual consent would be too high to justify legislating for OPA oversight in these cases, it is with this in mind that OPA sees the safeguarding role of Community Visitors as **crucial** to protecting the tenancy (and other) rights of people with disability.

When Community Visitors identify a concern in relation to a participant or an SDA, they must have effective referral pathways to ensure these concerns are addressed or resolved. These concerns may include that the Community Visitor is suspicious that the participant has been pressured or manipulated by a third party to refuse entry to the Visitor or, for example, concerns which arise from the state of the property. Currently, without limiting Community Visitor referral options, section 33 of the Disability Act states a selection of people to whom matters arising from their functions may be referred: the Secretary, the Disability Services Commissioner, the Senior Practitioner and the Ombudsman. OPA proposes this list be amended to also include:

- the NDIS Quality and Safeguards Commissioner
- the CEO of the NDIA.

Recommendation 12

That Community Visitors are able to raise concerns with the SDA provider (and/or the SIL provider) in the first instance. Where they are not satisfied by the response, or if the concern requires immediate action or is of a very serious nature, that Community Visitors can raise their concerns with the NDIS Quality and Safeguards Commission and/or the CEO of the NDIA.

Recommendation 13

That Community Visitors be protected from NDIS information-sharing laws to the extent necessary to advocate for participants and raise concerns with relevant complaints bodies.

6. Other issues

Tenancy agreements

OPA proposes that SDA tenancy agreements should draw upon the Residential Tenancies Act's standard tenancy agreement where it is not inconsistent with OPA's proposal for additional tenancy protections.

These agreements will better reflect the realities of SDA in an NDIS environment – where day-to-day support is separated from accommodation provision – than residential statements (s 57) as required by the Disability Act.

Standardising these agreements, and including the additional SDA specific provisions proposed in this submission (referred to above), would help protect the rights of SDA tenants. Careful consideration needs to be given to the clauses included in this standard agreement on the grounds that behaviours of concern relating to the participant's disability might unduly disadvantage them. For example, the current Residential Tenancy Agreement refers to the tenant's responsibilities in relation to damages, for example, that they must take care to avoid damaging the rented premises. This clause may disadvantage a person with behaviours of concern and, further, it may not be a reasonable request in some circumstances.

Under the NDIS rules, participants are required to have a signed agreement with the SDA provider. Where a resident cannot sign an agreement because they have been determined to lack the capacity to do so, supported and substitute decision-making arrangements will need to apply. OPA holds concerns about the use of nominees as signatories because of the lack of safeguards present in standard substitute decision-making arrangements (for example, enduring powers of attorney and tribunal appointed guardians and administrators).

Recommendation 14

That there should be a standard SDA tenancy agreement, as there is a standard tenancy agreement in the Residential Tenancies Act. The agreement should include any additional protective clauses deemed to be relevant to the circumstances of SDA tenants.

House mates and house management

The development of more diverse models of SDA will make legislating in the areas of housemates and house management very difficult, if not impossible.

This diversity may include, but not be limited to: single or dual occupancy households; households established through agreement between participants who want to live together; and, along with existing group homes, potentially, more households established by service providers to provide shared services to SDA eligible participants. Protections that will be relevant in one setting will be onerous or pointless in another.

In relation to participants having choice over who they live with, OPA suggests that participant choice and control be enshrined as a principle of service delivery. In some settings OPA anticipates that participants will be the decision-makers, seeking out co-tenants and setting up their own SDA households, coming to joint agreements over how the household is managed and agreeing on house rules. In other settings, for example, when the SDA provider chooses to provide SDA in a 'rooming house' style or when a SIL provider acts as the landlord and manages the household, the participant will likely not have full control over who they live with or over the house rules. However, providers should aim to seek the views of co-tenants and carefully consider their preferences when deciding to fill a vacancy. Support coordinators,

supported decision-makers and other disability advocates could play a role in ensuring participants' voices are heard in provider managed SDA settings.

OPA supports the VCOSS recommendation that advocacy organisations and tenancy support services be funded to "assist people living in shared housing to establish house rules and coordinate shared services".

Access to house and room

Careful consideration needs to be given to what are appropriate provisions in relation to participant privacy and access to SDA homes and bedrooms. OPA proposes that issues around participant privacy and access to premises be specified in the standard SDA tenancy agreement.

The agreement would need to cover situations and timelines under which it would be appropriate to enter an SDA, including participants' bedrooms. They would need to specify when, and if, notice has to be given to the participant. OPA suggests that a review of existing provisions in both the Residential Tenancies Act and the Disability Act be undertaken and thought given to what specific needs might arise in SDA that may need to be provided for.

Rent and money management

As mentioned in the consultation paper, reasonable rent contributions from participants have been limited and details are available in the *Provider Toolkit Module 3*.

Disputes about rent will have to be considered with this framework in mind. With an understanding of the governing NDIS framework, disputes about SDA rent may be reasonably heard by VCAT.

OPA submits that participants in SDA should not be required to pay a bond. They are not required to do so under the Disability Act currently and OPA sees no reason to impose this additional burden. Further, SDA providers are receiving significant government funding already and provisions are in place to cover SDA provider income shortfalls should short-term vacancies arise.

Recommendation 15

That SDA participants not be required to pay a bond.

Oversight of home modifications

OPA proposes that VCAT oversee matters where landlords are not meeting their responsibilities in relation to home modifications. Complaints could also be made to the NDIS Quality and Safeguards Commissioner or to the NDIA CEO.

Where participants suffer from severe cognitive impairment, and have few, if any, informal supporters, OPA's holds concerns that participants would be unable to make use of safeguarding processes that require a complainant. Community Visitors could help fill this gap and ensure SDA landlords are meeting their obligations to participants. Community Visitors would be especially well-placed to report poor or unfit-for-purpose home modifications. Community Visitors could report such concerns directly to the SDA funder, the NDIA CEO.

Repairs and damages

As noted in the Consultation Paper, this is potentially a complex area due to the overlapping responsibilities and safeguarding frameworks of the Victorian Government (through new tenancy laws governing SDA) and the NDIA Registrar

(which, for example, may suspend SDA registration for poor product or service delivery) under the NDIS Quality and Safeguarding Framework.

At this point in time, with both State and Commonwealth safeguarding frameworks still in development, it is too soon to enable OPA to comment on the specifics of the important interactions between the two. OPA instead provides advice about the main outcomes that these frameworks should enable.

In regards to whether participants should have personal liability for property damages in SDA, OPA submits that one option would be to address the matter in the SDA tenancy agreement. The benefit of this is it takes into account the participant's ability to regulate their own behaviours (including those that might damage property) and the type of SDA that is being provided (for example, 'robust' SDA), and, could make it clear under what circumstances the landlord had the right to recourse to compensation or VCAT involvement.

Recommendation 16

That the tenancy agreement between SDA landlord and participant detail the conditions, if any, under which the participant can be made personally liable for property damage.

Recommendation 17

That where participants are eligible for 'robust' SDA that they should not be liable in any way for property damage. And that this be reflected in the SDA tenancy agreement.

Recommendation 18

That where damage results from a participant's inability to regulate their behaviour, that they not be held personally liable for property damage. And that this be reflected in the SDA tenancy agreement.

Recommendation 19

That, under circumstances where a participant may be held personally liable, they can only be held liable to the extent that the damage was caused "knowingly and intentionally" and does not constitute "fair wear and tear".

In relation to safeguards for tenants in need of repairs to SDA, OPA supports the following VCOSS recommendations:

- adopt Residential Tenancy Act protections for SDA tenants to pursue urgent and non-urgent repairs, with an expanded list of urgent repairs to reflect the urgent nature of certain repairs as a result of having a disability
- introduce a landlord bond for repairs and maintenance to protect tenants against the risk of unmet repair needs.

OPA agrees that SDA tenants have recourse to VCAT where the landlord is not meeting their obligation to maintain the premises in good repair. Again, Community Visitors could play a safeguarding role here.

Recommendation 20

That participants have recourse to VCAT in relation to maintenance and repair issues.

Family violence intervention orders and SDA

The Residential Tenancies Act contains a provision (s 233A) for tenants to apply to VCAT to vary their tenancy agreement in situations involving family violence. VCAT may make orders to terminate an existing tenancy agreement or to require the landlord to enter into a new tenancy agreement with the protected person, when a 'final order' has been made under the *Family Violence Protection Act 2008* or the *Personal Safety Intervention Orders Act 2010.*

OPA submits that consideration be given to extending this additional protection to participants in SDA.

Support for participants

To realise the potential benefits of greater choice of accommodation and laws protecting tenancy rights in SDA, some people with disability will require substantial advocacy supports, including legal advocacy.

Support coordination (as funded by the NDIA) will need to sit alongside independent disability and tenancy advocacy services. Community Visitors, also, may be a participant's only independent point of contact if they live in privately provided SDA. As such, they are an essential safeguard.