



# Submission to the Joint Standing Committee on the NDIS

Inquiry on Supported Independent Living

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## Abbreviations

NDIA	National Disability Insurance Agency
OPA	Office of the Public Advocate
SDA	Specialist Disability Accommodation
SIL	Supported Independent Living
VCAT	Victorian Civil and Administrative Tribunal

# Recommendations

## Recommendation 1

The National Disability Insurance Agency should review the *Guide to using the Provider Supported Independent Living (SIL) Pack* to enable core or SIL support funding to be available without a new quote, for participants seeking to change their SIL provider.

## Recommendation 2

Where there are safety concerns, the National Disability Insurance Agency should not require a reassessment of a participant's SDA eligibility.

## Recommendation 3

The National Disability Insurance Agency should ensure immediate access to funding for any assessment that is required for a plan review.

## Recommendation 4

The National Disability Insurance Agency, as market steward, should act to address the insufficient supply in occupational therapy services.

## Recommendation 5

The National Disability Insurance Agency should clearly state SIL eligibility in a participant's plan without requiring the participant to have identified their likely future accommodation setting (whether SDA or other).

## Recommendation 6

The National Disability Insurance Agency should adjust market levers, policies, and pricing to ensure that the supply of SDA and Short-Term Accommodation and Assistance (STAA) meets existing and future demand.

## Recommendation 7

The National Disability Insurance Agency should establish a central register for participants seeking SDA.

## Recommendation 8

The NDIS Quality and Safeguards Commission should provide guidance to SDA and SIL providers around effective and equitable tenancy management.

## Recommendation 9

The National Disability Insurance Agency should identify and monitor the adequacy of supports being provided to participants who are living together in supported accommodation (SDA or other) and who are all using the same SIL or core support provider.

## Recommendation 10

The Australian and Victorian Governments should work together to establish a system of independent oversight of disability and other services that are providing SDA-like accommodation services.

**Recommendation 11**

The Victorian Government should extend the scope of the Community Visitors Program to provide independent monitoring of NDIS funded non-SDA shared supported accommodation settings in Victoria.

**Recommendation 12**

The *NDIS Act 2013* (Cth) and relevant Rules should be amended to require a participant's accommodation provider to be different to their SIL or core supports provider(s).

**Recommendation 13**

The *NDIS Act 2013* (Cth) should be amended to restrict the use of NDIS funding for SDA-registered cluster housing in Australia.

**Recommendation 14**

The National Disability Insurance Agency should put in place a policy that support coordinators should ordinarily be independent of a participant's accommodation and core support providers.

**Recommendation 15**

The Australian Government, with the Victorian Government, should develop comprehensive guidance in relation to regulating SRS providers who are also registered NDIS providers.

# 1. About the Office of the Public Advocate

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services that works to safeguard the rights and interests of people with disability.<sup>1</sup>

The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian Parliament. OPA's primary functions include advocacy, investigation, and guardianship services for people with cognitive impairment and mental illness. The Office provides advice, information, and education about laws affecting people with disability and coordinates four volunteer programs.

Last financial year, OPA was involved in 1806 guardianship matters (963 of which were new), 389 investigations, and 320 cases requiring advocacy.

In 2017-18, the Public Advocate was guardian for 182 NDIS participants, advocate for 13 participants, and OPA undertook 28 investigations in relation to individuals where NDIS matters were relevant. OPA has acted as an advocate for 57 participants who currently reside or have previously resided in Colanda Residential Services and Disability Accommodation Services in Colac and Geelong during the NDIS trial phase.

OPA provides training and support to more than 600 volunteers across four volunteer programs: the Community Visitors Program, the Community Guardian Program, the Independent Third Person Program, and the Corrections Independent Support Officer Program. As a key component of the quality and safeguarding arrangements operating during the transition to the NDIS, OPA Community Visitors continue to visit disability residential accommodations, supported residential services, and mental health facilities where residents and patients have various interactions with the NDIS.

OPA also has a Disability Act Officer who assists OPA to fulfil its safeguarding role in relation to tenancy rights of people in disability residential services (many of which recently transferred to the Residential Tenancies Act) and other protections enacted in the Disability Act, for example in relation to civil detention and restrictive interventions.

OPA continues to undertake a range of systemic advocacy activities in the transition to the NDIS and the implementation of a nationally consistent quality and safeguarding framework. OPA has prepared submissions to past inquiries led by the Joint Standing Committee on the NDIS (the Committee) and welcomes the opportunity to make a submission in relation to Supported Independent Living (SIL) and associated models of supported accommodation.

OPA appreciates the continued engagement of the Committee and recognises the efforts that the NDIA and Commonwealth and State/Territory Governments have made to implement some of the Committee's recommendations. While the NDIS has the potential to provide more choice and control to people with disability, OPA notes that this intention has not yet been realised and the scheme continues to disadvantage people with cognitive impairment. OPA welcomes the opportunity to contribute to this inquiry.

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<sup>1</sup> *Guardianship & Administration Act 1986 (Vic)*.

## **2. SIL in context and in practice**

This submission seeks to engage with ‘what is’ happening on the ground as well as ‘what could be’ in relation to enhanced rights and safeguards available to SIL users. In spite of apparently clear funding stream dividers – for example, between SIL and Specialist Disability Accommodation (SDA) or between SIL and other core supports – we find the reality to be much messier.

### **2.1. Definition**

SIL, which stands for Supported Independent Living, is defined by the NDIA as ‘Assistance in Shared Living Arrangements’. Historically, it was limited to supported accommodation settings with more than one resident. We are now aware of more than one participant who has an approved SIL quote but who lives alone.

Services that may be encompassed by SIL (depending on the needs of the participant) include daily personal activities, provisions for ‘shadow shifts’, establishment of personal care, assistance with household tasks, and the preparation and delivery of meals. These same services can alternatively be funded and provided outside of the SIL framework. This occurs where a large amount of ‘core support’ funding is specified in the person’s plan, without the quoting requirements and booking system that are attached to SIL provision.

Hence, SIL is not always unique in what services it delivers to participants but rather in the administrative requirements that are attached when these are funded under the SIL label.

### **2.2. Confusion on the ground**

The confusion stems, at least in part, from the group home model of disability residential services that was dominant in state-funded disability services previous to the NDIS. This model still constitutes a large proportion of the NDIS funding of SIL, which explains the real connection that exists in these cases between SIL and SDA. In Victoria, all state-funded long-term residential disability services were reclassified as SDA and became subject to new and amended legislation governing SDA at full scheme. For OPA guardians, seeking a place in an SDA is therefore one clear path that may be pursued to acquire necessary SIL funding for their represented person. Once accepted into an operational group home, which in the vacancy management process would have considered whether the person would be eligible for SIL, one would expect the SIL quoting process would be relatively smooth.

Confusion may also come from the fact that some participants without SIL in their plans are receiving identical supports to other participants who are funded for SIL. It is unclear at this stage if this practice is solely employed in crisis or transitional periods or may become embedded long-term. OPA’s experience is that some participants who are living outside of SDA have been given substantial plans that include large dollar amounts dedicated to core funding. The main distinction between these participants is not their level of need but whether they have a support provider willing to engage in the official SIL quoting process. OPA has one example where a large unbranded core support package was recently translated into a SIL package, as encouraged by the NDIA, which adds weight to the possibility that this practice is limited to transitional arrangements and not become embedded long-term in some settings.

## 2.3. Current options

OPA understands that the majority of settings for the provision of SIL are still 'old style' group homes that were in operation prior to the introduction of the NDIS (these are now known as SDA).

However, the increased funding for core supports has generated supported housing options that sit completely outside the SDA regulatory regime. Some of these living arrangements are advertised as requiring SIL eligibility while others are not – the participants taking up these options (that OPA is aware of) generally have substantial core support funds in their plans.

SDA funding has also enabled new builds by private companies and investors, as well as families building an SDA for the benefit of a family member. Where the new build SDA is undertaken by a private company, that company may have an arrangement with one or more SIL providers to ensure that the finished property is a viable supported accommodation option, in that the participant will be able to find a support provider and not just a roof.

All in all, there are multiple options and pathways available to people who require support to live independently (including in shared accommodation settings). Some of these involve SDA and SIL, some involve SIL outside of SDA, and others, though they may look very similar in their day-to-day, involve neither of these line items.

OPA has identified the following possibilities (this is not a comprehensive list, but intended for illustration purposes):

- SIL provided to an SDA resident
- SIL provided to a person living in private accommodation (including public housing or social housing)
- SIL provided to a person where the SIL provider is also the person's landlord (including shared living arrangements)
- Core supports (not a SIL approved quote) provided to a person where the main support provider is also the person's landlord (including shared living arrangements).

Summer Foundation, without specifically engaging with the SDA and SIL language, produced an excellent report that provides an overview of the new and diverse types of supported accommodation options that are becoming available under the NDIS. They look at these models from the perspective of whether or not the resident's housing and support provisions are independent of each other.

## 2.4. Untested waters

The difficulties faced in making useful recommendations in this complex setting are many. Perhaps the most significant of these is that the safeguards for and legal rights of participants, especially those outside of an official SDA, are uncertain and, as of yet, untested. Nevertheless, this submission seeks to present OPA's observations and experiences in this new context, to highlight the principles OPA seeks to uphold, and to identify the concerns that have arisen for OPA about emerging practices.

### **3. Access to SIL**

Since the introduction of the NDIS, OPA has had a range of experiences in relation to clients' access to SIL funding and supports – from smooth and fast to dragging and difficult. Variables impacting the approval process for access to SIL would obviously include the skills and experience of the planner. However, in this submission OPA seeks to contrast the experiences of those who are in receipt of state-funded disability residential services with those who are seeking supports for the first time. It is OPA's experience that a person's ease of access to SIL funding is strongly correlated with whether they have existing supports.

While this section focuses on the administrative processes and hurdles that are required to gain access to SIL funding, it must be said that from OPA's front line perspective, these processes are only a secondary concern. The primary concern of OPA guardians in relation to supported accommodation is finding a bed (and ideally a home) – a place to engage with the participant and where these supports can be delivered.

#### **3.1. Existing SDA client**

##### **3.1.1. Business as usual**

OPA has found that existing Department of Health and Human Services (DHHS) clients in receipt of an Individual Support Package (ISP) and residential services have substantial evidence to support their claim on SIL funding. It is also likely that there are policies in place to support a smooth transition for existing clients from state-funded disability services to the NDIS. This has been the case for residents in existing disability services group homes, who might not be eligible for Specialist Disability Accommodation (SDA) under the new regime but nevertheless are given SDA funding in their plans as part of the transitional arrangements. In most cases, but not always, the transition to NDIA SIL funding is similarly 'business as usual' for the client.

OPA is aware of one situation where the NDIA did not fund an existing group home resident at the same level as their ISP, and this threatened the viability of that living arrangement. Discussions are ongoing between the NDIA and the support provider in relation to the quote provided. In the meantime, the Victorian Government is continuing to fund the existing arrangement.

##### **3.1.2. The process**

The NDIS *Guide to using the Provider Supported Independent Living (SIL) Pack* includes a flow chart outlining the SIL quoting process on page 3. In this version of the process:

- the participant and the SIL provider meet to understand the needs and goals of the participant
- the provider develops a quote and submits it to the NDIA
- the NDIA assesses the quote
- the quote is finalised and approved prior to the planning meeting
- at the planning meeting the SIL quote and other supports are discussed
- the plan is completed, and

- the quote is 'implemented'.

This version of the process applies best to existing disability residential services clients who are not seeking a change to their support arrangements. The process involves the existing (or proposed) SIL provider submitting a detailed quote to the NDIA (including staffing ratios, pay rates for various shifts, and a house roster, among other things). The NDIA either accepts the quote and SIL is included in the participant's plan or they refute it and the provider may enter into negotiations with the NDIA to come to an agreement.

The proposed timeline interestingly appears to contradict the description of that same process in the guidelines included on the first page of the template: *Supported Independent Living (SIL) Quote*. The key difference is that where the participant is not already receiving SIL supports, the NDIA requires evidence that the person is eligible for such supports before they accept a SIL quote. We will see what this looks like in the section below on the process for 'new' clients.

### 3.1.3. Transferability of SIL funding

The other question that remains unclear for DHHS clients who are now NDIS participants (or others who now have SIL in their plans) is whether the SIL funding included in a person's plan can be easily transferred to another place of residence or provider.

In OPA's experience, SIL funding is linked to the provider who quoted to provide it, and, as such, a person who wants a change of SIL arrangements requires a plan review and the approval of a new SIL quote. This can take time, which may see the person in precarious circumstances while awaiting an outcome (this also highlights the current gap in crisis accommodation services). This requirement seems in conflict with the general premise of the NDIS where funding is attached to the person rather than the provider.

#### **Recommendation 1**

**The National Disability Insurance Agency should review the *Guide to using the Provider Supported Independent Living (SIL) Pack* to enable core or SIL support funding to be available without a new quote, for participants seeking to change their SIL provider.**

Correspondingly, in relation to SDA accommodation, OPA recommends the following.

#### **Recommendation 2**

**Where there are safety concerns, the National Disability Insurance Agency should not require a reassessment of a participant's SDA eligibility.**

## 3.2. 'New' clients

For a person who is coming into the scheme from a different circumstance, for example, a person living at home whose circumstances have changed and needs to move out, or a person who has been residing in an SRS (or a series of other less than ideal arrangements) that are not working out, the process of determining eligibility and getting an approved plan can be long and confusing.

This includes circumstances where the 'new' person is at risk of serious harm in their home or is at imminent risk of eviction from the last SRS in the region.

Note that some of these people are completely new to disability services while others were DHHS clients but not in receipt of state-funded residential services.

### 3.2.1. Seeking SIL supports for 'new' clients

The process of seeking SIL for 'new' clients has multiple stages and several hurdles that stand in the way of, or significantly delay, a positive outcome.

The first step of the process that faces all 'new' clients is the need for very specific evidence that proves to the NDIA that the person is eligible for SIL. In practice, guardians involved in the first planning meeting seek money in the plan to fund the Occupational Therapist (OT) assessment necessary to obtain NDIA approval for SIL (where the need is demonstrated). If the person has the money to pay for this independently this step might occur before the first planning meeting and speed up the process by enabling the client to bring this evidence to the first planning meeting.

The second step is that the assessment is carried out. There are currently waitlists on these assessments, as OPA understands that not all OTs offer these specialised assessments. Wait times may be longer in certain geographic regions.

The third step is that the NDIA planner confirms that the participant is eligible for SIL, based on the evidence provided in the assessment. This is likely to occur during a review of the initial plan. Sometimes the NDIA planner asks for more evidence and in these cases it may be unclear what sort of evidence the planner is seeking which leaves the participant at an impasse.

Once eligibility has been confirmed by the NDIA, the participant can seek a SIL provider of their choice (subject to availability) who is interested in providing them with a service and is willing to submit a quote for that service to the NDIA. In practice, this fourth step has been problematic due to the availability of SIL providers (due to thin markets, especially where the service sought is for people with complex behaviours). OPA's report *The Illusion of 'Choice and Control'* (2018) provides evidence of how these thin markets impact people with complex and challenging support needs.

Where a participant wants to live independently or move into SDA but does not have a current offer of supported accommodation (and so has no accommodation in which SIL supports could be delivered) the planner does not generally include the person's eligibility for SIL in the NDIS plan. This means that plans are not flexible – they fund existing not aspirational circumstances – and therefore participants require a plan review once they identify a better support arrangement (which translates into more waiting). This would trigger the SIL quote process.

The fifth step is that the SIL provider develops a quote and submits it to the NDIA. Next the NDIA assesses the quote and either accepts it or enters into negotiations with the SIL provider.

Finally, once the quote is accepted, it is included in the participant's approved plan. Interestingly, the agreed amount is not documented in the plan, so there is no transparency as to the amount of funding being paid to the SIL provider. Further, as mentioned above, the SIL funding is then tied to the SIL provider who submitted the quote and does not seem to be transferable in the same way that other NDIS funded services are.

### 3.2.2. Hurdles for 'new' clients

The main hurdles OPA has seen for clients are:

- funding the OT assessment

- waitlists for OT assessments
- waiting times for plan reviews
- difficulty finding a home from which SIL supports could be provided
- difficulties identifying a SIL provider willing to provide a quote for SIL supports (thin markets particularly impacting clients with complex and challenging support needs)

### 3.2.3. Addressing the hurdles for ‘new’ clients

There is a real inequity that stems from a person’s capacity to fund their own OT assessment. The planning process is delayed by at least two months, often much longer, as the person is required to await a plan review to receive funding for the necessary and reasonable supports identified in the OT assessment. The OT assessment is costly, but people who have a TAC package (or other independent means) can pay the cost themselves and receive services they are eligible for months earlier than those who need an additional plan review to get to that point.

#### **Recommendation 3**

**The National Disability Insurance Agency should ensure immediate access to funding for any assessment that is required for a plan review.**

OPA hopes that the current wait times being experienced by people requiring OT assessments for SIL eligibility will decrease after this transitional period. There is some suggestion that the administrative hurdles in relation to NDIS registration is contributing to the long wait times but there may be other factors at play, as shortages in OT predate the NDIS.

#### **Recommendation 4**

**The National Disability Insurance Agency, as market steward, should act to address the insufficient supply in occupational therapy services.**

The very thin supported housing market, especially for participants with complex and challenging support needs, effects the ability of participants to obtain necessary core support provision. This is because without a home in which necessary supports can be provided, it is very difficult to get a support service to engage with the participant. Lack of housing is a hurdle to obtaining quotes for and implementing SIL supports.

#### **Recommendation 5**

**The National Disability Insurance Agency should clearly state SIL eligibility in a participant’s plan without requiring the participant to have identified their likely future accommodation setting (whether SDA or other).**

OPA amends a recommendation made in *The Illusion of ‘Choice and Control’*.

#### **Recommendation 6**

**The National Disability Insurance Agency should adjust market levers, policies and pricing to ensure that the supply of SDA and Short Term Accommodation and Assistance (STAA) meets existing and future demand.**

## 4. Vacancy management in Victoria

The DHHS vacancy management teams that operated previous to the NDIS remain in place despite having arrived at full scheme. They do not have the powers they used to, however they retain some of their previous value. These teams play a part in advertising (through the Housing Hub) and administering vacancies in all SDA owned by DHHS. They also offer their vacancy management services to private SDA providers; however private operators are not compelled to use them.

Private SDA providers may choose to run their own vacancy management processes.

This section of the submission is informed by OPA's front-line experiences with vacancy management processes. It seeks to highlight the positive and negative experiences for OPA clients and make recommendations that will improve vacancy management outcomes for participants in the scheme.

### 4.1. The DHHS managed system

OPA understands that the DHHS vacancy management teams operate their processes in accordance with detailed departmental policies, developed over many years to enhance transparency and good practice in the provision of disability services. The processes were amended where necessary to align with the new NDIS rules and legislation – for example, the vacancy management team used to shortlist preferred applicants and only provide that shortlist to the supported accommodation providers, now they provide the details of all applicants for the vacancy to the SIL and SDA providers so that DHHS does not have undue influence over 'market' outcomes.

The benefits of this system to participants are, in no small part, due to the detailed policies that govern the process. These include:

- minimum and mandatory advertising times (to ensure that the vacancy has a chance to be noticed by support coordinators or participants seeking new accommodation, and that operators do not just 'reconfigure' properties by moving the most convenient person in)
- processes that help ensure resident compatibility.

The other potential benefits to participants are that the DHHS team, while no longer having a final say in who the place is offered to, are still in a position to provide advice to the SDA and SIL providers about who they believe would be the best fit for a vacancy. OPA understands that the teams advocate, where they can, for participants who might otherwise struggle to find suitable accommodation (for example, a person with a history of violent behaviours). Where more than one applicant is considered a suitable fit, we understand that the teams also advocate for the place to be given to the person who has the most pressing need for accommodation.

In OPA's experience, people with complex and challenging support needs are finding it more difficult to secure accommodation under the NDIS. These difficulties are documented in the OPA report *The Illusion of 'Choice and Control'*. On the face of it, with the well accepted fact that demand for supported accommodation outstrips supply, and the final say in who is offered a place now sitting with private providers (even DHHS owned properties are run by private SIL providers who have a large say in who would be a good fit for the house), it is not surprising that people with complex and challenging support needs are missing out.

OPA is also aware that the DHHS managed Housing Hub is not kept up-to-date and may provide a false impression about the number of vacancies actually available.

OPA also understands that the DHHS vacancy management team is having difficulty filling some vacancies – that the people applying are not always a good fit. This means that some vacancies are long standing. The fact that there is no central place where a participant (or their support coordinator or advocate) can register their need for accommodation, that each vacancy must be applied for separately (in the same way that private rental operates, as opposed to the Public Housing register or the old Disability Services Register), puts the onus on the seeker to remain active in their search. This is a potential area for reform. A central place where people could register their need for accommodation may even ultimately strengthen the supply-side of the SDA market.

### **Recommendation 7**

#### **The National Disability Insurance Agency should establish a central register for participants seeking SDA.**

Until this recommendation is implemented, the NDIA should encourage SDA and SIL providers to make use of existing state government vacancy management teams, where they exist, to assist them to meet the requirement that they provide effective tenancy management and/or ensure that the person who best fits the vacancy is found and to promote fairness and better outcomes for participants.

## **4.2. Non-DHHS managed processes in SDA**

OPA understands that, unlike the detailed DHHS policy, vacancy management processes implemented by private providers are governed by one line from the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (Cth). Schedule 7, Module 5, section 7 on tenancy management states that:

Each participant accessing a specialist disability accommodation dwelling is able to exercise choice and control and is *supported by effective tenancy management*. (emphasis added)

There is no evidence that new providers are given guidance as to what ‘effective tenancy management’ looks like and whether it is intended to encompass vacancy management practices. More relevantly, there is no standard against which their practice can be held against.

Where providers do not meet the one-line requirement of the Rules (cited above) a person is able to make a complaint to the provider, and then, if they are not satisfied by their response, to the NDIS Quality and Safeguards Commission. However, it remains unclear how ‘effective tenancy management’ will be defined by the Commission and whether such complaints will be dealt with solely on process grounds or if they are able to be engaged with on substantive grounds as well.

OPA has been involved in a recent vacancy management related matter, which highlights the loss of good practice knowledge in relation to vacancy management as practiced by inexperienced providers. In this matter, one disability service organisation which ran both a respite house and an SDA, appeared to unilaterally decide to offer an existing vacancy in their SDA to a client who had been residing in their respite facility. OPA understands this was done without consultation with existing residents. One resident, when informed who their new co-resident was going to be, protested that they were scared of that person (having previously been placed in a respite facility with them) and did not want to live with

them. This matter has yet to be fully resolved, but it appears the organisation is moving back from what seemed to be a 'done deal'.

This example shows the potential for harm to occur when an organisation does not follow good practice in relation to vacancy management. Obviously clear processes to help ensure resident compatibility and which require the provider to seek the input of existing residents when determining who should be offered a place in their own home are both crucial to participant wellbeing and sustainable tenancy arrangements.

The other red flag this example raises about the lack of support for new organisations around what constitutes effective vacancy management (which OPA contends is part of 'effective tenancy management') is the regression to what is now acknowledged as poor practice in vacancy management. In this matter it appears that the organisation was simply 'reconfiguring' their residential services – prioritising an existing client into a vacancy that had not yet even been advertised, without regard to the best outcome for the other residents.

OPA is encouraged that the NDIS Quality and Safeguards Commission has begun developing guidance materials for SDA providers. This guidance should be informed by good practice norms in this area and specifically cover expectations around good vacancy management processes (based on existing state government policies governing vacancy management).

#### **Recommendation 8**

**The NDIS Quality and Safeguards Commission should provide guidance to SDA and SIL providers around effective and equitable tenancy management.**

### **4.3. Non-DHHS managed processes in other supported accommodation settings**

OPA is aware that there are at least two organisations in Victoria, and probably many more, who are NDIS registered SIL (and intensive daily support) providers leasing properties for the purpose of providing in-home core supports to multiple participants per house (usually two or three participants). These providers are filling an existing gap in the market for supported accommodation without having to meet the legislative obligations of SDA providers (despite the fact that they are providing accommodation for the purpose of providing a disability service). Under the old state-funded scheme these houses would not have existed due to funding constraints, however equivalent government funded settings fell under the banner and legislative protections of 'residential services'.

As they are not SDA providers, vacancy management processes in these situations would not be subject to specific service requirements or standards.

It is of concern to OPA that vacancy management processes appear to remain outside the scope of service quality oversights in these settings.

## **5. New models of supported accommodation**

While this inquiry focuses on SIL, as mentioned above SIL cannot operate without a roof over the participant. For this reason, OPA would like to bring the Committee's attention to some of the new models of supported accommodation that have arisen.

As desired and intended, the new and increased funding of disability supports have generated new business opportunities for providers and new supported accommodation models for people with disability. OPA is pleased about the growth in available services and supports for NDIS participants and sees the increased diversity in support models as much needed. For insights into the types of models now available, please see the guide produced by the Summer Foundation – *Separating Housing and Support Services: A Toolkit for Providers* (2017).

In this section OPA seeks to raise some concerns with the way some of these models are operating, including the levels of regulation and oversight they are subject to under existing laws, from the perspective of participants with cognitive impairment.

## **5.1. Principles underpinning good service delivery and positive outcomes for people with disability**

OPA understands the real fear for people with complex and challenging support needs (and their guardians) of becoming homeless or remaining stuck in prison or hospital or a mental health bed even when they are ready to leave. In these circumstances, almost any other bed holds with it the promise of a more self-determined and rewarding life. Under the NDIS, this fear plays into resistance to the ‘over-regulation’ of emerging markets: ‘over-regulate and those desperately needed beds will disappear’.

The principles of the NDIS, which include promoting social inclusion and supporting participants to reach their full potential, alongside OPA’s vision for a just and inclusive society that respects and promotes the dignity and human rights of all people, say that we should not automatically throw away what we know about good practice in this space because of these fears.

### **5.1.1. Safeguards**

Safeguards under the NDIS are largely focused on ensuring effective complaints processes and on the ‘natural’ safeguard of consumer choice. OPA has written and spoken frequently about the problems this safeguarding framework creates for people with cognitive impairment. To summarise, a complaints process requires a (supported) proactive complainant and ‘consumer choice’ requires a selection of viable service options. These requirements are, in OPA’s experience, frequently unmet – especially for people with complex and challenging support needs.

The other issue in relation to complaints processes as safeguards is that a positive outcome is promoted by clear grounds for the complaint. In the move to the NDIS Quality and Safeguards Framework, away from state-based contracts and policy governed processes, grounds for complaints are, at the very least, much less clear (for example, lack of transparency in vacancy management processes).

In relation to supported accommodation, OPA considers the following safeguarding principles key to promoting positive outcomes for people with disability:

- independent oversight of closed-environments (for example, the monitoring role played by Community Visitors in traditional supported accommodation settings which, until further notice, will continue in a subset of SDA properties)
- clear tenancy rights that include protections from breaches and eviction due to behaviours related to a person’s disability (for example, those protections enshrined in Part 12A of the *Residential Tenancy Act 1997* (Vic))

- protection from service provider conflicts of interest or undue influence (for example, good vacancy management processes can be abandoned where a provider stands to benefit from a certain participant's move or support coordinators recommending services from their own organisations over others).

One good practice principle that has been promoted in relation to supported accommodation is the goal of separating housing provision from support provision. This practice would help avoid a conflict of interest arising from joint provision of these services. This practice is also said to promote consumer choice by removing at least one hurdle to changing support (or SIL) providers.

A range of policies, including the DHHS policy governing vacancy management, have also promoted good practice and positive outcomes for people with disability. For example, the DHHS policy steps through advertising timelines and detailed processes to assess resident compatibility – both things that help ensure that the house finds the best person to fit in with existing residents which would promote resident wellbeing and safety.

### 5.1.2. Cluster housing research

The question of whether cluster housing benefits people with disability is well researched and the “evidence suggests that smaller-scale, non-congregated housing dispersed in the community is a fundamental condition for the social inclusion, self-determination, and wellbeing of people with disability”.<sup>2</sup> Cluster housing has generally been found to be inferior to dispersed housing on a number of indicators including quality of life indicators.

While advocates for cluster housing argue that some people prefer to live in cluster housing arrangements due to opportunities for friendship with other people with disability, and this may be true of a few, “in the context of a housing supply shortfall, some people may be forced to live in congregate housing due to lack of other opportunities. In other words, cluster housing ... can only be a meaningful choice in the context where there is sufficient supply of other options.’ Bigby argued in 2004 that cluster housing ‘might reflect the choice of a few now but will leave behind a legacy of bricks and mortar that will restrict choice and segregate people with intellectual disability for decades to come’.<sup>3</sup>

In 2019, OPA is seeing growth in cluster housing developments generated by NDIS monies despite cluster housing being widely demonstrated to limit social inclusion and quality of life of residents when compared to smaller-scale supported housing models.

The Australian Housing and Urban Research Institute (AHURI) called for “clear guidelines and benchmarks on the clustering of dwellings for NDIS participants...to prevent” growth in examples of cluster housing.<sup>4</sup> AHURI were talking about the clustering of disability specific units in a larger mixed-use development. However, OPA believes that the grouping of ten to 15 residents on a single parcel of land with only disability specific accommodation provided on that land clearly constitutes cluster housing and, as such, should not be funded by the NDIS. The NDIS Act includes the general principle guiding actions that: “People with disability have the same right as other members of Australian society to realise their

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<sup>2</sup> Ilan Wiesel and Daphne Habibis, *NDIS, housing assistance and choice and control for people with disability* (2015) AHURI Final Report No. 258.

<sup>3</sup> Christine Bigby, ‘But Why are These Questions Being Asked?: A Commentary on Emerson’ (2004) *Journal of Intellectual and Developmental Disability* 29 (3), 204.

<sup>4</sup> Wiesel and Habibis, above n X, 26. (AHURI)

potential for physical, social, emotional and intellectual development”.<sup>5</sup> Research shows that cluster housing options do not help people realise their full potential in these realms.

## **5.2. Supported accommodation models that contravene the principles**

OPA does not hope to present a comprehensive list of the diverse range of supported accommodation options now on the market. Instead, it raises concerns about three models of supported accommodation provision that are appearing in Victoria which contravene the principles for good practice and positive outcomes described above. In doing so, OPA concedes that because these models are very new, the extent to which concerns are valid and not theoretical is not completely clear. For example, the tenancy rights of participants in these arrangements has not yet been tested at the Victorian Civil and Administrative Tribunal (VCAT).

The models described below include:

- providers of core supports that are head-leasing the accommodation and sub-letting rooms to the participant
- cluster housing arrangements
- Supported Residential Services (SRS) proprietors entering the NDIS market.

OPA has evidence that these business models are occurring in Victoria and elsewhere. Each of these models is discussed below.

## **5.3. Head-leasing and sub-letting**

### **5.3.1. Examples**

OPA is involved with at least three NDIS participants under guardianship orders who are currently residing in properties which have been leased by a disability support provider for the purpose of providing them with a range of disability core supports. Of particular note here is the fact that the person’s landlord is also their core support provider. In this case, OPA understands that the residents have neither SDA nor SIL funding in their plans – however they do have a large sum of core support funding enabling the provision of intensive supports with daily living. A similar model is also described in a Summer Foundation toolkit for NDIS providers, with the service being provided by a Western Australian company called RISE.<sup>6</sup>

In at least one of these matters, State Trustees has signed a ‘Residential Sublet Agreement’ (sic) on behalf of the participant. There is uncertainty around the tenancy protections available to this participant and others who find themselves in similar arrangements. This is because such arrangements are, as yet, untested in VCAT. However, they would not include disability specific provisions around temporary relocation or protections from breaches stemming from behaviours related to their disability (as are available in SDA residency agreements).

In another matter, the lease holder (and core support provider) is considering evicting the participant if the guardian does not agree to move the participant to another one of their

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<sup>5</sup> *National Disability Insurance Scheme Act 2013* (Cth), s 4(1).

<sup>6</sup> Summer Foundation, *Separating Housing and Support Services: A Toolkit for Providers* (2017) 15.

properties. This demonstrates the potential for a real conflict of interest to arise for the support and accommodation provider that may negatively affect the participant.

OPA's involvement in these accommodation and support arrangements stems from the fact that, although it is likely these many of participants would be eligible for SIL and SDA, they have not managed to find a provider willing to offer them a place in an SDA property. This apparent thin market for supported accommodation for people with complex and challenging support needs may leave guardians without another feasible housing option than these sublease agreements.

### **5.3.2. OPA's concerns**

This model of service provision lacks almost all of the safeguards available to people with similar support needs living in SDA, despite effectively operating as a shared SDA-like accommodation for people with complex and challenging support needs.

- There is no independent oversight – Community Visitors cannot visit these homes as they can SDA.
- The SDA regime does not apply – No disability specific tenancy protections and no requirements for additional fire safety provisions to account for the fact that residents may not be able to respond quickly to a fire warning due to their cognitive impairment or mobility.
- Potential for conflicts of interest to arise due to the combined nature of accommodation and supports (landlord and core support provider are the same person/entity).

The scheme acknowledges the value of placing additional regulation and oversight onto official SDA homes. OPA believes that, at a minimum, independent oversight of these head-leasing or sub-letting arrangements is required to protect the wellbeing and rights of people in this new form of accommodation. Depending on whether the person has independent or informal advocacy supports, or has other support providers who are independent of the supported accommodation provision, these arrangements can verge on closed-environments.

This much needed accommodation has sprung up to fill a gap that has emerged in the NDIS market for people with complex and challenging support needs. It is important that adjustments are made to ensure that effective safeguards are available for these participants. Of the participants using this model who OPA knows about, it is fair to say that the guardians involved see this option as the participant's only supported accommodation option, and hence a de-facto 'accommodation of last resort' for this cohort.

### **5.3.3. Current restrictions on separation of accommodation from supports**

While the NDIA has encouraged the separation of accommodation and disability support services, for example in a speech given by Bruce Bonyhady (then Chair of the NDIA) in 2014, there is nothing in the legislation that currently enshrines this division.

The clearest statement of this position was made in 2016 which said that "the Agency expects SDA and SIL to be separable and ultimately separately provided", and that the NDIA was looking to enable this shift from historical practice in all states and territories. During the period of transition from joint provision of housing and support to full separation,

the NDIA would employ Conflict of Interest provisions “to manage any real or perceived conflict of interest between SDA and SIL services”.<sup>7</sup>

While it is understandable that transitional provisions would be necessary to facilitate the needed shift from a long-standing business model, it is unclear why stronger prohibitions were not put in place to prevent new businesses replicating these integrated models of housing and supports.

Also of note is the fact that the light-touch approach to the regulation of new NDIS funded services has meant that these head-leasing arrangements do not appear to be subject to any requirements in relation to the separation of housing from core supports. This allows head-leasing supported accommodation arrangements to flourish under the NDIS. This is despite the fact that the NDIS Code of Conduct has been finalised and legislated and guidance for providers written by the NDIS Quality and Safeguards Commission in relation to this law states that NDIS providers must disclose real or perceived conflicts of interest to participants and should “not allow any financial or commercial interest...to adversely affect the way in which the NDIS provider engages with people with disability”.

#### **5.3.4. Potential for improved safeguards and practice**

Historically, the NDIA has been unable to easily identify these SDA-like shared accommodation arrangements. OPA understands that while the NDIA is currently unable to interrogate a participant and plan data to look at the location at which accommodation and core support services are provided, they are working towards this technical capability. OPA recommends that the NDIA use this new capability to ensure that appropriate oversight and attention is given to these SDA-like shared accommodation. Research is needed to better understand the cohort who resides in these settings and identify barriers preventing them from accessing supported accommodation with greater safeguarding arrangements. Research is also needed to speak to participant rights and outcomes in these settings and look at whether OPA’s concerns are ultimately justified.

A geographical analysis of scheme data would also identify SDA-like shared accommodation that did not tick all of the problematic boxes that these head leased properties do – for example, group homes where there is a real separation between the residents’ landlord and their support provider.

##### **Recommendation 9**

**The National Disability Insurance Agency should identify and monitor the adequacy of supports being provided to participants who are living together in supported accommodation (SDA or other) and who are all using the same SIL or core support provider.**

##### **Recommendation 10**

**The Australian and Victorian Governments should work together to establish a system of independent oversight of disability and other services that are providing SDA-like accommodation services.**

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<sup>7</sup> NDIA, *Specialist Disability Accommodation: Pricing and Payments Decision Paper* (2016) 30.

## **Recommendation 11**

**The Victorian Government should extend the scope of the Community Visitors Program to provide independent monitoring of NDIS funded non-SDA shared supported accommodation settings in Victoria.**

Further, the benefits that the scheme is seeking to achieve with its progress towards separation of SDA and SIL will not flow to participants in these quasi-SDA arrangements. If the principles behind this are to be upheld for all participants, and not just those lucky enough to secure an SDA place, legislative change is necessary. However, this cannot occur until the real demand for supported accommodation options for people with complex and challenging support needs is met.

## **Recommendation 12**

**The *NDIS Act 2013* (Cth) and relevant Rules should be amended to require a participant's accommodation provider to be different to their SIL or core supports provider(s).**

## **5.4. Cluster housing and institution-like environments**

### **5.4.1. Examples**

Cluster housing developments for participants in need of supported accommodation have been built in response to the new NDIS monies for SDA. One example of this is the Kidman Park development in South Australia – a small, two storey apartment block comprising ten single occupancy units. In the Kidman Park example, residents select support services from organisations not connected to the housing provider. These properties have 'been designed to align with and support the implementation of the National Disability Insurance Scheme' and, as such, one would imagine NDIS funding is being used to support these arrangements.<sup>8</sup>

OPA has direct involvement with one Victorian business that is expanding the scope of their business to include multiple SDA builds in more than one SDA design category. This business has already built at least one cluster housing arrangement with four two-bedroom units, which they are in the process of leasing as single occupancy dwellings to NDIS participants. The company is also building more multi-occupancy dwellings on a single parcel of land – with three separate three to four-bed homes located together, with technology like CCTV and panic buttons linking the properties with the intention of enabling the residents to use shared supports.

### **5.4.2. Current restrictions on cluster housing**

The examples given above meet the current restrictions on the total number of residents who may be housed on a single parcel of land (which apply to new builds), as referred to above. These are set out in the NDIS's *Specialist Disability Accommodation: Decision Paper on Pricing and Payments* from 2016:

- "no more than 5 people can reside in a single SDA dwelling;
- if there are multiple properties on a single parcel of land, then the number of dwellings which may be enrolled as SDA can house no more than 10 residents

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<sup>8</sup> Ibid, 27.

unless all SDA dwellings house two or fewer residents per dwelling in which case there may be up to 15 residents or 15 per cent of the total number of expected residents, whichever is greater.”<sup>9</sup>

### 5.4.3. OPA’s concerns

OPA has previously said it supports group homes having no more than six residents (in its 2016 Response to the SDA Pricing and Payment Framework) and was pleased to see the SDA new builds restricted to five residents per house. However, OPA believes siting 10 to 15 people with disability in adjacent homes is unacceptable due to the well-documented poorer outcomes of cluster housing arrangements.

OPA recommends these restrictions should be legislated to limit the number of participants on a single parcel of land to a maximum of five participants or ten per cent of expected occupants in a mixed-use development. Legislative force to these restrictions are required.

#### **Recommendation 13**

**The *NDIS Act 2013* (Cth) should be amended to restrict the use of NDIS for SDA-registered cluster housing in Australia.**

OPA is aware that much of the motivation to pursue cluster housing developments under the SDA funding scheme is related to the profits to be made, not the benefits of the setting for future residents. While on one hand cluster housing developments can be seen as a much-needed boost to the supply of supported accommodation, on the other hand research shows they do not provide participants with full access to reach their potential.

In practice, people residing in these cluster housing arrangements may not have automatic access to the independent oversight of Community Visitors because the developer is planning to offer some of the beds to people who do not meet the special criteria for SDA. This would mean that the residents would all likely be signing the standard Residential Tenancy Agreement instead of the SDA Residency Agreement.

Further, as the cluster builds are designed to take advantage of a shared core support or SIL provider, residents’ choice of support provider will likely be limited.

## 5.5. SRS providers enter the NDIS space

### 5.5.1. Examples

OPA has multiple examples of Supported Residential Services (SRS) proprietors entering the NDIS marketplace.

SRS proprietors have registered as NDIS providers in a range of categories. OPA is aware of providers offering services to participants that include: support coordination, community access, SIL and SDA, and intensive supports with daily living.

SRS proprietors have been seen to exert undue influence on residents and pressure to choose the proprietor’s new NDIS business to spend their plan monies. OPA and Community Visitors have at least two examples of SRS’ where this is happening.

SRS proprietors are known to attend planning meetings, in which they can act as an advocate for the person, but also an advocate for their own financial interests.

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<sup>9</sup> NDIS, *Specialist Disability Accommodation: Decision Paper on Pricing and Payments* (2016) 29.

As SRSs are another example of a de-facto supported accommodation option of last resort, especially for people with mental illness or ABI, this conflict of interest has the potential to affect a very vulnerable cohort. As well, the power the SRS provider has to threaten eviction proves highly problematic in at least some situations.

OPA guardians involved in matters where the person's SRS provider is also one of their NDIS providers have, in at least two instances, had to weigh very carefully the likelihood that the participant would be evicted if they did not comply with the pressures placed on them (and the participant) to accept their NDIS services on behalf of the participant. One participant has been threatened with eviction as the result of push-back from the OPA guardian in relation to accepting NDIS services from a participant's SRS provider.

### **5.5.2. OPA's concerns**

OPA's main concerns revolve around the SRS/NDIS provider's conflict of interest and the undue influence and power they may have over participants who reside in their SRS. Community Visitors also have some evidence that SRS proprietors may be 'double dipping' by using a person's plan funding to pay for services that the participant has already paid for as part of their SRS room and board (usually deducted from a person's Disability Support Pension).

Before suggesting that SRS proprietors should be automatically banned from providing a resident with NDIS funded supports, it is important to consider the circumstances of people living in SRSs. It is not completely unreasonable to see the benefits of additional funding flowing to the provision of the very basic supports and services otherwise funded in a pension level SRS, nor to suggest that some residents might have long-term relationships with SRS staff which translate into positive outcomes should they use those same people to provide additional services funded under an NDIS plan. The Victorian state-government provided funding to boost services to residents for these reasons.

Nevertheless, the conflict of interest inherent in this type of scenario is real and troubling.

### **5.5.3. Potential for improvement**

One pathway to addressing the inherent conflict of interest in these circumstances is to ensure that the participant's support coordinator is always independent of their accommodation and intensive daily support providers (including non-SDA accommodation like SRS as well as non-SDA supported accommodation with head lease arrangements). This would enable some 'independent' oversight of how NDIS funding is being spent and which providers are doing what and how well.

The NDIA should have policy in place to ensure that a participant's support coordinator is independent of the participant's accommodation provider as well as their daily living supports provider. This should be standard practice unless a convincing argument is provided as to why the participant would benefit from having a support coordinator who is not completely independent of their other services – for example, in the case of thin markets or where other benefits are clear and conflict of interest concerns are allayed.

#### **Recommendation 14**

**The National Disability Insurance Agency should put in place a policy that support coordinators should ordinarily be independent of a participant's accommodation and core support providers.**

OPA understands that DHHS is auditing the SRS sector with a view to identifying 'double dipping'. This may shed light on future arrangements that are necessary to better safeguard the rights of NDIS participants living in SRS.

**Recommendation 15**

**The Australian Government, with the Victorian Government, should develop comprehensive guidance in relation to regulating SRS providers who are also registered NDIS providers.**