

Inquiry into the provision and regulation of supported accommodation in Queensland

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Inquiry into the provision and regulation of supported accommodation in Queensland

Submission to Community Support and Services Committee

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Introduction

1. The terms of reference for this inquiry calls on the Committee to consider:
 - a. residential services as defined under the *Residential Services (Accreditation) Act 2002 (RSA Act)*, including service delivery models, regulation, oversight arrangements, and
 - b. issues raised by the Public Advocate’s report ‘*Safe, secure and affordable?*’ *The need for an inquiry into supported accommodation in Queensland* (August 2023).
2. The government has committed separately to a review of the RSA Act.¹
3. The Queensland Human Rights Commission (**the Commission**) is a statutory body established under the *Queensland Anti-Discrimination Act 1991 (AD Act)*. The Commission’s functions include dealing with complaints under the AD Act and the *Human Rights Act 2019 (HR Act)*, promoting an understanding and public discussion of human rights in Queensland, and providing information and education about human rights. The substantive provisions of the HR Act commenced on 1 January 2020.

Summary of Recommendations

4. In this submission, the Commission recommends:

Data collection

- a. The Queensland Government collects, analyses, and publishes de-identified data on who uses residential services so that the models of service, standards, and regulation align with the purpose of residential services and meet the needs of residents.

Standards and enforcement

- b. Consideration be given to whether residential services should be public entities under the HR Act, and if so, funding for residential services to meet the obligations imposed by the HR Act. Conversely, if the Queensland Government provides funding to residential services, consideration must be given to whether this will result in their meeting the definition of functional public entities and the support the Queensland Government will provide to assist them to meet their obligations under the HR Act.

¹ Department of Housing (Qld), *Written briefing requested by the Community Support and Services Committee in relation to the Inquiry into the provision and regulation of supported accommodation in Queensland* (16 November 2023) 7.

- c. Standards associated with the RSA Act and regulation be reviewed to ensure coverage of all relevant rights protected by the HR Act, and tools and guidance be developed to support residential service operators to understand and implement the standards.
- d. Inclusion in the standards of a requirement for residential service operators to collaborate and coordinate with service providers and other supporters (subject to the resident's consent) to facilitate effective, transparent, and cost-efficient outcomes for individual residents.
- e. Increasing the capacity of the Regulatory Services Unit (**RSU**) in the Department of Housing, Local Government, Planning and Public Works to conduct more frequent onsite audits and give advice and guidance to operators of residential services.
- f. Residents' rights as protected by the standards (and if applicable, the HR Act) are provided to residents and the people who support them in an accessible form they can understand and apply to their own situations.
- g. Residents have access to an external dispute resolution process.

Resident wellbeing

- h. The roles of each regulator and oversight agency in relation to residential services is mapped out and streamlined.
- i. Residents have a single point of contact through which to escalate concerns about residential services without having to identify the correct body to complain to.
- j. Residents with complex arrangements have the ability to engage a case coordinator who has access to all relevant information to provide guidance and support for decision-making.
- k. Sufficient resourcing be provided for independent, individual advocacy for residents.

Residential services

- 5. For completeness, the Commission's broad understanding of residential services is:
 - Residential services are services operated by private accommodation providers that complement government programs to support social and affordable housing. They do not receive any government funding.
 - An accommodation provider must be registered and accredited under the RSA Act if the accommodation is occupied by four or more residents who are on individual rooming accommodation agreements (under the *Residential*

Tenancies and Rooming Accommodation Act 2008), do not have the right to occupy the whole premises, and share facilities. It is an offence to operate a residential service without registration or accreditation.

- While the demographics of residents are not centrally recorded, evidence presented to the Committee is that people accessing residential services often have complex mental health and/or physical health concerns, may have been recently discharged from hospital or prison, and/or have no other accommodation options. Residents may have cognitive disability and require support for decision-making or may have a substitute decision-maker.
- The purpose of regulating residential services is to ensure the safety and wellbeing of the people they accommodate.
- The RSU registers and accredits operators of residential services and ensures compliance with the standards in sections 6 to 8 of the Residential Services (Accreditation) Regulation 2018. In addition, registration requires compliance with building standards, fire safety standards, and that the operator is a 'suitable person'.
- After registration, the operator must apply for accreditation for level 1 (accommodation only), level 2 (if also providing food), and level 3 (if also providing personal care services). The RSU must have regard to the prescribed factors and standards, including the extent to which the operator observes the rights of each resident, and the extent to which the operator provides the personal care service in a way that meets the individual needs of the residents, protects their interests, and maintains and enhances their quality of life. Accreditation and renewal of accreditation involves a site visit from the RSU. Accreditation can only be granted for a maximum period of 3 years.
- Residents and people who support them may complain to the RSU, which may trigger an investigation and compliance action.
- Food and personal care services provided by level 2 and level 3 residential service operators are paid for by the resident. Meals and personal care services funded through NDIS are subject to NDIS safeguards and oversight and are not regulated by the RSU. A residential service operator may provide both NDIS funded services as well as level 2 and level 3 services, or a resident may elect to have their personal care services provided by an external provider.
- Rents and terms of rooming accommodation agreements are not regulated under the RSA Act.

Relevant human rights

6. Many human rights are engaged by the negotiation and provision of residential services to people. The following are particularly relevant to this submission.

Recognition and equality before the law

7. Section 15 of the HR Act protects the right of every person to recognition as a person before the law, to equal enjoyment of human rights without discrimination, and to be protected from direct and indirect discrimination.²
8. The right to recognition and equality along with the right to privacy (see below) underpins an adult's right to autonomy and self-determination, the presumption of legal capacity, and the right to the same human rights and fundamental freedoms, regardless of the adult's capacity.³
9. A person with cognitive disability should be supported to make their own decisions. Where a decision is made for or about a person, then their views, wishes and preferences should be taken into account. Negotiating complex systems can be a barrier to people making their own decisions and to expressing their views, wishes, and preferences.
10. In the Commission's view, and in line with the *Convention on the Rights of Persons with Disabilities*⁴, human rights requires public entities consult with people with disabilities in the development and implementation of legislation and policies that affect them. The Commission commends this inquiry for adopting the Public Advocate's recommendations and seeking the views of residents directly with the support of independent advocacy organisations. Those views should be given considerable weight.

Privacy and reputation

11. The scope of the right to privacy⁵ is broad and protects a person's privacy, family, home or correspondence from unlawful or arbitrary interference.
12. Privacy includes personal information, and the right to control collection, use, and access to information about a person.
13. The right to privacy also encompasses a person's private life more generally and protects a person from interference with their physical and mental integrity, individual identity (including sexuality, gender, appearance, and clothing),

² Discrimination in accommodation and in the supply of goods and services is also prohibited under the *Anti-Discrimination Act 1991* (Qld).

³ See *Convention on the Rights of Persons with Disabilities* UN Doc A/RES/61/106 (24 January 2007) art 3(a).

⁴ *Convention on the Rights of Persons with Disabilities* UN Doc A/RES/61/106 (24 January 2007) art 4(3).

⁵ *Human Rights Act 2019* (Qld) s 25.

freedom of thought and conscience, legal personality, and the capacity to develop and establish meaningful social relations and to experience a private life.⁶

14. The right prohibits unlawful or arbitrary interference with a person's home, which would be engaged by unlawful or arbitrary home inspections, tenancy agreement changes or evictions.

Property rights

15. The HR Act protects a person's right to own property, and to not be arbitrarily deprived of their property.⁷
16. Property includes possessions, money, contractual rights with economic value, and rental agreements.⁸
17. The right to property will be engaged where property is taken, or a person's ability to access and use the property is severely restricted, and that is done in an arbitrary (unlawful, capricious, random, or disproportionate) manner.⁹

Protection from torture and cruel, inhuman or degrading treatment

18. The HR Act protects a person from torture or cruel, inhuman or degrading treatment.¹⁰
19. Treatment that inflicts severe physical or mental pain or suffering may meet the threshold of torture, cruel or inhuman treatment. Treatment that causes a person to feel humiliated, debased, fearful, anguished or inferior may be degrading treatment. Intention to cause harm is not necessary for there to be cruel, inhuman or degrading treatment.¹¹ Violence, abuse, neglect and exploitation of a person living in a residential service may amount to torture, cruel, inhuman or degrading treatment.
20. The right is related to the right to humane treatment when deprived of liberty, protected under section 30 of the HR Act, which mandates humane and respectful treatment of people who are not free to leave a place. Internationally, a person has been found to have been 'deprived of liberty' where the person is under continuous supervision and control and is not free to leave. It does not

⁶ Explanatory Notes, Human Rights Bill 2018 (Qld) 22. See also *Kracke v Mental Health Review Board (General)* (2009) 29 VAR 1; [2009] VCAT 646 [619]-[620].

⁷ *Human Rights Act 2019* (Qld), s 24.

⁸ *Brisbane Housing Company Ltd (Nos 1-3)* [2024] QCAT 5, 6 and 7.

⁹ See eg. *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 [131].

¹⁰ *Human Rights Act 2019* (Qld), s 17.

¹¹ Explanatory Notes, Human Rights Bill 2018 (Qld) 19.

require that the place be locked, or that the person attempts to leave.¹² The use of some restrictive practices may amount to a deprivation of liberty.

Current role of human rights in residential services

21. Under the HR Act, public entities have obligations to act and make decisions compatibly with human rights and to give proper consideration to human rights when making decisions.¹³ Residential services are unlikely to meet the definition of a public entity under the HR Act (see further discussion below). However, a registered NDIS service provider is a public entity when performing functions of a public nature in Queensland.¹⁴
22. A person subject to an alleged contravention of these obligations may make a complaint to the Commission for dispute resolution. If the complaint is not resolved, the Commission must prepare a report about the unresolved complaint, which may include details of action the Commissioner considers the public entity should take to ensure its acts and decisions are compatible with human rights.
23. The Commission also receives complaints alleging unlawful discrimination and other contraventions of the AD Act, which can be made against any respondent, not just public entities. Unresolved complaints under the AD Act may be referred to a tribunal for determination.
24. The Commission keeps a record of enquiries and complaints made to it, but identifying particular matters that involve residential services with precision is currently not possible. It appears that since 1 June 2022, the Commission has accepted 6 complaints under the AD Act from NDIS participants against their service providers.
25. In one example, the complainant lived in Queensland government housing managed by the respondent. The respondent also provided the complainant with Supported Independent Living (**SIL**) services funded by NDIS. After some months, the respondent advised they would stop providing SIL services to the complainant as they did not have the staff or skills to provide the required support. The respondent's understanding of the complex series of agreements in place was that the complainant could no longer live in the accommodation without their SIL services and issued a notice to vacate. This was incorrect. Ultimately, the notice to vacate was not enforced, and the participant was able to remain in the accommodation with a new SIL service provider.
26. In another example, the complainant had both a NDIS service agreement for SIL services and a rooming accommodation agreement with the respondent. A further agreement for community access support was with another provider. The respondent offered to take over full care of the complainant which was refused.

¹² Eg *Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] MHLO 16.

¹³ *Human Rights Act 2019* (Qld), s 58(1).

¹⁴ *Human Rights Act 2019* (Qld), ss 9(2)(a), 9(5).

The service provider then terminated the service agreement with 4 weeks notice and took possession of the accommodation. The matter was not able to be resolved at conciliation and the complainant elected not to have the matter referred to the tribunal for determination.

Recommendations

27. The following comments and recommendations focus on how the human rights of people living in residential services can be better protected and promoted.

Data collection

28. At present, there is limited data available on the demographics of people who use residential services, in what circumstances, for how long, and their service needs (including NDIS).
29. Models of service provision, standards, and quality and safeguard arrangements cannot be optimised without a better understanding of who use these services. Identifying the target audience and their needs will help to better safeguard resident rights and avoid over-regulation and unnecessary costs.
30. Ongoing centralised data collection and analysis would also assist in identifying trends and gaps in services and help government and private sector services to better meet the needs of the community. Publication of data on which decisions and planning is based assists transparency and accountability.
31. To achieve these outcomes, the Commission recommends the Queensland Government collects, analyses and publishes relevant data about residents who use residential services.

Standards and enforcement

Residential services as public entities

32. The term ‘public entity’ is defined under section 9 of the HR Act and includes entities ‘whose functions are, or include, functions of a public nature when it is performing the functions for the State [that is, Queensland] or a public entity’.¹⁵ These are known as functional public entities. The HR Act also allows entities that are not public entities to choose to be subject to the obligations of the Act by opting in to be a public entity.¹⁶
33. Residential services are privately owned, and do not receive Queensland State Government funding. While serving a vital public function, they are unlikely to meet the definition of a functional public entity because they do not provide their services ‘for the State’. The definition of public entity extends to registered NDIS

¹⁵ *Human Rights Act 2019* (Qld) s 9(1)(h).

¹⁶ *Human Rights Act 2019* (Qld) s 60.

service providers ‘when the provider is performing functions of a public nature in the State’.¹⁷

34. If residential services were public entities, they would be required to act and make decisions compatibly with residents’ human rights and be subject to the Commission’s dispute resolution processes if a complaint was made. This may help drive a more person-centred approach to service delivery.
35. The Commission acknowledges that if residential services were made subject to the legal obligations of the HR Act, then government funding ought to be provided to assist operators to comply with those obligations. Such funding (or any funding), depending on the arrangements, may result in residential services meeting the definition of functional public entities. Alternatively, residential services could be expressly defined as functional public entities as is currently the case for registered NDIS service providers. This could be considered in the HR Act’s first review which is due to commence.¹⁸

Standards

36. Whether or not residential services are public entities, the Commission recommends that human rights be embedded within the standards.¹⁹ While not committing the residential service operator to the legal obligations imposed under the HR Act, this has the benefit of articulating rights as they apply to the particular circumstances of people living in residential services and having an existing mechanism to proactively assessing whether rights are being met, rather than being reactive to complaints.
37. Level 1 standards, with which all residential services must comply, include a standard that ‘the service provider acts to uphold the legal and human rights of residents’.²⁰ According to the site audit tool and accreditation report template, assessment of this standard considers the residential service’s policy, the complaints register, the incident register, and actions taken in regard to any complaints and incidents.
38. Many of the standards already touch on aspects of human rights in the context of residential services, such as level 1 standards regarding a resident’s right to privacy, dignity and confidentiality, and level 3 standards in relation to choice and decision making.²¹

¹⁷ *Human Rights Act 2019* (Qld) ss 9(2)(a), 9(5).

¹⁸ *Human Rights Act 2019* (Qld) s 95.

¹⁹ That is, the minimum standards prescribed for a residential services accommodation provider to achieve in order to secure accreditation at level 1, level 2, and level 3 set out in Part 3 of the Residential Services (Accreditation) Regulation 2018 (Qld).

²⁰ Residential Services (Accreditation) Regulation 2018 (Qld), ss 6.

²¹ Residential Services (Accreditation) Regulation 2018 (Qld) ss 6(2), 8(2).

39. The Commission recommends that the standards be reviewed to ensure coverage of all relevant rights protected by the HR Act. Some examples of rights not included or not sufficiently covered by the current standards are:
- a. the right of residents to be supported to make their own decisions, including providing information that the person is able to understand and that the person needs in order to make a decision (right to equality, right to privacy, freedom of expression);
 - b. rights to liberty and freedom of movement;
 - c. standards that protect a resident's possessions and recognise that the residential service is their home (property rights, right to privacy);
 - d. standards that ensure a resident's individual identity, physical and mental integrity, and forming meaningful social relationships are not disproportionately interfered with (right to privacy, freedom of expression);
 - e. standards that ensure a resident is able to access health services without discrimination (access to health services).
40. The Commission further recommends that there be sufficient tools and guidance in place to support residential services to implement these standards, and to assist meaningful assessment against these standards by the RSU.
41. Finally, the Commission notes that, given the complexity of arrangements for many residents in residential services, the standards could mandate collaboration and coordination by the residential service operator with other service providers involved with the individual, subject to the resident's consent, to facilitate effective, transparent, and cost efficient outcomes for the individual.

Auditing

42. Regular auditing enables problems to be identified before they cause harm and does not rely on a vulnerable person making a complaint.
43. Auditing against the standards should give emphasis to interviewing residents for their experiences and review of resident records.²² This requires on site auditing.
44. The evidence given by the Department is that current staffing of the RSU only allows for an on site audit every 3 years.²³ Infrequent audits may mean problems

²² See Department of Housing (Qld), *Written briefing requested by the Community Support and Services Committee in relation to the Inquiry into the provision and regulation of supported accommodation in Queensland* (16 November 2023) 30, which states, 'During the Site Audit the Inspector will endeavour to interview 10% of residents and sight a minimum of 10% of the resident records.'

²³ According to the evidence provided to the Committee, there are 252 residential services for 7,483 residents; 42 are level 3 residential services supporting 1,435 residents. There are 5 staff in the regulator that is responsible for registration, accreditation, and investigation of complaints. See Department of Housing (Qld), *Written briefing requested by the Community Support*

continue for an extended period of time, and auditors may be unable to interview people about events that happened some time ago. More frequent audits would help build relationships between the RSU and residential service operators, encouraging collaboration and best practice.

45. The Commission recommends increased resources to allow RSU to conduct more regular audits, and to provide guidance and advice to residential service operators.

Complaints and investigations

46. Residents' rights as protected by the standards (and if applicable, the HR Act) should be provided to residents and the people who support them in an accessible form they can understand and apply to their own situations.
47. There does not appear to be any formal mechanism by which a resident can have individual complaints resolved. Complaints to the RSU may lead to investigations and non-compliance action, but may not promptly resolve the issue for the resident. The Commission recommends that an external complaints mechanism be available to residents who allege non-compliance with the standards. This would promote efficient resolution of disputes, incremental service improvement, and may enhance understanding of the standards and human rights by residential service operators, employees and residents.
48. If residential services were public entities, then the Commission could deal with complaints that allege contraventions of the HR Act.

Resident wellbeing

Regulation and oversight

49. Regulation and oversight of residential services appears to be complex and fragmented. There are different regulators and oversight agencies for tenancy, NDIS service provision, residential service accommodation and service provision, use of restrictive practices, and the protection of adults with impaired decision-making capacity. There does not appear to be any regulation or oversight of rent or service provision costs for residents.
50. The Commission recommends:
 - a. mapping out the roles of each regulator and oversight agency, clarifying roles, identifying gaps, and creating efficiencies where possible. For example, Level 3 service providers could be required to comply with one set of standards that facilitate compliance with both NDIS Quality and Safeguards as well as the RSA Act;

and Services Committee in relation to the Inquiry into the provision and regulation of supported accommodation in Queensland (16 November 2023) 8.

- b. providing people with a single point of contact to escalate concerns about a residential service or, as suggested by the Public Advocate, a 'no wrong door approach' to complaints lodged about residential services;
 - c. people with complex arrangements are able to engage a case coordinator who has access to all relevant information, and can look at their arrangements holistically and provide guidance and support.
51. A case coordinator chosen by the individual may be in a better position to achieve outcomes for an individual than a decision-maker (like the Public Guardian) who has been appointed for the individual.

Individual advocacy

52. People living in residential services may require support to understand their rights and advocate for themselves. This could be for a variety of reasons, including cognitive disability, fear of victimisation or eviction, or lack of personal and social resources.
53. Accessible independent advocacy for people living in residential services is a necessary component for safeguarding human rights.

Conclusion

54. Thank you for the opportunity to make submissions on this important inquiry.