

Application to the Australian Human Rights Commission



Human Services
Ageing, Disability & Home Care

1. Introduction

Ageing, Disability and Home Care (ADHC), as a major provider of specialist services to people with a disability and frail older people in NSW, aims to improve outcomes and to provide support to people with a disability to live in their own homes and participate in community life.

ADHC's responsibilities include:

- providing strategic leadership and policy advice on ageing and disability issues;
- delivering services to older people, people with a disability and their carers across NSW;
- providing funding and working with non-government organisations to deliver appropriate services;
- working with other Departments to influence services and policies; and
- undertaking strategic research and planning to develop a robust service system and to ensure services are developed in line with whole-of-government policies.

2. Purpose of this application

The purpose of this application is to seek an exemption from the Australian Human Rights Commission (Commission), pursuant to section 44 of the *Age Discrimination Act 2004* (ADA), from sections 28 and 29 of the ADA.

The reasons for seeking this exemption is so that ADHC can implement a proposed amendment to the assessment tool (known as the Screening Tool) used to determine whether a person is suitable to be a resident at a licensed residential centre. ADHC is proposing to amend the Screening Tool so that persons under the age of 18 years are deemed unsuitable to become residents of a licensed residential centre.

Licensees are obligated, pursuant to regulations made under the *Youth and Community Services Act 1973* (YACS Act), to ensure that prospective residents are screened in accordance with the Screening Tool and its criteria. In implementing the screening process, licensees of licensed residential centres would be precluded from offering accommodation to persons under the age of 18 years.

3. ADHC's obligations pursuant to the *Youth and Community Services Act 1973 (YACS Act)*

The YACS Act establishes a licensing and monitoring regime for 'residential centres for handicapped persons'. The YACS Act defines:

- 'handicapped persons' as being "*a person who is senile, temporarily or permanently incapacitated for work, mentally ill, intellectually handicapped, physically handicapped, sensorily handicapped, chronically ill, of advanced age or suffering from any medical condition prescribed by the regulations, or any combination of those disabilities, and who requires supervision or social habilitation*"; and
- 'residential centres for handicapped persons' as being "*premises comprising or of the nature of lodgings or a boarding house, home or hostel ... at which two or more handicapped persons reside ... subject to the payment of a fee or the giving of some other consideration, and otherwise than a person who is a relative of those persons*".

ADHC is responsible for licensing residential centres for handicapped people under the provisions of the YACS Act, monitoring the conditions at licensed residential centres and ensuring compliance with the YACS Act and regulations made under the YACS Act. Pursuant to this piece of legislation, the Minister may issue licences, and these licences may be issued subject to conditions.

In addition to providing accommodation facilities, licensed residential centres also provide a number of associated services, including the provision of meals, the provision of linen and washing of clothes, and assistance with personal care including assistance with medication, personal hygiene, arranging doctor's visits and so on.

In May 2010, the *Youth and Community Services Regulation 2005* (2005 Regulation) was amended to incorporate prescribed standards to be met by licensees and/or licensed managers of 'residential centres for handicapped persons'. These prescribed standards were not new, as they were imposed on licensees and licensed managers by way of licence conditions attached to each licensee's licence.

Prior to these recent amendments to the 2005 Regulation, licences granted to conduct residential centres for handicapped persons contained a set of conditions that the licensee and licensed manager have the responsibility to follow. These conditions set standards which must be observed.

These licence conditions were administered and enforced by ADHC, through regular monitoring of licensed premises for compliance. However, there was some uncertainty as to the scope of the Minister for Ageing and Disability Services' power to impose conditions on a licence where the conditions did not directly relate to the licensed premises or the licensee or licensed manager – that is, conditions relating to the care, safety and well being of residents and the provision of services from the premises.

The purpose of amending the 2005 Regulation was to create greater certainty regarding licensee's obligations thereby ensuring that the residents' health and safety are protected and that reasonable standards regarding important matters such as hygiene, sanitation, residents' rights and lifestyle are observed.

The 2005 Regulation was recently remade as the *Youth and Community Services Regulation 2010* (2010 Regulation).

4. The 2010 Regulation

The 2010 Regulation contains provisions relating to obligations on licensees and licensed managers of residential centres for handicapped persons in relation to those centres including the standards to be observed and the facilities to be provided, the qualifications and experience of staff and the making and keeping of records. These standards relate to the care, safety and well being of residents and the provision of services from the premises. The objectives of these provisions are to ensure that the residents' health and safety are protected and that reasonable standards regarding matters such as hygiene, sanitation, residents' rights and lifestyle are observed.

One specific provision relates to screening requirements upon entry to the residential centre – these concern the application of a screening tool to assess prospective residents' suitability to the proposed form of accommodation.

5. The Screening Tool for entry into Licensed Residential Centres

The Screening Tool is an assessment tool (in a form approved by ADHC) that contains criteria to be used to determine whether a person is suitable to be a resident at a licensed residential centre. The purpose of this is to prevent the inappropriate admission of people whose needs cannot be met in a licensed residential centre. Attached at **TAB A** is a copy of ADHC's User's Guide to the Screening Tool, and a copy of the Screening Tool itself.

Licensees are obligated, pursuant to the 2010 Regulation, to ensure that prospective residents are screened in accordance with the Screening Tool. Clause 19(1) of the 2010 Regulation provides:

“The following persons must be assessed in accordance with a screening tool, and must be determined to be suitable to become a resident, before being permitted to reside at the licensed premises:

- (a) a person who has not previously resided at a residential centre for handicapped persons,*
- (b) a person who has been absent from any licensed premises for two months or more,*
- (c) a person who has previously been admitted to a psychiatric hospital, an aged care facility or a rehabilitation centre (regardless of whether the person resided at licensed premises before the admission).”*

Clause 19(5) provides an exemption for the above in circumstances where:

- (a) a person requires emergency accommodation (because of a natural disaster or where the person’s health, safety or welfare may be adversely affected if the person is not permitted to stay at the premises);
- (b) ADHC is notified of the person’s presence; and
- (c) steps to arrange an assessment in accordance with the screening tool are taken within one business day of the person being permitted to stay at the premises.

6. Proposed amendment to the Screening Tool and reasons for it

ADHC is proposing to amend the Screening Tool so that persons under the age of 18 years are deemed unsuitable to become residents of a licensed residential centre.

Residents of licensed residential centres are an extremely vulnerable and disadvantaged group of people. Many have physical and intellectual disabilities, with a proportion also suffering from mental illness. Most rely solely on a pension for income (of which most if not all goes to the cost of board and lodgings), and most have no real alternatives for accommodation. There have been alleged incidents involving violence between residents.

Irrespective of the care and supervision provided by people working at licensed residential centres, such facilities are not suitable nor safe for persons under 18 years of age, and in particular for children.

Furthermore, ADHC is aware of alleged cases where residents are treated to sub-standard levels of accommodation and service: poor food and clothing, poor hygiene and cleanliness and poor physical health. In light of these matters, ADHC considers that licensed residential centres are not suitable accommodation facilities for persons under 18 years of age.

In any event, it should be noted that the *Children and Young Persons (Care and Protection) Act 1998* provides that: 'If a child or young person¹ is placed in out-of-home care, the child or young person is entitled to a safe, nurturing, stable and secure environment'. ADHC does not consider licensed residential centres offer a nurturing, stable environment for a child or young person.

7. Implications under the *Age Discrimination Act 2004*

The proposed amendment to the Screening Tool will establish a mechanism by which licensees of licensed residential centres are prevented from offering accommodation to people under the age of 18 years.

This practice potentially raises concerns under sections 28 and 29 of the ADA, namely:

- Section 28 – discrimination on the grounds of age by refusing to provide goods or services, or making facilities available;
- Section 29 - discrimination on the grounds of age by refusing a person's application for accommodation.

Exception under section 39

It is ADHC's assertion that any conduct, resulting from the proposed amendment to the Screening Tool, and which raise concerns under the above noted provision of the ADA falls within the exception contained in section 39(4). The effect of section 39(4) is that anything done by a person in direct compliance with an Act of a State or Territory, or a regulation or any other instrument made under an Act of a State or Territory, is not deemed unlawful.

The bases for ADHC's assertion in this regard are:

¹ 'Young person' is defined as a person who is 16 years or older but who is under the age of 18 years; 'child' is defined as a person who is under the age of 16 years.

- Licensees are obligated pursuant to clause 19 of the 2010 Regulation to arrange for the assessment of prospective residents in accordance with a 'screening tool'. Prospective residents must be determined to be suitable based on criteria contained in the Screening Tool prior to become a resident.
- Clause 19(6) of the 2010 Regulation defines the 'screening tool' as "*an assessment tool that is in a form approved by the chief executive [of ADHC] and that contains criteria to be used to determine whether a person is suitable to be a resident at a residential centre for handicapped persons (having regard to the health, comfort, safety and proper care of the person and other residents).*"
- The Screening Tool is therefore an extension of regulatory principles which have the effect of legally disqualifying persons under the age of 18 years from being deemed suitable as residents of licensed residential centres, and therefore from being permitted to reside at such premises.

ADHC seeks confirmation from the Commission as to whether it considers that conduct resulting from the Screening Tool deeming persons under the age of 18 years as unsuitable to become residents of a licensed residential centre falls within the exception set out in section 39(4) of the ADA.

Exemption under section 44

If the Commission does not agree with this position, ADHC seeks an exemption from the Commission pursuant to section 44 of the ADA from sections 28 and 29 of the ADA, for the maximum period of 5 years. The exemption would enable licensees of licensed residential centres to implement the screening process and refuse accommodation to persons under the age of 18 years.

In support of the application for exemption, ADHC provides the following information:

1. ***whether the proposed exemption is necessary, appropriate and reasonable*** - for the reasons set out in paragraph 6 above, ADHC considers the proposed exemption is necessary, appropriate and reasonable.
2. ***whether granting the exemption is consistent with the objects of the Age Discrimination Act*** - the object of seeking the exemption is to enable ADHC to implement a proposed amendment to the Screening Tool so that persons under the age of 18 years are deemed unsuitable to become residents of a licensed residential centre and so

that licensees can refuse accommodation to such persons. There are no non-discriminatory ways of achieving this objective and it is ADHC's submission that the proposed conduct is not inconsistent with the objects of the ADA. For the reasons enunciated above, licensed residential centres are not suitable or safe for persons under 18 years of age, and in particular for children. In any event, ADHC provides a range of alternative accommodation options to eligible children and young people under 18 years of age who require accommodation services.

3. **any conditions or limitations to be contained in the proposed exemption** – no conditions or limitations are proposed to be contained in the exemption
4. **further information** - ADHC provides a range of accommodation options to eligible children and young people under 18 years of age who require accommodation services. As a result, it is not necessary for such people to apply to live in licensed residential centres.

ADHC Information, Referral and Intake Services may be contacted for assistance in providing suitable accommodation for younger people with a disability as defined in the *Disability Services Act 1993*. Community Services also provide alternative accommodation services to children and young people requiring accommodation.

ADHC considers there will be no adverse impact of granting the proposed exemption.

There are currently no persons less than 18 years of age living in a licensed residential centre. Additionally, since the introduction of the Boarding House Reform Program in 1998 there has not been a person under 18 years of age living in a licensed residential centre.