

**AUSTRALIAN HUMAN RIGHTS COMMISSION
AGE DISCRIMINATION ACT 2004 (CTH), section 44(1)
NOTICE OF GRANT OF A TEMPORARY EXEMPTION**

By this instrument, under section 44(1) of the *Age Discrimination Act 2004* (Cth)(ADA), the Australian Human Rights Commission grants an exemption to the State of New South Wales - Department of Family and Community Services, Ageing Disability and Home Care (the Applicant) from the operation of sections 28 and 29 of the ADA. The exemption is granted for a period of one year from the date of this instrument and is granted subject to the conditions outlined below.

SUMMARY

The Applicant has developed a screening tool to assess the suitability of persons to live in 'Residential Centres for Handicapped Persons'. Residential Centres for Handicapped Persons are commonly known as licensed boarding houses. An operator of a licensed boarding house must not allow a person to reside at a licensed boarding house unless the Applicant has assessed the person as suitable to do so.

The Applicant sought an exemption under section 44 of the ADA so that it may amend the screening tool to provide that it is a criterion for admission to a licensed boarding house that a person be 18 years of age or over. The Applicants sought an exemption from the ADA for a period of five years.

The Commission has granted the exemption because it is persuaded by the submissions of the Applicant, and of the two agencies that made submissions in response to the Application, that licensed boarding houses are currently not suitable places of residence for persons who are under 18 years of age.

The exemption is granted subject to the following conditions.

1. Within 14 days of the date of conclusion of the exemption period, the Applicant must advise the Commission:
 - a. of any measures taken by the Applicant during the exemption period to ensure that operators and proprietors of licensed boarding houses comply with the requirements of the *Youth and Community Services Act 1973* (YACS Act) and *Youth and Community Services Regulation 2010* (YACS Regulations);
 - b. of any measures taken by the Applicant during the exemption period to reduce the level of violence or abuse experienced by residents of licensed boarding houses;
 - c. of any measures taken by the Applicant during the exemption period to improve the accommodation and services provided to residents of licensed boarding houses; and
 - d. of any allegations of abuse, neglect, misconduct or breach of the YACS Act or YACS Regulations within a licensed boarding house. In relation to each alleged incident, the Applicant is required to advise the Commission: what was alleged, in which licensed boarding house the

event is alleged to have taken place and what, if any, action the Applicant took or is taking to address the alleged breach.

2. Applicant must maintain its Prioritisation and Allocations policy which provides that children at risk of homelessness and some children at risk of harm are among the Applicant's 'highest priorities, requiring an immediate response.'

BACKGROUND

The Department of Family and Community Services, Ageing Disability and Home Care (the Department) is a department of the government of New South Wales that provides services and support to older people, people with a disability, and their families and carers.

Under the YACS Act, a person may apply to the Minister of Family and Community Services to become the proprietor of a licensed boarding house.¹

A 'residential centre for handicapped persons' is defined as any premise at which two or more 'handicapped' persons reside with a person who is over 18 years of age, who is not a relative of the persons with disability and who does not have a disability, for payment of a fee or other consideration.² The Minister may also declare a premise to be a residential centre for handicapped persons³ The Applicant advises that as at September 2011, there were 30 licensed boarding houses in New South Wales which together house 668 people.⁴

Proprietors of licensed boarding houses provide a range of services to residents in addition to accommodation. For example, proprietors of licensed boarding houses provide residents with meals, clothing, linen and toiletries and may administer medication. The YACS Regulations outline the obligations of licensees and licensed managers of licensed premises with respect to the services provided to residents.⁵

To be permitted to reside at a licensed boarding house, a person who:

- has not previously resided at a licensed boarding house;
- has been absent from a licensed boarding house for 3 months or more; or
- has previously been admitted to a psychiatric hospital, an aged care facility or a rehabilitation centre

must be assessed under a screening tool as suitable to do so.⁶ The screening tool has been developed by the Department and is administered by staff of the Department. Unless a person requires emergency accommodation, a proprietor must not allow a person to reside in a licensed boarding house unless the potential resident has been assessed by a staff member of the Department, using the screening tool, as suitable to do so.⁷ Where a person has been allowed to reside in a licensed boarding house because of an emergency, steps to arrange an assessment in accordance with the screening tool must be taken within one business day of the person being permitted to stay at the premises.⁸

The fact sheet provided with the Application advises that the purpose of the screening tool is to introduce a 'gate-keeping' process to prevent inappropriate placement of individuals with high support needs in licensed boarding houses⁹

The Application

The Applicant seeks an exemption from sections 28 and 29 of the ADA so that it may amend the screening tool to provide that it is a criterion for admission to a licensed boarding house that a potential resident is 18 years old or over.

The Applicant states that licensed boarding houses are not suitable places for persons under 18 years of age to reside because the residents of licensed boarding houses are “an extremely vulnerable and disadvantaged group of people” and that “many have physical and intellectual disabilities, with a proportion also suffering from mental illness.”

The Applicant notes that there have been allegations of abuse between residents at some licensed boarding houses. The Applicant also advises that it is “aware of alleged cases where residents are treated to sub-standard level of accommodation and service: poor food and clothing, poor hygiene and cleanliness and poor physical health.”

The Applicant states that it provides a range of accommodation options to eligible children and young people under 18 years of age who require accommodation services. The Applicant claims that it is therefore unnecessary for persons under 18 years of age to be eligible to reside in licensed boarding houses.

Submissions received by the Commission

The Applicant’s request for a temporary exemption was posted on the Commission’s website and interested parties were invited to comment on the exemption. The Commission received two submissions in response to the Application. Both submissions recommended that the Commission grant the exemption.

People with Disability Australia (PWDA) advised that it “fully supports” the Application. PWDA agrees that licensed boarding houses are not safe or suitable places for persons under 18 years of age. PWDA stated that relevant considerations in relation to the Application are the rights outlined in the Convention on the Rights of the Child and the Convention on the Rights of Persons with a Disability (CRPD). PWDA particularly notes article 7 (children with disabilities) and article 23 (respect for home and family) of the CRPD which specifically address the rights of children with disabilities.

The Tenants Union of New South Wales is also of the view that licensed boarding houses are not suitable places of accommodation for minors. The Tenants Union states that “all too often, (licensed boarding houses) reproduce the segregation, exploitation and abuse of the large institutions they were meant to replace”. The Tenants Union further states “we believe that there is no place in the future of our housing system for these institutionalizing places. While they are allowed to continue to operate, (licensed boarding houses) should be subject to a regime of close monitoring and compliance with standards. A screening tool that excludes minors from (licensed boarding houses) is part of such a regime.”

Further information received from the Applicants

In response to a request from the Commission, the Applicant provided further information in support of the Application.

The further information outlined the history of the licensed boarding house sector and the scheme established in the YACS Act and YACS Regulation. The submission also provided demographic information about the people who live in licensed boarding houses.

The Applicant restates that licensed boarding houses are not suitable places of residence for persons under 18 years of age because many residents of licensed boarding houses have an intellectual disability or a mental illness, and because there have been incidents of violence between some residents and allegations of sexual assaults at some licensed boarding houses. Further, the Applicant notes that in many licensed boarding houses, residents share rooms and staff members are not on site at all times. The Applicant also states that employees of licensed boarding houses are not required to complete a criminal record check.

The Applicant notes that under the *Children and Young Person (Care and Protection) Act 1988* (NSW), if a child or young person is placed in out of home care, the child or young person is entitled to a safe, nurturing, stable and secure environment.¹⁰ The Applicant argues that licensed boarding houses are not able to provide a nurturing, stable environment for a young person. The Applicant also states that no tenancy rights are granted to residents of licensed boarding houses and a secure environment cannot be guaranteed. The Applicant submits that, irrespective of the care and supervision provided by employees of licensed boarding houses, such facilities are not suitable or safe for persons under 18 years of age.

The Applicant advises that few people aged under 18 have ever resided in licensed boarding houses and that for approximately 10 years no such person has resided in a licensed boarding house. The Applicant advises that of the 375 people who have been assessed using the screening tool since April 2010, the youngest person was 19 years of age but the majority of people assessed were between 45 and 50 years of age.

The Applicant claims that there are a number of alternatives available to persons under 18 years of age who are in need of accommodation. The Applicant advises that persons aged over six years of age who have an intellectual disability are eligible for its direct services. The Applicant also states that it funds numerous non-government organisations who support people who have a disability within the meaning of the *Disability Services Act 1993* (NSW) but who do not meet the criteria for provision of direct services by the Applicant.

The Applicant advises that under its Prioritisation and Allocations Policy, children and young people who are homeless and certain and young people who are assessed as being at risk of harm are “among its highest priorities requiring an immediate response”. The Applicant advises that in each region, an Intake Referral and Information (IRI) team manages phone enquiries. The Applicant claims that where a person who has a disability is identified as being homeless or at risk of homelessness or at risk of harm, the IRI team will trigger an immediate response to secure emergency support until a longer term solution can be identified. The Applicant advised that it assisted a number of people in this way in the 2010/2011 financial year.

REASONS FOR DECISION

The Commission has considered all of the material that has been placed before it, together with the Commission's Guidelines on Temporary Exemptions under the ADA, and has decided to grant the Application for a period of one year, subject to the conditions outlined above. The reasons for the Commission's decision are as follows.

The Commission is of the view that it is reasonable to grant the exemption for a period of one year because it is persuaded by the submissions of the Applicant and of the two agencies that made submissions in response to the Application that some licensed boarding houses are currently not suitable places for persons under 18 years of age. The Commission notes the recent report of the New South Wales Ombudsman which expresses concern about the "vulnerability and poor circumstances of people living in licensed boarding houses".¹¹

However, the law of New South Wales does not provide that licensed boarding houses are places of residence for adults only. The Commission has therefore granted the exemption for one year so that the Applicant has a period of time to devise a scheme to ensure the improvement of conditions within licensed boarding houses. To this end, Condition 1 to the exemption requires that the Applicant advise the Commission of the steps that it has taken during the exemption period to ensure greater compliance with the YACS Act and YACS Regulations and the improvement of conditions within licensed boarding houses generally.

The Commission notes that the majority of residents of licensed boarding houses have a mental illness and that a substantial proportion of them have an intellectual disability. The Commission also notes that in 2010 the majority of residents of licensed boarding houses were over 48 years of age. As people with disability and older people are likely to be vulnerable they also should have access to appropriate and safe places of residence. However, the Commission considers that persons under 18 may presently be at particular risk should they be admitted to a licensed boarding house.

APPLICATION FOR REVIEW

Subject to the *Administrative Appeals Tribunal Act 1975* (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.

Dated this 18th day of January 2012.



Signed by the President, Catherine Branson QC, on behalf of the Commission.

¹ Section 11 YACS Act.

² Section 3 YACS Act.

³ Section 3A YACS Act.

⁴ Further submissions of the Applicant provided to the Commission on 27 October 2011.

⁵ Sections 5 to 15 YACS Regulation.

⁶ Section 19 YACS Regulation.

⁷ Section 19 YACS Regulation.

⁸ Section 19 YACS Regulation.

⁹ Information About the Screening Tool for Licensed Residential Centres. Family & Community Services, Ageing Disability and Home Care April 2011.

¹⁰ Section 9(f) *Children and Young Person (Care and Protection) Act 1998* (NSW)

¹¹ More than board and lodging: the need for boarding house reform. A special report to Parliament under section 31 of the *Ombudsman Act 1974* August 2011.