

Alert

Property, Building & Construction

Navigating the legal requirements of building and providing housing for people with disabilities under the National Disability Insurance Scheme

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Whether you are a builder, an architect, a building surveyor/certifier, a landowner, a property agent, a property valuer, or directly involved in providing NDIS support, regulations governing housing for people with disabilities (and in particular under the National Disability Insurance Scheme) are becoming more and more relevant. The [Liveable Housing Design Standard](#) for residential buildings is being rolled out nationwide effectively as a watered-down version of disability housing building standards, and particularly with the support of funding under the NDIS and a rapidly growing cohort of Australians diagnosed with a disability, the demand for housing to meet the needs of people with disabilities is on the up and up. It behooves anyone in the construction, real estate and NDIS industry to be aware of these regulations as they pertain to this broader movement towards supporting this demand, as well as similar demand particularly for housing supporting those ageing in their own homes.

This is a broad subject, and this article will touch on matters relevant to each of these perspectives on this growing sector. This article comes in three parts:

- a general introduction to NDIS housing and relevant NDIS rules and regulations;

- detailing the design standards and framework for housing for people with disabilities generally, and NDIS housing in particular; and
- terms of service for providing NDIS housing (or services in that context) to NDIS participants.

The NDIS and most rules for construction of accommodation for people with disabilities apply nationally, but this article will also deal with South Australia-based rules where applicable.

NDIS - a general overview relating to housing

Accommodation is relevant to two types of NDIS supports:

- [Specialist Disability Accommodation \(SDA\)](#), where accommodation operated by an NDIS provider is directly funded by the NDIS (for NDIS participants with a very high need for constant or immediately available supports, and/or an extreme functional impairment in a core area such as self-care, mobility or self-management, as defined in the *NDIS (SDA) Rules 2020*) – covering rent and other costs of accommodation an NDIS participant may incur;
- [Supported Independent Living \(SIL\)](#), where supports inside an NDIS participant's dwelling are directly funded by the NDIS, but the direct costs of accommodation are not funded.



While the NDIS estimates that 6% of participants may use SDA supports under the NDIS totalling approximately \$700 million per year from the NDIS directly (with further funding expected from private sources to supplement), it is estimated that around 6 times that number of participants will use SIL supports.

By and large (but not necessarily, strictly speaking), participants using SDA support will also be using SIL supports. The NDIS specifically recognises this under section 10 of the *NDIS (SDA Conditions) Rule 2018*. NDIS providers offering SIL supports are increasingly recognising that there is an opportunity in also offering SDA support by constructing or purchasing accommodation which is compliant. This opportunity presents both for the providers in being able to offer further services to their clients, and for participants in being able to obtain both SIL and SDA supports in a coordinated and efficient manner. Under section 34(1)(c) of the *NDIS Act*, participants are in fact obligated to look for the most efficient service offering the best value for money.

Because of this overlap, and because otherwise SIL supports are more common, you may often hear NDIS housing described as ‘SIL housing’.

The [National Disability Insurance Scheme Act 2013 \(Cth\)](#) is the key NDIS legislation, which relevantly:

- defines a participant (including the requirement for Australian resident status) and the threshold for qualifying disability;
- provides principles to follow when participating in the Scheme;
- establishes the ability to promulgate further rules and regulations – in particular:
 - o the [National Disability Insurance Scheme \(Supports for Participants\) Rules 2013](#)
 - o the [National Disability Insurance Scheme \(Code of Conduct\) Rules 2018](#) – establishing the *NDIS Code of Conduct*
 - o the [National Disability Insurance Scheme \(Restrictive Practices and Behaviour Support\) Rules 2018](#)
 - o the [National Disability Insurance Scheme \(Specialist Disability Accommodation Conditions\) Rule 2018](#)

- o the [National Disability Insurance Scheme \(Specialist Disability Accommodation\) Rules 2020](#)
- o the [NDIS Practice Standards and Quality Indicators](#)
- o the [NDIA Price Guide](#) – which is issued each year, and lists the maximum hourly price limits a provider can charge for any support
- o the [SDA Price Guide](#)
- o the [SDA Design Standard](#)
- o the *Terms of Business for Registered Providers* – which set out what must be included in written NDIS service agreements

Eligibility as a participant, how much funding is provided to a participant, and what type and frequency of services are appropriate, are based on assessments and reports given to the NDIS (provision of which the NDIS may mandate under sections 36, 48 and 51 of the *NDIS Act*) along with the participant's preference and which type of support would make other supports easier or more efficient to obtain – particularly in relation to SDA supports, this is described in section 16 of the *NDIS (SDA) Rules 2020*.

Funding claims – general information

The hourly rate chargeable by an SDA or SIL provider will usually be based on standard intensity pricing listed in the *NDIA Price Guide*, but the rate may be higher (high intensity pricing) if a participant requires either:

- services at least once per shift to manage challenging behaviours necessitating intensive positive behaviour support; or
- continual active support due to circumstances such as unstable seizure activity or respiratory support needs.

Participants may pool their budgets and negotiate with a provider to agree to offer services using all of the participants' pooled funding – this may be useful where one or more of the participants has significantly higher funding than needed for the service sought, and other participants in the group have less funding than needed.

Specialist Disability Accommodation

SDA accommodation is categorised by the NDIS either as *legacy stock*, *existing stock* or *new build*.

New builds are buildings given a certificate of occupancy on or after 1 April 2016.

Legacy stock and existing stock have different rules with respect to design standards and maximum number of occupants, and conditions for enrolment (including *Liveable Housing Australia* certification). The NDIS has expressed that they would prefer no existing or legacy stock be enrolled from now on.

Under section 25 of the *NDIS (SDA) Rules 2020*, a dwelling must be enrolled as SDA accommodation with the NDIS (using the provider's NDIS portal). New builds can be enrolled to house only 5 residents at maximum (excluding support staff, or where all residents are from the same family – and this figure is limited by building type as well as detailed below).

An application to enrol a dwelling to offer as Special Disability Accommodation must include information set out in section 25 of the *NDIS (SDA) Rules 2020*, and certify several matters, including, generally, that:

- it is a permanent dwelling intended to provide long-term accommodation to at least one SDA participant
- it is owned by the provider, or the owner approves the enrolment – enabling the owner of an SDA dwelling to subcontract the offering of the accommodation on the NDIS to an NDIS provider with more experience providing that service
- it meets relevant building codes
- if the dwelling is a refurbished new build, the cost of refurbishment at least equalled the amount tabled in Appendix F of the *SDA Price Guide*
- no Commonwealth funding has been provided in relation to the dwelling (including to fund complex home modifications) since 1 December 2016

The NDIS can follow up to check that matters certified continue to apply, at any time – and they can also require that a provider arrange for another person to certify those matters, under section 30 of the *NDIS (SDA) Rules 2020*.

A dwelling cannot be enrolled until a certificate of occupancy has been issued for the dwelling – however, the application for enrolment can be made at any time, and a provider can arrange for an accredited SDA assessor to certify that a dwelling design meets design criteria, which may be useful in providing some confidence of successful

enrolment once construction is completed.

When enrolling, a provider can record the claiming of GST tax credits. A different SDA price limit applies if the owner of the dwelling either did not pay GST on construction costs/purchase price of the dwelling, or was permitted to claim input tax credits.

A dwelling will be enrolled by the NDIS within 28 days of a complete and correct application for enrolment – if it takes any longer, the NDIS will notify the applicant, usually along with requests for further information. If the NDIS' notice is not responded to within a reasonable timeframe, the NDIS will cause the application to be withdrawn (and a new one can be submitted).

Enrolment cannot be transferred, or amended. Any modification to an enrolment, and any new provider, requires the submission of a new application to enrol the dwelling, after the current enrolment has been cancelled. If the dwelling was originally enrolled between 2016 and 1 July 2021, and the new application is made less than 30 days after cancellation of that enrolment, the *SDA Design Standard* (more on that below) may not be applicable – but *Liveable Housing Australia* certification would be required.

Under section 27 of the *NDIS (SDA) Rules 2020*, enrolment of a dwelling can be cancelled by the NDIS with 14 days notice (which they may do if the provider fails to advise of changes to the dwelling or its occupation within 5 business days after the change).

Under sections 24(1)(a) and 26(2)(c) of the *NDIS (SDA) Rules 2020*, an NDIS provider must register, as an SDA provider, to be permitted to provide SDA services. As described earlier, the NDIS specifically recognises the use of SIL supports in conjunction with SDA services, and pursuant to section 10 of the *NDIS (SDA Conditions) Rule 2018*, registration as an SDA provider is conditional on the SDA provider having documented arrangements with each participant and each participant's SIL providers, which establish parameters facilitating a collaborative working arrangement and establish rights and responsibilities of each party.

Claims under SDA

The owner of an SDA dwelling may charge rent to the participant, under section 21 of the *NDIS (SDA) Rules 2020*.

Rent chargeable is generally capped at the lesser of the following:



- the amount which the dwelling is enrolled for (all claimable amounts are set out in the Appendices to the *SDA Price Guide*, and depend on building type, design category, number of SDA participants for which the dwelling is enrolled, location, sprinklers, and GST tax credits claimed)
- the amount which the participant is entitled to receive in their funding

plus 'reasonable rent contributions', which comprises the total of the following:

- an amount not exceeding 25% of the basic rate of Disability Support Pension which a person 21 or over would receive under the *Social Security Act 1991* (Cth)
- 100% of any Commonwealth Rent Assistance which the participant receives, and
- (if the participant receives the Disability Support Pension) 25% of the Pension Supplement/Youth Disability Supplement which the participant receives

each adapted to whether the participant is single or in a couple depending on whether the participant is sharing their bedroom in the SDA dwelling or not.

The SDA provider can charge further higher rent, with the participant's consent, if:

- the participant chooses the SDA provider's dwelling despite other available options, or
- market rental value for the dwelling exceeds the capped amount described above, and the provider notifies the NDIS and provides a certificate from a qualified property valuer stating that the rent to be charged is fair and reasonable, under section 29 of the *NDIS (SDA) Rules 2020*.

The NDIS will not fund non-participants in SDA or SIL housing, even if it is enrolled. Those residents can be charged market rent on market terms.

The SDA provider may also charge a participant board.

Similar to reasonable rent contributions, board chargeable is capped at the total of:

- an amount not exceeding 50% of the basic rate of Disability Support Pension, and

- 100% of any Energy Supplement which the participant receives under the *Social Security Act*.

each adapted to whether the participant is single or in a couple depending on whether the participant is sharing their bedroom in the SDA dwelling or not.

Any SDA provider charging the maximum amount possible for board must be supplying at least the following:

- Meals and consumables
- Utilities which would ordinarily be paid by occupants
- Access to whitegoods and laundry facilities
- Furniture and furnishings in the common areas

A participant may choose to obtain goods or services themselves from a source other than the SDA provider, and not pay board for that item, even if the parties have agreed for the provider to provide those goods or services in exchange for board.

When a participant vacates and ceases services (whether they vacate, are made to vacate, or they pass away), the provider of a dwelling enrolled for 5 residents can continue to receive the benefit of SDA funding until the earlier of 90 days or when the vacancy is filled, under section 32 of the *NDIS (SDA) Rules 2020*. If there are fewer than 5 residents enrolled, different timeframes apply.

An SDA provider may, in addition to claiming rent and board directly, also claim payment for an On-site Overnight Assistance (**OOA**) room, being a room used by support staff who provide support services overnight to participants in the same dwelling or nearby.

Supported Independent Living

Supported Independent Living supports fund assistance or supervision with:

- daily tasks (personal care, getting ready, eating and drinking, preparing and cooking meals, doing chores)
- overnight supports of different types depending on particular need
- building skills (in daily tasks, developing a routine, social skills)
- actioning behaviour support plans

- personal safety and security
- taking medication
- medical appointments
- irregular community events (physical therapy sessions, activities and personal tasks outside the home, going to the shops, visiting friends/family outside the home) – up to 10 days for standard intensity support needs, and up to 15 days for high intensity support needs.

Generally, a participant will not be eligible for SIL supports if they are under 18 years old.

SIL funding will not be provided to cover the cost of rent, board, groceries, utilities, vehicle costs, household budgeting, bill paying, holidays, regular activities outside the home, employment/recreation supports, supports in the justice system or in hospital, nursing, medical, palliative or other healthcare.

SIL supports can be provided to participants living alone or with others (including other participants, users of SDA supports, and people not using NDIS supports at all).

A SIL provider does not need to be registered except when providing SIL services using regulated restrictive practices (limiting the rights or freedom of movement of a participant), or if a participant is 'NDIS managed'.

Claims under SIL

Generally, a SIL provider can claim for their services on a weekly basis (or hourly, provided they are consistent). An SDA provider usually claims on a monthly basis (but can also claim on a different frequency). Claims must be in arrears.

NDIS will create one service booking for the annual SIL plan value, and a second service booking for irregular supports. Unless a participant's plan is 'plan managed', no claims for SIL funding can be made without a service booking (and claims cannot be made more than 90 days after the end of a service booking). Service bookings can be changed with participant consent at any time.

A SIL provider cannot charge a participant additional amounts for management, training of staff, record keeping/filing, or shadow shifts, or increase prices if another occupant of a 'SIL house' vacates and supports are shared by fewer people.

Once SIL supports are assessed, funding will generally remain on the level as assessed unless a new assessment occurs (and the participant must advise NDIS if circumstances change to require a new assessment), or if the NDIA Price Guide changes funding limits.

Provided that the service agreement provides for it, a SIL provider can claim for a period of up to 4 further weeks after a SIL service agreement is terminated.

Design, construction and occupancy

The NDIS establishes several regulations for design, construction and occupancy, but on a more general level, other legislation has previously already established rules which apply broadly, as follows:

- the [*Disability \(Access to Premises – Buildings\) Standards 2010 \(Cth\)*](#), issued under the Disability Discrimination Act 1992 (Cth), has resulted in the creation of several standards, including, relevantly:
 - AS 1428:2021, which relates to design for access and mobility, and particularly AS/NZS 1428.4.1:2009, which relates to orientation of people with vision impairment
 - AS 1735:2020, which relates to lifts, escalators and moving walks
 - AS 2890:2022, which relates to parking facilities for people with disabilities
 - AS 4586, which relates to slip resistance on floors

These Standards apply to builders, building certifiers, surveyors, developers, owners, designers, managers, and lessees – to the extent any of these are involved in the construction of any building which is not Class 1a (a house for related people to live in) or Class 4 (a residential dwelling inside an office, a shop, a car park, a storage unit, a laboratory or factory, or a public building) under the *National Construction Code (NCC)*.

- The *Residential Tenancies Act 1995 (SA)*, relating to residential tenancies (as Specialist Disability Accommodation at least will constitute), contains the following requirements with respect to dwelling design:
 - Under sections 68A and 105PA, and regulation 11A:

- there is a maximum flow rate for shower heads and taps
 - toilets must have a minimum 3-star rating under the *Water Efficiency Labelling and Standards Act 2005* (Cth)
 - electrical appliances must have a minimum 3-star rating under the *Greenhouse and Energy Minimum Standards Act 2012* (SA)
 - electric/gas water heaters must comply with the *Greenhouse and Energy Minimum Standards Act 2012* (SA)
 - o under section 67A, the dwelling must comply with minimum housing standards under the [Housing Improvement Act 2016 \(SA\)](#) before a resident takes occupation (specifying minimum facilities, amenities and services, standards of installation of fixtures and maintenance, standards of construction, and prohibited substances).
- living areas
 - switches and powerpoints
 - lifts
 - common external areas
 - private open spaces
 - landscaping
 - storage facilities
 - breakout room
 - lighting and colouring of structures for visibility and to reduce glare
 - ceiling hoists
 - heating and cooling
 - emergency power
 - assistive technology
 - fire safe design
 - any features to effect robust design

The *National Construction Code* also applies generally, and takes precedence to the extent of any inconsistency with the *SDA Design Standard* (except in relation to spatial requirements set out in the *SDA Design Standard*).

The *Liveable Housing Design Standard* is being rolled out nationwide in relation to Class 1a and 2 buildings under the NCC, but generally stipulates lower standards than the *SDA Design Standard*.

The *SDA Design Standard* sets out minimum requirements in relation to new build SDA dwellings as of 1 July 2021, dealing with:

- the connection between the dwelling's car park and the dwelling proper
- amenities required to be on the ground floor
- design of entryways and doorways (and door hardware and handles), corridors, internal stairways, walls, and floors (including specifying slip resistance)
- sanitary facilities
- kitchens
- laundries
- bedrooms

The *SDA Design Standard* also provides further non-mandatory recommendations in relation to all of these matters, as well as car parking size, windows, and sprinklers.

SDA design categories and building types

The *SDA Design Standard* will apply differently depending on the design category and building type for which the dwelling is enrolled. These will also inform pricing rates chargeable by the SDA provider, and as I will set out below, may reduce the maximum number of residents further below the nominal maximum of 5 for new builds.

Note: The NDIS regularly releases data on participant demand for particular building types and design categories.

There are 5 SDA design categories:

1. Basic – which has no specialist design features. Under sections 17 and 24 of the *NDIS (SDA) Rules 2020*, all shared areas, at least one bathroom accessible by all participant occupants, and each bedroom occupied

by an SDA participant in an SDA dwelling, must all meet the minimum design requirements of an SDA design category above this category of Basic (unless specifically requested by a participant under section 15(2) of the *NDIS (SDA) Rules 2020*).

2. Improved Livability – housing designed to improve livability by incorporating a reasonable level of physical access and enhanced provision for people with sensory, intellectual or cognitive impairment (for example, walls and floors that are very easy to see, living areas in which support workers can see participants easily, and very few stairs).
3. Fully accessible – housing designed to incorporate a high level of physical access provision for people with significant physical impairment (for example, for participants using a wheelchair, or who cannot use steps).
4. Robust – housing providing the 'Fully accessible' features and which is very resilient, reducing the risk to residents and the community, and the likelihood that reactive maintenance will be required (suiting participants who need help managing complex and challenging behaviours, and who often cause significant property damage).
5. High physical support – housing providing the 'Fully accessible' features and for people requiring very high levels of support (eg for participants needing a ceiling hoist, a backup power supply, home automation, or communication technology).

The 4 SDA building types are:

1. Apartment – Class 2 building in the NCC (being a self-contained unit in a larger residential building). This is capped at 3 bedrooms and 2 residents.
2. Villa, duplex, townhouse – Class 1(a)(i) or (iii), or 3 in the NCC (semi-attached properties, but also including stand-alone villas or granny flats). Capped at 3 residents.
3. House – Class 1(a)(i), 1(b)(i), or 3 in the NCC (detached building with garden or courtyard area, and no more than 2 ancillary villas, duplexes or townhouses). Capped at 3 residents.
4. Group home – Class 1(b)(i), or 3 – with up to 5 long-term residents.

Note: Under the *Building Work Contractors Act 1995 (SA)*, these are domestic building contracts (unless they are buildings divided into a number of separate places of residence intended only for rental, which may very likely apply for SDA dwellings).

Any SDA dwelling must contain at least one kitchen, one bathroom, one living/dining area, one entrance/exit, and a bedroom per participant.

Bedrooms

Under section 24(1)(d) of the *NDIS (SDA) Rules 2020*, each participant must have their own private bedroom, occupied only by themselves and others they choose to reside with. Pursuant to sections 24(1)(e) and 24(2) of the *NDIS (SDA) Rules 2020*, the participant must notify the NDIS of any other occupant of the bedroom and satisfy the NDIS that the other occupant does not adversely impact the participant's needs. Participants can share a bedroom with their partner, or children can share a bedroom with siblings – but each resident is counted under the relevant cap.

An OOA room is not considered to be a bedroom for these purposes.

An application to enrol a dwelling as an SDA dwelling must include information about the number of non-compliant bedrooms, the number of people who will live in each of those bedrooms, and a declaration that non-compliant bedrooms will not be used by SDA participants.

Certification

Enrolment of an SDA dwelling must, since 1 July 2021, include an SDA Design Standard certification from an accredited third party SDA assessor (who can be found on the *Liveable Housing Australia* website). A person can become accredited using [Access Institute](#) – not much is required beyond evidence of accreditation in the assessor's field (whether as an architect, access consultant, occupational therapist, or building surveyor/certifier). Different States have different standards in this regard.

No assessor is permitted to certify any project which they themselves have designed, constructed, or assessed in any other capacity or context.

A single dwelling may be certified to be more than one design category, and an SDA provider may offer and claim payment for each bedroom assessed each as a different design category.



Density

In addition to the previous information regarding resident caps, the number of participants who can receive SDA funding for occupying an SDA dwelling on a single parcel of land with more than 1 dwelling is the greater of:

- 10 participants; and
- a number equal to 10% of the total number of bedrooms on the land.

In most building types, the OOA room claimable by an SDA provider can only be claimed against one dwelling. For an apartment, OOA for one separate OOA apartment can be claimed against a maximum of 10 SDA apartments (20 participants, theoretically).

Density caps are different if the SDA dwelling is enrolled for fewer than 3 residents or the dwellings are part of what is defined as an 'intentional community'.

Location

There are few rules about location of SDA dwellings, although in order to meet minimum requirements of the *SDA Design Standard*, some locations may not be feasible – for instance, a house up a hill beyond a certain incline, with many steps.

Naturally, a residential building may only be approved for construction in a zone which permits residential construction.

In New South Wales, there are particular mandated location requirements with respect to distance from public transport hubs, which reflects a general non-mandatory recommendation in the *SDA Design Standard*.

Terms of service

Whether providing SDA or SIL or any other NDIS services, a provider needs to have a written service agreement. Ideally, this agreement is signed by both the provider and the participant. Technically, under the NDIS regulations, execution is not essential provided that the agreement has been developed in consultation with the participant and a written copy has been issued to the participant, but other legislation would recommend execution regardless. For instance, the [Privacy Act 1988 \(Cth\)](#) applies to this context in which considerable personal and sensitive information is being obtained from participants. The *NDIS*

Code of Conduct requires providers to respect the privacy of participants. Sections 76A and 76B of the *Residential Tenancies Act 1995 (SA)* also details obligations of the owner of a dwelling with respect to residents' information. A provider should ensure their service agreement includes a privacy clause describing their use of a participant's sensitive information such that execution of the service agreement constitutes consent to such use.

A registered provider must not charge the participant any costs in relation to preparation of the service agreement.

Australian consumer laws apply – including obligations not to mislead, to provide replacements or refunds for faulty goods/services, and not to act anti-competitively. In particular, Australian consumer law prohibits making services conditional upon the participant also contracting for services from another specified business (known as third line forcing).

Under section 37 of the *NDIS (SDA) Rules 2020*, an SDA provider cannot restrict other NDIS providers from accessing the SDA dwelling in order to provide supports, nor can the SDA provider prevent the participant from engaging such services from other providers.

As service agreements will contain standard terms (while certain terms may vary depending on particular participant circumstances, otherwise the provider must treat all participants equally and not preference any one over another, so terms must necessarily be standard in that respect), to a degree the unfair contract terms regime applies. This regime stipulates that as of November 2023, if any standard term which cannot be negotiated causes a significant imbalance in rights and a detriment to the participant, and does not protect a legitimate business interest of the provider, the term is void and the provider may be liable for penalties in the tens of millions of dollars per contravention (meaning per term, per service agreement, per participant).

Particularly where some people with disabilities may be vulnerable, the ACCC also strongly warns against 'sharp practices' such as asking for additional fees or inducements with no particular link to an NDIS plan, or high pressure sales tactics.

Specific terms

A written service agreement prepared by any registered NDIS provider (including all SDA providers) must include

terms as set out in the *Terms of Business for Registered Providers* issued by NDIS, including:

- a declaration to the participant, prior to delivering the relevant service, of relevant prices – which prices must adhere to the *NDIA Price Guide*, and cannot include credit card surcharge fees, gap fees, late payment fees or cancellation fees
- an obligation to regularly or continually provide information to the participant in relation to services delivered and amounts charged (which must be consistent and compliant with NDIS pricing arrangements, guidelines and laws including in relation to GST)
- the process for making a complaint, and information on complaint handling and dispute resolution processes
- timeframes for notice of termination of services – the minimum period being 14 days or such longer period as is adequate to enable the participant to move to an alternate provider of those services

An SDA service agreement must contain further terms set out in the specific *SDA addendum to the Terms of Business for Registered Providers*, including:

- commencement date, duration of the agreement, and the manner by which the duration of the agreement can be extended
- the amount of rent, and method and timing for payments (including details of each component of rent)
- the amount of any bond, and management arrangements that apply to that bond (to be informed by local residential tenancies legislation)
- board payments, what they cover, and the method and timing for payments
- an obligation to issue a receipt for any payment
- the minimum notice period before rent or board is increased (again, to be informed by local residential tenancies legislation)
- contact details for the provider or their agent (and the agent's responsibilities) – and an obligation to notify the participant within 5 business days of any change to these details

- an obligation for the provider to ensure that the dwelling is in a good state of repair, and is being appropriately maintained, having regard to the safety, security and privacy of the residents (this is also an obligation under section 28 of the *NDIS (SDA) Rules 2020*)
- details of the process for requesting repairs/maintenance
- house rules (which again may be informed by local residential tenancies legislation)
- reasonable responsibilities/obligations of the participant
- circumstances in which the provider or their agent can access the dwelling, and notice that must be provided to the participant
- circumstances in which the agreement can be terminated
- a minimum period of 90 days notice for a participant to vacate, unless a shorter period is required to reduce risk of harm
- a declaration of any conflict of interest the provider may have (particularly any affiliation with a provider of SIL services to the participant).

SIL service agreements should include, in addition to any requirements for registered providers (if registered):

- a description of the amount, intensity, and ratio of supports (to explain 'ratio' – depending on the level of support a participant requires, particularly whether that support is active or passive or overnight, and depending on any shared living arrangements, a different staff-to-participant ratio is determined by the NDIS to be required in each case – the OOA ratio which we described earlier is an example)
- the price of each support
- the provider's responsibilities
- the participant's responsibilities
- when the agreement ends
- how the agreement can be amended
- how disputes will be resolved

- how supports will change if circumstances change (for instance, the participant goes on holiday)
- if the participant's dwelling is being shared with other participants, how supports may change if another occupant vacates (particularly if supports aren't being shared with as many people any more), and how vacancies generally will be managed.

Where a dwelling is being rented out to either an SDA participant or SIL participant, a residential tenancy will exist, and relevant State or Territory legislation in relation to residential tenancies will apply. In Victoria, this is made explicit – SDA housing is specifically referenced in Victoria's residential tenancies legislation.

Using South Australia as an example, in addition to terms already described above, the following matters under the [Residential Tenancies Act 1995 \(SA\)](#) and [Residential Tenancies Regulations 2010 \(SA\)](#) need to be considered for anyone leasing out to an NDIS participant:

- under section 49(1)(c), the agreement must be executed by both parties
- under sections 47A, 71A and 105Q, the provider must tell the resident if the provider intends to sell the dwelling
- under section 49(1)(a)(ii), the resident must be advised to seek independent legal advice
- under section 47B(3) and regulations 6A(5) and 7(a), a SIL provider must provide a prospective resident information (essentially just the weekly rent and bond amount), in a form which is accessible having regard to any disability – note this obligation does not explicitly extend to SDA providers
- under section 48(2), manuals for operation of domestic facilities must be provided
- under sections 65 and 105N, the provider cannot interfere with the quiet enjoyment of the dwelling by the resident
- under section 66, a resident may keep an animal in the dwelling without the provider's approval or conditions necessarily if, under the [Equal Opportunity Act 1984 \(SA\)](#):

- o the animal is a therapeutic animal certified by a medical practitioner as required to assist a person as a consequence of their disability; or
- o the animal is an assistance dog for a person with a disability, accredited (pursuant to the [Dog and Cat Management Act 1995 \(SA\)](#)) by the Dog and Cat Management Board, the Royal Society for the Blind of SA Inc., the Guide Dogs Association of South Australia and Northern Territory Inc., or Lion Hearing Dogs Inc.
- a provider may terminate a tenancy under any grounds set out in regulation 16, and the notice of termination must be in the form set out in regulation 19D. Section 91A prohibits reletting for 6 months afterward.
- Particularly for a dwelling housing 5 participants in any way under individual agreements, the dwelling constitutes a 'rooming house' and the following needs to be considered:
 - o many obligations specifically relating to residential tenancy agreements under the [Residential Tenancies Act](#) do not apply (including exclusive possession and caps on instances in which the provider may enter the dwelling)
 - o under section 103C, the provider must register as a designated rooming house proprietor
 - o under section 105A, house rules must only be made for the purpose of enhancing the health or safety of persons or of property, and be consistent across agreements affecting the rooming house. Under section 105D the rules must be displayed in a prominent place in the dwelling. Under section 105B, these rules can be amended by the provider by 7 days notice to residents
 - o under section 105E(4) the provider must give each resident an itemised account setting out the resident's proportional use of facilities or services for which the provider is charging the resident, in advance.
- no more than two weeks' rent can be charged prior to the end of the first two weeks of a residential tenancy agreement (under section 54), and no more than one week's rent can be charged prior to the end of the first week of a rooming house agreement (under section 105F)

- rent can only be increased once each 12 months for a residential tenancy agreement (under section 55(2)(c)), and each 6 months for a rooming house agreement (under section 105I(2)(c))
- under sections 61 and 105K(1)(b), no bond can be charged for a tenancy with a rent of \$250 per week or less; only two weeks' rent can be charged as a bond for a rooming house agreement; only four weeks' rent can be charged as a bond for a tenancy with rent between \$250 and \$800 per week; only six weeks' rent can be charged as a bond for a tenancy with rent more than \$800 per week
- under sections 62 and 105L, any bond must be dealt with as a residential bond and lodged with the RBO.

The Residential Tenancies Act makes specific exemption for SDA dwellings such that information of the tenant (medical records, details of previous tenancies, pet details etc.) which can normally not be requested under section 47B, can be requested by a provider of an SDA dwelling under regulation 6A(4)(b).

Note: The NDIS requires that any provider must ensure that its employees, agents and subcontractors comply with the obligations of the provider – so comprehensive contracts with each of these (including strong indemnities and insurance obligations on the part of subcontractors) should be considered.

Final thoughts

Anyone in the construction industry should be aware of the standards of design and construction described here, not only to be able to build to them when requested, but to be able to proactively offer to a principal the understanding that a principal may be looking to build to all of these standards when they ask for only some, and to offer design which complies with all of these standards.

A principal engaging a builder to construct a dwelling for people with disabilities to occupy, should also be aware of the requirements concerning design and construction to enable them to effectively supervise and course-correct if issues arise.

Anyone looking to directly offer SDA or SIL services should recognise the overlap between these services, and be aware of the entire regulatory framework with which they must comply in providing these services – including general NDIS requirements, SDA and SIL specific requirements, and requirements of other legislation such as relevant residential tenancies legislation.

An owner of a dwelling with compliant design should be aware of the opportunity to subcontract and lease the dwelling to an experienced SDA/SIL provider, and what may be required of them as owner. This is also relevant to SDA/SIL providers who set up a corporate structure splitting these interests along these lines, whether to reduce risk or tax exposure or for any other reason.

I encourage you to reach out to experts in each complex area of this sector for advice (including as directly referenced by NDIS in its legislation) – assessors, certifiers, specialist builders and manufacturers (who have been working on coming up to speed in this space for several years now and who have developed a mature supply chain at this point), valuers, experienced real estate agents, and, of course, lawyers for assistance navigating the specific application of this complex legal framework to your particular plans or needs.



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