



Registrar of
Community Housing



Regulation of Boarding Houses in NSW

Final discussion paper

From the viewpoint of the NSW Registrar of Community Housing

This advice is from an independent statutory officer, does not reflect government policy, and is provided pursuant to the Registrar's function contained in section 10(1) (h) of the NSW Community Housing Providers (Adoption of National Law) Act 2012.

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This paper is the final paper from the NSW Registrar of Community Housing, finalised following consultation with the sector.

Initial Consultation

The Registrar of Community Housing undertook initial consultation with the following organisations and teams and thanks them for their insights: NSW Fair Trading, the NSW Tenants Union, Shelter NSW, the Boarding House Outreach Team at Newtown Neighbourhood Centre, Redfern Legal Centre, Echo Realty / Evolve Housing, local government councils, the Office of Local Government, FACS Community Homes and Place team and FACS Community Housing & Pathways team.

Second round of Consultation

The draft report was circulated to all those organisations and teams who took place in the initial consultation, as well as all registered Community Housing Providers and feedback was provided to the Registrar.

Executive Summary

The purpose of this discussion paper is to stimulate a conversation about the regulation of the boarding house sector, ways to improve that regulation and to investigate some ways that the NSW Registrar of Community Housing (the Registrar) may contribute to this process. The paper will:

- provide a summary overview of the boarding house sector;
- review current regulatory mechanisms for the boarding house sector and identify any gaps in regulation; and
- offer some suggestions for regulatory reforms that will improve security for boarding house residents and the oversight of the sector.

The paper identifies two main areas of concern that inform all the finding of this paper

1. Registration of boarding houses – there are gaps in the registration processes for boarding houses, with a substantial number of boarding houses not being registered and operating illegally (consultation and feedback suggests this figure may be as high as 25% of the total number of general boarding houses). This lack of Registration contributes to a lessening of protections for residents.
2. Lack of overarching stewardship – the current regulatory systems are piecemeal and have substantial gaps in oversight and associated tenant protections. For example a lack of tenure protections in the current *Act* mean residents tenures are short and unstable. This tenure insecurity is a key factor in situating boarding houses as marginal accommodation. An overarching steward of the system could consider the role of boarding houses in housing solutions for NSW and ensure regulatory mechanisms are designed to support this role.

For the purposes of this paper, boarding houses are defined as residences with five or more bedrooms where residents share some community spaces including kitchens bathrooms and living areas (*Boarding Houses Act 2012* s5 (2)). Boarding houses receive a number of concessions (both financial status and building exemptions such as those enabled in the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARHSEPP)).

To operate as a boarding house, the proprietor must be able to demonstrate that most residents regard it as their primary residence - in other words for boarding house residents, the boarding house is their home. There are two main types of boarding houses currently in operation in NSW, both of which are required to be registered with NSW Fair Trading.

- General boarding houses (the majority of boarding houses), mainly centrally located (most are in Sydney and Newcastle), with a number of unrelated residents sharing a property that includes communal spaces. Tenants' tenure is often short term.
- New generation boarding houses - a subset of general boarding houses introduced in the ARHSEPP in 2009, distinguished by the fact that each room is self-contained with its own bathroom and kitchen, with shared spaces still part of the complex.
- Assisted boarding houses (steadily declining in numbers) are those that have two or more residents who meet the definition in the *Boarding Houses Act* (s. 36) of additional needs.

Boarding houses residents are often vulnerable across a number of domains typically being older, single, with limited incomes (85% on Commonwealth statutory payments e.g. Newstart or disability support pension) and likely to have some mental health concerns (65%). Most residents would be eligible to live in social or community housing based on their income levels. However, the limited supply of social and affordable housing has meant residents have been forced into the private rental sector where their lower income levels have limited their accommodation options. There is also some evidence that boarding house residents include a cohort of tenants who have lived previously in social housing, but had their tenancies terminated, (often due to with mental health concerns¹) who are no longer eligible to live in social housing. Due to a lack of legal protections offered to boarding house residents, they can experience high degrees of instability and vulnerability in their housing.

After a period of decline in boarding house numbers, there has recently been an increase in the number of new boarding houses on the NSW Fair Trading Register despite ongoing local community resistance to boarding houses in local neighborhoods. Currently there are more than 1,000 boarding houses on the NSW Fair Trading Register and anecdotal evidence gathered while preparing this paper suggests this figure is roughly 75% of total boarding house numbers with a sizable portion of boarding houses operating unregistered. Sector consultation indicates that boarding house owners are willing to risk operating while unregistered due to the profitability of boarding house operations conservatively estimated to be approximately \$130m annually. Strong financial returns, coupled with relatively inadequate regulatory mechanisms means the number of unregistered boarding houses is substantial.

The increase in demand for boarding houses can partly be linked to changes in demographics and accommodation affordability. There has been a rise of single person households and there are limited affordable options available to single people on very low, low and moderate

¹ C. Martin, et al, 'Social housing legal response to crime and anti-social behaviour: impacts on vulnerable families', Melbourne, 2019, <https://www.ahuri.edu.au/research/final-reports/314>.

incomes, especially in high-demand, high market rent areas. Another factor in the rise in boarding house numbers is the development of new generation boarding houses as part of the affordable housing spectrum.

The NSW Registrar of Community Housing (the Registrar) assesses the suitability of organisations to become registered Community Housing Providers (CHPs) and conducts ongoing regulation of registered CHPs in NSW. Boarding houses came to the attention of the Registrar due to their recent inclusion in CHP property portfolios. Boarding houses in these portfolios meet the definition of community housing under the *Community Housing Providers (Adoption of National Law) Act 2012*, as “housing for people on a very low, low or moderate income or for people with additional needs delivered by non-government organisations”.² The Registrar consulted with organisations across the housing spectrum and became aware of the breadth and complexity of the issues affecting the boarding housing sector.

There is inequity in the treatment of boarding houses residents depending on boarding house ownership. Where boarding houses are managed by CHPs, the residents can access CHP systems, including complaints processes, security of tenure, and usually, a Residential Tenancy Agreement. However, residents in privately owned boarding houses (which is the majority of the boarding housing sector) are regulated by NSW Fair Trading and local councils under the *Boarding Houses Act 2012 (NSW)* and *NSW Boarding Houses Regulations 2013 (NSW)*. Residents in privately owned boarding houses tend to have less secure tenure due to a lack of protections through legislation. Coupled with a lack of access to effective complaints mechanisms, lack of clear and effective oversight and no rent regulation, residents in privately owned boarding houses are often subject to unstable and expensive housing conditions with few other choices

This paper has identified the following key findings and issues, and made some suggestions to mitigate the associated risks:

- There is obvious lack of strategic stewardship of affordable housing, including boarding houses that could be addressed through a re-design of the regulatory scheme for affordable housing.
- There are significant gaps in the regulation of boarding houses due in part to uncoordinated and partial oversight by multiple agencies which could be mitigated in a range of ways.
- Lack of resourcing in all regulatory agencies to fully implement the current boarding house regulatory regime, with additional resourcing and/or rationalisation of the current scheme being a possible option.
- There are considerable weakness in boarding housing residents' occupancy rights under the current *Boarding Houses Act 2012* which could be strengthened.
- Complaints mechanisms available to boarding house residents are incomplete and inconsistent. This should be addressed in order to achieve equitable treatment across the subsidised housing spectrum. Design and implementation of a cohesive and comprehensive complaints mechanism will be suggested by the Registrar as part of the current statutory review of the *Boarding Houses Act 2012*.
- There is no comparative review of performance across the boarding house sector, primarily due to the lack of an overarching stewardship of the system. A regulatory system re-design could address this.

² *Community Housing Providers (Adoption of National Law) Act 2012 (NSW)*, Appendix s.(1)

Overview of the boarding house sector

Background

For the purposes of this discussion, boarding houses are residences with five or more bedrooms where residents may share some community spaces including kitchens bathrooms and living areas.³ Some boarding houses historically provided meals and other services to residents, although it is more common nowadays for boarding houses to provide room and access to shared spaces only.

Boarding houses are generally part of the private rental sector and residents are not allocated to boarding houses via the NSW Housing Register for social and community housing. This means boarding house residents are not protected by social / community rent setting policies or other protection mechanisms such as an appeals process. However, many residents of boarding houses meet the eligibility criteria for social housing assistance from the NSW Housing Register (income within eligibility limits, no ownership of housing assets, ability to sustain a tenancy). Due to the length of the waiting list for properties on the NSW Housing Register (there is currently a five-ten year waiting period for studio / one bedroom property in central Sydney) and the prioritisation criteria used to match tenants to vacant properties, people on the waiting list are forced to seek other property options; some enter the private rental market of boarding houses.

Boarding houses have limited regulatory mechanisms in place as compared to as social and community housing, and the residents are not offered commensurate levels of consumer housing protection. The legal instruments that regulate the operations of boarding houses are the *Boarding Houses Act 2012 (NSW)* and *Boarding Houses Regulations 2013 (NSW)*. There are a number of differences in the regulation and protections afforded to social and community housing tenants versus those given to boarding house residents which will be examined in more details in subsequent sections.

Types of Boarding Houses

There are two main types of boarding houses: General Boarding Houses and Assisted Boarding Houses. New Generation Boarding Houses are a particular subset of General Boarding Houses which are examined in detail in this discussion. All boarding houses are considered registrable as defined in the *Boarding Houses Act*⁴ and must register with NSW Fair Trading who manages the Boarding House Register, although significant numbers of eligible boarding houses remain unregistered.

For the purposes of this discussion, boarding houses are residences with five or more furnished bedrooms where residents share some community spaces which may include kitchens bathrooms and/or living areas.⁵ Boarding houses receive a number of government concessions (both financial status and building exemptions such as those enabled in the *State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARHSEPP)*), and to be considered a boarding house, the proprietor must be able to demonstrate that most residents regard it as their primary residence - in other words for boarding house residents, the boarding house is their home. As mentioned earlier in the paper boarding houses meet the definition of community housing. A small number of boarding houses are managed by registered CHPs but the majority are not as there is no requirement for boarding houses operators to be registered community housing providers. This paper will argue that one of the options to improve outcomes for residents would be to introduce such requirement through the boarding housing regime review process via the review of *Boarding Houses Act* which is currently under way.

Although there are similarities in structures and/or operations, short term tourist accommodation, residential aged care facilities and crisis accommodation are excluded from this definition. Likewise, group homes, which are a form of specialist disability accommodation are also excluded from this discussion.⁶

While similar to boarding houses in size and relatedness of tenants, group homes are regulated under the National Disability Insurance Scheme (NDIS) for the quality of services to residents. Assurance of asset maintenance for properties owned by the NSW state is overseen by contract managers in the Department of Communities and Justice. Conditions of residency are those in the NDIA (*Specialist Disability Accommodation Conditions*) Rule 2018 and the *National Disability Insurance Scheme Act 2013*, rather than the occupancy principles in the *Boarding Houses Act*.

General Boarding Houses

A general boarding house is a house that provides beds for a fee to five or more, generally unrelated residents. Historically, boarding houses were privately owned and run, usually small-medium in size (ten beds or less).

³ *Boarding Houses Act 2012 (NSW)*, s5 (2).

⁴ *Ibid.* ss.9-15.

⁵ *Ibid* s5(2).

⁶ *NDIS (Specialist Disability Accommodation Conditions) Rule 2018*, s25(d).

Currently there are more than 1,000 general boarding houses on the Fair Trading Register – approximately 50 per cent are located in the City of Sydney or Inner West local government areas.

The Department of Communities and Justice (formerly FACS) have some targeted programs which offer certain oversight of general boarding houses. The Boarding House Financial Assistance Programs contributes to running costs as long as the owner keeps rentals below published affordable rental thresholds (currently this program is taking no new entrants due to budgetary constraints). The Fire Safety upgrade grants assist in the implementation of essential fire safety works. Boarding houses must be registered with NSW Fair Trading to be eligible for these programs. The DCJ monitors these programs via either an annual statutory declaration for the life of the grant or a fire safety order issued by the local council for the Fire Safety Upgrade grants.

General boarding houses have the widest gaps in regulation, with oversight being spread over multiple government departments, and no coherent regulatory scheme in place to coordinate regulation regimes. General boarding houses also make up the bulk of boarding houses operating in NSW. Most of the issues identified in this paper relate specifically to general boarding houses.

New Generation Boarding Houses

A subset of general boarding houses, new generation boarding houses are 'micro-apartments' (12m² for single occupant) where rooms are self-contained with their own bathroom and kitchen. Any new generation boarding house with 20 or more rooms is required to have a manager living onsite.

These continue to be termed 'boarding houses' which allows them to take advantage of the concessions enabled in the ARHSEPP development approvals criteria. These boarding houses usually have private kitchen or bathroom facilities in each room, and some shared spaces such as laundry and living areas. Figures suggest there are currently 46 new generation boarding houses being constructed or in use in NSW. The majority of these new generation boarding houses are used as student accommodation.

A small number of the new generation boarding houses are currently managed by registered CHPs and subject to the Registrar's oversight, however the majority are managed in the private rental market

Assisted Boarding Houses (ABH)

Previously called Licensed Residential Centers and steadily declining in numbers after the introduction of the NDIS, these boarding houses have two or more residents with additional needs as defined in the *Boarding Houses Act*⁷. Additional needs are where a resident has either age related frailty, a mental illness or disability that is permanent. These persons require ongoing support with daily tasks such as personal care. Assisted boarding houses must be specifically registered as such with Fair Trading and ongoing monitoring is undertaken by the DCJ Boarding House team. Assisted boarding houses, like general boarding houses, offer a combination of shared facilities to residents.

Assisted Boarding Houses are more highly regulated than general boarding houses however, with controls exercised by the NDIS and NSW Ageing and Disability Commission.

Residents

People living in private boarding houses are usually referred to as residents with a different legal position to that of 'tenant'.⁸ The profile of boarding house residents varies across the different types of boarding houses however residency management for all boarding houses is governed by the *Boarding Houses Act* and *Regulations*. These regulatory instruments define occupancy principles, and give guidance on protections available to residents in boarding houses. The *Act* and *Regulations* introduced minimum protection for residents to curtail previous resident exploitation, however the lack of overall stewardship for the sector and high demand for boarding house accommodation has limited the effectiveness of these protections.

The *Boarding House Act* requires that all residents sign an occupancy agreement when moving in and this agreement is based on the occupancy principles as outlined in the *Act*.⁹ The occupancy principles outline a variety of conditions a resident can expect in the boarding house, including the condition of the premises, house rules, parameters for room inspections by proprietors, management of security deposits and termination processes. The occupancy agreement must not contain any information that is not consistent with the *Act*. If a resident

⁷ *Boarding Houses Act*, op.cit. s 36.

⁸ G. Drake, 'Evaluation of the *Boarding Houses Act* 2012 Final Report' for the Newtown Neighbourhood Centre, 2018, p. 7.

⁹ *Boarding Houses Act*, op.cit. s.28(1) and Part 3.

believes their occupancy agreement goes against the occupancy principles, they can contact the NSW Tenants Union or make an application to the NSW Civil and Administrative Tribunal (NCAT).

While the occupancy agreement performs similar functions as a residential tenancy agreement (outlined in the *Residential Tenancies Act 2010* (NSW)), it lacks some of the protections that tenants have under the *Residential Tenancies Act 2010*. Tenants have protections around evictions and rent rises, however boarding house residents have no protections in these areas. The Registrar has been advised by advocacy groups that residents can be evicted with only 24-48 hours' notice. Boarding houses are not subject to any affordability regulations (unlike Affordable Housing) and weekly rents are subject to market forces meaning they can consume the majority of the residents' available weekly funds. The *Boarding House Act* does not provide any guidance on the frequency of rental increases so residents can experience multiple rent rises annually.

General boarding house residents

The profile of the general boarding house resident is likely to be male (75%), over the age of 40 (64%), living in a single person household (90.8%) and dependent on either Newstart (52.7%) or the Disability Support Pension (31.2%) as their main source of income.¹⁰ Roughly 20% of the residents had been homeless prior to obtaining rooms in a boarding house (either sleeping rough or in emergency accommodation), with a further 15% of residents coming from a correctional facility prior to taking up residence in a boarding house. Many residents have a mental health diagnosis (64.2%). The Boarding House Outreach Service at Newtown Neighborhood Centre offers supports to residents, with the majority of requests related to issues with residency –commonly housing affordability stress (24.6%), a housing crisis, usually threat of eviction (31.9%) or issues with the adequacy and state of repair of the dwelling (10.8%).

Due to the lack of protections available to residents under the *Boarding Houses Act*, resident's tenures in general boarding houses can be very unstable. This instability means residents can be reluctant to raise any issues with regard to the fitness of the boarding house with the proprietor or the relevant regulatory body. This tenure insecurity contributes to boarding houses operating as marginal accommodation, which is aggravated by the lack of stewardship across the sector. A key question that is not currently being considered across the boarding house sector is where boarding houses should sit as part of housing solutions for NSW.

Options for residents to make complaints and be supported in those complaints are few, and residents can be reluctant to seek support or assistance from relevant bodies. NCAT is a possibility for some matters; NSW Fair Trading and local councils are not complaints bodies for residents. The Boarding House Outreach Service at Newtown Neighborhood Centre is funded to provide case management to assist residents as capacity permits. The Tenants Union NSW and tenants' advocates will provide pro bono advice and assistance if requested, however they report few requests for support from residents.

New Generation boarding house residents

New generation boarding houses tend to have a higher rent than general boarding houses, due to the self-contained facilities and more modern condition of the buildings. The profile of tenants / residents in new generation boarding houses tends to be split across two main types:

1. Students - recent research indicates that roughly half of new generation boarding houses approved under the AHRSEPP to 2017 are for student accommodation in central Sydney (see Troy et al, 2018, p22).¹¹
2. Workers – there is a growing group of working people accessing these studio apartments due to their location near workplaces and relative affordability.

Residents in new generation boarding houses may be covered by *Boarding Houses Act 2012* on an occupancy agreement, however it has become more common for these residents to have a Residential Tenancy Agreement and be covered under the *Residential Tenancies Act 2010*. Leases provide greater protection for tenants in a number of areas including limiting rent increases to annually, and creating controls for tenant evictions. As tenants, these residents are able to access all the protective bodies and structures relevant to tenants including the Tenants Union NSW, NCAT, the Residential Bond Board and NSW Fair Trading. In addition, where new generation boarding houses are managed by community housing providers, these properties are also subject to the monitoring regime of the Registrar. The Registrar, for example, conducted a review of eviction rates in 2017/18 in order to ensure better practice procedures were in place.

Assisted boarding house residents

Residents in assisted boarding houses have additional needs, defined in the Act as an age related frailty, a mental illness or disability that is permanent. These residents are generally not eligible for Supported Disability Accommodation, but do need ongoing, regular support with daily

¹⁰ Drake, op.cit., p14.

¹¹ L. Troy, R. van den Nouwelant & B. Randolph, 'State Environmental Planning Policy (Affordable Rental Housing) 2009 and affordable housing in Central and Southern Sydney', *City Futures Research Centre* (website), June 2018, p.22, <https://cityfutures.be.unsw.edu.au/research/projects/affordable-housing-sepp-and-southern-sydney>

tasks such as personal care.¹² These residents' tenure is governed by the *Boarding Houses Act 2012*, with a raft of additional provisions in the *Boarding Houses Regulations 2013*. There may also be general boarding house residents living in the assisted boarding house.

Assisted boarding house residents generally receive their funding from a variety of sources that may include the Department of Social Services, the NDIS, My Aged Care (over 65) or the Continuity of Supports (CoS). Supports for assisted boarding house residents are provided via programs from a number of regulatory bodies including the Boarding House Unit at DCJ, NDIS planners, the NDIS Quality and Safeguards Commission, Official Community Visitors, and NCAT for limited matters. This higher level of oversight ensures these residents are less vulnerable to unstable tenancies than general boarding house residents.

Different programs and legal conditions across boarding houses

The main differences between tenants (new generation boarding houses) and residents (general or assisted boarding houses) are summarised below. Residents have less legislative protections and are more vulnerable in their homes than tenants.

	Tenants (new generation boarding houses)	General Boarding House Residents	Assisted Boarding House Residents
Contract for renter	Residential Tenancy Agreement (RTA)s	Occupancy Agreement (OA) <i>Note: some boarding houses use RTAs for renters in which case the RTA conditions apply</i>	Occupancy Agreement
Additional rental conditions	None outside lease	OA - usually subject to house rules	Usually subject to house rules
Rent increases	Annually, subject to controls	OA - No cap on frequency or size of rent increases	No legal limit on ABH charges – only requirement is that ABHs must display their fees prominently.
Bond	4 weeks rent, lodged with Rental Bond Board	OA - 2 weeks rent, held by proprietor	2 weeks rent, held by proprietor
Amount of landlord /owner daily control of premises	As per the lease agreement	OA - Via house rules Landlord/delegate onsite who can access residents room with minimum notice	Via house rules Landlord/delegate onsite who can access residents room with minimum notice
Goods and services provided (e.g. toilet paper, cleaning)	As per the lease agreement	OA - As per house rules	As per house rules
Complaints	NCAT - bond	NCAT for deposit recovery	NCAT for deposit recovery
Advocates	NSW Tenants' Advice and Advocacy Services NSW Tenants Union	None officially – TU will assist Boarding Houses Outreach Service	TU, Boarding House Unit, Disability Advocates, OCV
Notice to vacate	As per lease agreement (by tenant – 14-21 days; by landlord – 14-90 days)	By resident – no minimum, depend on agreement By proprietor - nothing fixed – must be 'reasonable'	By resident – no minimum, depend on agreement By proprietor - nothing fixed – must be 'reasonable'
Notices seen as retaliatory can be overturned	Yes by NCAT	No	No
Residents possessions left on premises kept for proscribed length of time by landlord	As per the lease agreement consistent with the <i>Residential Tenancies Act 2010</i>	No protection in <i>Boarding House Act 2012</i>	No protection in <i>Boarding House Act 2012</i>
Regulatory Instruments for the protection of occupiers	<i>Residential Tenancy Act 2010</i>	<i>Boarding House Act 2012 + Regulations 2013</i>	
	<i>Community Housing Providers (Adoption of National Law) Act 2012 (NSW)</i>	<i>Community Housing Providers (Adoption of National Law) Act 2012 (NSW)</i> for boarding houses managed by community housing providers	
Regulator	FACS under a contract RCH under the Community Housing Providers National Law	NSW Fair Trading – boarding houses must register Local Council – initial compliance inspections and any ongoing compliance regime councils put in place in their area RCH – for boarding houses managed by CHPs	
Regulatory oversight	Ongoing	Limited; by councils that have an oversight program in place	Assisted Boarding Houses – every 6 weeks by FACS Boarding House Unit

Regulators and Regulations

The legal instruments that establish a regulatory framework for the delivery of quality services to residents of registrable boarding houses, and for the promotion and protection of the wellbeing of such residents is the *Boarding Houses Act* and *Regulations*. There are a number of other regulatory instruments that impact on boarding houses.

¹² *Boarding Houses Act*, op.cit., s.26

The following table summarises the various regulatory instruments that govern the boarding house sector and outlines the related regulatory bodies.

Regulatory Instruments	Parts of the instrument administered by
<i>Boarding Houses Act 2012</i>	Premises inspection – Local Councils Approving development applications for new boarding houses – Local Councils Register of all Boarding Houses in NSW – NSW Fair Trading Occupancy principles dispute e.g. Unreasonable notice period, return of security deposit, access to collect belongings – NCAT Compliance and monitoring of assisted boarding houses – FACS Boarding House Unit + local council
<i>Boarding Houses Regulation 2013</i>	Compliance and monitoring of assisted boarding houses – FACS Boarding House Unit + local council
<i>Local Government (General) Regulation 2005 (NSW)</i> (c. 83(1)(b))	Local council
<i>Public Health Regulation 2012 (NSW)</i> (s.45-46)	Local council
<i>Environmental Planning and Assessment Act 1979 (NSW)</i> , (s.121) and <i>Environmental Planning and Assessment Regulation 2000 (NSW)</i> (s.186B)	Local council
<i>State Environmental Planning Policy (Affordable Rental Housing) 2009</i>	No entity has overall responsibility for monitoring the achievement of the enabling policy intentions. Monitoring entities for different aspects of the enabling planning instrument include local councils, the Department of Environment and Planning, FACS. Local councils - planning permission and certification. Private certifiers – certify developments and occupancy.
<i>NSW Affordable Housing Ministerial Guidelines</i>	FACS Minister has endorsed the guidelines No entity has overall responsibility for monitoring compliance with <i>Guidelines</i> . The RCH addresses tenants concerns but does not monitor asset level performance.
National Rental Affordability Scheme (NRAS)	Commonwealth Government – funding subsidies and reporting. State government – funding subsidies and reporting. Local councils - planning permission and certification.

The Boarding House Act 2012

All boarding houses that meet the definitions in the Act¹³ must register with NSW Fair Trading within 28 days of commencing operations, and be placed on the publicly available Register of Boarding Houses. Registration aims to ensure that boarding houses meet all building and fire safety requirements, public health standards and local government guidelines for building conditions. Currently, the process at NSW Fair Trading does not require new registrations to provide evidence of their development as part of the registration process. NSW Fair Trading notifies the relevant local council of new boarding houses registrations in their area, and the council conducts an initial compliance inspection of the boarding house within twelve months. The information obtained during the initial compliance inspection is held by the local council and is not required to be shared with other regulatory bodies. All registered boarding houses are also required to complete an online Annual Return with NSW Fair Trading on the anniversary of their registration date, providing updated information, although this return does not contain any elements of the performance of the boarding house.

Reports such as Drake's *Evaluation of the Boarding Houses Act 2012* indicate that up to half of known boarding house proprietors are not registered with NSW Fair Trading and are therefore operating illegally. Unregistered boarding houses are not inspected for fire and safety compliance and present potential dangers to the residents and the local community.

Role of local councils

Local councils conduct initial inspections of boarding houses and may monitor compliance of boarding houses within their local government area if they decide that such an inspection regime is warranted for their community and for 'place making' in their council area. Councils have considerable powers under the *Boarding Houses Act 2012* and other legislation (see below). They may gain entrance to boarding houses for the purpose of the initial inspection; and can assess compliance with development approval of properties alleged to be used as boarding houses contrary to the approval. Fair Trading recommends councils inspect all registered boarding houses in their area every two years, or more frequently depending on risks identified, with practices varying across local councils from planned annual to ad hoc inspections. Councils will act within the development standards set by their Local Environmental Plan (LEP), Development Control Plans (DCPs), and relevant Local Government Regulations, Environmental Planning and Assessment Regulations and the National Building Code.

¹³ *Boarding Houses Act*, op.cit., s.5(102)

Local council can issue orders under section 124 of the *Local Government Act 1993 (NSW)* with respect to standards for places of shared accommodation set out in Part 1 of Schedule 2¹⁴ to places of shared accommodation as set out in clause 83 of the *Local Government (General) Regulation 2005 (NSW)*. Orders regarding unregistered boarding houses can be issued via the Environmental Planning and Assessment Act 1979 (NSW).

Councils may also conduct inspections for the purpose of relevant provisions of the *Public Health Regulation 2012 (NSW)* (clauses.45-46) regarding cleanliness and room size; and *Environmental Planning and Assessment Regulation 2000 (NSW)* with respect to fire and smoke alarms (clause186B).

These regulations are focused on the relationship between the proprietor of the boarding house and the local council, working to ensure the proprietor is complying with their responsibilities for zoning, use and safety of the boarding house.

In practice there appears to be inconsistent approaches taken to compliance requirements by local councils.¹⁵ Anecdotal evidence suggests councils take differing approaches to inspections. There is no record of inspection dates or sanctions currently held on the NSW Fair Trading Register. One of the reasons for the lack of consistent approach to monitoring compliance of general boarding house by local councils is insufficient resourcing of councils for these functions.¹⁶ Anecdotal evidence suggests that a number of councils monitor general boarding houses only via the development application approval process for building of new boarding houses. Media articles indicate that communities are reluctant to accept the development of new boarding houses in their neighborhoods, citing reasons of potential social problems and decrease in property values.^{17 18}

Performance of assisted boarding houses, on the other hand, is monitored collaboratively by the DCJ Boarding Houses Team and the local council. These two entities conduct joint initial compliance assessments with local councils having oversight of building and development requirements, while the DCJ Boarding Houses Team provides the assisted boarding houses with the license to operate. The DCJ Boarding Houses team provides all ongoing monitoring for assisted boarding houses against the *Boarding Houses Act 2012* and *Regulation 2013* via regular monitoring visits and undertaking investigations as required.

Standards for new generation boarding houses

New generation boarding houses are currently unique to NSW as a form of affordable housing. These boarding houses are constructed under the enabling provisions of the ARHSEPP. The ARHSEPP is a planning policy for the development of affordable rental housing. The ARHSEPP supports the development of affordable housing through provisions in planning concessions, zoning permissions and density.

NSW has Affordable Housing Ministerial Guidelines that define 'affordable housing' as homes provided to households with very low to moderate income, with housing costs at 30% of gross household income.¹⁹ This definition of affordable housing applies to all housing built under the National Rental Affordability Scheme (NRAS) program. NRAS is a Commonwealth government program delivered in partnership with state governments that aimed to increase the supply of affordable rental dwellings by providing an annual financial incentive for up to ten years. However new generation boarding houses, built solely under the ARHSEPP enablement, apply this definition of affordable housing only to housing built on land owned by the Land and Housing Corporation.²⁰ Otherwise, the term 'affordable' appears to apply to the costs associated with building this type of rental housing, rather than the rental costs for the tenant. Research indicates that new generation boarding houses are being built to fill housing gaps in the rental market (student accommodation / micro apartments for singles) rather than as 'affordable' housing as defined in the Guidelines.²¹

In NSW, housing that meets the Affordable Housing Ministerial Guidelines definition of 'affordable housing' must be managed by a registered CHP regardless of ownership²², and a number of the new generation boarding houses are managed by CHPs. Indeed, it was through compliance performance reviews of CHPs that the issue of boarding house regulation was first brought to the attention of the Registrar.

Currently there is little clarity in NSW over the responsibility for monitoring the affordability of new generation boarding houses where NRAS affordability requirements apply, or indeed for monitoring any affordable housing built under NRAS or the Ministerial Guidelines.²³ There is no

¹⁴ Standards set out in Part 1 of the Schedule 2 relate to issues such as maximum number of boarders and lodgers, notifications places of shared accommodation have to provide to occupiers, light, ventilation, general cleanliness, furniture and fittings and furniture requirements for long-term (longer than seven days) residents.

¹⁵ Drake, op.cit., p15.

¹⁶ Ibid p.14-15

¹⁷ B. James, 'Mayor slams court ruling', *Manly Daily*, 19 June 2019 p.4.

¹⁸ M. Trembath, 'Council recommends approval of Miranda boarding house DA', *St George and Sutherland Shire Leader*, 23 April 2019.

¹⁹ NSW Affordable Housing Ministerial Guidelines 2017-19 (NSW), 2018-19, <https://www.facs.nsw.gov.au/>

²⁰ *State Environmental Planning Policy (Affordable Rental Housing)* (AHRSEPP) 2009 (NSW), s.6 (2).

²¹ N Gurran et al., 'Supporting affordable housing supply' AHURI, (website), April 2018, p.46-48. <https://www.ahuri.edu.au/research/final-reports/297>

²² *State Environmental Planning Policy (Affordable Rental Housing)* (AHRSEPP) 2009 (NSW), s.17(a)(ii).

²³ Troy et al., op.cit, p.19.

regulatory body that monitors adherence to the NRAS requirement that homes built as affordable housing must remain affordable housing for 10 years from the date the occupation certificate is issued, or the requirement that rent must be set at least 20% below market value. Given the government requirement for management of such properties by a CHP, it could be assumed that the Registrar of Community Housing has authority to assure performance outcomes. However there is no capacity or linkages to do so.

Gaps in the current regulatory regime between the various bodies that have some regulatory authority over new generation boarding houses include:

- Notification - local councils or local/regional planning panels approve new housing properties, NSW Fair Trading registers new generation boarding houses on the NSW Boarding House Register and the Registrar of Community Housing regulates community housing providers (via the *Community Housing Providers (Adoption of National Law) Act 2012 (NSW)*) who manage affordable housing properties. Currently there is no formal communication mechanism in place between these three bodies and the Registrar has no visibility of where properties are and what rents are being charged.
- Monitoring of policy framework - the NSW policy framework for managing affordable housing tenancies is the *NSW Affordable Housing Ministerial Guidelines 2017-19 (NSW)* which applies to all affordable housing in NSW that receive government capital funding and/or were acquired using finance secured against government assets. The Registrar is supportive of the view that it would be clearer for all affordable housing developed under AHRSEPP even when no government capital funding was received use the Ministerial Guidelines to manage affordable housing. Regardless there should be clarity over the regulatory body with oversight of affordable housing to monitor the implementation of these guidelines.

While the Registrar of Community Housing is well placed to monitor affordable housing delivered by registered community housing providers, including new generation boarding houses managed by CHPs, the Registrar is not resourced to collect asset and rent level data which would be required to effectively monitor the performance of general boarding houses operators. Currently community housing providers' compliance returns to the Registrar are not required to differentiate between the different types of subsidised housing products and boarding houses are captured as part of the overall housing numbers. The Registrar is not specifically monitoring the affordable housing component of registered providers' performance. The Registrar is undertaking a range of actions to enable regular monitoring of affordable housing to occur.

The Future

Due to a lack of affordable rental accommodation in metro areas and the rise in the single-person household, it is likely that the number of general boarding houses will continue to rise.

There are a number of issues identified in this paper which are likely to increase exponentially:

- Residents will continue to experience inequalities in their housing experience compared to tenants under the current regulatory regime if the levels of protection for residents are not amended to ensure people renting across all types of accommodation receive the same protections under legislation. Options for this include recognizing boarding house residents as a subset of tenancies (similar to the Queensland approach); extending the current Boarding Houses Act to include the same protections for residents as tenants, or creating a requirement that general boarding houses achieve registration as a CHP. In this case, a special category of provider will need to be created.
- Gaps identified in the current regulatory system expose residents to increased risks in their accommodation with the likelihood of tragedies associated with the buildings, such as those that have occurred in Queensland and Victoria, the client mix and the lack of effective protections for residents.
- There are associated risks for regulators with significant reputational damage for all government agencies who have responsibility for regulating part of the sector. Regulatory system re-design is required to address this issue.
- Entrepreneurs are likely to continue to find general boarding houses (including next generation) to be attractive investments. Resourcing pressures are likely to increase the current gaps in the approval and monitoring of boarding houses for health and safety leading to increased risk exposure for residents.

Key findings and implications

There are identified gaps in the regulation of boarding housing in NSW due to a combination of factors including varied oversight arrangements, confused stewardship of policy and design, regulatory resourcing, consumer rights and complaints systems.

The following implications for policy and stewardship could be considered:

- Clarifying the legislated role of the NSW Housing Agency and Housing Secretary as the lead on stewarding social and affordable housing solutions across portfolios including the design of the regulatory and other assurance systems.

- Placing all providers contributing to subsidised housing and shelter solutions for the people of NSW in the one visible registration scheme that connects across portfolios.
- Undertaking regulatory scheme design of the boarding house sector, considering improved information exchange between regulatory bodies, registration and monitoring process and resourcing of regulatory bodies. Although some of the stakeholders expressed concerns about adding a third party stewardship arrangement into boarding house operations, a change in scheme design, giving overall stewardship to a single agency could increase tenant protections without adding to regulatory burden.
- Expand the Boarding House Register, managed by NSW Fair Trading to provide fuller details for boarding houses and their providers. Include new powers for NSW Fair Trading to remove the details of a boarding house from the Register under prescribed circumstances, providing there are sufficient safeguards in place to monitor this process.

The following implications for provider participation in the area of boarding housing could be considered:

- Encouraging the expansion of Community Housing Providers into this sector while reducing duplicative oversight arrangements where necessary – including a single register of providers and assets.
- Working with registered CHPs to ensure their policies and procedures have a focus on maintaining tenancies, to prevent vulnerable tenants from becoming homeless and entering the general boarding house sector

The following gaps in knowledge and operations remain and warrant further examination:

- Lack of communication and information exchange protocols between NSW Fair Trading and local councils with regards to new, existing and unregistered boarding houses.
- In addition, there is a lack of communication and information exchange protocols between NSW Fair Trading, local councils and the NSW Registrar of relevant information about providers of new generation boarding houses

The following implications for the NSW Registrar's current operational posture are worth consideration:

- The Registrar's office will continue to monitor new generation boarding houses via CHP's compliance returns and to respond to complaints from tenants as required
- The Registrar will make a submission to the review of the *Boarding Houses Act*, currently under way on the need to strengthen the Boarding Houses Register, the need to develop a comprehensive complaints process for residents, and the need to extend tenant's rights to boarding house residents.

Attachment 1 - Examination of Specific Risks

There are identified gaps in the regulation of boarding housing in NSW due to a combination of factors including varied oversight arrangements, confused stewardship of policy and design, regulatory resourcing, consumer rights and complaints systems. Suggestions for risk mitigation strategies; and the possible ongoing Regulator role (appropriately resourced) are considered.

Regulation of boarding houses

Issue: There are multiple regulators for different types and different aspects of boarding houses operations. The development of boarding houses is considered, consulted on and approved (or not approved) by local councils or planning panels; registration of general boarding houses is recorded by NSW Fair Trading; and of assisted boarding houses by a combined FACS and local council teams; and community housing providers manage some of the new generation boarding houses tenancies and properties. The performance of community housing providers is monitored by the Registrar of Community Housing. There is no regulator for managing the policy framework for boarding housing. There are limited mechanisms for information exchange between the various regulators which increases the risk in the overall regulation of boarding houses, particularly to residents who may not be able to access protections that other subsidised housing occupants have access to.

Suggestions to mitigate risks:

1. That the gap in strategic stewardship of affordable housing planning be addressed through regulatory scheme redesign. A similar issue is discussed in detail in the Affordable Housing – housing regulatory perspective discussion paper produced by the Registrar's office. The creation of such scheme would address the gaps in the current system between the enabling instruments and different regulatory bodies and allow for standardised oversight of all affordable housing, including boarding houses.
2. Pending appropriate resourcing of the Registrar's office or NSW Fair Trading, that information exchange protocols be established between local councils that have boarding houses in their areas, NSW Fair Trading and the Registrar of Community Housing on data exchange about relevant types of boarding houses. This increased level of oversight would enable better levels of protection for residents of new generation boarding houses.

Possible role and resourcing implications for the NSW Registrar of Community Housing: The current role for the Registrar is limited to monitoring community housing providers who manage new generation boarding houses as part of the monitoring of registered CHPs performance. A re-designed, expanded regulatory scheme could require all boarding houses operators to become or partner with a registered community housing provider. Since community housing is by definition housing for people on very low, low or moderate income or for people with additional needs delivered by non-governmental organisations the Registrar's role could be extended to provide monitoring for all boarding houses. This is already the case in Queensland. In Victoria the extended role has been provided to the Consumer Affairs (CA) regulator as the Victorian Community Housing Registrar has authority restricted to large housing providers, unlike the NSW and QLD Registrars. Appropriate resourcing of the Registrar's office, possibly in partnership with existing boarding housing regulators would need to be considered as part of this role expansion.

Registration of Boarding Houses

Issue: There are significant complexities in the registration of general boarding houses with overlapping and disconnected responsibilities between local councils (registrations, new build approvals, WHS/ building conditions, and ongoing compliance of boarding houses with building code) and NSW Fair Trading (maintenance of boarding houses register). There is a lack of resourcing at all levels to ensure proper registration of new boarding houses and ongoing compliance monitoring regime for established boarding houses. There also appears to be limited processes for tracking ongoing compliance and issues arising by either local councils or NSW Fair Trading.

There is also a failure to address a significant number of unregistered boarding houses. Consultation with stakeholders has indicated that there is a considerable number of un-registered boarding houses currently in operation. A scheme design stewardship approach would be required to identify and register unregistered boarding houses with required resourcing and public benefits considered. The boarding house registration process in other Australian jurisdictions may offer possible solutions. In Victoria, boarding houses are required to register with their local council who is resourced to investigate unregistered boarding houses and update the information in the Consumer Affairs Register. Victoria has also added an additional requirement to the registration of boarding houses from 2017 by requiring a boarding house operator to get a 'fit and proper person' license. In Queensland, the Department of Housing and Public Works Registry maintains the Register of Boarding Houses and investigates unregistered boarding houses, underpinned by the *Residential Services (Accreditation) Act 2002*.

Suggestions to mitigate risk: A review of the current boarding houses registration process should be undertaken to bring the oversight of boarding houses via registration and appropriate ongoing monitoring their operations. Consideration of resourcing requirements for the development of such system would be a central to any such review; models applied in other Australian jurisdictions could be considered. The issue of identifying unregistered boarding houses and pursuing registration must also form part of the review. This review will provide better

levels of protection for boarding house residents. In NSW, the Registrar of Community Housing will make a submission to that to the *Boarding Houses Act* review currently under way.

Possible role and resourcing implications for the NSW Registrar of Community Housing: The current role for the Registrar is limited in this area. The Registrar will make a submission to the Boarding Houses Act review regarding registration process and ongoing monitoring for boarding houses.

Occupants' rights to secure residency in Boarding Houses

Issue: Occupancy agreements, as defined in the *Boarding Houses Act 2012*, offer significantly less protection for residents than those received by tenants under the *Residential Tenancies Act*. Residents have less protection against eviction and no limits on the frequency and size of rent increases. One option to address this inequality is to include boarding house residents in the Residential Tenancies Act. This is the path taken in Queensland where boarding house residents are considered a subset of tenants and covered by the *Residential Tenancies and Rooming Accommodation Act 2008*. The QLD Act gives boarding house residents all the protection of tenants, while at the same time recognizing the specific requirements that apply to boarding houses, such as the fact that tenants do not have the right to occupy the whole premises.

Suggestions to mitigate risk: The NSW *Boarding Houses Act 2012* is currently undergoing statutory review and the NSW Registrar of Community Housing will make a submission during this process recommending tenants' rights be extended to boarding house residents.

Possible role and resourcing implications for the NSW Registrar of Community Housing: The current role for the Registrar is limited in this area. The Registrar will make a submission to the Boarding Houses Act review recommending tenants' protection principles be extended to all boarding house residents.

Resident complaint mechanisms

Issue: Complaints mechanisms for boarding house residents provide incomplete coverage, and are inconsistent in their adequacy. While residents in assisted boarding houses have robust and comprehensive avenues for complaints, general boarding house residents (the majority of residents) have limited and confusing avenues for complaints available.

Residents can have trouble identifying the correct body to lodge their complaint with. Residents can seek support from the Tenants Union, and limited matters such as disputes relating to violation of occupancy principles can be taken to NCAT. Residents can take fire safety or cleanliness complaints to their local council. The Newtown Neighborhood Centre Boarding House Outreach Team are funded by DCJ (formerly FACS) to provide some case management services for residents in Sydney under the Housing Action Project which can provide some support for resident complaints.

In addition there are issues faced by boarding house residents where there is no meaningful avenue of complaint available to them to address issues with the adequacy of the dwelling or deposit refund processes. The complexity of lodging a complaint means residents are less likely to lodge grievances and endure sub-standard or unsafe living circumstance. Additionally and unfortunately, residents who complain can easily be evicted from their property with minimal notice, due to the nature of the Boarding Houses Act (see above).

Suggestions to mitigate risk: the development of a comprehensive and user-friendly complaints process for ALL boarding house residents to allow complaints to be easily lodged, allocated to the appropriate authority and resolved in a timely manner. This would assist in addressing the risks of inadequate housing and the difficulties that residents face when requesting actions regarding basic health and safety matters in boarding houses. In NSW, the Registrar of Community Housing will make a submission to that effect to the *Boarding Houses Act* review currently under way.

Possible role and resourcing implications for the NSW Registrar of Community Housing: The current role for the Registrar is limited in this area. The Registrar will make a submission to the Boarding Houses Act review recommending the development and implementation of a complaints mechanism for boarding house residents.

Clearer accountability and review of regulation

Issue: There is a lack of clear accountability across the various facets of regulation and no regular overall reviews of regulatory performance across the sector. There is currently no regulatory body appointed to provide a review of regulatory performance and ensure regulation mechanisms are delivering required results or to suggest improvements in regulation.

Suggestions to mitigate risk: That a regulatory body is given oversight of the boarding house sector as a whole and conducts regular reviews of performance. The Registrar of Community Housing is well placed to assume this function for boarding houses managed by community

housing providers although resourcing capacity would need to be considered. A regulatory system re-design could also be undertaken to extend this function across the whole sector.

Possible role and resourcing implications for the NSW Registrar of Community Housing: The current role for the Registrar is limited to monitoring community housing providers that manage boarding houses. The Registrar is well placed to expand their function to the monitoring of performance of all boarding houses if they are managed by community housing providers. Resourcing capacity would need to be considered.

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