

## Chapter 5 Regulatory and Reporting Frameworks

This chapter examines the regulatory and reporting frameworks operating in the community housing sector, and assesses their effectiveness in promoting accountability and corporate governance. A brief overview of the existing framework is provided, together with participants' comments on its efficacy. Proposals for improvements to the regulatory and reporting systems are also considered.

### Existing regulatory framework for community housing

- 5.1** As with most States in Australia, New South Wales does not have a statutory framework for regulation of community housing.<sup>251</sup> Existing legislation gives few powers to the Department of Housing (through the Office of Community Housing) to develop and support the community housing sector. There is no legislated definition of community housing, nor is there a summary of the sector's role and objectives in the context of social housing provision.
- 5.2** In evidence to the Committee in 2002, the then Director General of the Department of Housing explained the historical development of community housing regulation in New South Wales:
- The community housing sector is in transition from what originally started out as a small community managed sector that was established to provide crisis and short-term housing. That sector, which is now in the process of becoming a professional sector, is one that is growing in size and in professionalism. We are seeing, therefore, a transition in our regulatory approach and our performance systems that have to be able to support that changing environment.<sup>252</sup>
- 5.3** Several provisions regulating community housing in New South Wales currently exist, but these are ad-hoc and frequently are not specific to the community housing sector. The following sections assess the provisions currently regulating community housing in New South Wales.
- 5.4** It should be stressed that, in discussing the need for, and use of, regulatory tools we do not mean to suggest that the community housing sector is malfunctioning. The Department emphasised to the Committee that the majority of community housing organisations are managed and operated extremely well.<sup>253</sup> This does not, however, negate the need for effective regulation of the provision of services and the use of government funded resources.

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<sup>251</sup> South Australia is the only state with legislation for community housing.

<sup>252</sup> Mr Andrew Cappie-Wood, Director General, Department of Housing, Evidence, 11 November 2002, p1

<sup>253</sup> Ms Lynne Ready, Acting Executive Director, Office of Community Housing, Evidence, 11 November 2002, p2

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## **The *Housing Act 2001***

- 5.5 The *Housing Act 2001* outlines the functions and powers of the NSW Land and Housing Corporation generally.<sup>254</sup> Relevantly, this includes the power to enter into joint ventures for the purpose of provision of housing (Part 8) and the granting of funding to councils and other organisations (Part 6). The Act does not specifically make reference to community housing or community housing providers.

## **Corporations law**

- 5.6 The Committee notes that, because community housing organisations are corporate entities, most aspects of their business are covered by legislation that applies to corporations generally. In New South Wales, a community housing organisation can be incorporated as a company limited by guarantee, an incorporated association, a co-operative society, a statutory religious or charitable corporation, or local government.<sup>255</sup> The minimum standards set down in the various forms of incorporation are slightly different, but all provide protection for individual members of boards and committees.
- 5.7 Associations and cooperatives are governed by the *Cooperatives Act 1992* and the *Associations Incorporation Act 1984* and are regulated by separate parts of the NSW Department of Fair Trading.<sup>256</sup> Corporations law has higher levels of reporting and governance requirements than associations or co-operatives law. Companies limited by guarantee come under the regulatory powers of the Australian Securities and Investments Commission (ASIC).
- 5.8 Corporations law is problematic as a means of regulating community housing. Ms Mills, from the Department of Housing, explained:

The providers, being independently incorporated entities, are administered by means outside the control of the Department of Housing. So that is one of the issues for us. [There are] instances where the expectations and standards of adherence to the funding agreement may not be met, but the organisation may still meet the broader requirements of the Australian Securities and Investments Commission [ASIC] or the Registrar of Co-operatives. Again, at the moment there is no system in place for resolving those two, sometimes quite different, viewpoints about the performance of an organisation.

We have a number of instances where the small scale of our housing providers means that, even if they are covered by ASIC, for example, they are not of a scale such that that organisation would want to conduct an investigation into. Similarly with the Registrar of Co-operatives. Although we have been building a stronger relationship over a number of years, some of our primary objectives are quite different. Organisations that we have found to be very poor performing have met the basic requirements of the Registrar of Co-operatives in terms of annual

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<sup>254</sup> *Housing Act 2001*

<sup>255</sup> Robyn Kennedy and Associates, *A Regulatory Framework for Community Housing in Australia – Vol 1*, NCHF, December 2001.

<sup>256</sup> Supplementary submission 34, NSW Federation of Housing Associations, p156

reports and would not be deregistered by the Registrar of Co-operatives, but those organisations are not ones in which we would have confidence.<sup>257</sup>

### **Funding agreements**

**5.9** Where recurrent funds are provided through the Department of Housing, the funding agreement can serve as a regulatory tool. The agreement takes the form of a contract between the Department and the community housing provider. Approximately 80% of community housing properties are funded through such agreements.<sup>258</sup> The provider is required to report quarterly against recurrent funds received, and the Department of Housing contracts auditors to conduct an audit program.<sup>259</sup>

**5.10** There are a number of shortcomings in using funding agreements as a regulatory tool, as described by Ms Lynne Ready of the Office of Community Housing:

The funding agreement applies only to housing providers who receive recurrent funding, that is, leasing subsidies. So providers who number in the hundreds and who have small amounts of capital stock are not covered by this agreement. That is one of the things that is problematic at the moment.<sup>260</sup>

**5.11** In addition, the key sanction available for poor performance is withdrawal of funding, which obviously would have serious repercussions for the tenants, as it:

...puts at risk the tenancies between the housing provider and its tenants and the leases held on the private market. The funding contract has no power to compel an organisation to transfer its leases to another provider.<sup>261</sup>

**5.12** Ms Ready also explained that the funding agreement contracts do not facilitate timely resolution of problems:

Our current contract does not set time frames for resolution of issues, so we find that we might conduct a review, a reasonable period is given for resolution of those issues, and those issues do not get resolved. Time frames drag on, and it appears no action has been taken.<sup>262</sup>

**5.13** The National Community Housing Forum (NCHF) also considers the use of funding agreements as a regulatory tool to be problematic:

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<sup>257</sup> Ms Carol Mills, Executive Director, Housing Systems, Department of Housing, Evidence, 11 November 2002, p4

<sup>258</sup> Supplementary submission 54, Department of Housing, p1

<sup>259</sup> Cappie-Wood, Evidence, 11 November 2002, p1

<sup>260</sup> Ready, Evidence, 11 November 2002, p2

<sup>261</sup> Supplementary submission 54, Department of Housing, p1

<sup>262</sup> Ready, Evidence, 11 November 2002, p3

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A particular problem with the use of contracts as a method of regulation of the community housing sector is that the usual remedy for breach of contract is damages, quantified either by the actual loss suffered by the innocent party or by a reasonable pre-estimate of damage included in the contract itself... which must not be in the nature of a penalty.

... In the absence of any special contractual provision, the right to terminate arises only on *serious* breach, a very uncertain area of action, particularly as wrongful termination of a contract is itself a serious breach which then provides the other party with the right to terminate and seek damages. It should also be noted that termination is often an unsatisfactory means of resolving a problem between a Community Housing Authority (CHA) and a CHO as termination can mean closing down the provider with consequent effects on the security of tenure, affordability and appropriateness of the accommodation occupied by the provider's tenants.<sup>263</sup>

## Registration

**5.14** The registration of community housing organisations in New South Wales is provided for under the *Residential Tenancies (Residential Premises) Regulation 1995*, which is made pursuant to the *Residential Tenancies Act 1987*. According to the long title, the Act provides for matters including:

...the rights and obligations of landlords and tenants under residential tenancy agreements; to make provision with respect to excessive rent increases and rents; [and] to confer functions on the Consumer, Trader and Tenancy Tribunal of New South Wales with respect to landlords and tenants...

**5.15** Narrowly focused, the *Residential Tenancies (Residential Premises) Regulation* allows (but does not require) community housing organisations to register as social housing providers in order to access provisions relating to long term leases and advice about changes in rent.<sup>264</sup>

**5.16** The regulation provides for two classes (Class 1 and 2) of registration. Under the registration guidelines, Class 2 organisations are those that:

- comply with the Department's insurance standards and rent policy
- comply with reporting requirements
- comply with funding agreements and associated guidelines
- comply with all relevant legislation.<sup>265</sup>

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<sup>263</sup> Robyn Kennedy & Co, *A Regulatory Framework for Community Housing in Australia*, Vol 2, National Community Housing Forum, December 2001, p60

<sup>264</sup> Submission 34, NSW Federation of Housing Associations, p173

<sup>265</sup> Mills, Evidence, 11 November 2002, p6

5.17 There are currently no guidelines regarding which organisations fall within the Class 1 registration category.<sup>266</sup>

5.18 The Department has raised three main problems with the system of registration as it is currently provided for under the regulations:

- It is voluntary
- There is no system for suspending registration. Organisations can meet minimum requirements, become registered and hence gain access to the benefits provided for under the *Residential Tenancies Act* but there is no provision to de-register them if they no longer meet the requirements
- The regulations provide for only two classes of registration, creating limited mechanisms for differentiating organisations.<sup>267</sup>

#### **Administrative regulatory tools**

5.19 The Department also has available to it a number of administrative actions that allow it to influence the community housing sector. These include:

- Setting policy guidelines for community housing providers with regard to certain areas
- Review periods under five-year head leases
- Undertaking reviews of management and financial corporate governance
- Undertaking specific inquiries about individual organisations, where appropriate.<sup>268</sup>

#### **Accreditation**

5.20 Accreditation of the community housing sector has been established as a standardised national system through the National Community Housing Accreditation Council, the National Community Housing Standards Manual and administration units in each State and Territory. Seeking accreditation is voluntary for community housing providers.

5.21 The Council is the supervising body which sets and reviews the national standards and ensures consistency in their implementation. This body consists of representatives from jurisdictions implementing the standards and those jurisdictions seeking to, representatives of tenant interests, experts in community housing and experts in accreditation.

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<sup>266</sup> *ibid*, p7

<sup>267</sup> Mills, Evidence, 11 November 2002, p8

<sup>268</sup> Cappie-Wood, Evidence, 11 November 2002, p1

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**5.22** The standards for accreditation are set out in the Manual and are expressed as a list of indicators in seven key areas of service provision including: tenancy management; asset management; tenant rights and participation; working with the community; organisational management; evaluation, planning and service development; and human resource management. Full three year accreditation is achieved if an organisation has met 65% or more of the indicators set out in the manual, while one-year accreditation is attained by organisations meeting 50% of the standards.

**5.23** Information we have received during the inquiry suggests that the accreditation system has broad support amongst stakeholders. Hume Community Housing Association, the first housing association to be accredited, submitted:

The triennial accreditation cycle is an excellent tool with enforced deadlines for the organization to regularly review their policies, procedures and activities.<sup>269</sup>

**5.24** The New South Wales Federation of Housing Associations (FHA) also supports the accreditation process:

The National Community Housing Standards work well in building a culture of good practice within community housing and have proved very successful as a quality improvement mechanism.<sup>270</sup>

**5.25** St George Community Housing also considers accreditation useful:

The introduction of a formal Accreditation process has enabled the providers to aspire to 'being accredited'. Already, the process has demonstrated the ability of better managed organisations to improve their systems and processes to an advanced position. Accreditation needs to be further fostered and assistance given to the smaller providers so that they may reach this new level of professionalism.<sup>271</sup>

## **The adequacy of the existing framework**

**5.26** From the evidence detailed above, the Committee has concluded that current provisions for the regulation of community housing are piecemeal and inadequately targeted to the sector. Regulation by the Department of Fair Trading and ASIC is either inadequate or inappropriate, and there are virtually no legislated regulatory mechanisms for the provision of community housing. The Department has little statutory power to enforce policies and procedures or to retract stock if providers are experiencing problems or have breached funding agreements.

**5.27** In this weak regulatory environment, dealing with poor performance has been difficult. In its submission to the inquiry, the Department of Housing noted:

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<sup>269</sup> Submission 20, Hume Community Housing Association, p4

<sup>270</sup> Supplementary submission 34, NSW Federation of Housing Associations, p5

<sup>271</sup> Submission 51, St George Community Housing Association, p12

... the lack of an effective regulatory framework for community housing has restricted the capacity of the Department and the sector to effectively deal with poor performance and serious breaches by providers.<sup>272</sup>

**5.28** This is a problem identified by many of the stakeholders. For example, the NSW Federation of Housing Associations considers performance management to be a key failing in relation to the regulation of community housing:

There are a couple of housing associations that have had considerable difficulties and have not performed well. Their problems have not been addressed in a way that is designed to assist those organisations out of their difficulties. The current approach to housing associations in trouble appears to have been punitive rather than working out ways in which they can be assisted.<sup>273</sup>

**5.29** Shelter NSW concurred:

While community housing providers are subject to the regulatory requirements of their particular form of incorporation, there are few formal structures that relate directly to their mode of business activity; and intervention is likely to be on an *ad hoc* basis rather than being the result of clear structures and processes. Given the scale of the public assets involved, and the risk to tenants of any failure, this is an important issue.<sup>274</sup>

**5.30** Overwhelmingly, those providing evidence to the Committee have endorsed in principle the further development of the regulatory system for community housing. The Association to Resource Cooperative Housing (ARCH), for example, submitted:

The co-operative housing sector supports and welcomes the on-going development of the regulatory framework to which Government funded co-operative housing ventures are accountable.<sup>275</sup>

**5.31** St George Community Housing similarly commented:

Appropriate and effective mandatory regulatory mechanisms for the community housing sector should be developed.<sup>276</sup>

**5.32** The FHA indicated that:

The current regulatory framework is piecemeal and does not deliver the outcomes that government wants. Nor does it provide effective regulation from the point of

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<sup>272</sup> Submission 54, Department of Housing, p65

<sup>273</sup> Submission 34, NSW Federation of Housing Associations, p181

<sup>274</sup> Submission 47, Shelter NSW, p41

<sup>275</sup> Submission 48, ARCH, p75

<sup>276</sup> Submission 51, St George Community Housing, p13

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view of the sector. There is a strong case for change – particularly as the sector grows and becomes more diverse in its funding sources.<sup>277</sup>

**5.33** The FHA added a caveat:

...our support for broad regulation is conditional on the type of regulation provided. In essence we argue that it should be independent and it should be enabling regulation. That is, the purpose of regulation should be so government can ensure and encourage the quality provision of services that it funds or facilitates.<sup>278</sup>

**5.34** The Committee acknowledges the Department of Housing's work in recent years seeking to address some of the problems with the current regulatory system.<sup>279</sup> The work has included:

- improving monitoring of quarterly reports from housing associations
- realigning staffing to dedicate positions to performance management and monitoring
- further investigating options for improved regulation with the sector including explaining legislative requirements.<sup>280</sup>

**5.35** Nevertheless, it is clear that further work is required to ensure effective corporate governance and accountability in the community housing sector. The following section outlines a proposed new regulatory and reporting framework, based on suggestions of inquiry participants.

## **Broad principles for a new regulatory system**

**5.36** The Department of Housing notes the following overall objective of a new regulatory system:

In brief the principal policy objective to be achieved through regulation should be the promotion of viable and well governed not for profit organisations which deliver housing for low income households consistent with government housing policy. It should result in value for money housing where public and private resources are maximised to achieve government objectives, whilst recognising the autonomy of community providers and promoting flexible housing responses to local needs. The performance standards that would underpin a regulatory regime

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<sup>277</sup> NSW Federation of Housing Associations, *Regulation of Community Housing*, p1

<sup>278</sup> Supplementary submission 34, NSW Federation of Housing Associations, p178

<sup>279</sup> Information about the Department's work on the Performance Management Framework and the extended registration system are detailed further below.

<sup>280</sup> Submission 54, Department of Housing, p66

should be common to both government and non government providers (with additional requirements about governance for the non government providers).<sup>281</sup>

**5.37** The Department emphasised that in proposing a new regulatory framework, it does not aim to exert more control over the community housing organisations. Rather, it seeks to ensure that the risks to the government and the community are minimised:

A couple of times you asked whether we wanted to control them and the answer is no, but as a government agency and as the funder, we want to ensure that appropriate securities are in place to protect both the government investment and the community outcomes. One of the challenges for us, again picking your point that it is a small sector and that is true, is that in non-government terms it has the largest asset of any non-government sector in Australia. We have over \$1 billion of assets now invested in the community housing sector. In addition to that, we have an annual recurrent leasing program of in excess of \$35 million.<sup>282</sup>

**5.38** The National Community Housing Forum (NCHF) considers the essential criteria of any new regulatory framework to be:

- accountability
- innovation
- proportionality
- transparency
- consistency.<sup>283</sup>

**5.39** For ARCH, the key to successful regulation of community housing includes:

- transparent performance expectations
- a stress on the rights and responsibilities of both parties
- being flexible rather than prescriptive
- a risk management approach focussed on constructive and early intervention
- being enabling rather than disengaging
- avoiding duplication and complexity
- avoiding unnecessary intervention.<sup>284</sup>

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<sup>281</sup> Supplementary submission 54, Department of Housing, p1

<sup>282</sup> Mills, Evidence, 11 November 2002, p5

<sup>283</sup> Mr Adam Farrar, Executive Director, NCHF, Evidence, 11 November 2002, pp20-21

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## Statutory regulation

- 5.40** The key stakeholders agree that any regulatory framework should be statutorily based. The Department of Housing, for example, submitted:

... the Department considers that legislation to regulate community housing is essential. These powers should be outcome focussed and enabling. Legislation should meet objectives about safeguarding the public interest through promoting a sustainable, well governed and managed housing sector, which encourages innovation whilst ensuring good performance and representing value for money. A regulatory system should be tiered and proportionate to the risks of the different size providers in the sector...<sup>285</sup>

- 5.41** A legislative basis to regulation is also supported by other inquiry participants. Shelter NSW submitted:

New regulatory legislation is needed to ensure the sector is accountable to government and the community, and to provide greater security for potential private investors. The legislation should cover the entire community housing sector, and not just that in receipt of CSHA funding.<sup>286</sup>

- 5.42** Churches Community Housing maintains that:

Legislation will ensure that the sector has a strong commitment from government to its future and that the sector will continue to develop along best practice principles for tenants, providers and government alike.<sup>287</sup>

- 5.43** In 2001, the National Community Housing Forum published a study jointly funded by the Queensland, NSW, ACT, Victorian and Tasmanian Governments, on regulatory options for community housing. Concerning legislation, the NCHF noted:

A legislative framework for community housing is needed. Reliance on contracts alone is almost unenforceable and is not transparent. However, it would be desirable to expand and amend existing housing acts rather than develop new legislation.<sup>288</sup>

- 5.44** The report provided further details:

... legislation allows for a clear statement of the regulatory powers available to the relevant authority and the rules applicable to the industry. A number of other benefits were noted which are unavailable under other regulatory models. Without legislation, regulatory options such as registration and negative licensing cannot be

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<sup>284</sup> Submission 48, ARCH, p75

<sup>285</sup> Supplementary submission 54, Department of Housing, p4

<sup>286</sup> Submission 47, Shelter NSW, p42

<sup>287</sup> Yule, Correspondence to Director, 2 September 2003, p2

<sup>288</sup> Submission 28, NCHF, p35

effectively implemented and options to compel adherence to the terms of a funding agreement may be limited and/or difficulty to enforce.<sup>289</sup>

**5.45** Benefits of legislation identified by the NCHF study include:

- certainty with respect to rights, obligations and required standards
- provisions to enable the achievement of policy objectives
- authorisation of a range of regulatory powers not available in contract law
- exemptions and specific provisions in other applicable legislation
- binding rights of appeal for both service providers subject to regulation and consumers
- the ability to use provisions which encourage self enforcement
- the potential to make program policies and guidelines subject to public scrutiny through processes such as the use of disallowable instruments.<sup>290</sup>

**5.46** The FHA endorses the idea of legislation to regulate community housing, as long as it complements rather than replaces existing legislation. It advocates integrating community housing into the *Housing Act* rather than creating a new stand-alone act.<sup>291</sup> The FHA submitted:

A legislative approach will provide assurance for government that it has appropriate regulatory powers to ensure that its social, economic and other objectives are met whilst managing the risks inherent in community housing. We also believe that legislation is the preferred approach to provide certainty and recognition for the sector and ensure that housing association business is viewed in its entirety, not just as a single housing program.<sup>292</sup>

**5.47** The FHA commented further:

The NSW Federation of Housing Associations has consulted widely with housing associations and considered the concerns of all stakeholders in developing this policy position. There is widespread agreement that regulation is required if government is to assure itself that it can effectively and efficiently manage its exposure to risk in this sector. Seeking accountability for government funds and desired outcomes is a legitimate desire for government funding agencies.

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<sup>289</sup> Kennedy et al, Vol 2, p70

<sup>290</sup> *ibid*, p51

<sup>291</sup> NSW Federation of Housing Associations, *Regulation of Community Housing in NSW*, October 2002. Cited in supplementary submission 54, p6

<sup>292</sup> Supplementary submission 34, NSW Federation of Housing Associations, p2

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At the same time, housing associations are increasingly seeking the assurances they need that their affairs will be regulated in a way that does not stifle their innovation or autonomy but ensures that excellence in service delivery is promoted and the good reputation of the sector protected.<sup>293</sup>

**5.48** Other stakeholders also emphasised the need to ensure that creating a legislative basis for regulation does not curtail the flexibility of the sector. For example, Churches Community Housing advised:

However, our concerns are that legislation will need to be well drafted so as it does not stifle the flexible and unique nature of community housing. Community housing by nature is actually defined by the needs of a particular community and how that community is then resourced to meet the need. If the community housing sector was to be defined by legislation there is every possibility that it will become a social housing provider similar to Housing NSW and therefore lose its distinctive nature.<sup>294</sup>

**5.49** Similarly, ARCH told the Committee:

We envisage legislation that is not onerous and does not stymie innovation, which strikes a balance between respect for sector independence and the need for Government accountability, without being prescriptive. We need to look to legislation that can anticipate change and allow for creative responses to changing social, economic and demographic circumstances.<sup>295</sup>

**5.50** The Committee notes that South Australia has adopted a legislative approach to regulation of community housing, specifically the *South Australian Co-operative and Community Housing Act, 1991*. The Act also established the South Australian Community Housing Authority (SACHA) to administer the Act on behalf of the responsible minister. SACHA's functions and powers are outlined in Section 16 of the *South Australian Co-operative and Community Housing Act, 1991*.

**5.51** The establishment of SACHA ensures that there is centralised coordination of the South Australian community housing sector's regulation and funding. SACHA describes the provisions of the Act as follows:

The Act provides a legal structure, which contains enabling mechanisms for government [ie SACHA] to implement regulatory functions in respect of corporate governance, including powers of intervention where a community housing organisation (CHO) is experiencing financial and/or management difficulties...

The Act also provides additional powers such as the ability to enter into contracts, to determine rents, to prescribe accounting and record keeping standards and audit requirements in order to be able to monitor the activities of CHOs. It includes powers to investigate the management of CHOs and where necessary

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<sup>293</sup> Supplementary submission 34, NSW Federation of Housing Associations, p1

<sup>294</sup> Yule, Correspondence to Director, 2 September 2003, p2

<sup>295</sup> Shellshear, Correspondence to Director, September 2003, p4

enables the Authority to remove the name of a CHO from the register of CHOs registered under the Act.

The Act provides the regulatory structures to ensure program accountability, financial stability and the professional management of program assets through program reporting and accountability measures.<sup>296</sup>

- 5.52** The South Australian legislative approach was identified by a number of inquiry participants as a successful model. Further details about the South Australian model appear in Chapter 3.

### **Regulatory tiering**

- 5.53** The Committee also heard evidence in favour of a **tiered approach** to regulation, in which the level of regulation is dependent upon performance and risk. The NSW Federation of Housing Associations, which supports regulatory tiering, explained the approach in this way:

A tiered regulatory system is one in which those organisations that are higher risk to government receive higher levels of scrutiny by government. For instance, an unaccredited organisation that is small and has historically poor performance will be more closely regulated than a large, accredited organisation that is performing well.<sup>297</sup>

- 5.54** The NCHF also advocates a tiered approach:

The community housing sector in Australia is one of fairly marked differences. It ranges from small, rural housing associations to large urban and regional organisations and cooperatives of varying sizes and operating models... These differences can be recognised through tailoring regulation so that it is appropriate to the form of community housing being regulated. For example, the regulatory issues applicable to co-ops are different in a number of ways to those associated with other forms of community housing. A flexible approach to regulation, such as one which reflects the nature of risks, is generally likely to minimise costs to both CHAs and CHOs and deliver an effective and efficient regulatory scheme.<sup>298</sup>

- 5.55** The Department of Housing has indicated that it supports a tiered approach to regulation, provided it is “inclusive of all non-government housing providers (irrespective of scale).”<sup>299</sup> The Department told the Committee that it favours a:

... risk-based approach to regulation [but] additional work is required about the differentiation of risk. Risk should be determined according to the nature of

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<sup>296</sup> Guide to Regulation of the Community Housing Sector in South Australia, SACHA, p4

<sup>297</sup> Supplementary submission 34, NSW Federation of Housing Associations, p6

<sup>298</sup> Kennedy et al, Vol 2, pp69-70

<sup>299</sup> Supplementary submission 54, Department of Housing, p5

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housing business and scale, not type of housing providers (eg not a universal approach to churches which is different to cooperatives, and different from housing associations).<sup>300</sup>

## Specific components of a new regulatory system

- 5.56** The Committee was pleased to note broad areas of agreement between the Department and stakeholders concerning the key features of the new regulatory system. The consensus is strongly in favour of a regulatory framework that is established in legislation and underpinned by an effective system for managing performance. Specific reform proposals are discussed below.

### Legislation

- 5.57** As noted above, the stakeholders generally indicated support for the development of legislation to regulate community housing. Unfortunately, we did not receive a great deal of evidence or submissions with detailed proposals for the content of the legislation. This section collates the information provided to us during the inquiry.

### Definition and role of community housing and the regulator

- 5.58** The Department's submission suggested that any legislation should include an:
- Overarching definition and role of non-government housing providers. Emphasis should be on not for profit provision rather than defining types of housing providers.<sup>301</sup>
- 5.59** The FHA also advocated inclusion of a definition of community housing and of the regulator's role:
- Community Housing is currently not defined in the Housing Act... The Act should include a definition of community housing that properly describes the sector now as well as in the future...<sup>302</sup>
- The body that regulates community housing should be clearly named, defined and its objectives set out...A common understanding of the objectives of the purpose of the regulator will deliver a more robust and better structured funding and administrative program than currently exists...
- The regulator should have the power to monitor performance of community housing organisations and intervene in organisations that are significantly under-performing.<sup>303</sup>

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<sup>300</sup> *ibid.*

<sup>301</sup> *ibid*, p 6

<sup>302</sup> Supplementary submission 34, NSW Federation of Housing Associations, p4

### Resourcing

- 5.60** Participants also suggested that legislation should provide for statutory powers for the Department to fund and resource community housing. The Department argued that while this should include the power to enter into funding agreements, it would go beyond that, and provide for more general allocation of resources and the repayment of surpluses.<sup>304</sup>
- 5.61** The NCHF sees funding contracts as continuing to “be required to delineate arrangements such as payments, reporting, monitoring and performance requirements”.<sup>305</sup> In its report on regulation, the NCHF envisaged funding contracts that are variable rather than identical for providers regardless of the risk involved.<sup>306</sup>
- 5.62** The FHA also noted the need for legislative powers to fund providers:

The legislation should ensure that the community housing administrator has powers to provide, and withdraw, funding to community housing providers for a range of defined purposes and in a range of defined circumstances. This head of power is important because it provides a formal mechanism to manage funding programs and asset transfers... The legislation (or regulations attached to the Act) should set out the names, objectives and principles of the funding programs.<sup>307</sup>

- 5.63** The Committee has addressed this issue in Recommendation 24 below.

### Registration system

- 5.64** The Department of Housing considers registration to be an essential part of any new legislatively based regulatory system:

It is appropriate to have a registration system... registration is one of the core components of the legislative process.<sup>308</sup>

- 5.65** Substantial work has already been undertaken by the Department in developing a registration system that is multi-tiered, and that would allow for suspension of registration status.<sup>309</sup> The proposal allows for six classes of registration, with Class 1 representing an organisation with “comprehensive and reliable performance information on all outcomes, ... consistent pattern of meeting or exceeding performance indicator benchmarks across

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<sup>303</sup> Supplementary submission 34, FHA, p4

<sup>304</sup> *ibid.*

<sup>305</sup> Supplementary submission 54, Department of Housing, p7

<sup>306</sup> Kennedy et al, Vol 2, op cit, p61

<sup>307</sup> Supplementary submission 34, NSW Federation of Housing Associations, p4

<sup>308</sup> Mills, Evidence, 11 November 2002, p6

<sup>309</sup> Supplementary submission 54, Department of Housing, p2

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all outcomes, [and] evidence of strong internal business assurance arrangements”.<sup>310</sup> A Class 1 organisation is one that “the Department has a high degree of confidence about entering into complex financing and contractual arrangements to provide innovative community housing solutions”.<sup>311</sup>

**5.66** At the other end of the scale, a Class 2C organisation has “basic performance information on most outcomes [and] a variable pattern of meeting...benchmarks”.<sup>312</sup> Such an organisation needs support in managing its financial and contractual arrangements. Providers that fail to provide performance information or consistently fail to meet benchmarks will have their registration suspended, and will be subject to full reassessment within six months.<sup>313</sup>

**5.67** To implement the registration system, the Department proposes the establishment of a Performance Review Team, which would be responsible for assessing providers both for registration and performance management:

This team will be responsible for assessing organisational performance against the performance criteria prior to determining the registration status of a provider.<sup>314</sup>

**5.68** The Performance Review Team will operate at ‘arms length’ from service delivery and will ensure that their decisions are transparent to service providers.<sup>315</sup>

**5.69** The NCHF agrees that registration should be established in legislation, and in fact argues that any community housing legislation should include provision for registration.<sup>316</sup> It also suggests that that registration should be the basis for funding and access to capital assets, and there should be provision for deregistration in cases of serious breaches.<sup>317</sup>

**5.70** The NCHF report noted:

The proposed registration system can also operate as a negative licensing system. Breaches of the legislation or of funding agreements could result in de-registration and hence loss of eligibility for funding as well as other penalties such as repayment of funds and activation of the statutory charge on properties where applicable. Of course, where the legislation provides the regulatory authority with powers of investigation and intervention, de-registration would be likely to act as a

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<sup>310</sup> *ibid.*

<sup>311</sup> *ibid.*

<sup>312</sup> *ibid.*, p3

<sup>313</sup> *ibid.*

<sup>314</sup> *ibid.*

<sup>315</sup> *ibid.*

<sup>316</sup> Supplementary submission 54, Department of Housing, p7 and Kennedy et al, Vol 2, p72

<sup>317</sup> Supplementary submission 54, Department of Housing, p7

final sanction rather than as a primary response to breaches and/or poor performance.<sup>318</sup>

**5.71** The FHA supports the concept of ‘the registration of housing associations by an independent regulator,’<sup>319</sup> and argues that:

Registration systems should be part of the Act and should clearly identify what the different levels of registration are. The purpose of registration should be defined in the Act and the way in which it should be applied. This could include linkages to other Acts that use the registration system...

Various levels of registration should ensure that the levels of registration reflect different standards, abilities and risks that apply to more sophisticated large organisations compared to small organisations. The registration system should clearly identify the skills and capability levels of every registered organisations.<sup>320</sup>

**5.72** While noting that the proposal has been developed in ‘good faith’ ARCH advised that it is unable to fully support it at this stage, as there has been insufficient consultation:

Whilst representatives involved in the development of the proposal support the current documentation as sighted at the beginning of 2003, it should be noted that it has not gone to the broader community housing sector for consultation, as was intended. As such, any proposal for the introduction of such radical change to the community housing registration system should be tested with the sector in terms of its practical application, perception and implications.<sup>321</sup>

**5.73** Churches Community Housing expressed a similar reservation:

As the ‘peak’ for the Church Sector, Churches Community Housing has appreciated the involvement in the development of the new tiered Registration System.

While supportive of the current draft documentation it will be necessary for the wider church sector to be involved in consultation before the final documentation is approved and accepted.<sup>322</sup>

**5.74** The Committee concludes from the information relayed in this section that the Department’s proposal for a tiered registration system has received the general support of the community housing sector. However, we note the reservations of the peak groups relating to the need for further consultation with their sectors on the details of the registration system. The Committee therefore recommends that the tiered registration system proposed by the Department be finalised in consultation with the industry. It

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<sup>318</sup> Kennedy et al, Vol 2, p73

<sup>319</sup> Submission 34, NSW Federation of Housing Associations p178

<sup>320</sup> Supplementary submission 34, NSW Federation of Housing Associations, pp4-5

<sup>321</sup> Shellshear, Correspondence to Director, September 2003, p9

<sup>322</sup> Yule, Correspondence to Director, 2 September 2003, p3

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should be implemented as part of the legislative amendments proposed in recommendation 24 at the end of this Chapter.

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### **Recommendation 18**

That the Department of Housing finalise the details of its proposed tiered registration system in consultation with the community housing sector.

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#### Regulation of title and capital assets

- 5.75** The legislation should include provisions relating to title and capital assets. Further details about this issue are examined separately in Chapter 6.

#### **Appeals and complaints mechanisms**

- 5.76** A major shortcoming in the existing system is an absence of appeals and complaints mechanisms, both for providers and consumers.

#### Appeals by consumers

- 5.77** Consumers do not at present have a right to appeal decisions made by providers. However, a pilot project has enabled access to review in limited circumstances through the Housing Appeals Committee (HAC). The HAC, describing itself as “an independent administrative review body reporting to the Minister for Housing”,<sup>323</sup> may review decisions about matters such as:

- eligibility for housing
- the waiting list
- rental subsidies
- property modifications relating to medical needs.<sup>324</sup>

- 5.78** Established in 1995 originally to review decisions of the Department of Housing, the Housing Appeals Committee was trialled between 2001 and 2003 as an appeals body for community housing.

- 5.79** The Executive Chairperson of the Housing Appeals Committee advised us about the operational framework of the HAC:

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<sup>323</sup> Submission 12, Housing Appeals Committee, p1

<sup>324</sup> Submission 12, Housing Appeals Committee, p1

This pilot has been set up in consultation with the Office of Community Housing, the Federation and the Association for Resourcing Co-operative Housing... We work directly to the Minister for Housing; we are not a separate tribunal with separate legislation. We have been established by the Minister because the Commonwealth-State housing agreement expects States to have an independent review process.<sup>325</sup>

**5.80** The Committee heard that the appeals mechanism established under the pilot project is a voluntary scheme:

As to the pilot, it was our idea that people should enter it only voluntarily rather than suddenly introducing a process whereby all community housing providers—there are a lot of them—are subject to an external appeals process...

We have learnt from that process that in starting the pilot with community housing it is important to have willing participants. If they are not willing participants they will not tell their clients about the appeals process and administer it in a way that makes it possible or easy for a client to appeal. As an alternative, we have made it a voluntary process through the pilot. We hope that at the end of the pilot a number of organisations will be able to tell their peers that it did not hurt, did not scare the horses and is a valuable process that is worth doing. Even if it becomes compulsory at the end of the pilot, it will have been tested in a more neutral environment. That was the basis on which we started the pilot which goes until June [2002].<sup>326</sup>

**5.81** In May 2003, the Department of Housing received a draft evaluation of the external appeals pilot. While the details of the evaluation have not been finalised, the main finding was that the pilot successfully provided efficient and cost effective reviews of community housing decisions that provided benefits to applicants, tenants and providers.<sup>327</sup>

**5.82** In its submission to the inquiry, the HAC emphasised the importance of the appeal process and recommended that it be made compulsory:

Currently participation in the Community Housing External Appeals System is voluntary. There is a wide-ranging degree of commitment to an appeals system within the community housing sector. Some providers have an effective and accessible appeals process, some have an appeals process but perhaps do not actively encourage their clients to utilise it and others do not appear to have an appeals process at all... In the interests of natural justice clients should have access to an appeals system. The participation in an appeals process, internally or externally, ought to be considered compulsory. The Housing Appeals Committee considers that the decision to undertake an appeal process is a basic client right and should not be governed by the organisations decision not to offer this service to their clients. An effective appeals system ensures that services are provided

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<sup>325</sup> Ms Lynden Esdaile, Executive Chairperson, Housing Appeals Committee, Evidence, 12 February 2003, p31

<sup>326</sup> *ibid*, pp32-33

<sup>327</sup> RPR Consulting, *Draft Evaluation of the Community Housing External Appeals Pilot*, May 2002, p5

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fairly and equitably and that housing providers are accountable for the decisions they make.<sup>328</sup>

**5.83** While the HAC sees some advantages in a legislatively based appeals process, it does not advocate a more formal approach to hearings:

I certainly would not want to get into a more formal hearing process. One of the crucial elements we have been able to offer to clients is a non-threatening and responsive process for a lot of people because in two-thirds of the cases we agree with the housing provider's decision. Frequently for the person to feel it has been of any value to them it is about them actually having a say, a day in court, getting it out to an independent body that can look at whether or not it is all fair. They still may not like our decision but we get very few complaints.<sup>329</sup>

**5.84** ARCH supports an external appeals mechanism for community housing tenants and applicants:

ARCH and representatives of the Co-operative Housing Sector participated in the development of Community Housing Appeals mechanism that would ensure administrative review rights, and we have strongly supported a strategic policy position to ensure tenants in community housing have the right “to independent scrutiny of decisions affecting their lives and futures”.

In this respect, we recommend strong support to the establishment of an External Appeals System that becomes a permanent feature of the community housing sector for the purpose of protecting the rights of tenants and applicants to fair and reasonable treatment because this constitutes good practice and is in accord with principles of natural justice.<sup>330</sup>

**5.85** ARCH notes that the existence of an appeals system provides benefits beyond ensuring individuals have access to a review of decisions made that impact upon them. It also encourages continuous improvement in policies and practices of providers, and encourages the development of internal review systems.<sup>331</sup>

**5.86** Churches Community Housing is also supportive:

CCH believes that an effective appeal mechanism is a basic right for community housing tenants and that an external appeals mechanism is an essential and appropriate part of community housing.

We endorse the use of the Housing Appeals Committee to provide access to external appeals for all community housing tenants and for those applicants desiring placement in community housing properties.<sup>332</sup>

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<sup>328</sup> Submission 12, Housing Appeals Committee, p3

<sup>329</sup> Esdaile, Evidence, 12 February 2003, p39

<sup>330</sup> Shellshear, Correspondence to Director, September 2003, p5

<sup>331</sup> *ibid*, p5

<sup>332</sup> Yule, Correspondence to Director, 2 September 2003, p2

**5.87** The Federation of Housing Associations indicated its agreement with the extension of the HAC to community housing:

The Federation has specifically endorsed the use of the Housing Appeals Committee to provide access to external appeals for ... all community housing applicants and tenants and so participation in the system should be a requirement for all associations.

We believe that effective appeals – including external appeals – is a basic right for tenants. However, we also believe that being subject to such an external appeal procedure will help to strengthen the eligibility, allocation and other tenancy policies and practices of organisations, and so will also benefit providers.<sup>333</sup>

**5.88** The NCHF argued that an effective appeals process is a fundamental right for all social housing applicants and tenants. The NCHF considers that the appeals process should be compulsory, independent and external. The NCHF noted the benefit of having a legislatively based system with legally binding decision-making powers, but argues that the community housing appeals system should not be different to that applying to public housing, which does not have a legislatively based appeals mechanism.<sup>334</sup>

**5.89** A similar point was made by the FHA, which maintains that community housing and public housing should face the same requirements in terms of appeals. The FHA favours enshrining appeal rights in legislation for community housing as long as public housing appeals were also legislatively based, and argues against the HAC having determinative powers in community housing appeals if it is not similarly empowered to make determinations for public housing:

Preferably, the role and powers of the HAC should be included in an amendment to the Housing Act, but should not be limited to any legislation or amendments specific to community housing.<sup>335</sup>

**5.90** The Department acknowledged these concerns, noting that:

Determinative powers do not apply to public housing and their application to community housing cases would create additional differences between social housing landlords in NSW. Such changes, if applied, would be better considered as part of system wide changes, rather than applied to one part of the social housing system at a point in time.<sup>336</sup>

**5.91** A reservation expressed by the NCHF was that any external appeals body should be aware of the particular circumstances applying in the community housing sector:

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<sup>333</sup> Farrar, Correspondence to Director, 29 August 2003, p4

<sup>334</sup> Clough, Correspondence to Director, 29 August, 2003, p1

<sup>335</sup> Farrar, Correspondence to Director, 29 August 2003, p4

<sup>336</sup> Wannan, Correspondence to Director, 26 September 2003, p2

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...it is essential that an external appeals panel understands the constraints that community housing providers work within and can review decisions effectively in an environment of over-demand.<sup>337</sup>

**5.92** A similar concern was raised by ARCH in relation to co-operative housing:

Other judiciary bodies such as Consumers, Traders and Tenancies Tribunal (CTTT) have not demonstrated a good track record in their understanding of the particularities of the Co-operative Housing Sector...

In this respect, whilst it is reasonable to assume that a Housing Appeals Committee should have determinative powers (and sanctions at its disposal), and it is recognised that the proposed HAC will be bound by the policies of the housing provider (or fall back on the National Community Housing Standards) there is nevertheless a high level of apprehension that a new outside body will adopt a “one-size-fits-all” modus operandi and fail to do adequate research to bridge the gap between a theoretical view of how things should work and a practical gutsy knowledge base of how things *actually work best* on the ground.<sup>338</sup>

#### Appeals by providers

**5.93** The Federation of Housing Associations argues that the new regulatory framework should include a right of appeal for providers:

In relation to providers, the Department’s proposed performance management framework includes a provision for appeals against decisions relating to assessments against performance and registration criteria.<sup>339</sup>

**5.94** The FHA considers the right of appeal for providers to be essential:

Community housing organisations must be able to appeal decisions of the regulator and to ask for an independent review of decisions that are made. For instance, the level of registration that is provided may well be the subject of challenge. The provision of an appeals system is a suitable form of resolving disputes between the regulator and the organisation.<sup>340</sup>

**5.95** In its evidence before the Committee, Shelter NSW also raised this issue:

One thing we would argue, when it comes to regulation, is that there needs to be an appeal mechanism for the community housing providers themselves in the event of a dispute with the funding body or whatever.<sup>341</sup>

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<sup>337</sup> Clough, Correspondence to Director, 29 August 2003, p2

<sup>338</sup> Shellshear, Correspondence to Director, September 2003, p6

<sup>339</sup> Supplementary submission 34, NSW Federation of Housing Associations, p5

<sup>340</sup> *ibid.*

<sup>341</sup> Mr Harvey Volke, Policy and Liaison Officer, Shelter NSW, Evidence, 16 April 2002, p10

**5.96** ARCH's view is that service providers are entitled to transparency and accountability in decision making in the same way the clients and tenants are:

In order to be consistent and transparent for all parties, and to have ... the same right to independent scrutiny of decisions affecting their operations or for co-ops, their lives and futures, it is important for providers to have access to a neutral context, and the opportunity for appropriate mechanisms of appeal to:

- resolve differences
- ensure due process
- ensure fairness in accessing resources and
- demonstrate transparency and two-way accountability between Government and providers.<sup>342</sup>

**5.97** Churches Community Housing holds similar views:

We expect that community housing providers must be transparent and held accountable for all their actions. Therefore it is necessary that providers must also have access to an appeals mechanism. We believe that it is an essential requirements that all stakeholders within the sector must be held accountable for their decisions and actions.<sup>343</sup>

**5.98** The Committee agrees that both tenants and providers should have access to an external appeals mechanism. Given the extent of support for the Housing Appeals Committee's recent trial in providing an avenue for appeal for community housing, we consider it appropriate that the HAC be the source of appeal for community housing tenants and applicants on an ongoing basis. We would prefer that the HAC be established in legislation that sets out its functions and powers, but note arguments that community housing should not be subject to appeals requirements that differ from those applying to public housing. The Committee therefore recommends that the HAC appeals process continue to be administratively based for the time being. However, we suggest that the Department review the appropriateness of incorporating into the *Housing Act* the right of appeal to the HAC for all social housing.

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### **Recommendation 19**

That the Department of Housing extend the operations and functions of the Housing Appeals Committee to include community housing tenants and applicants, and consider the incorporation into the *Housing Act* of a statutory right of appeal for all forms of social housing.

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<sup>342</sup> Shellshear, Correspondence to Director, September 2003, p7

<sup>343</sup> Yule, Correspondence to Director, 2 September 2003, p2

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**5.99** In relation to appeals for providers, we did not receive information on options available. However, the Committee notes that the Department of Housing intends including appeals and complaints processes for decisions made in relation to the registration and performance management systems.<sup>344</sup> Depending on the administrative reporting structure created, this appeals mechanism could be used as the basis for a more general appeals process for providers who seek a review of the Department's decisions about other decisions. The Committee recommends that the Department of Housing examine means by which providers can obtain access to an independent review of decisions made concerning their registration, performance management and other appropriate administrative decisions.

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### **Recommendation 20**

That the Department of Housing examine means by which providers can obtain access to an independent review of decisions made concerning their registration performance management and other appropriate administrative decisions.

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### **Complaints about service delivery**

**5.100** Community housing providers have identified the lack of mechanisms for dealing with complaints about delivery of community housing services as a problem with the current system. Note that this issue differs from dissatisfaction with decisions by the Department, it relates specifically to complaints about the housing services provided by community housing organisations. The NSW Federation of Housing Associations commented:

The Office of Community Housing receives complaints about housing associations from time to time. The extent of complaints is unknown to us, nor the exact nature of those complaints. However, the whole sector is sufficiently concerned about those complaints to wish to address them constructively...

The Office of Community Housing has had a draft complaints policy in draft format for over a year. Despite the policy, most housing associations report that complaints are not properly investigated and are never properly resolved. There is no time when a complaint is deemed to be 'closed' and housing associations are unsure how to finalise a complaint and ensure that all parties to the complaint are satisfied.

Housing associations seek a transparent and open process for dealing with complaints and ensuring that they are received, dealt with and resolved as quickly and decisively as possible.<sup>345</sup>

**5.101** The Department explained the complaints handling process as follows:

...when situations arise—and they do reasonably regularly—where people are dissatisfied with an organisation, they will make a complaint to us because they

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<sup>344</sup> Supplementary submission 54, Department of Housing, p3. See also below for further information

<sup>345</sup> Submission 34, NSW Federation of Housing Associations, p181

know we provide the funding for the organisation. They might make a complaint to their local member or someone from Parliament in the same way. We have a duty to look into each of those situations where a complaint is made, although we have developed a complaint policy that pushes that responsibility upon organisations to investigate their own complaints and where there is no satisfactory outcome for us to become involved.

We have tried to put in place a system whereby the sector manages their own complaints but at the same time, our system of audits and the information that we receive mean we have to act if we see an irregularity. Our approach is to work with the organisations around a plan to improve performance or to improve whatever it was that brought the issue about. That is always our first approach and that works successfully in most cases that come up before us—90 per cent.<sup>346</sup>

**5.102** The Department advised that complaints about community housing are dealt with under the Department of Housing’s client feedback and complaint policy. The Department acknowledged the need to review the policy to “more adequately reflect and accommodate community housing arrangements”, including recognising the role of boards and the timeframes required for communicating with boards about complaints.<sup>347</sup> The Committee was told that the new complaints policy for the Office of Community Housing would ensure that organisations or individuals were informed about any complaints about them so that they have an opportunity to respond.

**5.103** According to the Department, the new procedures are still in draft form and are expected to be finalised in 2003-2004.<sup>348</sup> The evidence we have received suggests that the new complaints procedures have been in draft form for more than two years already and it seems that a further 18 months’ consideration would constitute an excessive delay. Given the importance of an effective complaints process, the Committee considers that the policy should be finalised and implemented as a matter of priority.

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### **Recommendation 21**

That the Department of Housing finalise and implement a complaints-handling policy to deal with complaints about community housing service delivery.

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### **Accreditation**

**5.104** The general viewpoint among inquiry participants is that, while accreditation is a valuable tool for ensuring standards, it should be neither compulsory nor legislatively based.

**5.105** ARCH emphasised that accreditation should be:

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<sup>346</sup> Ready, Evidence, 11 November 2002, pp4-5

<sup>347</sup> Wannan, Correspondence to Director, 26 September 2003, p2

<sup>348</sup> Wannan, Correspondence to Director, 26 September 2003, p2

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...seen as complementing Government requirements, building on the benchmarks of minimum acceptable standards, to encourage best practice through (continuous) quality improvement. In this respect, accreditation reflects a qualitative process, re-defining ways of achieving outcomes through potentially innovative means of service delivery.

Accreditation is essentially industry owned and driven and should be seriously identified as independent of Government performance requirements. At the same time, it should be recognised that accreditation serves as an extension to the regulatory system...<sup>349</sup>

**5.106** ARCH noted that because they are based on volunteer effort, for many housing co-operatives the substantial workload required to attain accreditation has served as a disincentive.<sup>350</sup>

**5.107** The FHA commented:

The accreditation system should remain focussed on good practice and quality improvement...The accreditation system should not be a core part of the regulatory system but it should be linked in. Meeting or exceeding standards should mean that those organisations that are accredited represent a lower risk to government. Therefore, the level of scrutiny applied within the regulatory environment may be lower.<sup>351</sup>

**5.108** The NCHF agrees:

Accreditation is a central and important part of the system. It should remain voluntary, however, to maintain a quality improvement focus.<sup>352</sup>

**5.109** The NCHF's 2001 Report on Regulation noted further points arguing the advantages of a voluntary accreditation system over a mandatory one in the case of community housing:

Mandatory accreditation ... implies significant costs which would be difficult to justify in the community housing context given the lower level of risk compared to other industries where there is mandatory accreditation...

... introducing a mandatory accreditation system for community housing providers would appear to potentially involve over-regulation and unnecessary cost.<sup>353</sup>

**5.110** The Committee believes that there is a good case for retaining accreditation as a voluntary, non-legislative scheme. The Committee sees the accreditation process as an adjunct to the

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<sup>349</sup> Shellshear, Correspondence to Director, September 2003, p9

<sup>350</sup> Shellshear, Correspondence to Director, September 2003, p10

<sup>351</sup> Supplementary submission 34, NSW Federation of Housing Associations, p5

<sup>352</sup> Submission 28, NCHF, p35

<sup>353</sup> Kennedy et al, Vol 2, p59

regulatory scheme, providing the sector with best practice goals rather than minimum standards. As such it is appropriate that accreditation continue to be non-compulsory, and should be retained in its present form.

### **Location of regulator**

- 5.111** One matter that was the subject of divergent views is the location of the regulator. At present, the Office of Community Housing performs a number of roles in relation to the community housing sector including support, funding, facilitation and regulation. The Standards and Accreditation Unit is also currently located in the Office of Community Housing and is overseen by a committee with an independent chair. The ability of one organisation to perform all of these roles has been questioned during the inquiry. For example, the NSW Federation of Housing Associations has argued that the current location of the unit affects its ability to be independent as well as the transparency of the process.<sup>354</sup>
- 5.112** In particular, the appropriateness of funding roles being combined with regulatory roles is a concern to many inquiry participants who argue that, in the interest of transparency and accountability, regulation should be independent of funding administration.
- 5.113** The Shoalhaven Community Housing Scheme for example submitted:
- It is of concern that the funding body has also appointed itself as the arbitrator on issues of ethical behaviour and good governance. It is strongly recommended that this role should be separated and administered by an independent body that has no vested interest in the financial role of the organization. We believe that some matters have been inappropriately handled by the Office of Community Housing in its role as the funding body, and that its role of regulation should be restricted to the reporting requirements of the funding agreement.<sup>355</sup>
- 5.114** A similar concern was expressed by the Australian Centre for Co-operative Research and Development (ACCORD), which noted:
- ... a key tension which arises where service providers are simultaneously resourcing agencies, funding regulators and ... advocates for their sector. There has certainly been some confusion within the co-operative sector in recent years about the various roles which ARCH and OCH play...<sup>356</sup>
- 5.115** The FHA advocates separating the regulator from the funder:
- We believe that good practice regulation requires a regulator that is independent of funding administration. Similarly, the administration of standards and accreditation should also be independent and separate from funding

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<sup>354</sup> Submission 34, NSW Federation of Housing Associations, p166

<sup>355</sup> Submission 21, Shoalhaven Community Housing Scheme, p12

<sup>356</sup> Submission 22, ARCH, p12

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administration. A decision to separate these functions is critical to future independence.

The current administrative arrangements are not sufficiently robust to provide the independence of regulation that we believe is required. Regulation should include the responsibilities of both the funding body and the funding recipient. We do not believe that the funding body should be responsible for its own regulation.<sup>357</sup>

**5.116** The Churches Community Housing also identified this as an issue:

Concern/criticism was also expressed that the administrative regulator of community housing was located within the Department of Housing and questions were raised as to the appropriateness of the same body being both funder and regulator. There was a preference expressed for a regulatory model that separates accountability from funding control.

The suggestion of a legislatively based independent regulator was viewed favourably. The model must reinforce core values such as honesty, transparency and open communication.<sup>358</sup>

**5.117** Mr Adam Farrar submitted that while the rationale for joining all social housing related functions into one Department was not unsound, losses and risks arose:

Partly it has reduced transparency – something that is very important as a new system is being built. This has been exemplified in the abandonment of strategic planning ... the lack of information about decision making, and the loss for a number of years of external advice or scrutiny. It has reduced by adding layers of reporting.<sup>359</sup>

**5.118** Mr Farrar noted that the interests and needs of public housing often overwhelm those of the community housing sector. However, he did not argue for a separation of the Office of Community Housing and the Department of Housing, rather:

...it is a strong argument for ensuring that the Office of Community Housing is retained with all its capacity within the Department structures and that we do not see a blending of public and community administrative arrangements...<sup>360</sup>

**5.119** He argued further that it is essential that the regulator role be kept separate from the roles of funder, funding administrator and policy development.<sup>361</sup>

**5.120** Shelter NSW suggests that OCH should maintain a regulatory role, but should report directly to the Minister:

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<sup>357</sup> *ibid.*

<sup>358</sup> Submission 27, Churches Community Housing, p25

<sup>359</sup> Submission 40, Mr A Farrar, p10 (personal submission)

<sup>360</sup> *ibid.*

<sup>361</sup> *ibid.*, pp10-11

In addition to its functions as program manager, OCH should also undertake regulatory functions, with investigative and interventionist powers... To avoid potential conflicts of interest, OCH should be removed from the formal reporting structure of the Department of Housing, and should report directly to the Minister for Housing.<sup>362</sup>

**5.121** The Department advised that it foresees the regulator as remaining within the Department but in 'a separate administrative stream'.<sup>363</sup>

**5.122** The Committee notes the importance of transparency in gaining industry support and the community housing sector's view that transparency requires a separation of the funder and regulator of community housing. The Committee believes that the Department should devise a structure that ensures administrative separation of the funding and regulatory functions of the Office of Community Housing, with consideration being given to having the regulatory functions reporting directly to the Minister.

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### **Recommendation 22**

That the Department of Housing ensure that the funding and regulatory functions relating to community housing have administratively separate reporting lines, with consideration given to having the regulatory function reporting directly to the Minister for Housing.

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## **Performance management under the new framework**

**5.123** As discussed above, effective performance management is dependent on effective performance reporting. The Department of Housing has made the development of a performance management framework a high priority.

**5.124** According to the Office of Community Housing, the Performance Management Framework (PMF) is an integrated system of performance reporting and management designed to sit across performance management arrangements already utilised by the sector, including quarterly reports and accreditation.<sup>364</sup> A pilot of the Framework was completed in March 2003.<sup>365</sup>

**5.125** The PMF includes nine service outcomes covering service quality, corporate governance and financial sustainability, with 29 Key Performance Indicators serving as performance

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<sup>362</sup> Submission 47, Shelter NSW, p42

<sup>363</sup> Supplementary submission 54, Department of Housing, p6

<sup>364</sup> Office of Community Housing, *Focusing on outcomes for Community Housing in NSW – Proposed Performance Management Framework*, 31 May 2002, p4

<sup>365</sup> Wannan, Correspondence to the Director, 26 September 2003, p2

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measurement tools.<sup>366</sup> The model involves three different levels of reporting based on “size of provider, level of risk, and the complexity of financial or contractual arrangements”.<sup>367</sup>

**5.126** The objectives of the new performance reporting mechanism are to ensure that:

- Streamlined and consistent arrangements are in place to collect performance information and to undertake performance assessments of all community housing providers
- Credible and useful comparative information is available to both the Office and community housing providers on key performance indicators
- Clear and transparent information is available to community housing providers on the Office’s overall assessment of their performance
- Comprehensive information is available to community housing providers on the overall performance of the community housing sector in a format that facilitates and encourages continuous improvement
- Comprehensive information is available to the Office on the relative performance of community housing providers to inform funding allocation decisions and to guide policy development.<sup>368</sup>

**5.127** A Performance Review Team will be established within the Office of Community Housing, which will be charged with implementing both the performance management and the registration systems. It will collate and analyse performance information and evaluate individual providers and the sector as a whole. A complaints and appeals system will be incorporated to enable the Performance Review Team’s decisions to be reviewed.<sup>369</sup>

**5.128** The second facet of performance management is taking action on poor performance. The Department explained that it was important that there be facility for intervention where standards were not being met:

There should also be another ... improvement to the current system: the ability ... to intervene if an organisation was performing poorly or if there were concerns about misappropriation or something else. The type of intervention we suggested in the draft [PMF] related to the appointment of a person either to work in that organisation or to work with that board. We have a history over the past few years of appointing administrators to organisations that were not performing well. In most instances that has delivered a successful outcome for the housing association or co-operative, but at present it is done only at the request of the board...

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<sup>366</sup> Supplementary submission 54, Department of Housing, p12

<sup>367</sup> *ibid*, p2

<sup>368</sup> Office of Community Housing, *Focusing on outcomes for Community Housing in NSW – Proposed Performance Management Framework*, 31 May 2002, p4

<sup>369</sup> Supplementary submission 54, Department of Housing, p3

There have been instances when the Office of Community Housing, as the current administrator, had significant concerns and believed that an administrator should be appointed but had no capacity to enforce it. It was left to the discretion of the board whether that would happen—regardless of whether the board then sought funding for that role from the office. We think that is important. We also think it is important to spell out in what circumstances that would occur and what the role of that intervention might be.<sup>370</sup>

- 5.129** In order to improve its ability to take action in instances of under-performance, the Department proposes that there should be a formal performance agreement between the regulator and the provider:

This relates basically to replacing what is presently a funding agreement relationship with most of our providers with a proper contract that spells out, in a more contractual way, the mutual roles, responsibilities and objectives of the programs being funded, the purpose of the funding and so on. Those agreements would then form the basis of the performance management system and accountability.

They would vary according to the class of registration and according to the kind of assistance being provided to the organisation. ...It was also proposed that there would be standards and targets for outcomes to be met. They would obviously become part of the agreement but would vary from time to time according to the class of registration. We also proposed basic requirements regarding record keeping and reporting—again, fairly standard—and that they should be spelt out.<sup>371</sup>

- 5.130** Moreover, the Department argues that the PMF should make provision for responses that are proportionate:

We are most anxious to ensure that the level of guarantee that we can give to the Government and the community is in accord with the level of risk. That is where we see a gap in the regulatory framework. There are very few actions we can take other than by a most circuitous route where there may be situations rising where the Government is concerned about the efficiency, effectiveness, misappropriation or some other elements of the business that the investment is not being effectively managed. It is a risk management approach, recognising their independent organisations and also recognising that they are administering very large annual, recurrent and capital investments of government.<sup>372</sup>

- 5.131** The NCHF also considers that there should be a spectrum of intervention measures:

These could range from training and support in good practice from the appropriate peak/resourcing bodies, to sanctions imposed by the regulator.<sup>373</sup>

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<sup>370</sup> *ibid.*

<sup>371</sup> *ibid.*

<sup>372</sup> Mills, Evidence, 11 November 2002, p6

<sup>373</sup> Clough, Correspondence to Director, 29 August 2003, p2

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**5.132** The community housing representative bodies were generally supportive of the Performance Management Framework. The FHA, for example, stated:

The Federation believes that the proposed PMF is the centre-piece of any effective regulatory regime and embodies best practice principles. There is nothing equivalent in any other jurisdiction.

The key to its value is that it takes a risk assessment and preventative approach. That is, it gathers just enough information, regularly enough to understand where potential risks are emerging across the key aspects of the business, to enable early intervention. By so doing, it can prevent the failure of the organisation or its key services.<sup>374</sup>

**5.133** The FHA did note, however, that the benchmarks had not yet been finalised, and that further consultation should be undertaken before the benchmarks are adopted.<sup>375</sup>

**5.134** ARCH commented favourably on the PMF, but expressed concern about supporting documentation relevant to co-ops:

... we are satisfied that the PMF in itself will not be onerous for housing co-operatives, will ensure a level of accountability and will be explicit in its expectations of co-operatives, enabling them to perform at the level required by Government...

Our concern, however, is that limited focus has been given to related guiding instruments that govern the operations of housing co-operatives in NSW and provide definition of Government expectations for housing co-operatives. The NSW Operational Guidelines for Co-ops dates back to 1998, is critically out of date and in certain areas inoperable. Whilst only verbal commitments have been made to address the Guidelines, these remain an anachronism and could present incongruity with expectations and requirements under the performance management framework.<sup>376</sup>

**5.135** In his evidence, the then Executive Director of the NCHF, Mr Adam Farrar, described the PMF as 'best practice':

My understanding is that best practice in Australia is clearly the performance management framework that is being piloted in New South Wales because that has now attempted to move from getting bits of paper in, to clearly identifying what are the risks, so that you can say, "The viability or the performance of this organisation is beginning to show some problems. How can we step in and manage those problems effectively?"<sup>377</sup>

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<sup>374</sup> Farrar, Correspondence to Director, 29 August 2003, p4

<sup>375</sup> *ibid.*

<sup>376</sup> Shellshear, Correspondence to Director, September 2003, p7

<sup>377</sup> Farrar, Evidence, 11 November 2002, p24

**5.136** NCHF perceives the following advantages in the Department's Performance Management Framework:

- As an outcomes based regulatory approach it will facilitate adequate and consistent reporting whilst enabling a flexible approach to undertaking the business of community housing
- The information generated will be able to be used by providers to improve their performance, as well as by administrators to inform funding decisions and policy development
- It concentrates on early risk management, thereby ensuring that potential problem areas can be identified and (ideally) managed before they blow out into actual or bigger problems.<sup>378</sup>

**5.137** Churches Community Housing also advised of its support for the PMF:

We believe that it contains the principles of best practice management and is necessary for any regulatory process to function effectively.

The Performance Management Framework should not however be seen as independent of other mechanisms in the sector, eg the Registration System and the National Standards and Accreditation requirements etc. And effective consultation with the whole sector will be necessary to enable benchmarks to be set that are acceptable and the framework finalised.<sup>379</sup>

**5.138** Given the overwhelming support for the Performance Management Framework in the community housing sector, the Committee considers it appropriate that it be rolled out. We have noted the industry views on the need for further consultation and suggest that full consultation with the sector (including tenants' representatives) be undertaken by the Department in finalising the Framework. The Department has advised that an information campaign will commence for housing providers in late 2003, and that the PMF will be rolled out on a trial basis across the sector in 2003/2004.<sup>380</sup> Provided there is a satisfactory outcome of the trial, the Committee recommends that the Performance Management Framework be implemented across the State without further delay.

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### **Recommendation 23**

That the Department finalise the details of the Performance Management Framework in consultation with the community housing sector, and implement it without further delay.

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<sup>378</sup> Clough, Correspondence to Director, 29 August 2003, p2

<sup>379</sup> Yule, Correspondence to Director, 2 September 2003, p3

<sup>380</sup> Wannan, Correspondence to Director, 26 September 2003, p2

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## Summary of new scheme proposals

- 5.139** This section draws together the various strands of the regulatory framework recommended in this Chapter.
- 5.140** The Committee's approach in considering the regulatory framework has been to suggest a scheme that enables the Department to support and develop community housing, provide properties and funding to organisations with specific conditions attached, and ensure satisfactory service and governance standards with minimal risk to public funds.
- 5.141** The Committee proposes a new regulatory scheme be incorporated into legislation by amendment to the *Housing Act*. The amendment should include, at a minimum,
- a definition of community housing
  - the role and functions of the regulator
  - powers for resourcing and provisions for funding contracts
  - governance frameworks
  - a multi-tiered registration system, and
  - provisions relating to title and equity.
- 5.142** Minimum standards would be safeguarded through the Performance Management Framework, the registration system and funding agreements, and policed by an administratively separate regulator such as the Performance Review Team. The accreditation process would provide a quality system to encourage continuous improvement in service standards and management.
- 5.143** An appeals process through the Housing Appeals Committee would be available to all community housing tenants and applicants, and will further encourage quality management decisions. Providers will also have access to review of administrative decisions relating to the regulatory framework themselves.
- 5.144** The continued involvement of the community housing peak organisations and the sector as a whole will be necessary to ensure the new regulatory framework has credibility and is supported and 'owned' by the industry. The sector has not had opportunity to consult in relation to certain aspects of the system, and in relation to other aspects, significant time has elapsed since discussions took place. The Committee therefore recommends that, in finalising the legislation and the constituent parts of the new framework, the Department consult further with the peak organisations and tenant representative groups.

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### **Recommendation 24**

That the Minister for Housing prepare an amendment to the *Housing Act* that incorporates:

- a definition of community housing
- the regulatory role and functions
- powers for resourcing and provisions for funding contracts
- a multi-tiered registration system, and
- provisions relating to title and equity.

In drafting the amendment, the Minister should ensure that further consultation with the community housing industry and tenants representatives occurs.

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