

INQUIRY INTO FUTURE DEVELOPMENT OF THE NSW TERTIARY EDUCATION SECTOR

Organisation: NSW Fair Trading

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The Hon Mark Latham MLC
Committee Chair
Legislative Council Portfolio Committee No 3 – Education

By email: PortfolioCommittee3@parliament.nsw.gov.au

Dear Mr Latham

Response to Inquiry into the future development of the NSW tertiary education sector

Thank you for your invitation to provide a submission to the above inquiry. I write to address the issues and proposals canvassed in the evidence of Associate Professor Berg on 8 September 2020, as outlined in the joint submission with Associate Professor Farbenblum.

Regulation of shared accommodation and statutory review of the Boarding Houses Act 2012

The reports referenced by Associate Professors Farbenblum and Berg, alongside feedback from the broader housing sector, have informed the recommendations of the statutory review of the *Boarding Houses Act 2012*, which was tabled in Parliament on 6 August 2020.

The report on the statutory review is attached for reference. Key recommendations include:

- rewriting the Boarding Houses Act as the 'Shared Accommodation Act', with an expanded scope to capture a wider range of shared accommodation arrangements
- strengthening key occupation rights and responsibilities, such as prescribing standard form agreements and minimum notice periods, requiring a property to be 'fit for habitation', and requiring lodgement of security deposits with the Rental Bond Board
- introducing a new dispute resolution and enforcement role for NSW Fair Trading in relation to certain occupancy rights and responsibilities
- providing additional jurisdiction to the NSW Civil and Administrative Tribunal (NCAT) to consider termination disputes and disputes over occupancy fees.
- replacing the existing boarding houses register with regularly published reports on shared accommodation developed from a direct feed of ePlanning data
- establishing a joint State and local government regulatory committee for shared accommodation.

The Government announced on 12 August 2020 that it will be implementing the recommendations from the review.

The new legislation will cover all shared arrangements where someone rents a space as their principal place of residence and shares a kitchen, bathroom or bedroom with others. This is likely to include arrangements where people live in boarding houses as well as some co-living premises, student accommodation and private lodging arrangements.

The Department of Customer Service is now working closely with the Department of Communities and Justice to implement the recommendations. Drafting of the new Act is well underway, with targeted sector consultation planned for late 2020 and early 2021.

'No grounds' evictions under the Residential Tenancies Act 2010

I note the suggestion to remove the ability of landlords to end a tenancy without grounds under the *Residential Tenancies Act 2010* (RT Act). In accordance with recommendation 17 of the statutory review of the RT Act, these provisions remained unchanged.

I note that the RT Act provides tenants with the option of applying to the Tribunal if they consider a termination notice is retaliatory or invalid, or for retaliatory rent increases.

Measures to protect tenants and boarding house residents during COVID-19

Earlier in the year, the NSW Government introduced measures to restrict when landlords can evict tenants due to rental arrears as a result of COVID-19. These measures have been extended until 26 March 2021 and include:

- a restriction on landlords terminating a tenancy or applying to the NSW Civil and Administrative Tribunal for a termination order due to rental arrears for tenants financially impacted by COVID-19 – unless they have first attempted to negotiate with the tenant in good faith and it is fair and reasonable for the termination to occur
- extended 90-day termination notice periods for certain other lease termination reasons
- allowing tenants financially disadvantaged by COVID-19 to terminate their own tenancy agreement where a landlord will not negotiate or where it is necessary to avoid financial hardship
- a restriction on landlords from listing tenants' personal information on tenancy databases for rental arrears that were incurred when the tenant was a COVID-19 impacted tenant
- extended termination notice periods for boarding house proprietors where a resident is in fee arrears.

Reforms to the NSW Civil and Administrative Tribunal (NCAT) process

The recommendations relating to NCAT processes are a matter for the Department of Communities and Justice.

Please do not hesitate to contact Anna Wade, Manager Real Estate and Housing Policy on if you require any further information.

Yours sincerely

Rose Webb
Commissioner
NSW Fair Trading

Date: 19/10/20

Encl. Report on the Statutory Review of the Boarding Houses Act 2012



Boarding Houses Act 2012 – Statutory Review

NSW **Department of Customer Service** and NSW **Department of Communities
and Justice**

August 2020

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Executive Summary

The *Boarding Houses Act 2012* (the Act) was a significant legislative reform that was introduced in response to concerns about the safety and well-being of residents living in boarding houses in NSW. The Act commenced on 1 January 2013 and established a new regulatory framework for certain types of boarding houses to ensure residents were provided with protection of their occupancy rights and basic living standards.

The Act is jointly administered by the Minister for Families, Communities and Disability Services and the Minister for Better Regulation and Innovation. Section 105 requires the Ministers to review the Act to determine whether the policy objectives of the Act remain valid, and the terms of the Act remain appropriate for securing those objectives. Accordingly, the Department of Customer Service (DCS) worked with the Stronger Communities cluster to undertake the review.

A joint Discussion Paper on the statutory review of the Act was published in August 2019 to commence an eight week public consultation period. The Discussion Paper received 63 submissions from all stakeholder groups and the general public. DCS undertook face-to-face consultation with a number of internal and external stakeholders. The Department of Communities and Justice (DCJ) commissioned forums with residents of assisted boarding houses. The feedback received through the forums, and the submissions made a valuable contribution to the review and have been carefully considered. This report presents the joint findings of the review.

The review has found that shared accommodation, including boarding houses, plays an integral role in the supply of affordable housing in NSW. Boarding houses have traditionally been a source of low cost accommodation, and housing affordability pressures have meant that increasing numbers of people across the demographic spectrum are making boarding houses their permanent home.

Housing affordability was a key theme of submissions with many noting that new forms of boarding houses are generally not affordable to low income earners and those with additional needs. It is outside the scope of this review to address housing affordability more broadly, with the NSW Housing Strategy looking at this issue more holistically across NSW. However, the review found that there is scope for the Act to respond to the changing housing landscape by recognising the unique nature of shared accommodation and ensuring that there are appropriate rights and responsibilities in place for residents and proprietors of shared accommodation.

Given the increasing importance of shared accommodation in the affordable housing mix the review proposes 21 recommendations to ensure the viability of the sector. These include:

- renaming and broadening the scope of the Act to capture a wider range of shared accommodation
- strengthening the rights of residents of shared accommodation
- introducing new provisions to address fire safety and overcrowding
- undertaking further work to explore how share housing for people with additional needs should be regulated in the context of NDIS.

Recommendations

The focus and scope of the Act

- Recommendation 1:** The name of the Act should be changed to the 'Shared Accommodation Act' and the objectives be amended to reflect the broader reforms proposed in this report.
- Recommendation 2:** The scope of the Act should be revised to:
- a) Apply the occupancy provisions to arrangements where a person is granted, for a fee, a non-exclusive right to occupy premises as their principal place of residence, and where they share a kitchen or a bedroom or bathroom space with one or more unrelated persons, being either the grantor of the right, or residents occupying under a separate grant; and
 - b) Exclude certain shared accommodation premises and arrangements that covered by other statutory frameworks (e.g. retirement villages, aged care facilities) or which are not suitable for this form of regulation (e.g. arrangements for holiday purposes or short term rentals)
 - c) Exclude arrangements where a person has exclusive use of self-contained accommodation. These arrangements will instead be captured by the *Residential Tenancies Act 2010*
 - d) provide that a wider range of shared accommodation such as backpacker hostels will be subject to new fire safety and overcrowding provisions.
- Specific further consideration and consultation should also be undertaken to refine the extent to which the new Act captures residents in informal share-housing arrangements.

The register

- Recommendation 3:** The initial council compliance inspection of shared accommodation is to occur within 12 months of the final occupation certificate being issued by the relevant council or accredited certifier.
- Recommendation 4:** Councils should be provided with a power under the Act to issue penalty infringement notices in relation to breaches identified as part of the initial inspection. DCS will work with the Office of Local Government to determine whether these powers and the obligation to conduct an initial compliance inspection should sit in the new Shared Accommodation Act or another Act.
- Recommendation 5:** Replace the register and registration obligation with more modern and efficient data collection and publication processes. This would involve the use of a direct feed of data from the ePlanning system to publish regular updates on approvals for certain categories of shared accommodation, including the status of their council compliance inspections.
- At the same time, an obligation on proprietors will be introduced that requires them to notify DCS that their premises have closed.

Recommendation 6: Establish a joint state and local government regulatory committee for shared accommodation covered by the Act. This committee should establish an MOU to clarify the different regulatory roles under the Act and would be designed to enable regular and structured data sharing, consideration of emergent regulatory themes and publication of key data, including around major compliance and enforcement activity.

Occupancy rights and principles

Recommendation 7: The existing power to prescribe a standard agreement should be used to establish a mandatory standard agreement in plain English that outlines rights and responsibilities under the Act. An additional power should also be provided under the Act to prohibit the inclusion of specific terms in agreements, or certain types of agreements.

Recommendation 8: Occupancy Principle 1 should be expanded to include a requirement that shared housing premises covered by the Act are 'fit for habitation'. Minimum standards that clarify what fit for habitation means in a shared accommodation context should be developed in consultation with the sector as well as a transition pathway to meet these standards for different types of shared accommodation.

Recommendation 9 : Establish under the Act a definition of what constitutes minimum 'reasonable notice' in the context of different grounds for termination, including where no reason is provided by either the resident or the proprietor.

Recommendation 10: Where security deposits are required, they must be lodged with the Rental Bond Board to ensure greater oversight and accountability.

Recommendation 11: Occupancy fee increases should be limited to once per year for each resident unless there is a substantial change in the nature of the occupancy agreement.

Recommendation 12: Proprietors of shared accommodation should be required to offer residents the option of paying occupancy fees via electronic means, such as direct debit or through Centre Pay.

Recommendation 13: A new occupancy principle should be established to provide that:

- a resident is entitled to have access to support and other services provided to them in their room
- such provision cannot interfere with other residents' reasonable peace, comfort and privacy, or cause unjustifiable hardship to the proprietor.
- a proprietor will use their best endeavours to facilitate access to services, and must not charge a fee or otherwise cause detriment to the occupant for accessing a service.

Recommendation 14: A new occupancy principle should be introduced to reflect the need for residents to respect the quiet enjoyment of premises by other residents.

Compliance and enforcement of occupancy rights and principles

- Recommendation 15:** Fair Trading should take on a greater role in assisting residents and proprietors of shared accommodation to resolve disputes.
- Recommendation 16:** Additional compliance and enforcement powers should be provided to Fair Trading in relation to certain occupancy provisions of a new Shared Accommodation Act. This would include the ability to issue Penalty Infringement Notices and additional powers of entry and investigation.
- Recommendation 17:** NCAT should continue to be able to consider disputes regarding occupancy principles and occupancy agreements under a new Act. It should also be provided with additional jurisdiction to consider termination disputes more broadly, such as whether a termination could be considered retaliatory, as well as disputes over occupancy fee increases.

Overcrowding and fire safety in shared accommodation

- Recommendation 18:** Explicit fire safety and overcrowding standards, consistent with existing local government and planning requirements, should be placed in the Act and apply to all shared accommodation, covered by the Act, including some accommodation that is exempt from other aspects of the Act, such as backpacker accommodation.
- Recommendation 19:** That the new Shared Accommodation Act provide Fire and Rescue NSW with new compliance and enforcement powers, including enhanced entry powers, ability to issue notices and impose injunctions to stop operation where there is a serious risk to health and safety.

Review of Act

- Recommendation 20:** That a statutory review of the new Act be required within 5 years of commencement.

Assisted Boarding Houses

- Recommendation 21:** That Assisted Boarding Houses are reflective of the principles of the United Nations Charter for People with Disability and consistent with the principles of the NDIS and contemporary policy and practice.
- Consultation with stakeholders directly involved with the assisted boarding house sector is undertaken on the implementation of mechanisms that will ensure the delivery of accommodation and individualised supports to residents with additional needs that meet contemporary disability standards.

Section 1 – Introduction

1.2 The Boarding Houses Act 2012

The *Boarding Houses Act 2012* was introduced in response to concerns about the safety, welfare and wellbeing of people living in boarding houses. The Act is jointly administered by the Minister for Better Regulation and Innovation and the Minister for Families, Communities and Disability Services

The provisions of the Act relating to registration of boarding houses commenced on 1 January 2013. The parts of the Act relating to the occupancy principles and assisted boarding houses commenced on 1 July 2013.

Prior to the introduction of the Act, there was no legislation in NSW that set out the rights and responsibilities of boarders and lodgers. A key purpose of the *Boarding Houses Act 2012* was to protect the rights of residents living in boarding houses and to promote the sustainability of the boarding house industry in New South Wales¹. The Act provides for the regulation of certain boarding houses and the licensing and regulation of assisted boarding houses.

Boarding houses can be an important source of rental accommodation, particularly for people looking for low-cost, alternate accommodation. Boarding house residents typically pay a fee to occupy a room under an occupancy agreement and share facilities such as kitchens, bathrooms and living areas with other residents who have separate occupancy agreements with the owner/proprietor.

1.3 Scope of the Act

The Act provides for:

- a central register of ‘registrable’ boarding houses
- occupancy principles and mechanisms for the enforcement of those principles, and
- the licensing and regulation of assisted boarding houses and their staff (including providing for service and accommodation standards at such boarding houses).

The Act requires operators of two types of boarding houses to register their boarding house with NSW Fair Trading. The two types of ‘registrable’ boarding are:

1. “General” boarding houses - boarding premises accommodating five or more unrelated residents, and
2. “Assisted” boarding houses - boarding premises accommodating two or more residents who have “additional needs”.

Under section 36 of the Act a person is a ‘person with additional needs’ if:

- 1) the person has one or more of the following conditions: an age related frailty, a mental illness within the meaning of the *Mental Health Act 2007*, a disability (whether or not of a chronic episodic nature) attributable to an intellectual, psychiatric, sensory, physical or like impairment
- 2) the condition is permanent or likely to be permanent, and
- 3) the condition results in the need for care or support services involving assistance with, or supervision of, daily tasks and personal care.

¹ Pearce MP, G., Boarding Houses Bill 2012 ‘Second Reading’ speech, Legislative Council, NSW parliament, 23 October 2012

Assisted boarding houses must be specifically registered 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. The stronger regulation of assisted boarding houses compared to general boarding houses reflects the higher risk of harm for this cohort.

Certain types of accommodation are excluded from the scope of the Act, including those covered by other statutory arrangements, tourist accommodation, specialist disability accommodation and premises used for refuge or crisis accommodation.

1.4 Relationship with other legislation and policies

Planning approvals

Most modern boarding houses generally seek planning approval under the State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARHSEPP), which was introduced on 31 July 2009 under the *Environmental Planning and Assessment Act 1979* (EPAA). It aims to facilitate the increased supply and diversity of affordable rental and social housing throughout NSW².

The ARHSEPP establishes a number of requirements for boarding houses, including those related to private and communal space, room size, kitchen and bathroom facilities and the number of people permitted per room. The ARHSEPP has particularly led to the development of new generation boarding houses, which are frequently quite different from more traditional boarding houses, often with self-contained rooms and less shared amenities. Although it could be argued that some of these properties may not meet the definition of a 'registrable' boarding house under the Act, they are approved as a boarding house under planning law, and so generally register as boarding houses.

Health, safety and compliance

Under the Act councils are required to undertake an initial compliance inspection within 12 months of a boarding house registration. This inspection is to check for compliance with planning, building and fire safety requirements, as well as shared accommodation standards under the EPAA, *Local Government Act 1993* (LG Act), the *Public Health Act 2010* (PH Act) and all associated regulations.

Council officers also have the power to fine boarding house operators if they are unregistered and order them to meet building, safety and accommodation standards.

Councils develop their own policies and programs for boarding house inspections based on the above requirements.

Boarding houses are also subject to other requirements such as swimming pool laws and registration on the Loose-fill Asbestos Insulation Register if they contain loose fill asbestos.

Land tax exemptions

Revenue NSW administers a land tax exemption for low-cost boarding houses. An exemption from land tax or a reduction in the taxable land value of the land is available if the land is primarily used to provide boarding house accommodation in accordance with

² Supporting new generation boarding houses, Planning and Environment, fact sheet, June 2018
<https://www.planning.nsw.gov.au/~media/>

guidelines approved by the Treasurer.³ Conditions that entitle the owner to claim an exemption or a reduction in the taxable land value include:

- the premises are a registered boarding house
- none of the residents have a residential tenancy agreement under the *Residential Tenancies Act 2010*
- At least 80 per cent of the accommodation is provided to long term residents (i.e. occupied continuously for at least three months) at or below certain tariff thresholds published each year by Revenue NSW. These maximum tariffs are shown below.

Maximum tariffs for land tax eligibility – boarding house, 2020 tax year

Year	Single accommodation		Family or shared accommodation	
	<i>Full board & lodging</i>	<i>Less than full board & lodging</i>	<i>Full board & lodging</i>	<i>Less than full board & lodging</i>
2019	\$389 per week	\$261 per week	\$643 per week	\$432 per week
2020	\$397 per week	\$267 per week	\$656 per week	\$441 per week

³ NSW Revenue, Ruling LT 106, Exemption: land used and occupied primarily for a boarding house – 2020 tax year, available at <https://www.revenue.nsw.gov.au/help-centre/resources-library/lt06>

Section 2 – Boarding Houses and shared accommodation in NSW

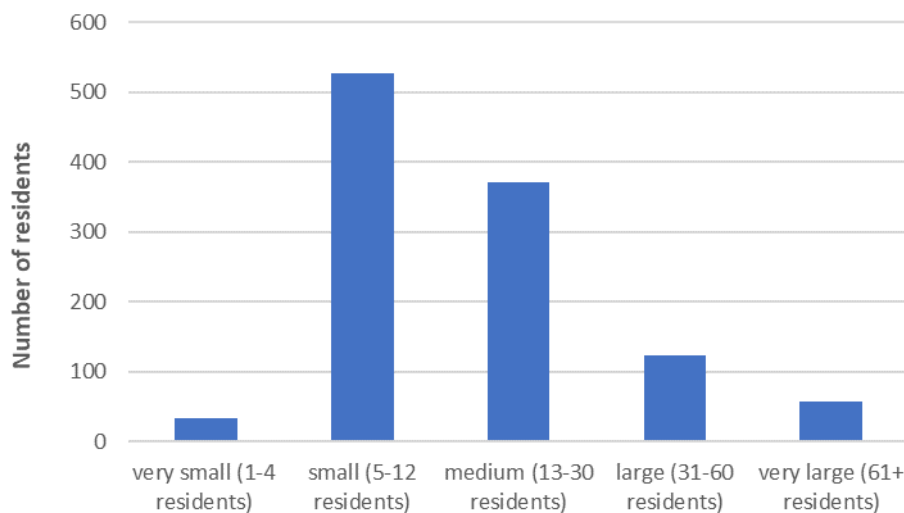
2.1 Registered boarding houses under the Act

There were 1,109 properties listed on the boarding houses register on 10 January 2020, with 17 assisted boarding houses, and the rest general boarding houses.

Since the registration provisions of the Act commenced in 2013, there has been a steady yearly increase in the total number of general boarding houses on the register, by around 80 to 90 per year.

The majority of registered boarding houses cater for between 5-12 residents.

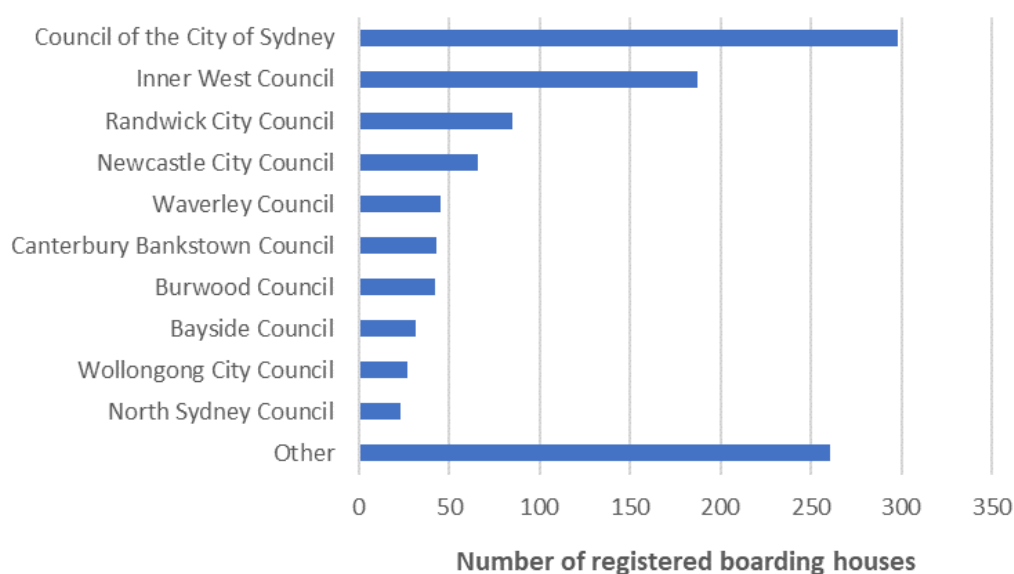
Number of registered boarding houses by size, January 2020



Source: Boarding Houses register, January 2020

The majority of registered boarding houses are in the local government areas of City of Sydney, Inner West, Randwick, Newcastle City and Waverley.

Number of registered boarding houses in top 10 local government areas, January 2020



Source: Boarding Houses register, January 2020

Some stakeholders note there is a substantial segment of the boarding house sector that chooses to operate illegally (unregistered and/or without planning approvals). While the exact size of the illegal sector is unknown, some estimates have put it at 25%⁴ or even 100% of the number of registered boarding houses.

2.2 The changing nature of 'boarding houses' and shared accommodation

'New generation' boarding houses

A key factor in the rise of boarding house numbers is the development of 'new generation' boarding houses (NGBH) or 'micro-apartments'. This type of accommodation is approved under the ARHSEPP, with the intention of increasing the supply of low-cost rental accommodation.

NGBHs often provide 'studios' - rooms that are self-contained with a kitchenette and bathroom, with some shared common spaces outside the studio. New generation boarding houses are usually more expensive than traditional boarding houses, and occupancy fees often include utility expenses. Some proprietors of these boarding houses provide residential tenancy agreements, so residents are covered by the rights provided under the *Residential Tenancies Act 2010*. Purpose-built student accommodation (PBSA) usually offers studio accommodation along the same lines as new generation boarding houses.

Co-living spaces are another new form of shared accommodation, offering furnished accommodation with different types of sharing arrangements. Online marketing for this type of accommodation suggests that residents pay membership fees which include all utilities and internet, and may also include cleaning and maintenance, and services such as bed linen or kitchenware. Some premises may have a manager who organises group events and assists with residents' needs.

⁴NSW Registrar of Community Housing, Regulation of Boarding Houses in NSW, Final discussion paper, From the viewpoint of the NSW Registrar of Community Housing, October 2019, pg 3

A small number of new generation boarding houses are currently managed by registered Community Housing Providers and subject to the NSW Registrar of Community Housing's oversight. This is because they 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'.⁵ However, the majority of new generation boarding houses are in the private rental market.

Private informal share-housing

Share housing arrangements in private accommodation have traditionally been a preferred arrangement for students and young people under 30.⁶ However, a shortage of affordable rental properties, particularly in capital cities, has led to an increase in shared housing arrangements within NSW. Data suggests that professionals, couples, young families and students who cannot afford to buy or rent an entire property of their own are increasingly turning to shared housing as an affordable alternative.

A 2019 national survey⁷ found that 73% of respondents who live in a share house do so because they could not afford to live by themselves. Macquarie University research undertaken in 2017 indicates that international students, holidaymakers (those staying longer than typically housed via services such as Airbnb) and young professionals are most likely to live in share houses.⁸

Residents in share or group households can be covered by the Residential Tenancies Act if they are named in a written residential tenancy agreement, either with the owner of the premises or the head-tenant (sub-tenancy). However, share house residents who are not named in a tenancy agreement are not usually covered by the Boarding Houses Act (as there are usually fewer than 5 residents in the house) nor any other statutory scheme that provides for occupancy rights.

⁵ *Community Housing Providers (Adoption of National Law) Act 2012 (NSW)*, Appendix s.(1)

⁶ Nicole Gurrán, Dr Madeleine Pill, Dr Sophia Maalsen, Dr Tooran Alizadeh and Dr Pranita Shrestha (April 2019) - Informal accommodation and vulnerable households <https://sydney.edu.au/content/dam/corporate/documents/news-opinions/informal-housing-spl-report.pdf>

⁷ National survey undertaken by Flatmates.com in 2019 surveyed 10,462 people

⁸ Nasreen, Z., and Ruming, K. (2019) Tracking the rise of room sharing and overcrowding, and what it means for housing in Australia. <https://theconversation.com/tracking-the-rise-of-room-sharing-and-overcrowding-and-what-it-means-for-housing-in-australia-107265>

Section 3 – The Statutory Review

3.1 Requirement for Review

Section 105 of the Act requires the responsible Minister to conduct a review to determine whether the policy objectives of the Act remain valid and whether its terms remain appropriate for securing those objectives.

The review is to be undertaken as soon as possible after five years from the date of assent to this Act, with a report on the outcome of the review to be tabled in each House of Parliament within 12 months after that. As the Act was assented to on 29 October 2012, this report was to be tabled in Parliament on 29 October 2018. However, the statutory review was postponed until 2019 due to a range of competing government priorities.

3.2 Consultation

A Discussion Paper on the statutory review of the Act was published in August 2019. The paper explored key topics including registration of boarding houses, initial compliance investigations and ongoing enforcement, occupancy agreements and principles, assisted boarding houses, and the Boarding Houses Regulation 2013.

All stakeholder groups, the general public, as well as boarding house residents and boarding house operators were invited to provide feedback on a range of matters identified in the paper and any other general matters relevant to improving the current regulatory framework under the Act.

Public submissions closed on 8 October 2019, with NSW Fair Trading receiving a total of 63 submissions. Fair Trading reviewed all submissions and considered each of the suggestions made.

Assisted boarding house proprietors were the largest group of respondents, providing around 29% of submissions. Groups or individuals advocating on behalf of general boarding houses residents made up around 13% of submissions. Groups advocating for assisted boarding house residents made up 7% of submissions. Individual proprietors and property owners organisations made up 4% of submissions.

Face-to-face consultation

In addition to receiving written submissions, DCJ and Fair Trading also undertook face-to-face consultation with a number of stakeholder groups including tenant advocates, proprietor representatives, student accommodation providers, research institutions, government and council stakeholders.

In addition to stakeholder submissions, the review has also taken into account research reports including:

- Evaluations of the Act undertaken by the Newtown Neighbourhood Centre (NNC)⁹ (with the Australian Catholic University and Western Sydney University)
- A report for Shelter NSW by UNSW City Futures Research Fund¹⁰ into NSW boarding houses and the growth, change and implications for equitable density housing

⁹ Drake, G. (February 2019) Evaluation of The Boarding Houses Act 2012 – Final Report
<https://www.newtowncentre.org/uploads/5/1/5/0/51502997/evaluation-of-the-boarding-houses-act-2012-report-4-and-final-report-2018.pdf>

¹⁰ Martin, C. (July 2019) Boarding houses in New South Wales: growth, change and implications for equitable density.
http://www.shelternsw.org.au/uploads/1/2/1/3/121320015/cfrjuly2019_boarding_houses_in_nsw_shelterbrief64.pdf

- Research into the issue of student share accommodation undertaken by the UNSW Human Rights Clinic (UNSW HRC) ¹¹
- A report by the Tenants' Union of NSW (TU)¹² assessing the operation of the Act.

¹¹ UNSW Human Rights Clinic. (July 2019) Addressing Exploitation of International Students in Sydney's Housing Market.
<https://www.law.unsw.edu.au/sites/default/files/imce/files/No-Place-Like-Home-UNSW-Human-Rights-Clinic-report.pdf>

¹² Tenants Union. (March 2018) Five years of the Boarding Houses Act 2012 in NSW.
<https://files.tenants.org.au/policy/2018-BHAct-5YearReport-FINAL-LPR.pdf>

Section 4 – Findings of the review – general boarding houses

4.1 The focus and scope of the Act

The focus of the Act, when it was introduced, was largely ‘traditional’ boarding houses, as is reflected in the current name. However, as noted in the earlier parts of this report, shared accommodation and indeed the concept of ‘boarding houses’ has changed. Some of the newer premises approved under current planning laws as ‘boarding houses’ bear little resemblance to the traditional image of a ‘boarding house’.

The review found that many stakeholders support the fundamental intent of the Act which is to protect the rights of those living in boarding houses. However, a wide range of submissions argued for both changing the name and widening the scope of the Act – to reflect the evolving nature of shared accommodation, to provide greater clarity, and to enable the inclusion of a broader range of shared accommodation residents. The following sections respond to this feedback and propose a reframing of the Act to change both its name and its coverage.

The name and objectives of the Act

The name of the Act and the current objectives are centred on the concept of a ‘registrable boarding house’. They reflect key aspects of the current regulatory regime – the register, the occupancy principles and the licensing of assisted boarding houses – as well as the aim of promoting and protecting the wellbeing of residents.

The application of the Act is limited to two distinct types of ‘registrable’ boarding house premises – those that accommodate five or more residents (general) and those that accommodate two or more residents with additional needs (assisted). Boarding houses with less than 5 residents are non-registrable and are not covered by the Act. The rationale for limiting coverage to more than five residents was to ensure that small operations and private arrangements would not be required to register with Fair Trading.

The need to reform the title of the Act was raised in a number of submissions. In part, this related to a desire for the Act to reflect the changing nature of boarding houses. For example, some proprietors highlighted the negative perception that the community often has of ‘boarding houses’ and argued that using this reference in the name of the legislation was outdated. A changed name was also seen as a way of more clearly identifying its application to all types of modern shared accommodation. A number of submissions expressed concern that ‘New Generation’ boarding houses (NGBH), approved under the ARHSEPP, were creating confusion in the sector around what is a boarding house. Both tenant advocates and representatives of ‘traditional’ boarding houses noted that new built forms of boarding houses often operated more like residential flats because they did not require residents to share communal facilities and typically provided tenancy agreements. This was creating confusion as to who the Act was meant to cover and what rights different residents have.

A change in title was also linked to the need for broader application. For example, some consultation feedback raised concerns that residents of ‘non-registrable’ forms of shared accommodation were left without specific statutory protections. To address this regulatory gap both tenant advocates (such as Shelter, TU, HRC UNSW) and the Property Owners Association recommended the coverage of the Act be expanded to all forms of shared accommodation, thereby providing all occupants with a basic set of rights and protections.

In addition to broadening the scope, some stakeholders (such as TU, HRC UNSW, NNC, Shelter NSW) questioned what they saw as the provision of a lower standard of 'occupancy' rights to residents of shared accommodation and instead argued for all renters to be covered under the *Residential Tenancies Act 2010*. Such an approach is not supported by others, including the Property Owners Association, who argued that both residents and proprietors in a shared accommodation environment require the flexibility that occupancy agreements and the Act provide.

The review examined the above views against the original intent of the Act. Shared accommodation, of which boarding houses are a key example, is an important and growing part of the housing spectrum. However, it is not the same as private rental accommodation where there is exclusive use and mastery of the premises. In shared accommodation:

- residents often do not get to choose with whom they share certain spaces of their homes,
- residents often have little control over many aspects of the premises, particularly shared facilities
- resident population can be diverse, with some housing highly vulnerable residents
- more flexible accommodation arrangements are often required, but the premises are still the resident's home.

These characteristics suggest that there is a need for different regulation, while also ensuring that the rights of those living in different types of shared accommodation are protected. The review proposes that occupancy rights be extended to a wider range of residents of shared accommodation (as discussed in the following section), and that the name of the Act be changed to the 'Shared Accommodation Act' to reflect this expanded coverage. To give effect to this change DCS proposes to reframe the Act so that it applies to share accommodation 'arrangements' rather than types of premises.

Recommendation 1

The name of the Act should be renamed to 'Shared Accommodation Act' and the objectives be amended to reflect the broader reforms proposed in this report.

The coverage of a new 'Shared Accommodation Act'

Occupancy provisions

Currently, occupancy principles only apply to registrable boarding houses with 5 or more residents. However, as noted above, the review is proposing that the application of the Act be expanded to cover all residents who rent in shared accommodation. The main basis for this coverage will be the arrangement between the resident and the proprietor, as opposed to the category of premises in which they live, such as a 'boarding house'.

A number of submissions made suggestions regarding the characteristics that should govern the application of a new, broadened Act. These included the sharing of key amenities, the payment of fees, the lack of exclusive use and/or mastery of a property as a whole.

Drawing on this feedback, the review considers that the key features defining a shared accommodation arrangement covered by the Act would include:

- a person living with 1 or more unrelated people in a property and paying a fee to an owner/proprietor/manager for the right to live there
- the premises are the person's principal place of residence
- while the person may have some exclusive-use space, such as a bedroom, they do not have exclusive use of the whole premises, or of a self-contained portion of a premises

- the person shares key amenities such as a kitchen or a bedroom or bathroom space with the owner/proprietor/manager, or other unrelated residents and the resident does not choose who they share these amenities with.

Shifting the coverage of the Act to arrangements that meet the above definition would remove the requirement for at least 5 residents and broaden who is captured by the Act.

The Act would continue to capture existing boarding houses and some student accommodation but other arrangements would also become newly captured. In particular, lodging in private homes and informal share housing arrangements could fall within the coverage of the Act. While this is likely to be appropriate in most circumstances as a means of providing protection for residents, such a change would also have implications for residents, head tenants, and landlords. DCS proposes to undertake further consultation on these implications as part of drafting the amended legislation to make sure the broadened coverage works effectively.

It is also noted that other types of rental arrangements, such as retirement villages and aged care homes, and some short term rental accommodation arrangements, could also fall within the above share accommodation definition. It is proposed that these should be excluded given they already have their own statutory frameworks. Equally, given that the Act aims to provide certainty over occupancy rights where premises are a person's principal place of residence, it is not proposed that the Act will generally capture arrangements that are for a holiday purpose, such as tourist accommodation or backpackers.

Nor is it intended that the Act will apply if the proprietor has chosen to enter into a written residential tenancy agreement under the *Residential Tenancies Act 2010*, or where a resident has exclusive use of a self-contained space and does not share key amenities – in this case the *Residential Tenancies Act 2010* must also apply.

Council inspections and fire safety and overcrowding provisions

The review proposes that certain fire safety and overcrowding obligations should apply to a broader range of share accommodation than the occupancy provisions. This is discussed further in section 4.5. Such differential of application reflects feedback to the review, with stakeholders such as the City Futures Research Centre, noting the importance of structuring Act application according to the characteristics and risks presented by particular forms of shared accommodation.

Further, the review proposes that the requirement that councils conduct an initial compliance inspection should continue to apply to premises that require planning approval as a boarding house, even if the tenants occupy under residential tenancy agreements. This is because the physical characteristics of the building are such that compliance with planning and fire safety and other shared accommodation laws should be monitored.

Recommendation 2

The scope of the Act should be revised to:

- Apply the occupancy provisions to arrangements where a person is granted, for a fee, a non-exclusive right to occupy premises as their principal place of residence, and where they share a kitchen or a bedroom or bathroom space with one or more unrelated persons, being either the grantor of the right, or residents occupying under a separate grant; and
- Exclude certain shared accommodation premises and arrangements that covered by other statutory frameworks (e.g. retirement villages, aged care facilities) or which are not suitable for this form of regulation (e.g. arrangements for holiday purposes or short term rentals)

- c) Exclude arrangements where a person has exclusive use of self-contained accommodation. These arrangements will instead be captured by the *Residential Tenancies Act 2010*
- d) provide that a wider range of shared accommodation such as backpacker hostels will be subject to new fire safety and overcrowding provisions.

Specific further consideration and consultation should also be undertaken to refine the extent to which the new Act captures residents in informal share-housing arrangements.

4.2 The register

The Act currently requires certain types of boarding premises to register with the Commissioner of Fair Trading:

- Boarding premises that provide, for fee or reward, beds for 5 or more unrelated residents (general boarding house); and
- Assisted boarding house that are required to be authorised under Part 4 of the Act.

This register is kept by DCS and certain information is published online:

- a) Name and address of the boarding house;
- b) Local council area in which the boarding is located;
- c) Whether the boarding house is a general or assisted boarding house; and
- d) Name of the boarding house proprietor.

The original intention of the register was to assist in assessing risk and monitoring trends in the boarding houses sector. The register acts as a trigger under the Act for local councils to undertake an initial compliance check. Registration is also a criterion used by Revenue NSW when assessing eligibility for land tax exemptions related to affordable housing.

However, the register is reliant on voluntary registration by proprietors and manual inputs from councils. This has meant information can be incomplete and out of date.

Input from stakeholders as part of the review has raised a number of concerns with the current registration system, including that:

- The register is ineffective and often out of date
- Many properties do not register and non-registration is not sufficiently enforced
- It is a poor trigger for council inspections
- It should become a licensing/accreditation regime that applies to all proprietors
- More data should be collected
- Data sharing is not working effectively between DCS and councils.

In light of this feedback and other previously raised concerns, the review has reconsidered the intent and use of the register.

The following section outlines a package of reforms that seek to remain responsive to the original intentions of the register's introduction while proposing changes that should deliver more modern, efficient and risk-based regulatory approaches. They are grounded in the substantial improvements that have occurred in the planning system, particularly through the introduction of e-planning, as well as in the digital and data capabilities across the Government, since the Act was introduced.

Initial compliance inspection trigger for councils

One of the key functions of the register under the Act is to trigger local councils to undertake an 'initial compliance inspection' of registered boarding premises within 12 months of a premises being registered with DCS. Feedback on these arrangements as part of the review highlighted a number of concerns as well as practical issues in relation to how these provisions have been operating. These included that:

- Premises may be registered but may not be ready for operation, or for council inspections, as there is no requirement for registration to be linked to council approval or the issue of an occupation certificate
- There is confusion about the need to register in some instances, with some properties obtaining council approval but then not registering on the basis that they did not think they needed to; meaning no inspection is triggered. This has particularly been raised in the context of the 'new generation' boarding houses
- There is not automatic data sharing between DCS and councils on new registrations

- There is no feedback loop on the outcomes of inspections to the register.

That said, the initial inspection has provided an important mechanism for councils to check that boarding premises are meeting building, safety and shared accommodation standards specified in both planning and local government legislation. The review considers such an inspection should be retained but improved, given the current concerns.

Specifically, the review is proposing that the trigger for the initial compliance inspection be changed to the issuing of an occupation certificate by the relevant council. This change addresses concerns about councils wasting resources by being required to inspect properties which may not yet be ready to operate. It would also create a more efficient trigger that comes directly from council's own processes rather than relying on a manual notification from Fair Trading or councils self-checking the register. In linking inspection to approvals rather than registration, it also removes the risk that entities are not the subject of inspections simply because they did not realise they needed to register.

A key factor which will make this change efficient and feasible is the mandatory roll-out of ePlanning; a program which has been developed by the Department of Planning, Industry and the Environment (DPIE) to streamline and digitise the planning process across NSW. The use of ePlanning by councils to process planning approvals has been made mandatory for all councils in Greater Sydney, the Illawarra and Central Coast from 1 July 2020 and for most remaining NSW councils from 1 July 2021. In making ePlanning mandatory, it delivers a new centralised source of data on approvals and therefore a uniform mechanism for triggering an inspection.

Under this approach, it will mean that only those shared accommodations which require an occupation certificate to be issued will be subject to an initial compliance inspection. The identification of which shared accommodation would meet this requirement would be based on Standard Instrument planning definitions. In practice, this would mean that premises approved as 'Boarding Houses', as defined in the existing planning instruments, and which have key shared amenities, would likely be the main focus of initial inspections, noting that this category of premises under current planning laws also includes student accommodation and co-living properties alongside more traditional boarding house developments. As discussed in the previous section, the nature of the occupancy agreement (that is, whether it is offered under the new Act or the *Residential Tenancies Act 2010*), would not alter the need for an initial inspection.

Those shared accommodation arrangements that do not require council approval, such as informal share housing and hosted short term rental accommodation, would not be the subject of these inspections, just as they would not have been under the existing laws. This is considered appropriate given it allows councils to focus their inspections on those properties of which they already have oversight and which are considered likely to pose the greatest risk. DCS will work with DPIE during the implementation of the review to ensure the transition to an ePlanning compliance certificate trigger works effectively.

Councils and Local Government NSW (LGNSW) also noted that managing breaches identified during an initial inspection can be difficult, especially in the context of not wanting to shut down access to affordable accommodation. LGNSW has suggested that one option which would assist would be the introduction of an ability for councils to issue penalty infringement notices as one of their compliance tools, rather than having to go to court. Given this would reduce costs and administrative burden, the review recommends councils should be provided with the power to issue penalty notices for breaches identified during an initial compliance inspection.

Recommendation 3

The initial council compliance inspection of shared accommodation is to occur within 12 months of the final occupation certificate being issued by the relevant council or accredited certifier.

Recommendation 4

Councils should be provided with a power to issue penalty infringement notices in relation to breaches identified as part of the initial inspection. DCS will work with the Office of Local Government to determine whether these powers and the obligation to conduct an initial compliance inspection should sit in the new Shared Accommodation Act or another Act.

The register and published shared accommodation data

Alongside triggering council inspections, another main driver for the register related to the collection, publication and analysis of data about the boarding houses sector. As noted at the start of this section, certain boarding premises are required to register with DCS and information from the register is then made public. However, the implementation of this requirement has been the subject of a range of concerns.

In responding to this review, stakeholders have made suggestions for reform that include: requiring substantially more data from registrants, linking the need to register to the issue of an occupation certificate and transforming the registration system into a full licensing or accreditation system for providers of boarding house type accommodation.

The review has considered all proposals in detail. While it is understood that a general licensing regime would be the preferred outcome for some stakeholders, such as the Tenants Union and the Newtown Neighbourhood Centre, the cost involved in putting in place such a system and the burden it would place on all providers, is not considered proportionate to the risk at present. Moreover, other reforms are recommended in order to improve how the Government, both local and state, can respond and enforce requirements against operators posing the greatest risk to residents.

The register is largely a self-reporting data collection tool and the review considers there are questions around whether this approach is the best way of delivering sector data. Recommendation 3 above already introduces a reduced need for the register and the same ePlanning system changes also present reform opportunities in the context of the register - to reduce red tape as well as provide rich new data streams that the Government could analyse and publish.

On the basis of the above considerations, the review proposes that the current register and registration obligations be replaced with a new reporting system that regularly publishes approvals and the issue of occupation certificates related to shared accommodation. This data would be based on a direct feed from the ePlanning system. It is likely that these reports would initially focus on approvals of specific categories of shared accommodation premises under existing planning instruments, such as boarding houses. In the future, such reports could also include the status of their council compliance inspections and other information. Historical data from the current register would also be retained and published, with a new obligation introduced for existing properties to inform DCS if they choose to no longer operate as shared accommodation.

This recommendation is premised on it occurring in conjunction with the recommendations discussed in the following sections of the report, which provide greater powers to DCS to investigate breaches of occupancy obligations, as well new powers for FRNSW in relation to overcrowding and fire safety. This approach is designed to ensure that the co-regulators

of this industry have greater ability to focus their resources on the biggest problems and on the issues posing the greatest risks to residents.

The proposed approach ensures published data remains available, while also streamlining and digitising previously manual data inputs. Using ePlanning data will ensure that public reports match the information councils are holding, and against which they are doing compliance inspections. It should also reduce red tape for providers by providing a one-stop shop for planning approvals and automated reporting on their existence, eliminating the requirement to register with Fair Trading.

The review considers it appropriate that the properties on the register going forward will be those that require planning permission to operate. It is these properties that are larger shared accommodation premises and which have the largest impact on the community, and the largest risk to residents if not operated properly, which is why planning approval is required.

As noted in the previous section, DCS would work closely with DPIE during the implementation of the review to ensure the development of appropriate ePlanning-based public reports. ePlanning data streams are already provided directly to DCS for other purposes and it is expected that this could build on existing systems and processes.

Recommendation 5

Replace the register and registration obligation with more modern and efficient data collection and publication processes. This would involve the use of a direct feed of data from the ePlanning system to publish regular updates on approvals under existing planning instruments for certain categories of shared accommodation.

At the same time, an obligation on proprietors will be introduced that requires them to notify DCS that their premises have closed.

Risk monitoring and regulator collaboration

As noted at the start of this section, another original intention of the register was to improve risk monitoring in the boarding houses sector. In replacing the register with the new reporting approach, a more reliable data stream will be established, and at the same time, the review is proposing new oversight powers to ensure the greater protection of shared accommodation residents. The later sections of this report provide recommendations for this new regulatory oversight, including new compliance and enforcement powers for DCS and FRNSW.

The recommendations in these sections mean that there will be a number of different government bodies overseeing the shared accommodation space. These different roles will work most effectively with clear data sharing and coordination.

On this basis, the review recommends that there is a structured, internal to government, communication and data sharing process put in place via a cross-regulator working party. To ensure clarity of roles, it is recommended that the committee establish an internal MOU to clarify regulatory roles and functions of each regulatory group (councils, DCS and FRNSW) in relation to shared accommodation. Additionally, while the final form of data sharing will need to be determined, there is potential for digital tools to be used to create an internal government data system that enables a 'single-view' of premises by all regulators.

Given the stakeholder interest in accessing more data on the sector, this sharing process should also enable the publication of high-level compliance and enforcement actions where there were major incidents or significant issues of public concern.

Recommendation 6

Establish a joint state and local government regulatory committee for shared accommodation. This committee should establish an MOU to clarify the different regulatory roles under the Act and would be designed to enable regular and structured data sharing, consideration of emergent regulatory themes and publication of key data, including around major compliance and enforcement activity.

4.3 Occupancy rights and responsibilities

When it was enacted, the Act established an important number of new occupancy rights and responsibilities for residents in boarding houses. The review process has highlighted that there are different views regarding how these rights and responsibilities should be reformed.

Some respondents, particularly tenant advocates (NNC, TU, Shelter NSW, HRC UNSW, RCH) argued that the rights and protections for occupants of shared accommodation are inadequate and have recommended applying residential tenancy laws to the shared accommodation sector to strengthen the rights and protections for occupants. Others, such as the Property Owners Association, largely support the existing framework, with only minor changes recommended.

On balance, the review considers that it is appropriate that the occupancy rights and responsibilities for residents in shared rental accommodation should be different from people with exclusive use and mastery of private premises, who are covered by the *Residential Tenancy Act 2010*. However, at the same time, the review has identified a number of areas where reforms could strengthen the regulatory framework and improve its operation for both residents and proprietors.

This section focuses on these proposed changes and also proposes a new role for DCS to better ensure compliance with the rights and responsibilities under the Act.

Occupancy agreements

An occupancy agreement is a written contract between the occupant and the proprietor and should set out the rights and responsibilities for both parties. Under the Act, the proprietor is required to have a written occupancy agreement with the resident. However, even if the proprietor does not enter into a written agreement, the occupancy principles and obligations under the Act continue to apply.

The Act allows the Commissioner of Fair Trading to mandate a standard agreement that must be used by all parties. However, this has not occurred to date, with DCS instead publishing a model form that can be voluntarily used as the occupancy agreement.

Feedback from the review, as well as previous studies, have highlighted that there is considerable variation in the content of occupancy agreements, where they are provided, as well as a substantial proportion of residents who have no written agreement. For example, Shelter NSW observed that where occupancy agreements are provided, they tended to vary, creating uncertainty about rights and obligations under the Act. The Tenants Union also raised concerns that the lack of a standardised agreement was enabling some providers to introduce obligations which were not permitted under the Boarding Houses Act, or which were considered to impose unfair requirements. Examples provided in submissions included requiring higher amounts of security deposits than is allowed and setting mandatory fixed rental terms in student accommodation that extends substantially beyond the educational semester.

The 2018 Evaluation study found that of those interviewed, the proportion with occupancy agreements declined from 62% in 2014 to 58% in 2017. This low level of compliance with the requirement for a written agreement was also echoed in submissions (e.g. Shelter and Newtown Neighbourhood Centre), which highlighted concerns that many residents did not receive an occupancy agreement and consequently felt that they did not have any occupancy rights.

In the context of a new Shared Accommodation Act, the requirement for a written occupancy agreement could also apply to informal share housing, where to date, there is often no written agreement. For example, a 2017 study found that where share housing

occurs under a head tenant, more than three-quarters of respondents did not have a sub-tenancy agreement, despite this being an option under the Residential Tenancies Act 2010.¹³ NSW Tenants Union has noted that the lack of a written agreement in a share housing context can be the source of substantial issues and conflict, including in relation to bonds, notices to leave and rent payment.

A number of submissions from entities including TU, NNC, Shelter NSW, CFRC, KLC, LA, Samaritans, have proposed that the Act should prescribe standard form agreements which are tailored to the various shared accommodation types, such as traditional boarding houses and newer student accommodation models.

The Property Owners Association (POA) supports the requirement to provide written agreements but recommends maintaining the optional use of a model standard form by operators. They are concerned prescribing mandatory standard occupancy agreements would remove an operator's capacity to cater flexibly to the needs of different occupants, such as those who choose to use the same room at different times of the week, or other alternative arrangements.

On the basis of the above feedback, the review considers that a basic standardised agreement would bring greater certainty to residents while also still allowing flexibility. A basic standard agreement should be in plain English and would be focussed on the occupancy principles which already apply to all residents. It would not prevent proprietors from still offering and including flexible arrangements in terms of room usage and other matters, provided such arrangements were also compliant with the occupancy principles.

Alongside a standardised basic agreement, the review considers that there is a need to introduce a power under the Act to prescribe terms and conditions which are prohibited. Unlike the Residential Tenancies Act 2010, there is currently no such power in the Act and including it would provide DCS with the ability to review and prohibit terms which were causing adverse outcomes for residents, while still allowing for substantial tailoring of agreements.

Recommendation 7

The existing power to prescribe a standard agreement should be used to establish a basic standard agreement in plain English that outlines rights and responsibilities under the Act. An additional power should also be provided under the Act to prohibit the inclusion of specific terms in agreements, or certain types of agreements.

Occupancy Principles

The Act sets out 12 Occupancy Principles. These cover a range of matters, including the state of the accommodation, rules, fees and charges, termination notices and repairs. The Act requires that residents be provided with accommodation that complies with the principles and provided with information as required by the principles.

The review has looked at the coverage and detail of the current occupancy principles, as well as considered feedback from stakeholders. The following section outlines a number of proposed changes to specific occupancy principles, as well as the proposed introduction of two new occupancy principles.

¹³ Tenant' Union (May 2017) Sharehousing in NSW (Report) https://files.tenants.org.au/policy/2017_Sharehousing_Survey.pdf

State of Premises

Under the first occupancy principle of the Act, a resident is entitled to live in premises that are:

- reasonably clean, and
- in a reasonable state of repair, and
- reasonably secure.

This applies to all boarding houses under the Act.

Alongside this requirement, there are a range of additional standards under planning and/or local government laws that influence the state of premises. These apply to some boarding houses depending on when they obtained planning approval. For example, the ARHSEPP, which has been in place since 2009, sets out a number of requirements that must be met, including having adequate bathroom and kitchen facilities and certain communal spaces.

The LG Act also includes standards for certain shared accommodation which are enforced by local councils. The standards only apply to class 3 buildings, which include most formal shared accommodation types such as boarding houses, hostels and backpacker accommodation. The legislation sets out standards for light and ventilation, furniture and fittings, storage space and existing kitchen facilities (where these have been built previously). Additional standards apply where long term residents are being accommodated for longer than seven days. At present, the Act requires councils to ensure compliance with these standards as part of the initial inspection.

There are also additional standards for assisted boarding houses under the Act. These duplicate some of the requirements under the LG Act, as well as including requirements relating to food preparation areas, dining space, laundry facilities, access to an operating telephone and a number of additional requirements specific to persons with additional needs.

A number of submissions from across the sector, including from Legal Aid NSW, Newtown Neighbourhood Centre, the Property Owners Association of NSW and Homelessness NSW, have raised concerns regarding the state of some premises, including no kitchens, poor cleanliness and limited bathroom facilities. Some have suggested a need for greater consumer protections, with the introduction of minimum standards that apply to all shared accommodation. They argue such requirements are needed to ensure that all premises, not just those which have been approved in more recent times, meet basic minimum requirements. The Property Owners Association of NSW noted that these unacceptable living conditions are more prevalent in boarding houses that are not registered.

Under the *Residential Tenancies Act 2010*, rented premises must be 'fit for habitation'. Recent reforms introduced seven minimum standards to clarify the meaning of 'fit for habitation'. The standards clarify that properties must be structurally sound, with adequate natural or artificial lighting in rooms, adequate ventilation, are supplied with electricity, gas and water connections, and contain bathroom facilities which allow user privacy. The baseline standards are not an exhaustive list of whether a property is fit for habitation. Section 52 of the Residential Tenancies Act also places an obligation on landlords to comply with the statutory obligations relating to the health or safety of the residential premise. The review considers that a similar approach should be explored in the context of shared accommodation and proposes that the first occupancy principle should be expanded to include that the premises are fit for habitation.

It is then proposed that further work be undertaken in consultation with the sector to determine what minimum standards shared accommodation should meet to be 'fit for habitation'. This would need to include consideration of consistency with existing standards for shared accommodation under local government legislation and the impact on older

premises and different types of shared accommodation under a new broader Act. The same process should then develop an appropriate transition pathway to balance providing all people with a basic quality of accommodation while ensuring the ongoing viability of affordable accommodation.

Recommendation 8

Occupancy Principle 1 should be expanded to include a requirement that shared housing premises are 'fit for habitation'. Minimum standards that clarify what fit for habitation mean in a shared accommodation context should be developed, in consultation with the sector, as well as a transition pathway to meet these standards for different types of shared accommodation.

Terminations

Under Occupancy Principles 9 and 10, a resident is entitled to know why and how an occupancy may be terminated, including how much notice will be given before any termination. An occupancy agreement also cannot be terminated without reasonable notice, which can take into account the safety of other residents, the proprietor and the manager of the registrable boarding house.

Fair Trading has developed and published a model occupancy agreement that is available for proprietors to use if they choose. The model form outlines suggested notice periods for different termination reasons initiated by both residents and proprietors and serves as a guide on what constitutes reasonable notice. For example, terminations where no reason is given, or where the proprietor is seeking the vacant possession of a room the suggested notice period is four weeks. However, neither use of the form or the guidance on reasonable notice is mandatory.

Feedback to this review, as well as the 2018 Evaluation study of the Act, have highlighted a range of concerns and views about the existing termination arrangements.

One of the main issues raised is around the wide scope for terminations, notably the ability of providers to terminate for no reason. This was raised in a number of submissions (including NNC, HRC UNSW, NSW T&G), with these stakeholders concerned that this results in unfair terminations that may result in homelessness when residents are unexpectedly asked to leave the premises for no reason.

While the Property Owners Association's submission indicated support for providing reasons for terminating an agreement, they also emphasized the importance of the ability to make terminations without a reason. This was particularly linked to share accommodation bringing together diverse people with different needs, and that there need to be flexible arrangements for ending a living arrangement if it is not working. While focusing on the rights of residents, the City Futures Research Centre submission also noted the importance of shared accommodation arrangements being able to be more readily terminated than private residential tenancy agreements, particularly due to the potential for a breakdown in personal relations between the grantor and resident. Their submission recommended that residents have a clear right to terminate without reason.

Alongside the issue of grounds for termination, a number of submissions, and the 2018 Evaluation study, found that the risk of homeless due to evictions is compounded by the lack of clarity in the legislation about what constitutes 'reasonable notice'. A similar issue has also been identified in the context of informal share housing, with a 2017 survey by the TU and TASS finding that 93% respondents in share houses also support minimum notice periods being introduced to clarify their share house arrangements.¹⁴ Many stakeholders (including Shelter NSW, TU, Legal Aid, NSW Trustee and Guardian) recommended

¹⁴ Tenant' Union (May 2017) Sharehousing in NSW (Report) https://files.tenants.org.au/policy/2017_Sharehousing_Survey.pdf

prescribing specific grounds for terminations, as well as notice periods to improve security of tenure and better protect vulnerable residents from unfair evictions.

A separate issue which has also been raised relates to concerns regarding retaliatory terminations. Both the 2018 Evaluation study and submissions to this review indicated that many residents were reluctant to pursue disputes due to concerns they may be threatened with eviction, or be evicted, particularly given the limited alternative, affordable housing options available. A number of submissions also expressed concern that the Act lacks adequate protections against retaliatory evictions. Submissions from stakeholders such as the TU, Shelter NSW, Newtown Neighbourhood Centre and legal advocates, noted that the Act does not provide NCAT with a sufficient role in relation to terminations, with no jurisdiction to consider whether the termination itself was reasonable or should be prevented.

A key factor which links the above issues is diverse views on what has been called the 'easy in easy out'¹⁵ nature of shared accommodation. This includes differing positions on the level of flexibility of arrangements that should be made available, and the extent to which termination arrangements need to consider the unique third-party impacts that can occur between residents who may not have chosen to live together.

These differing views result in tensions between providing greater rights and security for residents while maintaining flexibility for residents who want the ability to come and go as they need to.

The review has considered the above factors and seeks to balance the importance of a secure place to live with the need for flexible arrangements that can respond to resident and proprietor needs, as well as the interactions between residents. On this basis, it is proposed that DCS, in consultation with stakeholders, build on its existing guidance on terminations to develop clearer definitions of what constitutes 'reasonable' notice under the Act, and link such notice to various grounds for termination, including where no reason is provided by either the proprietor or the resident and when residents are in circumstances of domestic violence.

Given the potential vulnerability of some shared accommodation residents, and risks of termination, the review has also recognised that there is a need to clarify NCAT's oversight and role in relation to terminations. These are discussed further in Section 4.4 below.

Recommendation 9

Establish under the Act a definition of what constitutes minimum 'reasonable notice' in the context of different grounds for termination, including where no reason is provided by either the resident or the proprietor.

Security deposits

Under Occupancy Principle 8, the amount required as a security deposit (bond) must not exceed more than two weeks of occupancy fee (rent). A proprietor is required to repay the security deposit within 14 days after the end of the occupancy agreement, less any amounts required to cover the cost of reasonable repairs, cleaning, outstanding occupancy fees and other amounts prescribed by the regulations. A proprietor may retain the whole security deposit at the end of an occupancy agreement if the costs, fees or charges are equal to or exceed the amount of the security deposit.

¹⁵ Martin, C., (July 2019) Boarding houses in New South Wales: growth, change and implications for equitable density.
http://www.shelternsw.org.au/uploads/1/2/1/3/121320015/cfrjuly2019_boarding_houses_in_nsw_shelterbrief64.pdf

While the extent to which security deposits are required is not known, it is the main subject of the limited number of complaints received by Fair Trading. Submissions to the review raised a number of issues related to security deposits, particularly in relation to international students. A number of tenancy stakeholders (TU, HRC UNSW) raised concerns about proprietors charging international students security deposits that exceeded the amount permitted under the Act, as well as failing to provide written receipts or refunds. These submissions also raised concerns that the basis for holding back security deposits was often unreasonable. A number of submissions, such as that from the City Futures Research Centre and the Tenants Union, proposed that security deposits, where required, should be lodged with the Rental Bond Board, as is the case with residential tenancies. This echoes a finding from a 2017 share housing survey,¹⁶ where 73 per cent supported lodging bonds with the Rental Bond Board to help avoid disputes.

In contrast, some shared accommodation proprietors suggested that a larger security deposit should be permitted. They argued that a larger deposit would provide an operator with greater confidence in a resident and could enable a slightly lower on-going tariff because their business would have fewer financial risks.

On balance, the review considers that the 2 weeks maximum for security deposits remains appropriate given the flexible nature of many shared accommodation agreements and the potentially large financial burden a larger deposit could impose on vulnerable residents. However, given the concerns about non-compliant deposits and refunds, it is proposed that where a deposit is required, it must be lodged within the Rental Bond Board and an online lodgement option should be offered. This should provide greater protection without substantially increasing regulatory burden given the well tested and effective nature of the existing rental bonds system.

Recommendation 10

Where security deposits are required, they must be lodged with Fair Trading to ensure greater oversight and accountability.

Occupancy fees

Currently, there is no regulation of occupancy fees under the Act or their increases. The Act also does not allow residents to challenge proposed excessive rent increases through NCAT.

Rental affordability was a key theme of submissions. The 2018 Evaluation study assessed the affordability of boarding house rooms found that almost 40% of residents were paying over half their income on occupancy fees and around 14% were paying more than 70%. Only 14% of residents pay what is considered an affordable rent of less than 30% of income. The submission from the NNC noted that proprietors of shared accommodation often run for-profit businesses in the private rental market and have the discretion to set rents based on economic factors. While some properties choose to offer lower rents in return for land tax rebates, it is understood that many others choose to operate on market rents given the ability to obtain a strong return.

¹⁶ Tenants' Union (May 2017) Sharehousing in NSW (Report) https://files.tenants.org.au/policy/2017_Sharehousing_Survey.pdf

It is outside the scope of this review to address housing affordability more broadly, with the NSW Housing Strategy looking at this issue more holistically across NSW. However, the review does consider that there is scope for the Act to introduce some additional protections that seek to ensure residents are not facing unfair fee increases. The review proposes that occupancy fee increases should be limited to once per year unless there is a substantial change in the nature of the occupancy agreement, such as an increase in the number of days being rented per week or the provision of a new service, such as meals. This should provide greater certainty to residents while also enabling necessary increases to still occur due to the changing and flexible nature of agreements that have been highlighted in submissions to the review. The review considers there is also scope for NCAT to have greater jurisdiction in this space, which is highlighted in section 4.4.

How occupancy fees are paid is also a matter where further reform is recommended, with the significant growth in electronic payment options, including through Centrelink, not currently reflected in the Act. The Newtown Neighbourhood Centre (NCC) has noted that how residents pay their occupancy fees and therefore manage their finances influences affordability. They recommend providing occupants with a variety of options to pay their rent, in line with the options currently available to tenants under the *Residential Tenancies Act 2010*.

The review has considered this feedback and is proposing the Act should require that proprietors offer an electronic payment option, such as the option of paying through CentrePay. The review considers that such a change would reflect the broader shift to electronic payments across society and support greater consumer choice without imposing a substantial burden.

Recommendation 11

Occupancy fee increases should be limited to once per year for each resident unless there is a substantial change in the nature of the occupancy agreement.

Recommendation 12

Proprietors of shared accommodation should be required to offer residents the option of paying occupancy fees via electronic means, such as direct debit or CentrePay.

Enabling consumer choice and access to services

The current occupancy principles are silent on the rights of residents to bring in services, particularly support and advocacy services. In the context of an ageing population as well as changing models of disability support under NDIS, this has been identified as a potential gap.

The City Futures Research Centre has noted that if people are able to reside where they choose, then they also need to be able to access the supports they need and want, without any hindrance from the proprietor. New forms of commercial share accommodation also offer a range of add on services, such as professional cleaning. While some services are included in the occupancy fee, others can be 'added on' and the review considers that residents should have the right to choose what services they want and who they want to deliver them in these cases, irrespective of whether the proprietor also offers these supports.

Recommendation 13

A new occupancy principle should be established to provide that:

- a resident is entitled to have access to support and other services provided to them in their room
- such provision cannot interfere with other residents' reasonable peace, comfort and privacy, or cause unjustifiable hardship to the proprietor.
- a proprietor will use their best endeavours to facilitate access to services, and must not charge a fee or otherwise cause detriment to the occupant for accessing a service.

Responsibility to other residents

A fundamental feature of shared accommodation is that a diverse range of individuals need to live together within a single premises. Many different personalities need to cooperate with each other in order to keep the household functioning and form a harmonious community. Share housing can be a permanent or long-term home for many residents. Currently, occupants living in share accommodation premises do not have any recognised obligations towards other occupants living in the premises.

Occupancy principle 4 provides that a boarding house resident is entitled to quiet enjoyment of the premises, and occupancy principle 1 of Schedule 1 provides that a resident is entitled to live in premises that are reasonably clean, and in a reasonable state of repair, and reasonably secure.

A number of stakeholders have noted the unique nature of relationships in shared accommodation, with the City Futures Research Centre noting the risks of breakdown of relations between residents and proprietors, and the POA noting the need for residents to be able to respect each other and their needs. A 2019 national survey of shared accommodation¹⁷ found that key themes concerning share housing were frustrations with cleanliness and lack of privacy.

In this context, the review is proposing to introduce a new occupancy principle that requires all occupants living in shared accommodation to exercise responsibility towards other residents living in the premises and not seek to impede other's right to quiet enjoyment. This would include respecting the state of common areas.

Recommendation 14

A new occupancy principle should be established to reflect the need for residents to respect the quiet enjoyment of premises by other residents.

¹⁷ 2019 National Share Accommodation Survey on Flatmates.com.au

4.4 Compliance and enforcement of occupancy rights and responsibilities

The mechanisms within the current Act for enforcing compliance with rights and responsibilities are centred around direct management between parties, or through applying to NCAT. Occupancy Principle 11 states that, in the first instance, a proprietor and resident should try to resolve disputes using reasonable dispute resolution. If a dispute cannot be resolved between the parties, then they can apply to NCAT for a binding resolution.

DCS currently has a very limited role under the Act, which is focussed on the operation of the register. While it can provide factual information in response to inquiries about the Act and its provisions, DCS it does not have a role under the Act in terms of mediating disputes or enforcing compliance with the occupancy principles.

Future role for the Department of Customer Service

Many submissions noted that the Act provides very limited mechanisms for resolving disputes and enforcing compliance with rights. This includes more limited access to NCAT compared with tenants under the *Residential Tenancies Act 2010*, such as for breaches of the residential tenancy agreement. Some submissions also noted that residents of assisted boarding houses also have access to more comprehensive means for resolving complaints compared to residents of general boarding houses.

The 2018 Evaluation Report found that residents were most likely to seek assistance from community neighbourhood centres or tenant's advice services rather than Fair Trading or NCAT to resolve disputes. Analysis of Fair Trading's boarding house complaint and enquiry data shows that 1,927 enquiries were received between 2015 and 2019, while only 65 complaints were received in the same period. These numbers are likely to be influenced by the limited role DCS (then Fair Trading) is able to assume to help resolve issues. NCAT has considered 302 applications related to the Act between 2014-2020, with 30 in the period from 1 July 2019-29 February 2020.

Submissions noted there are a number of reasons why residents may be reluctant to engage with NCAT's dispute resolution process. Suggested reasons included fear of retaliatory eviction, limited financial resources (e.g. seeking repairs where there are health and safety issues could lead to increased occupancy fees to offset the cost of repairs), lack of awareness of legal rights, and the cost of applying to NCAT (currently a \$51 application fee).

Complaints and mediation

NSW Fair Trading currently provides a free complaint service for tenants, residents, landlords and agents with real estate and property related disputes. However, it is not currently available to residents of boarding houses.

The complaint service is a voluntary process between landlords or agents and tenants that are involved in a dispute, and who have been unsuccessful in resolving the issue themselves. A Fair Trading officer can assist the parties to come to a mutual agreement, and in some circumstances, formal mediation may also be offered. Under the *Residential Tenancies Act 2010*, Fair Trading has powers to conduct investigations and take disciplinary action if certain breaches have been identified.

Drawing on the feedback provided, the review is proposing to expand Fair Trading's role to include a dispute resolution process for shared accommodation. This would build on a similar function which already exists for tenants, residents, landlords and agents under the *Residential Tenancies Act 2010*.

It is also hoped that such a role could play an important part in more readily identifying and taking action against illegal share housing operators who choose to operate without the relevant planning approvals and in breach of their legal obligations. In offering a new function that can both assist in resolving disputes, this will offer a new means for residents in unsafe dwellings to come forward and to seek assistance without having to go to NCAT in the first instance.

Recommendation 15

Fair Trading should take on a greater role in assisting residents and proprietors of shared accommodation to resolve disputes.

Compliance and enforcement of occupancy provisions

The current Act does not provide Fair Trading officers with compliance and enforcement powers regarding boarding houses. In comparison, the *Residential Tenancies Act 2020* provides for an enforcement role, including powers of entry and power for an investigator to obtain information, documents and evidence, to investigate and enforce compliance with any breaches of the Act.

In conjunction with the proposed complaints and dispute resolution role, the review recommends that similar powers should be provided to Fair Trading under a new Shared Accommodation Act to investigate and enforce compliance with occupancy-related provisions. This reform should provide more consistent and responsive regulatory oversight as Fair Trading will be able to investigate or take action for breaches of certain occupancy sections of the Act, including those that arise through a new complaints and dispute resolution process.

These powers would not extend to enforcement of planning-related requirements, which will continue to be enforced by local councils, or the new fire safety and overcrowding standards, which are to be enforced by Fire and Rescue NSW (discussed further in the following section). This division is designed to ensure clear delineation of regulatory responsibility, and would be supported by the information sharing process proposed in the previous section. For example, complaints made about issues that relate to, for example, building or safety standards, rather than an occupancy issue, could be referred by Fair Trading to the local council.

Recommendation 16

Additional compliance and enforcement powers should be provided to Fair Trading in relation to certain occupancy provisions of a new Shared Accommodation Act. This would include the ability to issue Penalty Infringement Notices and additional powers of entry and investigation.

Role of NSW Civil and Administrative Tribunal

Under the Act, a current or former resident or proprietor of a boarding house can make an application to NCAT for an order regarding the enforcement of the occupancy principles or the written occupancy agreement. This can include an application for an order concerning a dispute about the occupancy agreement, payment of money, compensation, occupancy fees or charges, access to goods or termination. NCAT can order the proprietor to cease breaching the agreement, to act to remedy a breach of the agreement, or to pay compensation for a loss caused by a breach.

A number of submissions, such as from the Tenants Union and Shelter NSW, included concerns about residents' vulnerability to being evicted for no reason with very limited notice, and the limited options to dispute these terminations. This is because, while NCAT can hear disputes regarding the above issues, such as whether a required process was followed, it does not have the jurisdiction to consider other aspects of terminations, such as whether it was fair or could be considered as retaliatory.

The review process highlighted divergent views on what NCAT's role in terminations should be. The preferred position for some stakeholders such as the Tenants Union and the Newtown Neighbourhood Centre, is that NCAT should oversee all terminations, with all termination requiring a NCAT order. At the same time, the Property Owner's Association has raised concerns that a greater NCAT role would impose substantial administrative and costs burden that would have negative impacts on the affordability of their accommodation.

The review has considered these views and, in conjunction with the proposed changes to occupancy agreements and 'reasonable notice' provisions, is proposing that NCAT's existing role should be retained and expanded to also include the ability to consider whether a termination was retaliatory as well as to consider disputes over occupancy fee increases (as discussed in an earlier section). This is similar to powers that exist under the *Residential Tenancies Act 2010* and would enable NCAT to consider terminations matters that are currently outside its jurisdiction.

Recommendation 17

NCAT should continue to be able to consider disputes regarding occupancy principles and occupancy agreements under a new Act. It should also be provided with additional jurisdiction to consider termination disputes more broadly, such as whether a termination could be considered retaliatory, as well as disputes over occupancy fee increases.

4.5 Overcrowding and fire safety in shared accommodation

Overcrowding in boarding houses, backpacker hostels, student accommodation and other privately shared accommodation has been an issue of ongoing concern. It poses substantial health, safety and amenity risks to residents, with issues including residents being required to sleep in partitioned communal areas such as kitchens and lounge rooms, illegal bedrooms being added and safety-related risks such as beds blocking entry and exits to the property for use in case of an emergency.

Overcrowding and fire safety standards

The Act currently has no explicit or direct obligations in terms of overcrowding and fire safety. The limited obligations which do apply come through planning and local government legislation, such as requirements under the ARHSEPP and the initial compliance inspection requirements. For example, an initial compliance inspection requires that, amongst other things, premises comply with all requirements under the *Local Government Act 1993* and the *Environmental Planning and Assessment Act 1979* relating to building and fire safety and shared accommodation standards.

In its submission to the review, Fire and Rescue NSW raised concerns about poor basic health and safety standards in certain commercially available accommodation as well as the standards for sleeping accommodation. In its submission, the Property Owners Association of NSW raised concerns about illegal housing and how it can expose residents to serious health and safety risks. It noted that in Sydney, this issue was highlighted by the fire in an illegally subdivided Bankstown apartment which resulted in the death of an international student in 2012.

Given the devastating impact that can come from a fire in an overcrowded property, as demonstrated by tragic examples in recent years,¹⁸ the review considers that the current Act does not provide sufficient certainty and clarity around what standards apply in relation to this issue.

The review is proposing that all arrangements captured by a new Shared Accommodation Act be made subject to explicit basic public health, fire safety and management requirements. These requirements would align with existing overcrowding and fire safety regulations under the *Environmental Planning and Assessment Act 1979* (EPAA), *Local Government Act 1993* and the *Public Health Act 2010*, and other relevant regulations. In the context of a new Act, it is proposed that these requirements would also apply to some shared accommodation arrangements that are otherwise exempt from the occupancy provisions (such as backpacker hostels). This is due to such arrangements being known risks for overcrowding and there being no other clear regulatory requirements in place to address this issue.

The new basic standards would be incorporated into the occupancy principles and would clarify when a property is considered to be overcrowded. The standards will include specific requirements relating to sleeping accommodation – confirming minimum floor space for numbers of occupants, as is currently provided for by clause 46 of the Public Health Regulation 2012, and prohibiting sleeping in certain areas such as areas for sanitation, food preparation, cooking, and communal living purposes. These changes should provide a clear set of obligations and help increase operator awareness and understanding of their responsibilities.

It is proposed that proprietors will have a duty to comply with these requirements, and residents will be required to observe instructions and directions from management in relation to these requirements.

¹⁸ Coroners Court New South Wales, Inquest into the death of Connie Zhang, Inquiry into fire at Unit 53, 4 West Terrace, Bankstown, 18 September 2015

<http://www.coroners.justice.nsw.gov.au/Documents/Zhang%20findings%2018%2009%2015%20FINAL.pdf>

Recommendation 18

Explicit fire safety and overcrowding standards, consistent with existing local government and planning requirements, should be placed in the Act and apply to all shared accommodation covered by the Act, including some accommodation that is exempt from other aspects of the Act, such as backpacker accommodation.

Compliance and Enforcement of new overcrowding and fire safety standards

The Act's regulatory framework currently does not allow authorised officers, in particular FRNSW officers, to act in a timely manner or with the necessary legislative power to ensure the safety of occupants of overcrowded premises.

At present, FRNSW generally needs a search warrant to inspect premises suspected of overcrowding, unless there is an emergency situation unfolding (e.g. an actual fire). Otherwise, a warrant or prior notice of a proposed inspection is generally needed. The time-lag between observing the harm and gaining access can mean that operators become aware that they are under observation and respond by temporarily altering the dwelling to remove evidence of overcrowding (e.g. remove temporary walls or fittings, remove occupants).

A number of reviews have recommended a need for reform, including a 2015 Interagency Working Group and a 2012 Coronial inquest into the death of Ms Connie Zhang, who died in a private share accommodation premises. The inquest recommended consideration be given to introducing lawful powers of entry for appropriately authorised inspectors to inspect a property in circumstances where a reasonable suspicion of unlawful occupancy is held.

In conjunction with the proposed introduction of the new standards above, the review is proposing to make amendments to the Act to enhance the entry, inspection and enforcement powers of FRNSW officers. It is proposed to allow FRNSW officers to enter premises regulated under a new Shared Accommodation Act without a warrant where there exists or is a reasonable likelihood of a serious and immediate risk to health or safety caused by overcrowding. In Victoria, Public Health officers have similar powers of entry without warrant, under the *Public Health and Wellbeing Act 2008*.

The circumstances in which FRNSW could establish that there is a serious and immediate risk to health or safety as a result of overcrowding include:

- FRNSW officers have collected evidence of overcrowding as a result of exercising the general emergency response functions of the FRNSW Commissioner in accordance with clause 5A of the *Fire and Rescue NSW Act 1989*;
- FRNSW receive a written complaint from a council or other government agency providing evidence of overcrowding; or
- FRNSW become aware of evidence of overcrowding as a result of their non-emergency duties such as community prevention and engagement activities.

FRNSW officers would be allowed to order immediate closure or evacuation of premises, including taking appropriate action to secure the premises.

The proposed powers will allow for swift action where there are fire safety risks, or where Fire and Rescue officers have a reasonable belief that there is overcrowding or a fire safety risk. They will be able to be used for premises that have the appropriate planning approvals, and, importantly, those which do not – that is, those which are operating illegally as a shared accommodation premises.

The increased powers of entry for FRNSW officers will only be able to be exercised with the direct authorisation of the Commissioner for FRNSW. This will enable FRNSW officers to take quick action proportionate to the risks presented but ensure the powers of entry without

warrant to private residences are constrained by appropriate safeguards. FRNSW officers will also be required to give prior notice to the relevant council.

The review also recognises that the safety and amenity issues of overcrowding need to be considered against concerns about the shortage of low cost accommodation in Sydney and risks of increased homelessness. In this context, DCS and FRNSW will work with DCJ and councils and within the existing emergency management arrangements to co-ordinate the re-location of affected residents so they are not left homeless.

Recommendation 19

That new compliance and enforcement powers be provided to Fire and Rescue NSW under a new Shared Accommodation Act, including enhanced entry powers, an ability to issue notices and a power to impose injunctions to stop operation where there is a serious risk to health and safety.

4.6 Review of Act

The regulatory framework for shared accommodation in NSW aims to strike a balance between the interests of residents and proprietors of shared accommodation.

A legislative review will assess the legislation against its intended objectives through a sound evaluation process. A review of the new Shared Accommodation Act would provide an opportunity to examine whether the new Act is effectively achieving its objectives, and assess its impact on the community.

Recommendation 20

That a statutory review of the new Act be required within 5 years of commencement.

Section 5 – Outcomes of the review - Assisted Boarding Houses

The Boarding Houses Act 2012 provides a framework for regulatory protection and compliance requirements to ensure the safety, protection and wellbeing of all residents in both general and assisted boarding houses. However, Part 4 of the Act speaks to assisted boarding houses and has its own objectives targeted at the assisted boarding house sector. Assisted boarding houses are differentiated from general boarding houses as in addition to the provision of physical accommodation they provide a variety of daily living supports to residents with additional needs.

An assisted boarding house is defined in section 37 of the Act as premises that provide beds for use by two (2) or more persons with additional needs. A person has additional needs if he or she requires daily care or support services as a result of a permanent (or likely to be permanent) condition, such as an aged related frailty, mental illness or other form of disability. Assisted boarding houses are also required to be authorised by DCJ, and to comply with standards specifically designed to ensure the safety, welfare and wellbeing of residents with additional needs.

The provisions in Part 4 seek to protect people with a disability from discrimination, uphold their liberty and privacy, provide access to the highest attainable standard of health care without discrimination, as well as the right to live independently and be included in the community.

The provisions of the Act are consistent (to the extent that is reasonably practicable) with the purposes and principles expressed in the related articles of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The fundamental aim of the CRPD is to ensure persons with disabilities are not discriminated against on the basis of their disability, and are given the same rights as other people in the community.

The ABH sector has been in steady decline for 20 years, mainly due to the retirement of proprietors. Around 1987 the number of premises was approximately 200 state-wide and the capacity in the vicinity of 3,000 beds.

As at April 2020, there were 17 Assisted Boarding Houses (ABHs) operated by 12 Licensees accommodating about 250 people with “additional needs”. The number of 250 fluctuates as some ABHs have vacancies, and the number can potentially rise to 260-265. Half of these ABHs are situated in Sydney, with others are in Newcastle, the Central Coast, west of Lithgow, the Southern Highlands, and Queanbeyan. Some of the proprietors now directly provide some services funded by the NDIS, while others do not register to provide services but facilitate and co-operate with external service providers.

On 1 July 2018 the requirements of the Boarding Houses Regulation took full effect. Proprietors are required to provide residents with single rooms unless two people who know one another wish to share; and the capacity of an ABH is limited to 30 people. Premises licensed under previous legislation had 5 years to comply, by 1 July 2018.

In addition to these regulatory changes and the further regulatory changes this report recommends, consideration needs to be given to how the assisted boarding house sector operates within the context of the national framework for the provision of disability services and supports, the National Disability Insurance Scheme (NDIS).

Transition to the NDIS involved a reform of legislation and policy to deliver disability services and supports from a person centred approach. Integral to this is the provision of support

based on the principles of choice and control and responsive to individual support needs and preferences. The establishment of quality and safe guarding mechanisms and the rules, policy and regulations related to the provision of disability support through both the National Disability Insurance Agency and the NDIS Quality and Safeguards Commission is central to the responding to and delivery of contemporary disability standards and meeting community expectations.

In this context, the review of the Boarding House Act 2012 is timely. It allows for consideration of not only how the compliance requirements for assisted boarding houses should be met but acts as a catalyst to engage in further discussion as to how we ensure that the additional daily living services and supports provided by assisted boarding houses meet the contemporary disability standards enshrined in the NDIS and in alignment with the CRPD.

In relation to consultation on Part 4 of the Act dealing with Assisted Boarding Houses, and the Boarding Houses Regulation, there was diversity in the perspectives provided by stakeholders including that the objects of the Act need to be considered from the context of the National Disability Insurance Scheme (NDIS), supporting the above rationale.

The People with Disability Australia (PWDA) submission argued that people with disability should not reside in the boarding house sector, and that the model represents an institutional setting inconsistent with the United Nations Convention on the Rights of Persons with Disabilities 2006. The Tenants Union NSW and Inner West Tenants' Advice & Advocacy Service referenced the PWDA submission and gave support to their recommendations in relation to Assisted Boarding Houses.

Consultative mechanisms should investigate the appropriate legislative and policy levers and their enactment should be considered to support the delivery of contemporary daily living services and supports and accommodation options for people with disability who reside in Assisted Boarding Houses.

Further consultation with state and federal government stakeholders will also be undertaken to consider the necessary safeguards for people with disability who reside in General Boarding Houses (shared accommodation) and those who may choose to in the future.

Aligning the boarding house sector to the contemporary policy context will ensure that the delivery of disability supports are person centred and offer both quality outcomes and the necessary protections to ensure the safety and wellbeing of residents with additional needs.

Recommendation 21

That Assisted Boarding Houses are reflective of the principles of the United Nations Charter for People with Disability and consistent with the principles of the NDIS and contemporary policy and practice.

Consultation with stakeholders directly involved with the assisted boarding house sector is undertaken on the implementation of mechanisms that will ensure the delivery of accommodation and individualised supports to residents with additional needs that meet contemporary disability standards.

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