# Response to ***The Review of the National Regulatory System for Community Housing Discussion Paper***

## Shelter NSW submission

April 2019

Shelter NSW is pleased to comment on the NRSCH Review Working Group's Discussion Paper as part of ***The Review of the National Regulatory System for Community Housing.***

### About Shelter NSW

Shelter NSW has been operating since 1975 as the peak housing policy and advocacy body in New South Wales, with a vision of a secure home for all. We pursue this vision through critical engagement with policy and practice, and thought leadership. We provide systemic advocacy and advice on NSW policy and legislation to resolve housing inequality, and we seek to ensure the voices of consumers are given prominence in discussions around policy and practice.

Our approach involves engaging, collaborating and connecting with people and organisations across the housing system including government, the private and not-for-profit sectors, and consumers. We conduct and commission original research to investigate the causes of inequality and injustice in housing, to ensure our agenda for a fairer housing system for all remains firmly rooted in rigour and evidence.

Our membership is broad and diverse. It includes numerous organisations that provide and manage social and affordable housing, and individuals who work across the field, as well as tenants' and their representatives, advocacy groups and a range of other services and individuals with interests in housing from different perspectives. While Shelter NSW does not have any direct operational engagement with the National Regulatory System for Community Housing, many of our members do, and some members of our staff have had high level interactions with the NSW Registrar's office over many years. Given our purpose as a systemic housing peak body, it is on this basis that we provide the following response to the discussion paper concerning the Review of the National Regulatory System for Community Housing.

## About this submission

We note our sector colleagues and member organisations the Community Housing Industry Association of NSW, the Tenants' Union of NSW and Homelessness NSW have made detailed submissions on matters that are of operational significance to each of the sectors whose interests they represent. We have had the benefit of reviewing those submissions in draft, and we make our contribution with this in mind. We do not seek to comment on operational or technical details of the current regulatory systems (both within and external to New South Wales), rather, our submission explores some of the higher-level principles we expect the working group will encounter throughout the current discussion and Review.

These are, in particular:

- that a growing community housing sector should operate not only with transparency and accountability to government funders and private financiers in mind, but also with residents and other key stakeholders across the broader community whose primary interests in affordable housing are generally of a different kind; and
- that a regulatory system should seek to enhance, rather than potentially diminish, the sector's capacity for growth – in terms of both practice improvements towards putting consumer outcomes at the centre of community housing business, and portfolio development and/or asset management as providers of an increasingly diverse supply of social and affordable housing.

To explore these principles we pursue two separate lines of inquiry: first, looking at how the sector has grown and changed in New South Wales since the inception and implementation of the National Regulatory System for Community Housing, and how this might prompt changes to the regulatory scheme; and second, identifying the key interests in a well-functioning community housing sector and considering how the regulatory system might addresses them.

## Growth and change in the community housing sector

While it is now five years since the National Regulatory System for Community Housing was established in January 2014, the drafting of the National Law for Community Housing Providers dates back further still. The passing of the New South Wales *Community Housing Providers (Adoption of National Law) Act* occurred in mid-2012, as is noted in the working group's discussion paper. It should also be noted that this law repealed and replaced a number of provisions that had been inserted into the *Housing Act 2001* (NSW) in 2007 and 2010[1] to establish and empower the New South Wales office of the Registrar of Community Housing, which operated a local regulatory scheme between 2009 and 2014. The National Law drew heavily on the existing state-based schemes and in particular the scheme that had been operating in New South Wales, which it replaced.

[1] See *Housing Amendment (Community Housing Providers) Bill 2007* (NSW) and *Housing Amendment (Community Housing Providers) Bill 2010* (NSW)

As such some of the language and concepts featured in the National Law and the National Regulatory Scheme for Community Housing Providers reflect the sector as it was in New South Wales more than a decade ago, which is a far cry from what it is today. For instance, prior to April 2010 the NSW Housing Register did not integrate waiting lists for both public and community housing, and applicants for a community housing tenancy were required to approach their local provider directly. The growth of the community housing sector was then primarily driven by stock transfers from the Land and Housing Corporation, contemporaneously through schemes like the Property Transfer Program of 2009-2011, the Social Housing Initiative under the Nation Building Economic Stimulus Plan of 2009, and the establishment of a Public Private Partnership to undertake the "New Leaf" estate redevelopment at Bonnyrigg in 2007. This is reflected in the National Law's definition of "community housing asset", and the NSW's legislation's determination of what is a "Housing Agency" that determines which parts of a registered community housing provider's business are within scope of a Registrar's oversight.

A key motivating factor for these stock transfers was the idea that community housing providers could leverage their interests in property to draw private finance into the sector, facilitating growth and diversification of community housing portfolios within a funding environment that was constrained by the Commonwealth and New South Wales budget policies. The introduction of the National Rental Affordability Scheme in 2008 and the Affordable Rental Housing State Environmental Planning Policy in 2009 provided further opportunities and incentives for providers to diversify their portfolios and pursue types of sub-market rental housing beyond the traditional "social housing" product. Such opportunities have subsequently been extended in New South Wales with the establishment of the Social and Affordable Housing Fund in 2016 and the National Housing Finance and Investment Corporation in 2018, as well as the adoption of Affordable Housing Rental Targets in 2018 and the extension of State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes) in 2019.

The predominant driver of growth of the community housing sector in New South Wales remains stock transfers, with the current Social Housing Management Transfer Program seeing large whole-of-area transfers and a total of 14,000 social housing dwellings being head-leased to community housing providers across the state over the next few years. The planned renewal of a number of estates and neighbourhood sites under the Communities Plus model is expected to deliver the management of around 23,000 newly constructed social housing dwellings, and a comparatively small number of affordable housing dwellings, to community housing providers once complete. Nevertheless the potential leveraging of assets and income streams remains a key objective to drive independent growth of portfolios. New opportunities to obtain cheaper and more stable finance through the National Housing Finance and Investment Corporation, and the enhanced potential for developer contributions and local government lead affordable housing programs to be delivered through the planning system, means leverage-driven growth independent of direct government assistance is now more likely than ever.

It is acknowledged that regulatory systems for the community housing sector were designed in anticipation of growth and change of this kind. However, the line between what is a "community housing asset", as defined in the National Law, and an asset that is independently owned by a registered community housing provider and not within the National Regulatory System's purview, now stands to

become increasingly blurred in New South Wales. There are obvious complexities to this issue that may not be easily resolved, but a key task for the current review must be to determine the extent to which a national scheme needs to regulate business that clearly falls within the scope of "social and affordable housing" but is only indirectly linked to specified types of government assistance, if there is a demonstrable link at all.

Shelter NSW urges the working group to take a strong position on this, and recommend a scheme that takes in the entirety of a registered community housing provider's relevant business. This could be achieved by extending the definition of "community housing asset" in the National Law, or with the addition of a new definition, to make clear that social and affordable housing assets obtained independently of a Housing Agency's assistance are to be included within the regulatory system. In saying this, we note the regulatory impact may need to differ depending upon the origins of an asset, and the provider's intentions with regard to dealing with it over the longer term. However, the expected outcome should be that social and affordable housing portfolios tend towards growth rather than contraction, where dwellings are not to be held as such in perpetuity.

## In whose interests should we regulate?

The discussion paper identifies the "regulatory purpose" of the National Regulatory Scheme, in accordance with the objectives of its founding Inter-Government Agreement, as to protect vulnerable tenants and improve tenant outcomes, protect government assets and funding, and facilitate private sector investment. Arguably the objectives of the National Law and the NRSCH Charter place greater emphasis on, and are more clearly directed towards, the second and third of these objectives. The bulk of the work of the National Regulatory Code is subsequently geared towards asset management, governance and administration, and financial viability, which is clearly in the interests of funders and financiers.

But there are other sets of interests that the National Regulatory Scheme captures only partially, through the Regulatory Code's performance requirement of "community engagement". This fairly narrowly frames community interests in the community housing sector, calling for partnerships to "promote community housing and to contribute to socially inclusive communities". This is an important element of the regulatory system in its own right, and one that could be brought to greater prominence through more targeted use of the Registrars' guidance notes, compliance checks and reporting opportunities. Organisations or groups that work with tenants, or interact with them through the provision of services and programs have a strong interest in knowing how the sector is performing beyond financial viability, probity and governance. Particularly as large whole-of-area transfers and estate renewal continues, and tenants and communities grapple with a new understanding of how social and affordable housing works, community housing providers could be directed to stronger and more considered community outcomes through the regulatory system. Providers are generally already doing the necessary work in this regard, in accordance with contracting and National Standards requirements. Sharing the evidence with a Registrar to more strongly capture and report on appropriate "community engagement" outcomes should not increase the regulatory burden.

There are broader public interest elements to any consideration of community interests that should also come to mind when considering the objectives of the regulatory scheme. As outlined above the evolution of community housing in Australia, and New South Wales in particular, has progressed towards ever increasing financialisation of the sector as a driver of growth. The more providers leverage assets and income streams to achieve growth, the greater their exposure to external economic conditions and the higher the risk of provider or even sector-wide failure in the event of a sudden economic downturn. While this may seem unlikely, the move towards greater financialisation of social and affordable housing – particularly while funding from government sources remains constrained – is a reputational risk that the regulatory system must be alert to.

This is something quite different from the "sovereign risk" issue that arose several years ago in New South Wales, which saw the potential for private investment in the community housing sector rapidly deteriorate following an unexpected change in the government's appetite for stock transfers to include property titles. It is rather the sense that increased reliance on private finance and financialised models of growth coincides with a significant reduction in government funding for housing assistance for very-low and low income households, bringing the public interest of housing assistance into a potentially precarious relationship with the private interests of investors. The reputational risk associated with increased financialisation is especially present for not-for-profit providers whose past growth has, for the most part, come through stock transfers and other forms of government assistance. It is also true for providers with portfolios, or parts of portfolios, that are not universally "community housing assets" as defined in the National Law, where failure could mean the loss of dwellings to the sector.

This brings us back to the first "regulatory purpose" as noted in the discussion paper, which we have noted is not directly supported by the National Law or the NRSCH Charter. The notion of protecting vulnerable tenants and improving tenant outcomes is perhaps an assumed by-product of a viable and efficiently run community housing sector, where provider failure and the loss of dwellings from the sector is clearly not an ideal outcome for tenants. The National Code, for its part, requires only that "community housing providers are fair, transparent and responsive in delivering housing assistance to tenants", but does not include any performance requirements that go directly to improved tenant outcomes. For that matter, the regulatory system remains altogether vague on what those words actually mean, and further clarification would be helpful. Targeted consultation on this point with tenants, residents and the broader human services sector is advised before settling upon any definition or conceptual understanding of the phrase.

Beyond this, the lack of any direct interface between tenants and regulators apart from the ability to raise "systemic issues" through notifications or complaints processes means the National Regulatory System has deprived itself of a key source of information about the entities it regulates, and the outcomes they produce. In its stead we can find reference to tenant and resident "satisfaction surveys", conducted by or on behalf of community housing providers, but without tenant voices from across the sector to help contextualise the results. Even where a Registrar has taken the initiative to investigate and explore issues that are brought to their attention, as has happened several times recently in New

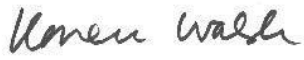
South Wales,[2] the lack of direct dialogue with tenants and their representatives means crucial inputs into how issues are perceived, understood and reacted to by consumers and communities are missed. It means poor outcomes are potentially left unidentified and unresolved, but it also means good outcomes are not routinely captured or celebrated in a systemic and impartial way.

Finding meaningful ways for the regulatory system to better engage tenants and residents, and require registered providers to do the same, must be a key focus for the working group in conducting this review. We note the example of Tenant Scrutiny Panels[3] being adopted by some community housing providers in the United Kingdom. These demonstrate a potential model for formal interactions between tenants and community housing providers that could be adapted to great effect if the regulatory system were also to include a requirement for formal interactions between tenants and the Registrars directly.

## Further discussion

We look forward to further opportunities to contribute to the Review of the National Regulatory System for Community Housing, which we understand will be made available through the release of an Options Paper following consideration of responses to the current Discussion Paper. Please do not hesitate to contact Shelter NSW's Senior Policy Officer, Ned Cutcher, on (02) 9267 5733 or ned@shelternsw.org.au should you wish to discuss these comments in the meantime.

Regards,



Karen Walsh
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[2] See for example: NSW Registrar Community Housing *Use of Section 85 by Community Housing Providers under the Residential Tenancies Act 2010 (NSW)* Summary Paper, June 2018; and *Repairs and Maintenance (R&M) Satisfaction* Summary Paper, October 2018; both available via http://www.rch.nsw.gov.au/reports/campaigns.
[3] See Chartered Institute of Housing *New Approaches to Tenant Scrutiny* October 2014, available at: http://www.cih.org/resources/PDF/Policy%20free%20download%20pdfs/New%20approaches%20to%20tenant%20scrutiny.pdf