



Statutory Review of Boarding Houses Act 2012

Shelter NSW Submission

October 2019

Introduction - and the context for Shelter NSW

Shelter NSW has been operating since 1975 as the state's peak housing policy and advocacy body. Our vision is "A secure home for all". We pursue our vision through critical engagement with policy and practice and thought leadership. We provide systemic advocacy and advice on policy and legislation for the whole NSW housing system to resolve housing inequality and we seek to ensure that the voices of housing consumers are included in our policy responses and review.

Our approach involves engaging, collaborating and connecting with Government, the private and not for profit sectors, stakeholders and consumers. Our research centres on the causes of inequity and injustice in the housing system and we advocate solutions that aim to make the housing system work towards delivering a fairer housing system for all.

Shelter NSW is concerned about the housing crisis in NSW and the rising trends in homelessness, housing rental stress as well as the impacts of poor- quality housing, particularly on low income households¹. Over three quarters of lower income renters in NSW are paying unaffordable rents (92% of very low- income renters in Sydney). Lower cost properties are being steadily replaced with new ones at higher rents, and new concentrations of disadvantage have been created across our major cities as low income households are displaced. The NSW rental market is failing, forcing our most vulnerable citizens to go without essentials and being excluded from jobs and opportunities.

Boarding houses represent a small part of the housing system but fulfill an important role for vulnerable and marginal renters on very low incomes. Shelter NSW has a strong interest in boarding houses regulation and supply pathway. Shelter NSW commissioned and recently released "[***Boarding houses in NSW: Growth, change and implications for equitable density***](#)" a research report by Chris Martin of City Futures Research Centre, UNSW. This is the most comprehensive overview of the boarding houses sector in NSW published since the introduction of the Boarding Houses Act 2012 and the State Environmental Planning Policy (Affordable Rental Housing) 2009 (AHSEPP).

¹ See Shelter NSW 2019 Election Platform
<https://www.sheltersnsw.org.au/uploads/1/2/1/3/121320015/sheltersnsw-2019-election-platform.pdf>

We are pleased to provide comment for the purposes of the statutory review of the Boarding Houses Act 2012 conducted by the Policy and Regulation Division, Department of Customer Service.

Preamble

Boarding houses play an important role in NSW's housing system. Although numbers of residents are relatively low compared to the population of the state, they provide accessible, 'easy in, easy out' for marginal renters who have difficulties accessing the rest of the private rental market. This 'housing of last resort' responds to a demand, and meets the shelter needs of its residents. It is important to recognise, however, that boarding houses ultimately represent a failure of either the social housing system or the private rental market. Boarding houses residents are experiencing a form of homelessness² characterised by the transient, temporary nature of their accommodation, lack of control over the premises where they live and relatively absence of choice in sharing space with others.

Boarding houses residents are in their immense majority vulnerable people experiencing one or various forms of disadvantage. In response to **Question 1**: While the objects of the Boarding Houses Act 2012 (The Act); to establish an appropriate regulatory framework for the delivery of quality services to boarding houses residents, and to promote and protect their wellbeing, are valid and laudable, it is important to keep in mind that boarding houses are a form of housing that is fundamentally insecure and difficultly suited to vulnerable people's needs. In short, we need to make sure that we do not overly focus on 'improving' what is fundamentally inappropriate housing. In addition to this, boarding houses are not affordable for people on social security benefits, and rarely affordable to people on very low incomes. Shelter NSW supports the regulation of the sector and the continuous improvement of the protections provided by The Act, and understands the scope of its review. We would still like to point out in this preamble, however, that there could be value in considering integrating the Act in a section of the Residential Tenancies Act based on occupancy principles, or creating an Occupancy Act altogether. This would deal with people in very similar circumstances having different rights and protections due to definitional issues.

Within the context of this review, we will focus on opportunities for The Act to regulate the boarding houses sector more efficiently and improve protections for some of the most vulnerable members of our communities. Shelter NSW sees three areas as particularly worthy of attention in addition to the need for better enforcement and compliance:

1. Addressing the definitional confusion around boarding houses, lodgers and lodging. This would allow refining the intention of the Act and providing for different protections suiting different circumstances.
2. Developing an improved accreditation and regulation model for boarding houses proprietors.

² Tertiary homelessness is defined as accommodation that falls behind minimum community standards (Mackenzie and Chamberlain 1992)

3. Improving rights and protections for residents of boarding houses, in particular relating to tenure security. Implementation of better regulation and compliance mechanisms should be done without increasing operators' costs significantly to avoid widespread exit from the sector.

1. The need for clearer definitions

Different regulation for boarding houses from residential tenancies is based on an understanding that they differ as forms of accommodation. Changes in the sector and somewhat inconsistent definitions in The Act, the Standard Instrument (Local Environment Plans) Order 2006 (NSW), the State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARHSEPP) and caselaw, however, show some definitional confusion. Some forms of self-contained accommodation, with limited sharing of facilities and caretaker functions, are being regulated by occupancy principles, while some accommodation delivered under the ARHSEPP and sharing similar built form and management style with 'traditional boarding houses' is regulated under the Residential Tenancies Act (RTA). This confusion is shared by operators themselves, with some of them registering as Boarding Houses proprietors while providing their residents with a residential tenancy agreement. This definitional confusion is explored further in our recently released research "[Boarding houses in NSW: Growth, change and implications for equitable density](#)".

Concerning **Question 2**, Shelter NSW's position is that sharing should determine the nature of residency, subject to further discussion with all stakeholders. Self-contained accommodation should be regulated as a residential tenancy. When a resident is granted the right to occupy premises but has to share some of this space, and when rules regarding this sharing are determined by the grantor of this occupancy right, different regulation should apply. We do not consider the mere presence of a caretaker to be an adequate test. Indeed, many multi-dwellings residential buildings include the services of a caretaker, from luxury apartments in Sydney CBD to the 'security' in high rise condominiums in South East Asia or the 'concierge' of medium density Haussmanian buildings in Paris, a service that is not specific to and/or constitutive of lodging.

Clearer, more robust and more strictly enforced definitions of 'lodgers' and 'lodging' will allow better understanding of what is a 'boarding house' and what isn't. For people who can be characterised as 'lodgers', occupancy principles should apply. Shelter NSW strongly supports an extension of occupancy principles so they apply to all people who pay for/are granted a temporary non-exclusive right to occupy premises for accommodation purposes, when they are not covered by more specific legislation such as the RTA, the Residential Land Lease Communities Act 2012 or the Retirement Villages Act.

2. Developing an improved accreditation and registration system

Question 3 invites comments on the two tiered registration system and how it compares with other jurisdictions. While ‘assisted boarding houses’ are strongly regulated and monitored, ‘general boarding houses’ vary greatly and so does their regulation and monitoring. Moreover, ‘assisted boarding houses’ are in decline and represent a small proportion of the sector, meaning that most boarding houses are bundled together under the ‘general boarding house’, a category with no regards to differences in clientele and services provided. Considering the question of ‘people with additional needs’ being accommodated in general boarding houses (**Question 24, 25**), Shelter NSW believes the legislation currently has unintended effects and that simple amendments could allow for better outcomes. There are currently a significant number of people with additional needs living in general boarding houses and this deserves better regulation. From our understanding, people with additional needs either do not declare them or are evicted from their residence by operators in order to avoid having to change status and comply with more extensive regulation. Adding a reference in the legislation whether the ‘additional needs’ of the resident are currently ‘met’ or ‘unmet’ by the services provided by the general boarding house would allow for accommodation of this person in the general boarding house as long as their additional needs are currently met.

Shelter NSW believes different types of boarding houses should attract different, appropriate regulation, in line with the recommendations of Dr Chris Martin: “Differences in the clientele served, and additional services provided, entail different levels of risk and should attract correspondingly different levels of regulation and monitoring.”

In that regard, the model developed in Queensland’s *Residential Services (Accreditation) Act 2002* should be given consideration by NSW legislators and policy makers. The Queensland regime requires accommodation providers to register according to the type of services they provide; accommodation, food and personal care services. Moving NSW towards this regime would allow differentiating between different types of ‘general boarding houses’ regulate and monitor them accordingly, while ‘assisted boarding houses’ would have to register for all three types of services. Concerning **Question 4 and 5**, similarly to the current system, a register should be held for information of residents and the general public, listing boarding houses, their proprietors and the type of services they are registered to provide. Registration should be compulsory and include all providers of accommodation involving some sharing of space if they are not registered under another scheme. The recent [death of a student in New Zealand](#) shows the need for registration of all providers, making sure they comply with their ‘duty of care’ regardless of the level of need and vulnerability of their customers. Student accommodation providers should also be subject to specific regulations related to the needs of their customers such as making sure they do not unduly impact education outcomes of students, for example.

This more sophisticated system would then allow the legislator to prescribe standard occupancy agreements (see **Question 9 and 10**) that are specific and tailored to the type of service provided by the boarding house proprietor. Occupancy principles could also be improved depending on types of services (**Question 12**). In any case (**Question 11.1 and 11.2**); knowledge of occupancy principles should be

increased by regulatory agencies by mandating their conspicuous display in common areas of boarding houses and distributions to each new resident separately from their standard occupancy agreement. As suggested by the discussion paper in **Question 14**, providing residents with information about how to access other services would also be a welcome initiative.

3. Improving rights and protections for residents of boarding houses

A – Better compliance and enforcement of regulations

As mentioned earlier, it is essential for residents of boarding houses to be aware of their rights and feel empowered to exercise them, either through an early dispute resolution mechanism or further through the NSW Civil and Administrative Tribunal (NCAT). This should be promoted and facilitated through legislation. It is important to recognise, however, that enforcement of regulation cannot be left to people who are vulnerable, often experiencing one or multiple forms of disadvantage and sometimes with limited agency. Moreover, the lack of security of tenure, most prominently represented by the possibility of being served a ‘no-grounds’ evictions with four weeks’ notice, undermines all other rights residents of boarding houses have. Residents are highly conscious of this and are often reluctant to demand that their rights are respected because of fear of retaliatory eviction. In the words of a resident: “You see the problem is people are scared to complain because they find if they make a complaint they’ll kick them out” (Drake 2018³).

This highlights the need for better and more stringent enforcement of regulations by local councils and other agencies. Shelter NSW research ([Shelter Brief 64](#)) and other reports⁴ estimate the number of unregistered, informal boarding houses to represent between 25% and 35% of the total number of boarding houses, and a large part of the increase in registrations is likely to be late registration for proprietors who have been operating since a long time. We recommend that Government leads on a registration campaign to encourage proprietors to register and achieve a higher proportion of boarding houses to be on NSW Fair Trading register.

Concerning **Question 8**, Shelter NSW does support mandating for local councils to inform Fair Trading of enforcement action undertaken, as well as for Fair Trading to liaise more closely with councils. This will allow Fair Trading to record infringements in the register, and better track the performance of both boarding houses proprietors and local councils in regards to their respective obligations of service provision and regulation enforcement.

³ Evaluation of the Boarding Houses Act 2012, Newtown Neighbourhood Centre & Australian Catholic University, Associate Professor Gabrielle Drake, February 2018.
URL: <https://www.newtowncentre.org/uploads/5/1/5/0/51502997/evaluation-of-the-boarding-houses-act-2012-report-4-and-final-report-2018.pdf>

⁴ Anecdotal evidence from Shelter NSW organisational members including Newtown Neighbourhood Centre. See also Troy et al. 2018, Gurrán et al. 2019
<https://cityfutures.be.unsw.edu.au/research/projects/boarding-houses-central-and-southern-sydney/>
<https://sydney.edu.au/content/dam/corporate/documents/news-opinions/informal-housing-spl-report.pdf>

The need for more streamlined and coordinated enforcement is illustrated by the fact that there are boarding houses that are registered with Fair Trading but operating without a development approval, for example. Concerning **Question 7**, there are a few different ways that local regulation of boarding houses could be improved. The major issue here relates to addressing the question of potentially conflicting outcomes and split incentives for enforcement. Enforcement of regulation is essential so residents can have access to quality services, but needs to be balanced with making sure that residents of boarding houses are not pushed into homelessness because of administrative closures. As pointed out page 13 of the discussion paper, there are measures that can be taken to achieve this balance, such as a risk-based approach to inspections, use of discretion powers of local government regarding how breaches are to be addressed, and an educational and guidance role rather than a pure compliance and infringement approach. Shelter NSW supports this approach based on a '*perfect is the enemy of the good*' principle, trying to avoid people exiting an uncompliant boarding house into homelessness. It is important to be clear about what this achieves, however. The root of the issue is that boarding houses are private rental market options for people at risk of homelessness and/or experiencing tertiary homelessness. They also fulfil a role that could be described as informal transitional or temporary accommodation for people exiting the carceral system or specialist homelessness services. This would not be the case in a functioning housing system, where these people would either be able to find secure and stable housing through the private rental market or, more likely, be housed within the social housing system. Shelter NSW understands that this is beyond the scope of the review of The Act but recommends that this is acknowledged by policy makers.

The issue of split incentives stems from the fact that local government has prerogatives to enforce the Act, while State Government manages the register through Fair Trading. We also note that while cost is borne by local councils, revenue collected from fines would go to State government. In short, local government is not resourced to enforce the Act and has no clear incentives to do so. In order to address this issue, we recommend for State government to specifically resource local councils where there is a high concentration of registered boarding houses and/or potentially illegally operating boarding houses for enforcing the Act. While this will have budget impacts, as always with good regulation, it will allow for greatly improved outcomes. Currently many operators do not comply with the requirements of the Act. For example, anecdotal evidence suggests that many of them give two weeks rather than four weeks' notice for 'no-grounds' terminations as required by the Act. Making clearer which Minister is responsible for implementation of potential changes to the Act and enforcement of regulation would also allow for clearer and more aligned action.

In addition to monitoring and regulation enforcement, improved access to services for boarding houses residents is of primary importance. Shelter NSW supports changes to the Act (**Question 29**) to broaden the definition of 'authorised service providers' in order to allow support services to enter premises including without the consent of the proprietor. This power should be granted to the organisation and not to a specific person as suggested in the discussion paper in **Question 29**.

B – Strengthening occupancy principles while maintaining viability

Shelter NSW strongly supports stronger regulation of the boarding houses sector to improve quality of services provided to residents, in particular concerning security of tenure. This increased regulation of the sector should be focused on tighter monitoring and compliance but as much as possible without increasing costs to operators. Indeed, there is a significant risk that a high increase in operating costs could trigger exit from the ‘traditional boarding houses’ sector from proprietors either by going underground or moving towards the ‘new generation boarding house’ sector. As mentioned in the discussion paper page 6, it is important to balance between “maintaining the viability of the boarding house sector and the need to provide appropriate protections for some of the most vulnerable people in our communities”.

Shelter NSW recommends the following to increase quality of service, security and stability of residents:

- Continue to mandate and enforce occupancy agreements being given to residents. Shelter NSW has received reports that many boarding houses residents do not receive an occupancy agreement and feel that they do not have any occupancy rights. This reinforces further the imbalance of power between proprietors and residents of boarding houses.
- Continue to mandate and enforce occupancy principles, in particular principles 3 and 7 which many boarding houses do not comply with according to anecdotal evidence from residents and service providers (**Question 9, 10, 12, 13**).
- Provide boarding houses proprietors with information about their rights and obligations as suggested in **Question 15**.
- Mandate for security deposits to be lodged with Fair Trading NSW, either through the Rental Bond Board or through another independent custodian specific to boarding houses residents.
- Current provisions do not provide for sufficient security for residents of boarding houses (**Question 19**). Suggested notice periods do constitute ‘reasonable notice’ in the case of residents terminating the agreement. Short notice periods are appropriate for residents given the fact their employment and financial situation is likely to be unstable, and to keep providing the ‘easy in, easy out’ which is the major benefit residents derive from this form of accommodation. In the case of proprietors, however, notice periods should generally be longer in the standard occupancy agreement. Notice periods should be at least one week for all reasons for termination except for violence or threats of violence; at least two weeks for minor breaches, three weeks for non-payment and six weeks for ‘no grounds’ termination (**Question 16,17**). This is justified by the high vulnerability of most boarding houses residents and the high demand for accommodation in these premises, meaning that longer notice periods will not

unduly impact viability and revenue for operators. The six weeks' notice period should also apply to surrender of licence and subsequent closure of the premises (**Question 27**).

- On the specific question of 'no-grounds' termination (**Question 16,18**), Shelter NSW strongly supports changes to the Boarding Houses Act so proprietors have to provide a reasonable explanation for termination of the occupancy agreement, with the possibility for residents to apply to NCAT for a review of this decision. Considering that a high proportion of boarding houses residents pay occupancy fees that are equal to market rent, it is completely inappropriate, especially considering their vulnerability, that they are afforded protections largely inferior to those of the Residential Tenancies Act. This would also be more consistent with the key purpose of the Act, "to protect the rights of residents living in all boarding houses" than current provisions. Ending 'no-grounds' evictions would provide greater security to residents who do the right thing while still allowing proprietors to evict people in breach of their contractual agreement. It would also contribute to addressing discrimination and retaliatory eviction which are currently common in the sector according to Shelter NSW members and academic research (Drake 2018).
- Shelter NSW supports the restriction of the maximum number of residents in assisted boarding houses to 30 residents in order to avoid the potential sense of institutionalisation (**Question 30**).

Further comments

Shelter NSW recommends a number of additional changes to the Act related to built form and/or language of the legislation:

- Schedule 1, Clause 7 of the Boarding House regulation should be amended to provide adequate sleeping arrangements for people living in boarding houses. Current arrangements of 7.2 and 7.3 stating a room for a single person should not be smaller than 7.5 square meters and 11 square meters for two people are inappropriate, especially considering the gap with requirements from SEPP 65/Apartment Design Guide that apply to multi dwellings residential buildings. This can also be traumatic for people exiting the carceral system as it is reminiscent of the size and appearance of a cell. Requirements should be increased to at least 10 square meters for single people and 16 square meters for people sharing a room (**Question 31**).
- Regulations of the Act should specify a minimum size for communal living space and this minimum size should be linked to the number of residents and/or the total floor space of the premises (**Question 34**).
- Define more clearly what constitutes an 'emergency inspection' as part of the standard Occupancy Agreement as this could be used to circumvent the minimum 48 hours' notice for inspections

We strongly encourage policy makers and legislators to read the full research report on Boarding Houses in NSW available on Shelter NSW website:

www.shelternsw.org.au/uploads/1/2/1/3/121320015/cfrcjuly2019_boardinghousesnsw_shelterbrief64.pdf

Shelter NSW, as a housing policy and advocacy peak is keen to continue to work with and support NSW Government on the further development of legislation related to the boarding houses sector. Thank you for the opportunity to contribute to the review of the Boarding Houses Act 2012.

Please contact Thomas Chailloux, Senior Policy Officer at Thomas@shelternsw.org.au should you wish to discuss these comments further.

Yours sincerely



Karen Walsh
Chief Executive Officer
Shelter NSW