Submission to the Review of the *Boarding Houses Act 2012* (NSW)

City Futures Research Centre (CFRC) welcomes the opportunity to make this submission on the review of the *Boarding Houses Act 2012* (NSW) (the BH Act).

CFRC is part of the Faculty of Built Environment, UNSW Sydney, and is a national leader in scholarly applied urban research. Housing research is a core strength of CFRC, and in recent years CFRC researchers have produced several research reports specifically on boarding houses in New South Wales.

* Martin, C (2019) ‘Boarding houses in New South Wales: growth, change and implications for equitable density’. Research report for Shelter NSW. <https://cityfutures.be.unsw.edu.au/research/projects/boarding-houses-new-south-wales-growth-change-and-implications-equitable-density/>
* Troy, L, van den Nouwelant, R and Randolph, B (2019) ‘Occupant survey of recent boarding house developments in central and southern Sydney’. Research report for the Southern Sydney Regional Organisation of Councils. <https://cityfutures.be.unsw.edu.au/research/projects/affordable-housing-sepp-and-southern-sydney/>
* Troy, L, van den Nouwelant, R and Randolph, B (2018) ‘State Environmental Planning Policy (Affordable Rental Housing) 2009 and affordable housing in Central and Southern Sydney’. Research report for the Southern Sydney Regional Organisation of Councils. <https://cityfutures.be.unsw.edu.au/research/projects/affordable-housing-sepp-and-southern-sydney/>
* Pawson, H, Dalton, T and Hulse, K (2015) Rooming house futures: governing for growth, transparency and fairness—New South Wales Discussion Paper, Australian Housing and Urban Research Institute Limited, Melbourne. <https://www.ahuri.edu.au/research/research-papers/rooming-house-futures-governing-for-growth,-transparency-and-fairnessnew-south-wales-discussion-paper>.

This submission draws particularly on the first-listed report above (Martin, 2019), which was undertaken as a broad review of the current state of the boarding house sector in anticipation of the present review of the Boarding Houses Act. The report is attached to this submission.

## Object and scope

The Boarding Houses Act 2012 was landmark legislation. Its introduction of a central, state-wide Boarding Houses Register increased visibility and knowledge of the sector, and helped put boarding houses back on the radar of local councils. The Act created for the first time in New South Wales a legislated regime of housing rights – the occupancy principles – and accessible dispute resolution for lodgers. And its provisions regarding assisted boarding houses replaced a dysfunctional licensing regime with an effective system of standards, monitoring and compliance that has improved conditions for vulnerable residents in those places.

We characterise the Act as a ‘landmark’ deliberately, because we think it should be seen not as a final legislative destination, but as indicating the way towards a more comprehensive, effective and sophisticated regulatory regime for diverse forms of *shared accommodation*. We submit that shared accommodation – that is, where a person does not get to choose with whom they share the intimate spaces of their housing – and the particular risks that shared accommodation involves, is really the proper object of regulation. This is what makes the Boarding Houses Act important – as far as it goes. Shared accommodation includes, but is not limited to, boarding houses; other forms include lodgements in private dwellings, student accommodation, and refuge and crisis accommodation. The key objective is to address shared accommodation, whatever the particular land use designation of the premises where it takes place. We therefore submit that the Boarding Houses Act should be replaced by a ‘Shared Accommodation Act’ that builds on the elements of the former Act.

The precise definition should be settled by consultation with all the stakeholders, but we suggest, as a starting point, that ‘shared accommodation’ is an arrangement where a resident is granted, for value, a right to occupy premises but shares sleeping space, or kitchen and bathroom space, with the grantor of the right, or with one or more other residents occupying by separate grant. Compared with housing arrangements where there is no sharing beyond any other members of the individual’s household (i.e. a mainstream residential tenancy), we submit that in shared accommodation occupation rights ought to be more readily terminated (including, for example, because of breakdown in personal relations between grantor and resident, which should never be sufficient grounds for a grantor to terminate a tenancy). By the same token, we also submit that in all forms of shared accommodation arrangement (not limited to registered boarding houses, as at present) both the premises and the proprietors themselves ought to be subject to more comprehensive standards and monitoring by public authorities than are mainstream rental premises and landlords.

Looking at the Boarding Houses Act as a model for a wider regulatory regime for shared accommodation, we submit that some elements– in particular, the occupancy principles and access to dispute resolution – should apply to all forms of shared accommodation, while other elements – such as registration – should apply to some and not others, and where they apply they should do so differently, according to the particular characteristics and risks presented by different forms of shared accommodation. This sort of differential application is already a feature of elements of the Boarding Houses Act, although the potential of it is not fully realised.

Implementing a wider, more comprehensive regime would also be an opportunity to address the definitional confusion the currently affects the boarding house sector, both in relation to other forms of shared accommodation, and in relation to other forms of housing. As discussed in detail in Martin (2019), the Act’s definition of ‘boarding premises’ is similar to (but not identical with) the planning regime’s definition of ‘boarding house’, which has historically been a form of land use distinct from that of ‘dwelling house’. The distinction, however, has been blurred by planning reforms that allow boarding houses to include self-contained rooms, which are conventionally characteristic of dwellings. This is exemplified in the emerging sector of so-called ‘new generation boarding houses’, which our research has found mostly operate not as boarding houses but blocks of small flats (Martin, 2019; Troy, et al, 2019). As the ‘built form’ aspect of the definition of boarding house has become blurred, the tenurial aspect of the definition – i.e. that boarding houses provide accommodation to *lodgers*, as distinct from tenants – has become more important. However, the tenant/lodger distinction, which historically turned on whether the right to occupy premises was exclusive or not, has also been blurred in residential tenancies legislation. This is because the Residential Tenancies Act 2010 (like its 1987 predecessor) provides that a person may be a tenant under that Act where there right to occupy premises is not exclusive. The Act still excludes lodgers, though, so there is a distinction – but it is not clear where the dividing line lies. As a result, it can be difficult to say if a person is a tenant or a lodger, and if the premises they live in are a shared private dwelling, or one of several dwellings in a residential flat building, or a boarding house. We submit that a clear definition and regulatory regime for shared accommodation is the key to clarifying this wider confusion in planning and tenancy laws, to the benefit of individual persons and housing policy-makers.

## Registration of boarding houses

The Act requires that proprietors of boarding houses – where the premises meet the criteria of a ‘general boarding house’ or an ‘assisted boarding house’ – provide certain information about themselves, their premises and the residents of the premises to the state government, and that the government publish some of this information (none of it about residents) on a public Boarding House Register. These requirements have increased the exposure of the sector to scrutiny by local government for compliance with development controls and fire and safety regulation. They have also increased information to prospective residents, and to researchers and policy-makers. These are all worthwhile purposes.

There are, however, some shortcomings. Of the two classes of ‘registrable boarding house’, ‘assisted boarding house’ is relatively well-defined, although it presents a problem when two or more ‘persons with additional needs’ (as defined by the Act) are accommodated in premises where the proprietor has no intention of operating as an assisted boarding house. This problem, and our recommended solution, are discussed further below. The ‘general boarding house’ class is an undifferentiated mix of types of accommodation, subject to a long list of specific exemptions. As a result, it is not very clear what registration as a general boarding house tells us about particular premises, or what the general boarding houses class in total tells us about the boarding house sector.

For example, when we conducted the analysis of Boarding Houses Register data presented in Martin (2019), we found 80 premises (out of just over 1,000 general boarding houses) that we could identify from other data as student-only accommodation (accommodating about 3,500 persons), a few of which were very large (the five largest accommodated about 1,700 persons between them). It is evident from other data that there are many more purpose-built student accommodation (PBSA) premises operating in New South Wales (according to JLL (2018) there are 20,000 PSBA beds in Sydney alone), some in joint-ventures with universities, others independently. Presumably at least some are unregistered under the exemption for ‘premises that are used by an educational body to provide accommodation for its students’ (section 5(3)(f)); and perhaps others because they use only residential tenancy agreements and so do not provide accommodation to ‘lodgers’. But it is not clear that the difference in classification reflects a real operational difference between premises in the PBSA sector, or difference in risks to residents and others. The growing scale of this anomaly results from the way that the PBSA sector has evolved over recent decades, with a fast-expanding proportion of such provision being developed, owned and managed by private companies rather than ‘educational bodies’.

We submit that the registration regime should be developed in two ways. First, the registration requirement should be cast wider, to generally cover all premises providing ‘shared accommodation’, subject to a threshold minimum number of residents. In particular, where shared accommodation is provided by an educational institution, a social housing provider, or a refuge or crisis accommodation service – all currently exempt categories – the premises should generally be required to be registered.

Secondly, the classification system should be made more sophisticated than the current two-class system, to more clearly differentiate between types of shared accommodation and regulate according to different levels of risk they represent. Differences in the clienteles served, and additional services provided, entail different levels of risk and should attract correspondingly different levels of regulation and monitoring. Such an approach is indicated by Queensland’s Residential Services (Accreditation) Act 2002 (Qld), which requires proprietors to register and become accredited for up to three levels of service provision: ‘accommodation service’ (which is mandatory for all registered residential services); ‘food service’; and ‘personal care service’. This regime, it should be said, currently excludes some forms of accommodation – specifically, student accommodation, and refuge and crisis accommodation – but there is no reason in principle why they cannot be subject to the requirement, and we submit they should be required to register.

Reformed along these lines, the New South Wales classification scheme could differentiate between:

* premises providing shared accommodation – and not any other type of service - to five or more residents; such premises should be registered and accredited as an accommodation service;
* premises providing shared accommodation and food – but not personal care services – to five or more residents; such premises should be registered and accredited as an accommodation and food service,
* premises providing shared accommodation and personal care services to two or more residents; such premises should be registered and authorised as an assisted boarding house.

We discuss accreditation in a little more detail in the section on ‘Initial compliance and ongoing enforcement’ below.

In addition to the three levels of service provision, we submit that the registration regime should also provide for each premises to have a service description recorded: e.g. ‘general boarding house’, ‘student accommodation’, ‘crisis accommodation’ or ‘refuge’. This description would be primarily for information, and need not involve any additional legal rights or obligations regarding accreditation or authorisation under the regime, except in the case of refuges, where qualifying for the description would mean that the premises are ‘silently’ registered (i.e. the registration is not made public on the register).

So, for example, premises may be registered as ‘assisted boarding house – accommodation, food and personal care service’, or ‘general boarding house – accommodation only’, or ‘crisis accommodation – accommodation only’, or ‘student accommodation – accommodation and food service’, etc.

For the information of prospective residents and the general public, the reformed and expanded register should publish for each registered premises its name and address, proprietor’s name and address, service descriptor and accreditation levels, and any infringements of the Act and associated regimes (e.g. local government fire safety regulations).

Finally, for each of the different service types and descriptions a specific standard form of occupancy agreement could be developed – consistent with the occupancy principles, and tailored to the particular type of service – and prescribed for use. We discuss this below at ‘Occupancy agreements and principles’.

## Initial compliance investigations and ongoing enforcement

Under the Act’s current two-class registration regime, general boarding houses are subject to an initial inspection by the local council, and separately are subject to the local council’s ongoing monitoring of development controls and fire and building safety regulations under the Environmental Planning and Assessment Act 1979 and the Local Government Act 1993. Assisted boarding houses are also, at least notionally, subject to the initial post-registration inspection, and the requirement to seek authorisation to operate from FACS, and to comply with the closely prescriptive regime of standards and monitoring set out the in the Boarding Houses Act.

From contact with sector stakeholders in the course of our research, our impression is that the performance of local councils in monitoring boarding houses varies considerably between councils, but is generally regarded as unsatisfactory. We heard complaints that councils’ approach to boarding house regulation was ‘looking under the light-post’: that is, they were focused on the more visible, formal sector of registered boarding houses operating lawfully, while not seeing the larger informal sector of unregistered boarding houses operating without development approval. Others complained that local councils were not monitoring either sector well. We consider that these problems are mostly not about the Boarding Houses Act, but about the ambiguity around boarding houses and shared accommodation in the planning system. Although planning instruments define ‘boarding houses’ broadly, the standards required of them by the National Construction Code, development control plans and the Local Government (Genera)l Regulation 1995 (Schedule 2 – places of shared accommodation) generate for regulators a mental image of boarding houses in the traditional built form of a mansion let in lodgings. As a result, premises that do not fit this image – i.e. ordinary houses and flats let in lodgings – are apt to be overlooked by local councils.

Leaving aside the issue of planning and development controls for boarding houses and shared accommodation, we have recommended an expanded and enhanced registration regime for shared accommodation. As indicated above, we envisage this including a system of accreditation whereby proprietors would have to satisfy a relevant authority that are competent in the relevant area of service (accommodation, food, personal care). In this regime, the relevant accreditation authority for personal care services would be FACS – basically as it is as regards assisted boarding houses now. For accommodation services and food services, we submit the accreditation authority should be local councils, building on their existing role in the regulation of accommodation (i.e. the initial post-registration inspection, and fire safety regulation), and in the regulation of food services (i.e. as allocated in the regulatory regime established under the Food Act 2003). However, accreditation as an accommodation service, in particular, should require demonstration of additional competencies, and organisations other than local councils could have a role in this regard. For example, accommodation service proprietors could be required to demonstrate competence in:

* mental health first aid - by completion of mental health first aid course conducted by accredited trainers
* disability support – by having a protocol for persons with additional needs, to be developed by FACS, that sets out procedures for notifying FACS when accommodation is provided to persons with additional needs, and affording access to services provided under the NDIS
* continuing service and sector development – by participation in a sector forum, such as Newtown Neighbourhood Centre’s Boarding House Roundtable and Operators’ Forums.

In this way, the accreditation process would connect proprietors and local councils with knowledge and guidance from other authorities and sources of expertise. Some aspects would be funded by proprietors (e.g. fee-for-service mental health first aid courses), while others would require resources from the state government (i.e. for FACs own development of a protocol for persons with additional needs, or for increased access by proprietors to activities like those of NNC). State government resources might also include an advice service and knowledge depository within the state government that can be accessed by local councils for information and guidance on questions of development consent, building and fire safety relating to boarding houses and other forms of shared accommodation. The key is that local councils would not be expected to individually hold all the relevant knowledge themselves, and could be satisfied as to proprietors’ compliance on the basis of their access to quality resources elsewhere.

## Occupancy agreements and principles

The occupancy principles are broadly stated formulations that set out basic requirements of all occupancy agreements while affording room for difference between occupancy agreements, including as to grounds and notice periods for termination, and house rules. The flexibility of occupancy principles was fundamental to their original design in the Australian Capital Territory, where they apply to the broad range of rental housing arrangements otherwise excluded from the Territory’s Residential Tenancies Act.

The occupancy principles in the Boarding Houses Act slightly modify the ACT principles and share their basic flexibility. In our view, the content of each of the existing occupancy principles is appropriate, although the principle about security deposits (OP 8) could be improved by amending it to require the lodgement of deposits with NSW Fair Trading. In addition to the existing occupancy principles, we submit that two additional occupancy principles should be included. The first would address the issue of persons with additional needs residing in shared accommodation (an accommodation service, or accommodation and food service) where the proprietor has no intention of operating as an assisted boarding house (i.e. provide personal care services). We submit that persons with additional needs should be able to reside where they choose and, conversely, that proprietors should be able to accommodate persons with additional needs without fundamentally changing their business to also provide personal care services and comply with the standards required of such a business. The occupancy principle could provide as follows:

**Access to support and advocacy services.** An occupant is entitled to have access to support and advocacy services (including services funded as part of a package or plan under the NDIS), and may have these services provided in or delivered to the occupant in their room, unless the provision interferes with other residents’ reasonable peace, comfort and privacy, or causes 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.

The second additional occupancy principle would address the sharp practice, commonly encountered by international students, of proprietors using agreements with fixed terms extending past the period of the student’s intended stay, and claiming compensation for loss of rent (by withholding the security deposit) when the student vacates during the fixed term. The occupancy principle could provide as follows:

**Termination by an occupant.** An occupant is entitled to terminate an occupancy agreement without grounds, including during the fixed term of an agreement, by giving notice as required by the agreement, and the required amount of notice shall not be more than two weeks.

We note that these additional occupancy principles and almost all the existing occupancy principles are beneficial to residents, rather than to proprietors (the exception is OP 5, which is framed as an entitlement of proprietors to have access to do repairs). There is, for example, no principle that entitles proprietors to receive rent from residents. This feature of the occupancy principles appropriately reflects the reality that individual occupancy agreements are drafted by proprietors, not residents, who will not fail to include in their agreement terms, such as an obligation for residents to pay rent, that are in their interests as proprietors. Therefore, no additional principles for the benefit of proprietors are necessary.

Aside from the content of the occupancy principles, the larger issue is the scope of their application. Because the Boarding Houses Act applies relatively narrowly to registrable boarding houses, it does not realise the potential of occupancy principles as a regime of legislated housing rights for diverse forms of housing.

We submit that the Act should be reformed to provide that the occupancy principles and dispute resolution provisions apply to all forms of shared accommodation. To be clear, these provisions should apply even where the premises are not required to be registered: e.g. a sole lodgement in a private dwelling would not be registrable (because it is under the threshold number of residents), but the occupancy principles should still apply.

(In fact, we would go further and suggest that the occupancy principles and dispute resolution provisions should apply not only to all shared accommodation, but wherever a person is granted, for value, a periodic right to occupy premises as a residence and is not covered by a specific legislative regime, such as the Residential Tenancies Act 2010 or the Residential (Land Lease) Communities Act 2013. This would make the occupancy principles a safety net for residents who fall out of those other legislative regimes.)

We further submit that NSW Fair Trading should conduct a series of consultations with stakeholders in the different shared accommodation subsectors – e.g. general ‘accommodation-only’ boarding houses, assisted boarding houses, student accommodation, share houses and lodgements in private dwellings – with a view to developing standard forms of occupancy agreement specific to each accommodation type or subsector. The standard form agreements would reflect the different needs and circumstances of parties in those subsectors: e.g. a student accommodation standard form agreement might be more restrictive of termination by proprietors than a general boarding house standard form agreement, but also contain as a specific ground for termination that the resident has ceased to be enrolled as a student. As part of the consultation process, the standard forms could then be ‘road-tested’ by proprietors, and refined if necessary, before being prescribed as the standard form for use by premises of the relevant registration category and service description.

## Assisted boarding houses

As a form of congregated accommodation for people with disability, with personal care services provided by the accommodation proprietor, assisted boarding houses present a high risk of isolation, neglect, abuse and exploitation to their vulnerable clientele. This was demonstrated all too often under the previous regime. In the registration and accreditation regime we recommend above, we have referred to assisted boarding houses as providing accommodation, food and personal care services, and FACS as the agency for authorising and accrediting them. This is essentially the same as the current regulatory relationship.

We understand that with the advent of the NDIS and, in particular, its provision of Supported Independent Living (SIL) packages, some disability support providers are offering SIL recipients shared accommodation, as well as SIL-funded support services. Under the current provisions of the Boarding Houses Act, these arrangements would likely fall within the scope of the assisted boarding house provisions. We suggest that this is appropriate: where one entity provides both shared accommodation and care, risk is high and close regulation and scrutiny is required.

On the other hand, where a proprietor provides only accommodation (or accommodation and food), and has no intention of providing personal care services, they should be able to provide that service to persons with additional needs without having to change their business to an assisted boarding house. As indicated above, this situation could be addressed both through an expanded and enhanced registration and accreditation regime, whereby all accommodation service providers would be competent in mental health first aid and in making referrals to FACS and other support agencies, and through a new occupancy principle that ensures residents may access support from other agencies in the premises where they live.



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