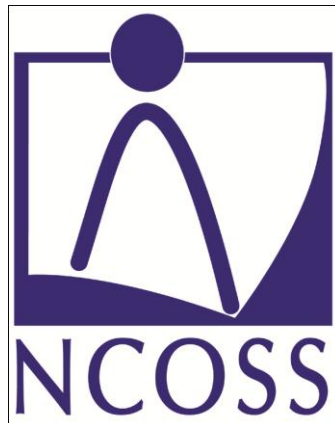


Submission on the Exposure Draft of the *Boarding Houses Bill 2012*



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Council of Social Service of NSW (NCOSS)

66 Albion Street

Surry Hills NSW 2010

Ph: 02 9211 2599

Fax: 02 9281 1968

Email: info@ncoss.org.au

About NCOSS

The Council of Social Service of NSW (NCOSS) provides independent and informed policy development, advice and review and plays a key coordination and leadership role for the non government social and community services sector in New South Wales. NCOSS works with our members, the sector, the NSW Government and its departments and other relevant agencies on current and emerging (and ongoing) social, systemic and operational issues.

NCOSS has a vision for a society where there is social and economic equity, based on co-operation, participation, sustainability and respect.

NCOSS membership is composed of community organisations and interested individuals. Affiliate members include local government councils, business organisations and Government agencies.

Member organisations are diverse, including unfunded self-help groups, children's services, youth services, emergency relief agencies, chronic illness and community care organisations, family support agencies, housing and homeless services, mental health, alcohol and other drug organisations, local indigenous community organisations, church groups, peak organisations and a range of population-specific consumer advocacy agencies.

Introduction

NCOSS welcomes this opportunity to comment on the Exposure Draft Bill and associated Position Paper. We welcome the Government's commitment to introduce legislation into Parliament in the Spring Session following consideration of community feedback on the Exposure Draft Bill.

NCOSS is concerned, however, that the material released for comment excludes consideration of key matters that will determine the effectiveness of the reform agenda, such as:

- the Government's anticipated commitment of resources for compliance and enforcement, given that lack of enforcement action in the past has contributed to many of the problems faced by boarding house residents;
- the future planning provisions governing boarding houses and other forms of marginal rental, given that the Government has already changed the Affordable Housing SEPP to make it harder for new supply to obtain planning consent; and
- the lack of explicit commitment to the provision of expanded support services for vulnerable people living in an authorised residential centre, or clear responsibility for the provision of such support. Our concerns on this aspect are linked to the substantial expansion of categories of clients for whom monitoring will be in place, including the addition of people with age related frailty or a mental illness, beyond people with disability covered by the existing legislation.

NCOSS understands the Regulations that will accompany this legislation will be developed in coming months and will include the following:

- Building standards.
- Provision of living spaces and other amenities etc.
- Standard of living issues.

Definition of a “registrable boarding house”

The definition of a Tier 1 registrable boarding house in section 5 (2) is if “the premises provide beds, for a fee or reward, for use by 5 or more residents (not counting any residents who are proprietors or managers of the premises or relatives of the proprietors or managers).”

The threshold number of five residents in this definition seems to have been chosen with no strong rationale or evidence base. The existing local government regulation, which is poorly complied with and not uniformly enforced by local councils, applies to premises with twelve or more residents, so the draft is likely to capture an increased number of residential premises.

NCOSS is also aware of businesses where not all residents are accommodated in a single dwelling, but where a single operator provides services from a separate building to residents accommodated in a number of dwellings. Under the draft Bill, such facilities would not be included under the definition of a registrable boarding house. NCOSS recommends that such facilities should be required to comply with the provisions of the Act.

Use of the term ‘registration’

NCOSS is concerned that the purpose of registration, and the role of Fair Trading in managing the registration system, is not clearly articulated in the Draft Bill and Position Paper.

It appears that the registration system is designed to clarify how many boarding houses are in operation, where they are located and who operates them. The Discussion Paper does not canvas the key risk to the whole package of reforms, which is that operators will not register in the first place and thus seek to avoid or delay the application of the additional scrutiny that the reform package is designed to provide.

In the case of Tier 1 boarding houses the role of Fair Trading staff is limited to processing registration applications and placing them on a public register, and pursuing those who seek to avoid registration. Local councils are responsible for monitoring compliance with building and related requirements, largely using existing powers.

In our view the use of the term registration in respect of Tier 1 boarding houses is inappropriate. The community would expect that a facility registered by a government agency has been accredited as providing a quality service. This is the sense in which the term registration is applied to non-government community housing providers.

NCOSS suggests that the more appropriate terminology for Tier 1 boarding houses, that are not subject to the more onerous requirements that apply to residential centres for vulnerable persons (Tier 2 boarding houses), would be listed boarding houses. Tier 2 centres should be referred to using the terminology inserted in the Bill ('residential centres for vulnerable persons') to differentiate them from boarding houses that have not been authorised to accommodate vulnerable people.

Monitoring

NCOSS is concerned that the initial assessment of whether a premises is a Tier 1 or a Tier 2 boarding house will be undertaken by the proprietor. Proprietors are not required to have training in assessment of the support needs of people with disability and other vulnerable people, and therefore there may be inconsistency in how assessments take place, resulting in some vulnerable persons being inadequately or inappropriately assessed. Proprietors, furthermore, have a conflict of interest in making the assessment, as assessing residents as vulnerable persons would attract a greater regulatory burden to the proprietor. NCOSS recommends that independent assessors conduct these assessments, possibly ADHC enforcement officers.

NCOSS is further concerned that further ongoing monitoring of boarding houses is not provided for in the Bill, and that the health and welfare of residents is not included in mandatory compliance monitoring required by local councils. Published registration alone may not be sufficient to monitor the health and welfare of residents of boarding houses. NCOSS recommends that standards relating to the health and welfare of residents be included in regulation.

NCOSS is concerned that local councils are not resourced to monitor compliance of boarding houses with the Act. A one-off registration fee will not necessarily meet the costs to some local councils, where there are numerous boarding houses operating, of monitoring compliance with local government and environmental planning legislation. NCOSS recommends that additional resources be made available to local councils, on the basis of the number of registrable boarding houses in the Local Government Area, to monitor compliance with relevant legislation.

Occupancy principles and occupancy agreements

NCOSS supports the implementation of occupancy agreements for residents of boarding houses. This reform is one that many working in housing advocacy in NSW have been seeking for many years, and will likely improve circumstances for low income and disadvantaged people living in boarding house accommodation.

However, NCOSS does not see a reason for occupancy agreements to be restricted to residents of registrable boarding houses only. The occupancy principles may be decoupled from processes relating to registration, and

applicable to a wider range of accommodation types not covered under other legislation.

NCOSS notes that the ACT Government amended its *Residential Tenancies Act 1997* to introduce a system of occupancy agreements for residents excluded from the system of residential tenancies. The success of the ACT system has been linked to the following approach:

- universal coverage,
- protection of occupants' rights,
- an important role for the tribunal, and
- public education¹.

NCOSS recommends that residents be entitled to occupancy agreements regardless of the registration status of the boarding house. Residents of residential parks, retirement villages and residential aged care facilities are covered by separate NSW or Commonwealth legislation and are sensibly excluded from the Draft Bill. However people staying in premises used for refuge or crisis accommodation are currently denied any statutory rights and NCOSS proposes that they be included in the occupancy agreements part of the legislation, and only that part (i.e. they should not be listed or registered).

Consideration should also be given to the extension of the system of occupancy agreements to other forms of accommodation, including serviced apartments, backpacker hostels, hotels and motels etc².

By way of example, NCOSS is aware of a number of backpacker hostels and hotels being used as a longer term place of residence by persons placed in those facilities by Housing NSW and other agencies. In these cases, where long term residence of a person is involved, an occupancy agreement would be an important provision to uphold the rights of person accommodated in those premises, many of whom experience types of disadvantage and vulnerability similar to people in boarding houses.

Occupancy agreements also do not seem to be required to include the occupancy principles; agreements must only not contravene the principles. NCOSS is concerned that this may lead to a number of agreements being created with poor protections for boarding house residents. NCOSS recommends that occupancy agreements be required to include the occupancy principles as a minimum.

NCOSS is concerned the Bill in its present form states that contravention of the occupancy principles and occupancy agreements does not attract any penalties. This limits the effectiveness of these instruments for protecting the rights and entitlements of residents. NCOSS recommends that penalties be added for contravention of the occupancy principles by relevant parties.

¹ Quoting Peter Sutherland, Visiting Fellow at the ANU College of Law, from his presentation to the roundtable in November 2010 convened by a number of peaks including NCOSS.

² This list is not meant to be exclusive.

NCOSS is concerned that the occupancy principles do not include provisions to limit excessive charges by proprietors, including mechanisms to appeal excessive increases in rent or fees, and by limiting any utility charge levy to a 'fair and reasonable estimate of the likely or actual amount consumed by each occupant'³.

NCOSS recommends that the Bill include rights for residents to apply to the Consumer, Trader and Tenancy Tribunal (the Tribunal) for an order that a fee increase or utility levy is excessive. NCOSS also recommends that the Bill include protections for residents who pay a bond, particularly registration with the Rental Bond Board.

Section 31 – Application to Consumer, Trader and Tenancy Tribunal for dispute resolution

NCOSS supports this section of the draft Bill. Application to the Tribunal is an important mechanism for upholding the rights of residents.

However, NCOSS recommends that former residents be included in relevant parties as defined in section (2). This would prevent proprietors punitively evicting residents in order to circumvent the jurisdiction of the Tribunal.

Moreover, section (5) excludes the Tribunal from ordering payment of damages or other compensation to an applicant. NCOSS queries this limitation on the authority of the Tribunal. In many cases where occupancy principles have been contravened, compensation or damages may be the most appropriate remedy, and other orders would not effectively address the contravention, particularly for former boarding house residents. NCOSS recommends that the Tribunal be granted authority to order payment of damages and compensation for contravention of the occupancy principles.

Residential centres for vulnerable persons

NCOSS supports these provisions. Stronger protection for residents of licensed residential centres has been called for by numerous parties including the NSW Ombudsman and the NSW Coroner. Recent actions in 2011 by NSW Ageing, Disability and Home Care to remove residents of Grand Western Lodge, and findings by the NSW Coroner in relation to the deaths of six residents of 300 Hostel, highlight the critical nature of these issues for residents of licensed residential premises.

Section 32 – Objects

NCOSS is concerned at the inclusion of paragraph (4) in this section which states that nothing in this entire section is legally enforceable. For the Bill to provide protections of the vulnerable people it is intended to support, this section must be deleted or reworded to avoid this interpretation.

³ This is the wording recommended by the ACT Essential Services Consumer Council.

Section 33 – Definitions

Serious criminal offence: NCOSS recommends the inclusion of serious drug offences in this definition, especially in light of the recent Coroner’s Report in March 2012 on deaths in a licensed Boarding House.

Staff member: NCOSS is concerned that some residents in licensed Boarding Houses have been engaged by proprietors to undertake staff duties sometimes in lieu of rent or board. It is unclear how these people would be identified or classified under this definition and whether the obligations and requirements in section 83 would then apply to them.

Section 34 – Meaning of “vulnerable person”

In the Bill, a residential centre for vulnerable persons is defined as “boarding premises that provide beds, for a fee or reward, for use by 2 or more residents who are vulnerable persons”. Many more premises than those operating currently as “licensed residential centres for handicapped persons” under the definition set out in the *Youth and Community Services Act 1973* (YCS Act) may fall under this definition. This may then create a perverse incentive for the operators of unlicensed premises to evict any residents who may be vulnerable persons prior to the implementation of the Act, so as to avoid the increased regulatory requirements under Chapter 4 of the Act.

NCOSS believes this may affect significant numbers of people. The NSW Ombudsman, in his 2011 report, noted “the capacity of licensed boarding houses is declining, and there are concerns that vulnerable people are entering unlicensed boarding houses”.⁴ Safeguards must be put in place to ensure that residents are protected in the process of implementing additional regulation on proprietors. NCOSS recommends that consideration be given to an enforceable obligation on all proprietors that ADHC be notified where a person who is vulnerable or in receipt of a Disability Support Pension or similar can no longer be accommodated. This must include the prior consent of the person.

Authorisation of residential centres

NCOSS recommends that licences can only be granted to persons fulfilling the prescribed criteria as well as:

- the expanded definition of serious criminal offences to include drug offences; and
- the applicant person is considered to be “of good character”.

NCOSS recommends against making provisions for appointment of substitute licensees (Section 46) or for licenses to be for no fixed term (Section 49). To maintain the health, welfare and safety of residents, NCOSS recommends that all licenses be for a fixed term, and attach to a single person or body.

⁴ NSW Ombudsman (2011) *More than board and lodging: the need for boarding house reform*, August, p. 1.

Where a license is held by a corporation, which would be subject to structural changes such as mergers or takeover, fixed term licensing would avoid licenses and management passing into the hands of persons not suitable to operate residential centres for vulnerable persons.

Compliance and Enforcement

NCOSS supports the powers of enforcement officers to enter premises without the consent of the proprietor or a warrant. Additional powers for enforcement officers to be accompanied by medical practitioners will enable ADHC to ascertain the health and welfare needs of residents more readily than the YCS Act provides. Given the findings of the NSW Coroner relating to health conditions of residents of 300 Hostel, and the apparent neglectful treatment by the proprietor and attendant medical practitioners, these powers are essential for monitoring the health, welfare, living and environmental conditions of licensed boarding house residents.

NCOSS advises, however, that the privacy of residents must be protected, and residents must retain the right to refuse examination or questioning by an enforcement officer.

Section 82 – Notification of critical incidents

NCOSS recommends an expansion to the range of mandatory notifications to include:

- suicide attempts;
- hospitalisations, including injury and illness;
- instances of self-harm; and
- physical assaults.

This is especially relevant in relation to both the Ombudsman's Report and the Coronial findings and could serve to provide pre-emptive notice of management or operational issues.

Section 84 – Removal of vulnerable persons from unauthorised residential centres

The Exposure Draft states that persons under 18 years may enter and reside in licensed residential centres. This contravenes ADHC's successful applications to the NSW Anti-Discrimination Board and the Australian Human Rights Commission to disallow residents under the age of 18 from residing in licensed residential centres. NCROSS acknowledges that ADHC's exemptions to the Commonwealth and NSW Anti-Discrimination Acts each apply for only one year. This means that effectively from early 2013, without protections included in the *Boarding Houses Bill 2012*, there would be no legislative protection for vulnerable children and young people from entering licensed boarding houses. NCROSS recommends that the *Boarding Houses Bill 2012* excludes persons under 18 years from entering and residing in licensed residential centres. NCROSS also recommends that the Bill includes that

persons under 18 years found to be living in licensed residential centres be removed.

NCOSS also supports the capacity for adults to be removed from a residential centre where the person desires it, but may be unable to organise it, or in cases of actual or suspected abuse or neglect.

Further information

For further information or to discuss any of the issues, please contact

- For Tier 1:
Warren Gardiner, Senior Policy Officer, on 9211 2599 ext. 112
or email warren@ncoss.org.au
- For Tier 2
Christine Regan, Senior Policy Officer, on 9211 2599 ext. 117
or email chris@ncoss.org.au