

Community Housing Regulation Review

Tenants Victoria Submission

Who we are?

Tenants Victoria was founded over 30 years ago to promote and protect the rights of tenants and residents in all forms of residential accommodation in Victoria. We aim to inform and educate tenants about their rights and work for social change to improve conditions for all tenants.

In 1974, a group of disgruntled tenants in Royal Court, Parkville formed a tenants' association to do something about their landlord: Rents were continually rising despite the landlord's failure to carry out repairs. The tenants at Royal Court soon realised that the basic problem was the archaic tenancy laws that still existed in Victoria at the time. They took their story to the media and in the process, raised awareness of tenancy law reform in Victoria. Tenants Victoria was formed as a result of the support and momentum from this brave undertaking.

By the mid-1970s, consumer rights had gained acceptance and the idea that tenants, as consumers, are entitled to basic consumer protection became easier to support in public policy. Once formed, Tenants Victoria – with a number of other community organisations – was instrumental in having the Community Committee on Tenancy Law Reform established, which ultimately led to the Residential Tenancies Act of 1980.

Since its inception, Tenants Victoria has worked continuously to provide advice to as many individual tenants as possible while working towards long-term change for the benefit of all tenants. We successfully campaigned to have caravan park residents included in the 1987 legislation and rooming house residents covered in 1990. After a protracted campaign of more than ten years, an independent Residential Tenancies Bond Authority was established in 1997.

We have assisted more than half a million tenants since that first informal advice service of 30 years ago. The need for basic advice and advocacy for residential tenants is as strong as ever, and we are now assisting more than 16,000 public and private tenants each year.

Contents of this submission

This submission will focus on community housing regulation from the point of view of Victoria and Victorian tenants. Victoria is of course one of the jurisdictions that has chosen to remain self-regulating, however information useful to the review of the national regulatory scheme can be drawn from Victoria's situation. This submission, does not address all of the consultation questions raised, but concentrates on those of most relevance to Tenants Victoria's stakeholders.

Submission

1. Is regulation still required and relevant for the community housing sector? Why/why not? What do you think regulation of this sector should aim to achieve?

The Community Housing sector represents a sizeable portion of rental housing, although there is some confusion in the publically available data. AIHW found 80,225 community housing properties (14,236 in Victoria) and an additional 27,533 State owned and managed indigenous housing and indigenous community housing at June 2016 (1,939 in Victoria)¹, while the Report on Government Services found it comprised 75 634 households and 82 902 community housing tenancy rental units at 30 June 2017, and at June 2016, 13 177 households and 15 461 permanent dwellings managed by government funded Indigenous Controlled Housing organisations². Both the Productivity Commission and AIHW reported that the community housing sector is growing as jurisdictions continue to transfer properties to it for management.

It is hard to imagine a situation where regulation of the community housing sector is not required and relevant. As a sector that provides housing for some of the most vulnerable people in our community, it is important that strong minimum standards are set and enforced to protect tenants.

The current national law's objects are:

- (1) *to provide for a national system of registration, monitoring and regulation of community housing providers:*
 - (a) *to encourage the development, viability and quality of community housing, and*
 - (b) *to promote confidence in the good governance of registered community housing providers so as to facilitate greater investment in that sector, and*
 - (c) *to make it easier for community housing providers to operate in more than one participating jurisdiction.*
- (2) *A purpose of registration is to identify appropriate entities to which government funding for community housing might be provided under other legislation or policies of a jurisdiction.*

Additional guidance on the scheme's aims are described in the National Regulatory System Community Housing Evidence Guidelines published in January 2014. These are to:

- provide a consistent regulatory environment to support the growth and development of the community housing sector
- pave the way for future housing product development
- reduce the regulatory burden on housing providers working across jurisdictions
- provide a level playing field for providers seeking to enter new jurisdictions.

The clear objects are to grow the sector, create consistent regulation across jurisdictions and reduce regulatory burden on community housing providers. These are appropriate objects but they do not properly or completely address the sector.

¹ <https://www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia-2017/contents/social-housing-dwellings>

² <https://www.pc.gov.au/research/ongoing/report-on-government-services/2018/housing-and-homelessness/housing/rogs-2018-partg-chapter18.pdf> at 18.3

Collectively, these objects are focused on the institutions and organisations running community housing rather than the people who are served and supported by the homes the sector provides. Improving the fiscal sustainability and governance of this sector is important, but the scheme’s current objects ignore the policy reasons for the existence of community housing, i.e. providing housing for those who find it difficult to access housing in the private market or whose circumstances mean that crisis or transitional housing is required immediately. Similarly, while growth of the sector is important, it should not trump quality of service to tenants. Without amendment of these aims, there is a significant risk that community housing will be blind to the needs of its tenants, and merely focus on its institutional or fiscal performance. Community housing regulation should recognise the need to support and maintain at risk tenancies, and improve its service to tenants resident in its properties.

In Tenants Victoria’s submission, additional aims should include:

- **High quality management of community housing, particularly protection of tenants from homelessness wherever possible, i.e. eviction as last resort**
- **Supporting improving standards and physical quantity of community housing**

2. Should community housing regulation apply to all forms of affordable housing, including for-profit providers? What modifications to the NRSCH would be required to appropriately support their inclusion?

- For profit providers should be regulated separately as their aims differ from other community housing providers. Tenants Victoria considers that their for-profit aim will reduce or dilute their benevolent output and therefore a stronger, more active regulatory regime is needed to ensure that they meet appropriate policy, housing and prudential standards, and that they continue to warrant the label community housing. It is especially important that for profit providers receiving government funding are subject to stringent oversight, to ensure that the policy aims of the funding are fulfilled.
- Fit and proper person test needed for community housing directors (whether not for profit or for profit) to provide appropriate safeguards to the vulnerable tenants housed in this form of property.

Tenants Victoria recommends that for-profit community housing has more stringent regulatory regime to ensure that tenants are not disadvantaged. In addition, Tenants Victoria recommends consideration of fit and proper person testing for directors of housing providers to protect tenants.

3. What do you think the vision for regulation of the sector should be moving forward and how could the design and operation of the NRSCH support this? What role should the National Industry Development Framework (NIDF) have in the NRSCH?

NIDF provides some positive general guides to community housing providers and government, however it embodies an “bigger is best” philosophy (in Outcome 2 – Construction and Development), and encourages community housing providers to ‘group buy’ construction of new premises. It’s not clear that this is always a positive approach for a small not-for profit sector organisation. Advantages of scale can be found in very large contracts, such as when State government is the purchaser. Tenants Victoria is not aware of state/territory governments allowing community housing providers to use government buying contracts to take advantage of the significantly greater bargaining power of a very large purchaser.

It is concerning that the NIDF – Outcome 4 – Regulation – Meeting the National Regulatory Code, states that *“providers are registered on an opt-in basis, subject to funding requirements of state and territory governments. This will enable localised approaches by government agencies to continue so that industry and sector development strategies are responsive and appropriate in each jurisdiction”*. If providers can choose to opt-in, a multiplicity of regulation and a two (or more) tier system is created, with differing requirements and standards prevailing. If it is the providers who opt-in this allows poor quality providers to remain outside the national system. If the ‘light-touch’ regulation provided under the NIDF/NRSCH is the norm, it allows standards to decline over time due to inattention to enforcement and requirement for self-regulation in the NRSCH.

Tenants Victoria recommends that jurisdictions consider granting registered not for profit community housing providers access to state government contracts to maximise the benefits of scale. Tenants Victoria also recommends that the Code be altered, so it is a mandatory rather than opt-in system, to ensure higher overall quality of service provision.

4. What is the impact (positive or negative) of having three different regulatory systems across Australia? Would there be benefits in WA and Victoria joining the NRSCH?

The three systems (Vic, WA and National) demonstrate some of the methods of monitoring and regulating community housing, and the variations in enforcement intensity across the regimes. The Victorian regime includes a stronger beneficial purpose requirement for community housing than the NRSCH. This additional purpose should not be lost if Victoria moves to join the NRSCH. Detriments to moving to a single system include the difficulty of changing the regime, and likelihood of lowest common denominator approach becoming the norm.

A feature of the NRSCH is that a community housing provider operating in more than one jurisdiction is able to nominate their primary jurisdiction, so conflict in regulation should be minimised. It is not however clear how this operates in practise, should a community housing provider be brought before the applicable tribunal by a tenant seeking to enforce rights. Currently there is doubt regarding the ability of State based administrative tribunals to hear litigation where one of the parties is outside the jurisdiction.³ So while housing providers operating in more than one jurisdiction may seek to benefit from a singular approach, they would have to use their “local” body to pursue rights in a tribunal. Further the tribunal applying the law remains a state tribunal, interpreting state residential tenancy law, so results for tenants and community housing landlords will vary between jurisdictions. This in turn leads to differing results for tenants. Further, it is not clear when housing providers are operating on behalf of public authorities, so administrative law cannot be used to help tenants negatively affected by poorly operated community housing providers. Until further consistency of Residential Tenancy law is achieved among the various state and territory jurisdictions, it seems there is little gain for landlords or tenants.

³ Burns v Corbett [2018] HCA 15 – NSW CAT exercises State judicial power in hearing and determining disputes, but it cannot determine disputes between interstate residents. Consideration of Judiciary Act 1903 (Cwth) s39(2) and cl.109 Constitution. KIEFEL CJ, BELL AND KEANE JJ found that a State law that purports to confer jurisdiction with respect to any of the matters listed in ss 75 and 76 of the Constitution on a tribunal that is not one of the courts of the States is inconsistent with Ch III of the Constitution, and is invalid. GAEGLER J found NCAT is not a State court, the provisions of the NCAT Act which purport to confer State judicial power on NCAT are invalid and otherwise supported the joint judgement. NETTLE and GORDON JJ found the purported exercise of NCAT jurisdiction contrary to the Cwth Constitution.

7. Are there existing forms of regulation that overlap with the NRSCH (e.g. the ACNC)? What is the impact of this? What should community housing regulation offer that is not covered by existing schemes?

It is not immediately apparent from the register how many cross jurisdiction community housing providers exist. In addition, it is not clear whether the nature of community housing means that community housing is a highly localised (i.e. not naturally intra-state activity). Tenants Victoria expects that only organisations that already have a presence in more than one jurisdiction would be attracted to establishing community housing in multiple jurisdictions. Thus the advantage of national registration is likely to be taken up only by existing charities or religious organisations (e.g. Mission Australia or Salvation Army), that provide this service as an adjunct to their work, rather than organisations specialising in housing provision. These types of organisations are already nationally governed and registered by the Australian Charities and Not for Profits Commission, including prudential oversight. It is not clear what is added by the Housing Register to this scheme.

Tenancy law is the other major regulatory scheme governing community housing operations. This overlap means that community housing must be managed according to the state based law, that currently varies considerably between jurisdictions. As a result, the policies and procedures that a community housing provider applies must be adapted to each jurisdiction, and there cannot be uniformity between tenants of the same community housing provider operating in several jurisdictions. The conditions between jurisdictions will differ between tenants and a key stakeholder group does not benefit from the NRSCH. Variation between regulations results in lack of uniformity/comity so that the key benefit of the NRSCH for community housing providers is not and cannot be delivered.

The scheme does not include any involvement of tenants in their community housing provider. Tenants Union NSW has argued forcefully that the NRSCH should, like the English and Scottish regulatory schemes, recognise the value of tenant involvement in governance and the importance of tenant participation to improve community housing.

In the UK, during 2017 the Homes and Community Agency adopted a Tenant Involvement and Empowerment Standard⁴ which includes that registered providers must ensure that tenants are given a wide range of opportunities to influence and be involved in:

- formulation of housing-related policies and strategic priorities
- making of decisions about how housing-related services are delivered, including the setting of service standards
- scrutiny of landlords' performance and the making of recommendations about how performance might be improved
- management of their homes, where applicable, and
- management of repair and maintenance services.

The independent Scottish Housing Regulator has also established a panel of tenants and service users to give feedback on the effectiveness of the regulatory scheme⁵.

Tenants Victoria recommends that the NRSCH be amended to provide a guaranteed voice for community housing tenants in the organisation and governance of the sector.

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725831/Tenant_Involvement_and_Empowerment_Standard.pdf

⁵<https://www.scottishhousingregulator.gov.uk/sites/default/files/publications/Involving%20tenants%20and%20service%20users%202016-18%20publication%20version.pdf>

8. Is there any other role the NRSCH should be undertaking that it is currently not?

The NRSCH is currently focused on financial probity and sustainability of community housing, however it does not address the rationale for the existence of community housing, nor provide useful information on the sector to support policy making.

Community Housing providers are not required to meet minimum standards of equity or tenancy management, or if they are, these standards and whether they are achieved are opaque and not ascertainable by the public. So we are not informed whether practises or needs in the sector are changing, or are being met currently. The NRSCH should encourage and require equity and high quality tenancy management practices in community housing providers, so that the sector's practises improve over time. Publication of information on the reasons each tenancy has ceased, the interactions the tenant had with the community housing landlord (including regarding improvements requested by a tenant) and other support services provided to a tenant would be useful for planning and improvement over time. This improvement is particularly important in a policy environment where jurisdictions are using community housing as replacement or proxy for publically owned housing.

Tenants Victoria recommends that:

- **NRSCH should also require wherever possible, registered community housing providers to maintain the tenancy as the first priority of community housing providers, to help prevent vulnerable tenants becoming homeless.**
- **Information on the performance of community housing providers should be provided and published by NRSCH, including tenancy turnovers, including reasons for turnover.**
- **NRSCH through the jurisdiction based Housing Registrars could also survey tenants to ensure management practices are appropriate, maintenance is appropriate and timely and providers meet the required standards of fairness and equity.**

9. Is the current design of the NRSCH conducive to efficient and effective regulation of the sector? Could the design of the NRSCH be improved or streamlined? If so, how?

The current regulatory design is minimalist and self-policing, and one that relies on community housing providers desire to maintain registration to encourage compliance, without significant oversight or enforcement by the relevant Registrar. This is not sufficient to ensure good practice.

Tenants Victoria recommends adopting a more interventionist approach to create transparent accountability to enforce minimum standards, including through spot checks and contacting tenants directly to obtain information about their community housing provider, requiring community housing organisations to provide their policies to the Registrar. Publication of investigations by the Registrar would also mean that investigation outcomes are clear for housing providers and tenants alike.

13. Are registrars' enforcement and investigative powers sufficient to protect tenants and public assets allocated to CHPs? Why/why not? How could this be improved?

While enforcement powers may be sufficient, it appears that their execution is lacking; there is no regular audit, inspection requirement of community housing providers to ensure that their work

with tenants is appropriate to their mission to provide social housing. Some registrars⁶ provide guidance to providers on best practice, however it

While ‘light touch’ regulation may be administratively efficient as it outsources the work to the regulated party, it does not ensure that non-compliance is picked up early before causing detriment to tenants. A stronger, regular and random inspection enforcement cycle is more likely to improve compliance, and avoid significant non-compliance.

16. Does the NRSCH provide sufficient information to stakeholders, including tenants, providers, investors and governments? Why/why not? What ways could it be improved? No, see response re question 8 above.

17. Are NRSCH communications with stakeholders effective in demonstrating the purpose, operation and performance of the NRSCH and relative performance of CHPs? Why/why not?

Tenants Victoria is not aware that NRSCH provides relevant information targeted to stakeholders. Certainly there is no information on the relative performance of community housing providers readily accessible to Tenants Victoria on this topic.

19. How has the NRSCH affected tenant outcomes? Have tenant outcomes improved?

As we have continued state based regulation in Victoria I cannot answer the question of improvements already made by the NRSCH with any certainty. We are not aware of any influence of the NRSCH on community housing practises or policy. To the extent that some organisations in other states have been refused registration, it is assumed that improvements have been made, however this is not clear from publically available information. It is not known to what degree accountability is exercised nor to understand changes effected by the NRSCH and actions of registrars under this scheme without further information on previously registered entities, and changes made by currently registered entities.

20. Should the NRSCH be modified to better regulate Aboriginal and Torres Strait Islander CHPs? What would be needed to achieve this?

Aboriginal and Torres Strait Islander groups have often expressed the need to be involved in and preferably in charge of the management of any entities providing services to ATSI peoples, so that culturally appropriate and best targeted services can be designed and delivered.

Tenants Victoria recommends that community housing providers for ATSI tenants should be run by and adhere to standards set by the regional or state based Aboriginal and Torres Strait Islander commission or similar body.

25. Could CHPs’ data reporting requirements better support increased investment in the sector? For example, do NRSCH reporting requirements need to be more regular and more responsive? Why/why not? What is a reasonable level of regular reporting?

Published reporting by NRSCH is very general and limited to percentage calculations of Community Housing Providers falling within specified desired target ranges for occupancy, tenancy turnaround times, outstanding rent and tenant satisfaction, as well as slightly more detailed reporting on write-

⁶ E.g. In Victoria, the Registrar has published guidance to agencies including: Agency publication of key policies, Agency self-assessment and reporting, Assets and complaints under the Registrar’s jurisdiction, Corporate group structures and the Victorian Regulatory Framework, Intervention guidelines, Regulation of newly registered agencies and Reportable Events. <http://www.housingregistrar.vic.gov.au/How-we-regulate/Guidelines-for-agencies>

downs and earnings before tax and depreciation. Aside from a comparison with the previous year, it does not provide any assessment of improvement, or any commentary that may explain reductions or changes. The Community Housing Providers own data is limited to materials included in their annual reports and ready comparisons can't be made between providers.

Tenants Victoria recommends additional reporting requirements on tenancy turnover and reasons for turnover be a minimum requirement, and that NRSCH consider retaining AHURI to report on best practise policy and procedures in the sector, and to draft new tenant survey questions to establish a clear tenant satisfaction rating and analysis of results.

Summary of Recommendations:

1. **Additional aims should include:**
 - **High quality management of community housing, particularly protection of tenants from homelessness wherever possible**
 - **Supporting improving standards and physical quantity of community housing**
2. **For-profit community housing should have a more stringent regulatory regime to ensure that tenants are not disadvantaged.**
3. **Jurisdictions consider granting registered not for profit community housing providers access to state government contracts to maximise the benefits of scale. The Code should be altered so it is a mandatory rather than opt-in system, to ensure higher overall quality of service provision.**
4. **The NRSCH should be amended to provide a guaranteed voice for community housing tenants in the organisation and governance of the sector, particularly board participation by tenants in larger or Tier 1 providers.**
5. **NRSCH should also require wherever possible, registered community housing providers to maintain the tenancy as the first priority of community housing providers, to help prevent vulnerable tenants becoming homeless.**
6. **Information on the performance of community housing providers should be provided and published by NRSCH, including tenancy turnovers, including reasons for turnover.**
7. **NRSCH through the jurisdiction-based Housing Registrars could also survey tenants to ensure management practices are appropriate, maintenance is appropriate and timely and providers meet the required standards of fairness and equity.**
8. **A more interventionist approach should be adopted to enforce minimum standards, including through spot checks and contacting tenants directly to obtain information about their community housing provider.**
9. **Community housing providers for Aboriginal and Torres Strait Island tenants should be run by and adhere to standards set by the regional or state based Aboriginal and Torres Strait Islander Commission or similar body.**
10. **Additional reporting requirements on tenancy turnover and reasons for turnover be a minimum requirement, and that NRSCH consider retaining AHURI to report on best practise policy and procedures in the sector, and to draft new tenant survey questions to establish a clear tenant satisfaction rating and analysis of results.**