

**POSITION PAPER
EXPOSURE DRAFT BOARDING HOUSES BILL 2012**

Position Paper

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29 June 2012

1. INTRODUCTION

Boarding houses play an integral role in the provision of low-cost, affordable housing, particularly for people who may otherwise struggle to afford private accommodation.

However, there are concerns that residents - many of whom are vulnerable- are frequently exposed to unacceptable risks in relation to their safety and well-being.

Boarding houses in NSW are either licensed or unlicensed. Those which accommodate two or more people with a disability are required to be licensed under the *Youth and Community Services Act 1973* ("YCS Act") and the *Youth and Community Services Regulation 2010* ("YCS Regulation").

The NSW Government intends to introduce a new legislative framework which will provide better protections for all boarding house residents.

The NSW Government's draft *Boarding House Bill 2012* ("Exposure Draft") includes:

- Relevant provisions from the YCS Act plus various amendments;
- The introduction of a centralised register for NSW boarding houses;
- Principles-based occupancy rights to govern the relationship between residents and boarding house proprietors;
- Enhanced accommodation standards for smaller boarding houses;
- Enhanced powers of entry and associated inspection regimes; and
- Increased penalties for non-compliance with the regulations.

Comments are sought on the Exposure Draft.

The proposals have been developed through an Interdepartmental Committee containing senior representatives of the Departments of Premier and Cabinet (including the Division of Local Government and the Better Regulation Office), Family and Community Services (Ageing Disability and Home Care, and Housing NSW), Health, Planning and Infrastructure, Finance and Services (NSW Fair Trading), the Attorney General and Justice (NSW Trustee and Guardian), and Treasury. Interagency consultation on the proposals has been substantial.

Stakeholders have also been consulted in recent years about options for reform of the boarding house sector. These consultations canvassed a number of reform proposals that are included in the Exposure Draft.

The NSW Government is aware that the number of licensed boarding houses has declined over the past two decades. The reforms seek to strike a 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 community.

Further work is being led by the NSW Government on monitoring the supply of boarding houses and on developing initiatives to deliver affordable housing (of which the boarding house sector is one part). As part of this process the NSW Government will examine whether there is a need for additional assistance and incentives.

The NSW Government is also aware that regulatory protections alone may not be sufficient to ensure the welfare of vulnerable people in boarding houses. The proposed registration system will provide a new source of information on boarding house residents, which will assist in an examination of residents' needs and whether resident access to necessary services needs to be improved.

This paper has been prepared to assist consultation with stakeholders on the Exposure Draft. It sets out the NSW Government's concerns about the current framework and how the Exposure Draft seeks to address these concerns. Stakeholders are also invited to address questions or issues not specifically raised in the Exposure Draft or the consultation paper.

Further copies of the Exposure Draft can be obtained on request by contacting BoardingHouseReform@facs.nsw.gov.au

Submissions are due by **Friday 10 August 2012**, and may be sent by:

Email: BoardingHouseReform@facs.nsw.gov.au

OR

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Post: Boarding House Reform Team
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2. A NEW BOARDING HOUSES ACT

A consistent criticism of the current regulatory arrangements is that they are split across various pieces of legislation. The Exposure Draft incorporates:

- the existing provisions of the YCS Act (with amendments as necessary to address deficiencies in that legislation);
- provisions governing the proposed boarding houses Register; and
- provisions governing the introduction of principles-based occupancy rights; and
- provisions requiring local councils, within 12 months of registration to inspect the boarding house to determine compliance with planning, building and fire safety requirements and standards applying to all registrable boarding houses.

This should assist stakeholders to understand the proposed new regulatory requirements and how these interact with existing requirements.

Planning, local government, food and public health related matters (e.g. in relation to standards, council approval of boarding house developments etc) remain within relevant legislation. However, the Exposure Draft cross-references these provisions ensuring that boarding house operators are able to identify their regulatory obligations from the one source.

3. KEY PROVISIONS IN THE DRAFT BILL

The Exposure Draft comprises provisions which provide for the following:

- 1 The establishment of a new Boarding Houses Act, which incorporates, among other things –
 - a the provisions of the *Youth and Community Services Act 1973* (plus amendments to those provisions);
 - b provisions governing the establishment of a boarding houses register; and
 - c provisions governing principles-based occupancy rights for residents of registrable boarding houses.
- 2 The establishment of a boarding houses registration system that:
 - a requires all boarding houses that meet the definition of “registrable boarding house” to register;
 - b provides basic information about boarding houses in NSW;
 - c provides for the classification of registrable boarding houses as:
 - i Tier 1 - boarding houses that are not currently required to be licensed; or
 - ii Tier 2 - boarding houses that are required to be licensed; requires Tier 1 and 2 boarding houses to update the Register annually;
 - d includes the charging of a one-off registration fee to operators for each boarding house, with provision for the fee to be varied by regulation; and

- e requires local councils, within 12 months of registration to inspect the boarding house to determine compliance with planning, building and fire safety requirements and standards applying to all registrable boarding houses.
- 3 An amendment to the *Local Government (General) Regulation 2005*, so that the accommodation standards set out in Part 1, Schedule 2 of the Regulation which currently only apply to larger boarding houses, apply to all registrable boarding houses.
- 4 The introduction of principles-based occupancy rights for residents of registrable boarding houses, based on the ACT regime with the additional principle that “an occupant is entitled to be given a written receipt for the payment of any money to the landlord”. The new scheme of occupancy rights will contain provisions that allow for the introduction of a standard occupancy agreement.
- 5 The inclusion of a circumstantial evidence provision, based on existing provisions in the *Environmental Planning and Assessment Act 1979* which enables circumstantial evidence to be relied upon by a court in proceedings for a warrant or to remedy relevant offences by registrable boarding houses, including offences in relation to the registration system.
- 6 The inclusion of provisions that empower authorised service providers and advocates to enter licensed boarding houses, without consent or warrant, for the purpose of determining whether a resident wishes to access support, legal or advocacy services.
- 7 An increase in the penalties applying to offences under the *Youth and Community Services Act 1973* and *Youth and Community Services Regulation 2010*, which are expressed in penalty units, with penalties for (as defined under the *Corporations Act 2001, Cth*) being twice that for individuals.
- 8 The establishment of new offences in relation to the Register.
- 9 A requirement that licensees and staff employed in licensed boarding houses be subject to periodic criminal record checks (as well as checks prior to employment or the provision of a licence), to allow for the identification and management of any potential risks to the safety, welfare and wellbeing of residents.

The following protections under the YCS Act will be retained:

- Provisions under the Coroner’s Act 2009 which empower the Coroner to hold an inquest into the death of a person in declared or licensed premises.
- Provisions under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* which provides for:
 - The resolution of complaints about boarding houses;
 - Inspections by Official Community Visitors
 - Reviews by the NSW Ombudsman into boarding house services; and
 - Investigations into the deaths of boarding house residents.

4. REGISTRATION OF BOARDING HOUSES

The NSW Government is concerned that there are numerous boarding houses which may not be complying with legislative requirements or in which vulnerable residents may be residing without access to appropriate supports and protections. At the same time, there is a lack of consistent information about the boarding house sector which could inform ongoing regulation, and other reform efforts to sustain the sector.

Obtaining information about boarding houses and collating this in a central register could, in combination with other measures, be effective in addressing these concerns, and should have a relatively low impact on the boarding house sector.

Chapter 2 of the Exposure Draft provides for the registration of boarding houses. It provides that the Boarding House Register be kept by the Commissioner for Fair Trading (clause 7).

Definition of a “registrable boarding house” – who must register?

In determining the scope of the definition, the NSW Government has been guided by the dual objectives of targeting operations where there may be a degree of risk or disadvantage to residents (e.g. more than one resident per bedroom), and avoiding imposing regulatory burdens on family type operations or very small operators that may be more sensitive to any additional regulatory requirements.

The Exposure Draft introduces the term “registrable boarding house” (clause 5). This is defined as either a:

- Tier 1 boarding house (premises which 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 their relatives) or
- Tier 2 boarding house (a “residential centre for vulnerable persons”).

Because of the absence of detailed data on the size of boarding house operations, determining an appropriate minimum resident threshold for a Tier 1 boarding house has not been easy. A threshold of three residents would capture small operations and private arrangements that may have no more than one person per bedroom. On the other hand, a threshold of six residents could increase the chance that businesses with a higher risk profile (e.g. with two or more people per bedroom) avoid registration. The Exposure Draft provides for a minimum resident threshold of five.

A range of businesses and accommodation services are excluded from the definition of “registrable boarding house”, such as hotel and motel accommodation, serviced apartments, backpackers, certain types of student accommodation, nursing homes and group homes, as they are either not intended to provide a principal place of residence or are specifically regulated under other legislation (clause 5(3)).

Question 1: Do you think that the list of accommodation types that are excluded from the definition of “registrable boarding house” under clause 5(3) is appropriate?

A “residential centre for vulnerable persons” is defined as boarding premises at which at least two or more vulnerable people reside (and they are not residing with a competent relative) for a fee or reward (clause 35).

Clause 35 excludes certain accommodation types from the definition of “residential centre for vulnerable persons”.

Question 2: Do you think that the list of accommodation types that are excluded from the definition of “residential centre for vulnerable persons” under clause 35(2) is appropriate?

Provision of information about registrable boarding houses

Clause 9 requires boarding house proprietors to provide basic identification information as well as profiling information for inclusion on the Register. This will help the Register achieve its objectives of assessing risk and monitoring trends in the boarding house sector.

Proprietors of existing boarding houses will have 6 months after the Act commences to register. Proprietors of boarding houses which are established after the Act commences will have 28 days to register.

All boarding house proprietors will be required to update the Register annually. Proprietors of Tier 2 boarding houses will be required to provide more regular updates to ADHC in accordance with licence conditions or other requirements (clause 10).

The NSW Government considers it reasonable for proprietors to make a modest contribution to the costs of the registration scheme, and that a one-off registration fee of \$100 is not unduly onerous (as compared to say, \$243 to register a motor vehicle for private use). Provision will be made in the regulations for the fee to be varied.

Clause 13 details what information is to be recorded on the Register and what will be made available to the public (name and address and Tier of boarding house only, clause 14). It will be an offence to provide false and misleading information about a registrable boarding house (clause 93).

5. OCCUPANCY RIGHTS

The nature of boarding house accommodation is different to that of private residential rental dwellings regulated under the *Residential Tenancies Act 2010*. Boarders do not have a right to occupy the entire premises, and their rights in relation to the enjoyment of the premises generally are more limited.

Proprietors retain a high level of day to day control over use of the premises (compared to landlords under a residential tenancy agreement), and agreements between proprietors and residents are developed on an informal basis. These features are inextricably linked to the low cost nature of the accommodation, and

the capacity or desire of residents to enter into formal agreements for their accommodation.

Given the nature of boarding arrangements, it is not appropriate for boarders to have the same rights as tenants under a residential tenancy agreement. However, in light of increasing concerns about the risks faced by boarders as a result of insufficient legal protections (e.g. there is no legislated requirement on a proprietor to provide a resident with any notice of termination of their occupancy), combined with the vulnerability of many boarding house residents, there is a strong case for strengthening the rights of residents in relation to their occupancy.

Chapter 3 of the Exposure Draft introduces a principles-based approach to occupancy rights for boarding house residents, based on the model adopted by the ACT in their *Residential Tenancies Act 1997*.

The principles will provide legal protection to both proprietors and residents and guide the relationship. Under this Chapter, a resident of a registrable boarding house is entitled to be provided with accommodation in compliance with certain occupancy principles (clause 29(1)).

The principles provide for a range of entitlements such as the right to live in premises which are reasonably clean and in a reasonable state of repair, to know the rules of the premises, to quiet enjoyment of the premises, to be given written receipts for payment of any money to the proprietor and not to be evicted without reasonable notice (clause 30). NSW Fair Trading may determine the form of the written receipts.

If the occupancy principles are not followed, a resident or proprietor can apply to the Consumer, Trader and Tenancy Tribunal (CTTT) for resolution of the matter (clause 31).

There is no requirement to register or lodge a written occupancy agreement, however, the Exposure Draft provides for such an agreement to be adopted and for the Commissioner for Fair Trading to approve a standard form occupancy agreement (clause 28). Parties can not override the occupancy principles with another agreement (clause 29(2)).

NSW Fair Trading will provide free-of-charge advice on parties' rights and responsibilities relating to occupancy agreements, similar to the advisory services offered to residential tenants.

6. STANDARDS

Boarding house accommodation can have advantages for people who are on very low incomes or have complex problems. Compared to other forms of accommodation, boarding houses offer more affordable living arrangements and in many instances residents may only be required to lodge a relatively small bond or no bond at all.

However, the low cost and less formal arrangements associated with boarding houses tends to result in a concentration of vulnerable people who may have complex needs and limited capacity to access available assistance and other services.

There is a range of existing regulation that applies to the boarding house industry. This includes:

- the licensing of premises that accommodate two or more people with a disability. These premises must be licensed by Ageing Disability and Home Care under the YCS Act. The YCS Act details the obligations of licensed boarding house operators in complying with the conditions of their licence and specifies minimum requirements in a range of areas including the condition of premises, residents' welfare, the provision of meals, the administration of medication and staffing arrangements;
- prescribed standards for maximum occupancy, cleanliness, light and ventilation in places of shared accommodation under the *Local Government Act 1993* and the *Local Government (General) Regulation 2005*; and
- regulation of structures and land uses in general, particularly in relation to the location of boarding houses, building standards and fire safety (the *Environmental Planning and Assessment Act 1979* and the Building Code of Australia). Boarding houses constructed after 1989 must submit an Annual Fire Safety Statement to the local council. The Statement is also provided to NSW Fire Brigades, who assist with compliance.

The NSW Government considers that the range of standards applying to boarding houses is comprehensive, and, supported by the other mechanisms established in the Exposure Draft, such as the introduction of occupancy principles, provides a sound basis for the effective regulation of the industry.

However, the restriction of accommodation standards under the *Local Government (General) Regulation 2005* to buildings with 12 or more residents, and a floor area of over 300 square metres is a deficiency in the current regulatory regime, potentially exposing some residents to unacceptable conditions. For this reason, the Regulation is to be amended so that the accommodation standards set out in Part 1, Schedule 2 apply to all registrable boarding houses (clause 2.5 of Schedule 2 of the Exposure Draft).

With regards to fire safety, following the nursing home fire at Quaker's Hill, the NSW Government is considering the need for further fire safety requirements in relation to boarding houses.

7. RESIDENTIAL CENTRES FOR VULNERABLE PERSONS

Chapter 4 incorporates relevant provisions from the YCS Act but with a number of enhancements.

For example, the term "handicapped" person has been replaced with the term, "vulnerable person" (clause 34) and, like the previous term, includes persons with a permanent condition such as age related frailty, a mental illness and a disability which results in a need for support.

Boarding house proprietors who provide accommodation to a child under 16 years of age who is living away from home without parental permission must report the

child to the Department of Family and Community Services (*Children and Young Persons (Care and Protection) Act 1998*).

Young people with a disability, aged between 16 and 18 living in a residential centre for vulnerable persons, without a competent relative, will be included in the definition of vulnerable persons for licensing purposes and will be assisted by ADHC to find more appropriate accommodation.

Chapter 4 includes provisions for:

- Imposing a broad range of conditions on residential centre authorisations, including accommodation and service standards (clause 41).
- Requiring boarding house licence applicants to undergo probity checks - including criminal record checks and financial probity checks (clause 43).
- Requiring managers and staff to undergo criminal record checks (clauses 59 & 83). A potential or current staff member who has committed a serious criminal offence cannot be employed or continue to be employed (clause 83);
- The variation, suspension, cancellation and surrender of licences with clear timeframes (clause 45, 47 & 48);
- The requirement for managers of authorised residential centres to be approved by ADHC (clauses 57-63); and
- The requirement to notify ADHC of the death, sexual assault or absence of a resident, and, in the case of the death of a resident, the police (clause 82).

Question 3: Should all staff members of a “residential centre for vulnerable persons” be required to undergo criminal record checks?

8. POWERS OF ENTRY AND INSPECTIONS

Powers of entry into boarding house premises

At present, in order for a local council to enter residential premises, the council must obtain either the consent of the owner, or a search warrant based on a reasonable belief that the *Local Government Act 1993*, *Environmental Planning and Assessment Act 1979*, or associated regulations are being contravened.

Under the YCS Act, ADHC must meet similar requirements if it wishes to enter an unlicensed premises (e.g. for the purposes of determining whether the premises should be licensed). In the case of licensed premises, ADHC may enter without the consent of the owner or warrant for the purposes of monitoring compliance with the Act and regulations.

The NSW Government is of the view that a power to enter residential premises without the owner’s permission or warrant (except as currently provided in relation

to licensed premises), is not justified, regardless of whether it is suspected that two or more disabled people are being accommodated at the premises.

Nonetheless, circumstantial evidence may be insufficient to support an application for a warrant (for example, anecdotal evidence from local community workers about persons entering and leaving the premises). The *Environmental Planning and Assessment Act 1979* contains provisions that explicitly provide for a court to consider circumstantial evidence in proceedings to remedy or restrain a breach of the Act by a backpackers hostel or a brothel.

The NSW Government believes there is a reasonable case for adopting similar provisions in relation to boarding houses, so that relevant contraventions in relation to the registration system can be remedied (see clause 98).

Compliance and enforcement

Part 3 of Chapter 4 details various powers for ensuring compliance and enforcement of authorised residential centres with the Act.

The compliance and enforcement powers of ADHC enforcement officers have been strengthened, including those related to:

- the power to require the provision of documents (clause 69);
- the power to require answers to questions (clause 70);
- powers of entry without consent or a warrant (clauses 75-77); and
- the power to issue compliance notices and the offence of failure to comply with a compliance notice (clauses 78-80).

Clause 66 also requires ADHC enforcement officers to produce an identity card when carrying out their duties.

Powers of entry into licensed boarding house premises by service providers and advocates.

Under the current YCS Regulation, residents who wish to access support or advocacy services must be assisted by the operator to access them. ADHC advises, however, that some licensed boarding house operators have been reluctant to allow authorised support and advocacy services to enter premises in order to ascertain whether residents need these services and provide them.

The Exposure Draft includes a provision empowering authorised service providers and advocates to enter licensed premises, without consent or a warrant, for the purposes of determining whether a resident wishes to access support, legal or advocacy services (clause 76).

ADHC may grant an authorisation subject to conditions.

Before entering the premises, an authorised service provider/advocate must (or must make a reasonable attempt to) identify himself or herself to any caretaker or operator present at the premises.

These provisions do not limit the right of a service provider/advocate to enter premises at the invitation of a resident.

Initial compliance investigations for registrable boarding houses

Part 4 of Chapter 2 contains provisions requiring local councils to undertake initial compliance investigations of registered boarding houses.

Clause 16 requires a local council to inspect registered boarding houses within 12 months of registration, re-registration or where the proprietor has changed, to determine compliance with planning, building and fire safety requirements and standards.

No warrant is required for a council officer to enter premises in such circumstances, however notice must be given (clause 19).

Local Councils are not required to undertake an inspection where one has already been conducted within 12 months prior to the boarding house's registration (clause 16(3)).

If, as a result of such an inspection, a boarding house is deemed to be operating without proper authorisation or in breach of a standard, it is a matter for the council to take the appropriate action within their existing powers.

ADHC will continue to monitor licensed boarding houses in accordance with current practice, with a focus on monitoring supports available to people with a disability and other standards specifically applicable to licensed boarding houses.

9. PENALTIES

Penalties applying to offences in the YCS Act

The penalties applying to offences in the current YCS Act have not been changed since they were introduced and are out of step with the penalties attached to comparable offences in other current NSW legislation. The low value of the penalties (the maximum penalty that can be imposed under the Act is \$500) limits the deterrent value of the legislation.

New penalties, comparable with penalty values in other NSW legislation have been introduced, and are expressed in penalty units. For example, failure to notify police of the death of a resident will increase from \$200 to 50 penalty units (\$5,500). Penalties applying to corporations have been set at twice those applying to individuals.

In addition, penalty notices will be introduced in relation to the following offences in the YCS Act:

- Section 21(5): Failure to exhibit licence for premises in a conspicuous position: now 1 penalty units (\$110)
- Section 25(6)(a): Refuse or fail to admit an officer or other person exercising his or her power of entry: 10 penalty units (\$1,100)
- Section 26(1) and 26(2): Failure to notify police and Director-General if a person with a disability dies at licensed premises, or is absent from the premises for more than 24 hours: 10 penalty units (\$1,100)

Penalty notices can be served by authorised officers (in person or by post) and can either be paid within the time specified on the penalty notice or have the matter determined by a court (clause 96). Depending upon the offence, an

authorised officer can be a police officer, local council officer, ADHC enforcement officer or other person as specified in clause 96(10).

Penalties associated with the proposed new registration system

To encourage compliance with the proposed new registration system, the Exposure Draft introduces penalties for three newly-created offences as follows:

- Failing to register/provide registrable information: 50 penalty units (\$5,500);
- Providing false/misleading information: 50 penalty units (\$5,500); and
- Failing to update the register in accordance with the updating provisions: 10 penalty units (\$1,100).

The penalties above apply to individuals. As with the new penalties applying to licensed residential premises, the penalties for corporations will be twice those applying to individuals.

10. PROCEEDINGS AND OTHER MATTERS

Provisions have been included which allow an “Act administrator” to commence proceedings in the Land and Environment Court to remedy or restrain a contravention of the Act (clause 97).

Proceedings could, for example, be commenced to restrain an unauthorised residential centre from continuing to operate.

The Land and Environment Court currently hears a number of matters relating to development applications for boarding houses and it would be beneficial if proceedings concerning different aspects of the regulation of boarding houses could be brought together in one jurisdiction.

Chapter 5 also provides for:

- the repeal of the YCS Act and a Review of the *Boarding Houses Act 2012* after 5 years of operation (clauses 102-103).
- an extensive regulation making power. This includes the power to establish an advisory body (clause 89(8)), provision for delegations (clause 91) and exchange of information (clause 92).

11. TIMING AND NEXT STEPS

The results of the consultation process on the Exposure Draft, along with any recommendations for adjustments to the Bill, will be reported to Cabinet by the Ministers for Disability Services, Fair Trading and Local Government with a final version of the Bill, for Cabinet approval.

Pending Cabinet approval of the final Bill, the Bill will be introduced into the NSW Parliament during the Spring Session 2012.

Boarding Houses Regulation

A number of administrative and functional matters relating to the operation of the *Boarding House Bill 2012* will need to be dealt with in subordinate

legislation. This includes a number of matters currently dealt with in the *Youth and Community Services Regulation 2010* (“YCS Regulation”) as well as a number of new matters relating to the boarding houses Register, local council initial compliance investigations, the occupancy principles and enhanced provisions relating to the authorisation of residential centres for vulnerable persons.

A Boarding Houses Regulation will be prepared once the *Boarding Houses Bill 2012* is passed and will be put out for consultation through a Regulatory Impact Statement.

Please forward your comments to

BoardingHouseReform@facss.nsw.gov.au by **Friday 10 August 2012**