



Response to the draft Housing Regulation 2009

NSW Federation of Housing Associations

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Summary of recommendations

- R1** That the Regulation be extended to all other social and affordable housing providers, particularly for-profit organisations utilising government support
- R2** We strongly urge that 5, 15 be rephrased to avoid any implication that all providers must undertake full quality assurance audits against the National Community Housing Standards.
- R3** That 6, 18 be reworded to require that providers “...*act to prevent any* serious or repeated fraud, corruption or criminal conduct
- R4** That 6, 21 be reworded to read: “...show a commitment to maintaining the good reputation of the community housing sector *and appropriately respond to* incidents that damage, or may damage, that reputation”.
- R5** That Part 5 be renamed “protection of investment” and that the object of the part be revised accordingly
- R6** That the Object of Part 9 reflect the wording in 30 (d): “ensure management of community housing developments that minimises variations to timeframes and budgets”.
- R7** That 9, 31 be completely rewritten. Consideration be given to the following: “...provider will achieve appropriate financial leverage rates for development projects, that are, in the opinion of the Registrar, financially viable.”
- R8** That the Registrar have responsibility for and control of the performance data required for regulatory oversight.
- R9** That only the Registrar collect performance data, and that all other performance decisions be based on registration status.

1. The NSW Federation of Housing Associations

The NSW Federation of Housing Associations is the industry association for not-for profit affordable housing managers and developers in NSW.

Our 34 full members provide social and affordable housing across the State. The NSW housing association sector is the largest in Australia – both in total tenancies and average size of associations. As of June 2008 our full members managed a total of 16,800 homes. The smallest manages 35 tenancies; the largest now manages 2,600, ranging from affordable housing for moderate income households to housing for complex needs tenants, particularly those with a mental illness, in partnership with support providers. Very many of our members have a wide range of support partnerships to ensure that tenants with specific needs are able to sustain their tenancies.

We also have 60 affiliate members, most of whom are SAAP services, who wish to access services, advice and information about the housing management aspects of their activities. The Federation represents the sector's interests to government and other stakeholders. It also provides consultancy services to support their business, and acts as a broker to bring providers and potential partners together. It is a Registered Training Organisation and the leading provider of social housing training, delivering training in three jurisdictions to both community housing and public housing staff. For further information see our web site www.communityhousing.org.au.

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2. Background – and our approach in this submission

Support for regulation

The Federation has a longstanding policy of support for the appropriate regulation of community housing providers.

We were closely involved in the development and implementation of the previous administratively based registration system, and in the development of this new system. The Federation welcomes the introduction of statutory regulation of community housing providers in NSW.

We also welcome the clarification provided by the Regulation of the meaning of 'very low', 'low' and 'moderate income'. We support the adoption of a definition that is consistent with the definition of 'affordable housing' under the Environmental Planning & Assessment Act 1979.

The growing importance of the provision of affordable housing to moderate income households through community housing makes such a definition important. At the same time, we would note that the community housing sector also continues to be demonstrably committed to its mission of

responding to the *range* of housing needs by also maintaining a very strong focus on housing for the most disadvantaged.

Need to regulate all affordable housing providers

The current Legislation provides only for the regulation of the community housing sector (non-profit providers who do business with Housing NSW). It does not regulate either the for-profit sector, when it does a similar business, or the public housing system.

This creates an uneven playing field for providers operating in the same industry. This will become increasingly important as the for-profit sector undertakes more business in this industry. The National Rental Affordability Scheme in particular is driving such an increase.

R1 That the Regulation be extended to all other social and affordable housing providers, particularly for-profit organisations utilising government support

Influence of the National Regulatory Framework

One consideration in the developing this Regulation has been to ensure that it will be consistent with the National Regulatory Framework endorsed by Housing Ministers earlier last year. While the Federation strongly supports a consistent national regulatory framework, we do not support the all aspects of the development or shape of the national framework, and note that some unsatisfactory elements of that framework have constrained the NSW Code.

Broadly, the limitations of the National Framework are that:

- it is far too narrowly focused on risks to the government
- it seeks to mandate through regulation government program or contractual objectives
- it does not focus on regulating for appropriate governance, management or viability for the enterprise as a whole
- it was developed without discussion with, or effective expertise from, the industry.

The touchstone for effective regulation is that it identifies the major areas of risk to the outcomes for tenants and the ongoing viability of the organisations, their services and their business dealings. In our view, the national regulatory framework does not meet this test.

While the NSW Regulation and Code have substantially overcome these limitations, they remain to some extent.

In particular, the Code still appears to be too narrowly focused on risks to government in some places. Part 7, which deals with financial performance, business planning, and risk management, is headed 'Protection of government investment'. However, the objective of effective regulation is to provide assurance to *all* stakeholders (including government) that services and business dealing can be relied on to be sustainable and at an appropriate standard. In particular, it is crucial that the regulation signals that it provides assurance to other financiers as well as government.

Contradictory objectives

While we broadly support the Code, we believe that it is important to point out that a number of the eight objects of the Code are potentially contradictory. Again, we feel that this reflects some of the limitations adopted from the National Regulatory Framework.

There is a tension between the first six objects, which deal with the quality, appropriateness and sustainability of the services provided, and the last two objects, which appear to deal with minimising cost and maximising financial leverage.

It will be crucial that the evidence guidelines developed for the last two outcomes recognise this potential contradiction, and take an approach to operational and financial efficiency that does not encourage cost minimisation or maximum leverage.

The final outcome, ‘financial leverage’, under the last object, ‘development projects’, is the one area of the Daft Code that must be rewritten. As discussed in the following section, it is incoherent as it stands.

Because of this, it is unclear precisely what is intended. However, it appears to be regulating to ensure that providers leverage their development business to at least a minimum rate. This is an extraordinary regulatory requirement, since it *requires* regulated organisations to increase their financial risk!

While it may be a sound business decision to leverage an organisation, and it may be a program objective of government to see its investment leveraged, one would expect government regulation to focus on providing assurance about the risks of such leverage.

Respond to comments through development of evidence guidelines

The Federation does not wish to see the Regulation delayed because of these limitations or other minor issues identified in this submission. As a result, most of the recommendations or comments that we make in this submission can be given effect without significant amendments to the draft.

In most cases, our points could be responded to in the development of appropriate evidence guidelines. We also hope that the comments can also inform the future development of the Regulation or revisions to the Code. In particular, we urge that wherever the Code uses the term “in the opinion of the Registrar”, the evidence guidelines will make clear the criteria on which that opinion will be based.

Recommendations (apart from R1, R8 & R9 above), therefore, only deal with proposed wording changes to the Code, while other comments are intended to suggest approaches to the drafting of the Evidence Guidelines, or subsequent revision of the Code.

3. Comments on the draft Code

Part 3, 6 – Partnership arrangements and support for tenants

The outcome required by the draft is that adequate support partnerships exist to enable tenants to maintain their tenancies. This is too narrow. Supportive tenancy management also requires access to and brokerage of less formal support.

Part 3, 7 – Community involvement

While the general thrust of the draft outcome is appropriate, it includes a requirement to contribute to initiatives that promote the benefits of community housing. Involvement in promotion and marketing is not an appropriate matter to be required by regulation.

Part 5, 15 – Compliance with legal and other requirements

The draft outcome includes the requirement to comply with relevant professional standards and guidelines. While we strongly support all providers undertaking quality audits on a voluntary basis, this is an entirely new requirement, and one that would require all registered organisations to undertake full quality assurance audits (internal or external) against the National Community Housing Standards. This has very substantial cost implications and has never been the subject of discussion with the sector.

R2 We strongly urge that 5, 15 be rephrased to avoid any implication that all providers must undertake full quality assurance audits against the national Community Housing Standards.

Part 6, 18 – Fraud and corruption

The outcome requires that providers must ‘ensure’ that there is no serious or repeated fraud, corruption or criminal conduct. It is impossible to ‘ensure’ this. A more appropriate wording is to ‘act to prevent...’

R3 That 6, 18 be reworded to require that providers “...act to prevent any serious or repeated fraud, corruption or criminal conduct

Part 6, 21 – Reputation of the community housing sector

In general we do not believe that industry reputation comes within the scope of statutory regulation. This is a matter for the industry itself though its own structures, including its industry association. In any case, a co-regulatory approach would see this aspect firmly in the self-regulatory camp.

More specifically, this outcome appears to have substantially changed from earlier drafts, which was to ‘show a commitment to maintaining the good reputation of the community housing sector *and appropriately respond to incidents that damage, or may damage, that reputation*’. The current draft substitutes ‘notify the Registrar in a timely manner of any...’.

We do not believe that the Registrar has a role as guardian of the industry’s reputation. But, more important, (a) the protection of the industry’s reputation depends on the way the organisation responds, and not on whether the Registrar is notified, and (b) it is impossible to determine which incidents should be notified. The level of potential dispute over whether an organisation has complied is far too great to form an appropriate part of any regulation.

The Federation strongly recommends a return to the original wording.

R4 That 6, 21 be reworded to read: "...show a commitment to maintaining the good reputation of the community housing sector *and appropriately respond to* incidents that damage, or may damage, that reputation".

Part 7 – Protection of government investment

We strongly recommend that this Part be renamed "protection of investment" and that the object of the part be revised.

As noted in our 'general comments' above, it is very important that the regulation explicitly signals that it provides assurance to interests other than government. The most important of these is the finance sector.

The limitation to 'government investment' in the title of Part 7 is actually inaccurate, since all the outcomes relate to financial and business viability and sustainability generally. Only 21 – Risk management planning – includes any specific reference to government investment.

R5 That Part 5 be renamed "protection of investment" and that the object of the part be revised accordingly

Part 7, 25 – Risk management planning

Risk management is fundamental to a viable and effective business. We therefore urge that the evidence guidelines for this outcome seek evidence of the effectiveness of risk management processes *in general*, rather than being limited (as the outcome wording implies) to ensuring effective management of risks to government investment.

Part 8, 28 – Competitive management costs

We believe that the choice of the term "competitive ...costs" or (in the title of the Part) "competitive delivery" is unfortunate. Human service delivery does not benefit from any approach which prioritises lowest cost of delivery, or decisions based on lowest cost. While we strongly support efficiency and value for money, there is no robust way to assess either efficiency or value which focuses on comparative cost. We are prepared to accept that the term is to be understood colloquially as "costs of delivery that is not out of line with the cost of equivalent service delivery within the industry". We strongly urge that the evidence guidelines take this approach.

Part 9, 29 – Development projects – Objects

As currently worded, this object is unachievable. On budget completion of housing development cannot be ensured.

R6 We recommend that the object of Part 9 reflect the wording in 30 (d) "ensure management of community housing developments that minimises variations to timeframes and budgets".

Part 9, 30 (b) - planning

The current version has replaced earlier versions of the wording of this outcome to make it far less specific. It now says simply that planning will reflect current law and policy guidelines. The original

specifically focused on community and environmental standards and on housing affordability. Again, it would be appropriate for the evidence guidelines to reflect these more explicit values.

Part 9, 31 – Financial leverage

This outcome is incoherent. “Leverage” means the proportion of external finance (usually debt) attracted for the capital contributed by the proponent. It is therefore entirely unclear what this outcome is seeking. On the face of it, it means ‘...must achieve a proportion of external investment that ensures external investment...’

We assume the intention of this outcome is to ensure that most development projects leverage any public or community housing investment in the project to an appropriate extent. If this is correct, we recommend that it be rewritten to say this. More important, we recommend that the outcome be redrafted to focus on ensuring that the financial leverage on development projects be sustainable.

R7 That 9, 31 be completely rewritten. Consideration be given to the following: “...provider will achieve appropriate financial leverage rates for development projects, that are, in the opinion of the Registrar, financially viable.”

4. Regulatory Impact Statement

Support for conclusion of the Impact Statement

The Federation agrees with the conclusions of Regulatory Impact Statement that the proposed regulation (Option 1 in the Impact Statement) should be the preferred option.

While accepting this conclusion, there are a few qualifications we would make to the discussion of this and to the cost/ benefit discussion of Option 1.

National Regulatory Framework not national best practice

In the third bullet point in 6.3, “represents national best practice and has been developed to align with the national Regulatory Framework for not for profit growth providers”, there may be an implication that the proposed regulation is national best practice *because* it aligns with the National Framework. While we accept that national alignment is important, as our Background comments will have made clear, we believe that the national framework is far from best practice. The proposed regulation is only national best practice because it made significant changes to overcome the limitations of the national framework.

Benefit of a risk-based approach

We strongly prefer a risk-based approach. But in comparing a risk based approach and a compliance (or ‘standards based’) approach, we have a somewhat different view of the relative benefit of a risk based approach to that put forward in the Impact Statement.

A compliance approach is most appropriate in regulating safety or quality where a failure to meet minimum standards has known negative impacts – food preparation for example. However, in terms of service effectiveness or viability, such standards may be met despite the fact that there is a present risk of a problem emerging.

The characteristic of a risk based approach, as we understand it, is that it is designed to provide early information about emerging problems in areas that are crucial to service effectiveness, sustainability or financial viability – performance risk. Its strength is that it raises ‘flags’ for further investigation, rather than relying on ‘pass: fail’ measures. This enables early remedies to be applied at far lower cost and less disruption to tenants, partners and financiers.

The account of a risk based approach in 6.2.1 outlines a number of aspects of the connection of regulation to risk.

We believe that the most important way such an approach “tailor(s) the level of regulatory engagement to the risks posed by individual organisations” is by seeking evidence and ongoing regulatory oversight that will allow closer engagement when evidence provided about “activities (with) significant (inherent) risk” in the “key outcome” areas raises a ‘flag’. This understanding delivers the greatest benefits (including cost savings), but is not one of the four aspects listed in 6.2.1.

On the other hand, two characteristics that *are* listed are problematic. The third dot point suggests the approach is to limit regulation to activities that “cannot be managed cost-effectively through other regulatory arrangements”. The fourth, suggests that it focuses only on the community housing aspects of the business.

We strongly support the implication that the Regulation must not duplicate other regulatory arrangements. But this is only part of the story. It is just as important that the overall regulatory regime should not be fragmented, and that the community housing Regulation must be *sufficient* to enable the Registrar to identify emerging risks/ concerns. Where such information is covered by other regulatory or quality assurance arrangements, it is essential that, to avoid duplication, the reports from these comprise the evidence for community housing regulation. But *all* activities or outcomes necessary to form a view about risks to effective service, sustainability and financial viability must be covered in the Code.

Similarly, while the Regulation should not cover risks to non-community housing parts of the business, it should not be so narrowly interpreted that it is unable to assess overall financial performance or governance performance, which will fundamentally determine the viability and effectiveness of the service delivery.

Regulatory oversight and performance data

The above view of a risk based regulatory system – that it provides early identification of possible risks, prompting further investigation only if necessary – means that there are two parts to effective regulation. The first is periodic comprehensive review based on either evidence provided or inspections. The second is regulatory oversight that draws on key performance measures to identify possible risks.

The way that the performance data for these measures is collected is the principal source of regulatory burden, and must be considered in any impact statement. We note that the impact statement provides estimates for the time taken for the initial registration, but not for the ongoing reporting.

The Federation strongly urges:

R8 that the Registrar have responsibility for and control of the performance data required for regulatory oversight; and

R9 that only the Registrar collect performance data, and that all other performance decisions be based on registration status.

Performance data is fundamental to regulatory decision making, and so it is crucial that the Registrar has direct control of the data required. Any other arrangement creates a serious risk that the Registrar may not be able to meet their responsibilities.

It is just as crucial that there be no duplication or proliferation of performance data. Only the data needed to identify emerging performance risks should be collected in any performance data collections. This would mean a substantial reduction in the existing quarterly data returns. If other performance data is utilised, it would effectively mean two parallel assessment systems – only one of which will have been reflected in this Impact Statement.

There will be other data needs – program data, and outcome data related to specific contracts. While these are distinct from performance data, every effort should be made to co-ordinate data collection to minimise the overall administrative burden.