

19 October 2023

National Housing and Homelessness Plan Issues Paper
Department of Social Services

Submitted Online: <https://engage.dss.gov.au/developing-the-national-housing-and-homelessness-plan/>

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1. The Australian Charities and Not-for-profits Commission (ACNC) welcomes the opportunity to comment on the National Housing and Homelessness Plan.
2. The ACNC recognises the importance of this conversation, and the need to ensure secure and affordable housing for the Australian community.
3. We have answered questions in the discussion paper that we consider are relevant to the ACNC's role.

About the ACNC and the charity sector

4. The ACNC is the national regulator of charities established by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act). The objects of the ACNC Act are to:
 - a. maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
 - b. support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
 - c. promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.
5. Currently, the ACNC has oversight of nearly 60,000 registered charities. These charities vary considerably in size, role, and function. Charities are a vital part of our community and economy. Registered charities employed over 1.42 million people¹ and reported revenue of \$190 billion in the 2021 reporting period.² While some charities are large and well-known entities, most charities are very small, volunteer-run organisations.³

Background

6. Many housing associations and providers are registered charities.
7. To maintain entitlement to registration as a charity, an entity must:

¹ Australian Charities and Not-for-profits Commission, Australian Charities Report – 9th edition, 2023, 19.

² Australian Charities and Not-for-profits Commission, Australian Charities Report – 9th edition, 2023, 24.

³ Australian Charities and Not-for-profits Commission, Australian Charities Report – 9th edition, 2023, 12; 19-21.



- a. be a not-for-profit entity;
 - b. only have purposes which are charitable purposes, and which are for the public benefit,⁴ or purposes which are incidental or ancillary to, and in furtherance of, a charitable purpose;⁵
 - c. be compliant with the Governance Standards and External Conduct Standards;⁴ and
 - d. not be an individual, political party, or government entity.⁶
8. Registration as a charity is a prerequisite for certain tax concessions. Access to those concessions may impact the financial viability of housing projects.
 9. The ACNC has issued a Commissioner's Interpretation Statement (CIS),⁵ which sets out the circumstances in which a housing provider may be entitled to registration as a charity (the **Housing CIS**). A CIS provides guidance and clarity to ACNC staff, the sector, and the public about the Commissioner's current understanding of a specific aspect of charity law. They are reviewed from time to time, and revised in consultation with key stakeholders, including when there has been a relevant legislative change.
 10. A charity may be registered with one or more of the 14 charitable subtypes that are listed in the ACNC Act.⁷ To be entitled to registration as a particular subtype, the applicant entity must have the charitable purpose that corresponds with the subtype.
 11. Some housing providers may be registered under several different charity sub-types and, possibly, under more than one.
 12. Some charity housing providers may be registered as the subtype "advancing social or public welfare", some may be registered as the subtype "public benevolent institution" (PBI), and some may be registered with both these sub-types. Registration as a PBI is a prerequisite for certain further tax concessions, for example, endorsement as a deductible gift recipient (meaning donations may be tax deductible for the donor).

The not-for-profit requirement

13. Charities are required to be not-for-profit, both while operating and upon winding up.
14. If a charity winds up, it must apply any remaining assets towards charitable purposes similar to its own. If there is a requirement in legislation, the entity's governing document, or elsewhere, for the assets to be distributed in another way then the entity does not satisfy the not-for-profit requirement and would not be entitled to charity registration. This may be a relevant consideration for providers.

⁴ The Governance Standards and External Conduct Standards are set out in the *Australian Charities and Not-for-profits Commission Regulations 2022* (Cth) (**ACNC Regulations**).

⁵ Commissioner's Interpretation Statement: Provision of Housing by Charities (<https://www.acnc.gov.au/tools/guidance/commissioners-interpretation-statements/provision-housing-charities>).



15. Relevantly though, in the Housing CIS, the Commissioner clarifies that a housing provider required to return housing assets to state or territory governments will be accepted as charitable where the winding up clause in the governing document is clear that:
- a. assets required by state or territory law or under a contract to be returned to the government on winding up will be returned; and
 - b. other remaining assets will be distributed for similar charitable purposes.⁶

Non-charitable or commercial activities

16. Registered charities frequently engage in commercial activities, including partnering with for-profit entities to deliver outcomes such as housing developments. Charities must make their own decisions about what is in the best interests of the charity, which should involve considering the following factors:
- a. **Purpose:** a charity can engage in commercial activities to raise funds for a charitable purpose. It may only engage in commercial activities for a non-charitable purpose if that purpose is incidental or ancillary to, and furthers, its charitable purposes.
 - b. **Private benefit:** A provider that is a registered charity must consider how the proceeds of any commercial activity will be used. A charity's employees and contractors may be fairly remunerated, but a charity should not set out to generate private wealth for individuals through its activities.

Any returns on investment that a charity partner receives must be applied (or held to be applied later) to its charitable purposes. While a commercial partner may be motivated by profit, its profits must be proportionate to its investment – in other words, it should not profit at the expense of a charity partner.
 - c. **Governance Standards:** registered charities must take reasonable steps to ensure, among other things, that their Responsible Persons: act in good faith in the charity's best interests,⁷ ensure that the charity's finances are managed responsibly,⁸ and disclose material conflicts of interests.⁹
17. We acknowledge that housing providers may engage in commercial ventures to enhance their viability and promote growth in the sector, including:
- a. entering into an agreement for financing with a for-profit entity (for example, an institutional investor).

⁶ Housing CIS, [58] – [62].

⁷ Governance Standard 5(2)(b) (Subsection 45.24(2)(b) of the ACNC Regulations).

⁸ Governance Standard 5(2)(f) (Subsection 45.24(2)(f) of the ACNC Regulations).

⁹ Governance Standard 5(2)(g) (Subsection 45.24(2)(g) of the ACNC Regulations).



- b. providing affordable housing to individuals and families with low to moderate incomes, some of whom may not meet the definitions of 'poverty' that are used in charity law.
18. As stated in the Housing CIS, a charity must ensure that any commercial activities further its charitable purposes.¹⁰ Whether a charity's commercial activities are incompatible with its ongoing charity registration will depend on the circumstances, including the extent of the commercial activities and whether they enable the charity to pursue its charitable purpose.

What future role should the community housing sector play in Australia and what initiatives and funding mechanisms would support this? Are there any capacity and capability constraints impacting on future growth of the community housing sector?

19. We suggest that any initiatives or funding mechanisms should be reviewed to ensure that they do not compromise the charity registration of those registered charities in the community housing sector.
20. Given the scale of investment required to meet demand for social and affordable housing, we acknowledge that a range of funding mechanisms and investment parties may be needed. Community housing providers may also engage in other activities to fund their provision of social housing. As stated in the Housing CIS, this can include commercial activities unrelated to the provision of housing.¹¹
21. Charities may also look to debt financing to fund land acquisition and construction. Any debt financing arrangement should be on arms-length terms or terms more favourable to the charity. In particular, returns to for-profit investors should not be above market rates. The Housing CIS states:
- If a charity wants to enter into arrangements with other parties, including private sector entities, it must ensure that doing so furthers its charitable purposes. A charity is more likely to demonstrate that it is furthering its charitable purposes if any debt it enters into is on commercial, arms-length terms or if the terms are more favourable to the charity. It is less likely to be found to be furthering its charitable purposes if the debt is on terms more favourable to private sector entities.¹²
22. In deciding whether to pursue a particular commercial opportunity, the directors of a charity may find it difficult to determine whether the opportunity would impact the charity registration, because the outcome turns on the facts of each situation and the law can be complex. Charities are likely to need to obtain professional advice in each scenario. This may be costly and could serve as an obstacle to community housing providers wishing to improve their financial position.

¹⁰ Housing CIS, [45] – [53].

¹¹ Housing CIS, [49].

¹² Housing CIS, [51].



How can governments encourage delivery and availability of affordable housing in the short, medium and long-term? How can governments partner with institutional investors to support more housing development (particularly affordable housing)?

23. We acknowledge that institutional investors play an important role in helping to achieve the scale of funding necessary to deliver affordable housing.
24. Even in the affordable housing context, institutional investors may prioritise higher income groups or developments to obtain the level of return they are seeking. This may make partnering with charities who must further charitable purposes less attractive.¹³
25. By way of example, institutional investors may prefer a development that offers affordable housing for key workers, such as a build to rent to buy scheme.¹⁴ In charity law, the issues with this scheme include:
 - a. Key workers may not meet the definitions of 'poverty' that are used in charity law. Providing housing to these beneficiaries may, therefore, not be considered to further a purpose of relieving poverty.
 - b. As stated in the Housing CIS, providing beneficiaries with support to buy their own home may not always be charitable, if it leads to the provision of a private benefit that is not ancillary or not incidental to a charitable purpose.¹⁵
26. The provision of affordable housing is likely to be acceptable if it is incidental or ancillary to the charity's other charitable purposes, such as where it is the means for generating income (profit) to fund the charitable purpose (in line with [16.(a.)] above). As a result, a charity considering participating in such a scheme will need to consider all of the circumstances, and perhaps seek legal advice, to determine whether the scheme is compatible with the charity's ongoing registration.
27. As an alternative, a charity may work with an institutional investor to deliver a mixed housing development, comprising social and affordable housing. That is, the housing is made available for rent at different price points. The ACNC will consider the development holistically, including the percentage of housing set aside as affordable housing, in determining whether it furthers a charitable purpose. For example, the charity may be able to demonstrate that the revenue from the higher price point is used to subsidise housing provided at the lower price point.
28. We suggest that governments consider the intersection between Commonwealth charity registration requirements and ongoing obligations when designing projects, to ensure that charities in the housing sector are able to bring their expertise and experience to

¹³ Richard Benedict, Nicole Gurrán, Catherine Gilbert, Carrie Hamilton, Steven Rowley, and Sha Liu, *Private sector involvement in social and affordable housing*, Australian Housing and Urban Research Institute (October 2022), page 58, <https://www.ahuri.edu.au/sites/default/files/documents/2022-09/AHURI-Final-Report-388-Private-sector-involvement-in-social-and-affordable-housing.pdf>.

¹⁴ *Ibid*, 48-49.

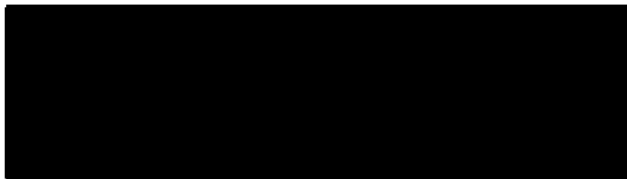
¹⁵ Housing CIS, [37] – [44].



partnerships with institutional investors, while minimising any unnecessary or duplicative regulatory obligations. We would be happy to assist further in this regard.

Next steps

29. If you have queries about this submission please contact [REDACTED] Director, Legal and Policy, [REDACTED] or [REDACTED] Acting Policy Manager, Legal and Policy, [REDACTED].



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Commissioner
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