Review of the Boarding Houses Act

Eastern Area Tenants' Service

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The Eastern Area Tenants Service (EATS) is a not-for-profit, community organisation that provides free information and advice to renters across the Eastern Suburbs of Sydney as part of the statewide network of local Tenants Advice and Advocacy Services (TAAP).

EATS has close to twenty years front line experience assisting boarding house residents experiencing difficulties in their accommodation. Our catchment area including a significant proportion of the State's registered Boarding Houses and many more unregistered premises. We supported the introduction of the *Boarding Houses Act* 2012 (NSW) (the BHA) as a mechanism for regulating the boarding house sector and providing rights and protections for residents and provided submissions to Government in regards to its development.

Having worked with residents of boarding houses, both prior to, and after the introduction of the Act, we welcome the opportunity to review the BHA seven years on.

In summary, although we recognise that the BHA represents a major step in terms of acknowledging that those living in boarding houses need protections and safeguards, it is our view that the BHA has limited use as a mechanism for providing boarding house residents with rights and there is still much to be done to ensure that its specified aims are realised.

We recommend:

- **That the definition of a registrable boarding house be narrowed to premises that are trading as commercial businesses;**
- **That minimum accommodation standards be prescribed for all registrable boarding house accommodation;**
- **The introduction of prescriptive grounds in the BHA under which an agreement can be terminated by either party;**
- **That residents to be given the ability to challenge the validity of terminations at the NSW Civil and Administrative Tribunal (NCAT) and that the Members be given the discretion to decline to grant terminations based on the circumstances of the case;**
- **that occupation fee increases be limited to one increase per calendar year, or only when the proprietor undertakes major and extensive repair works or makes significant improvements to the premises;**
- **That security deposits be held by the Rental Bond Board (RBB);**

- **That additional funding be provided to Local Councils to effectively regulate the sector (we support the Tenants' Union of NSW's proposal that this funding could be sourced from interest from security deposits held by the RBB);**
- **That resources be invested into further education of the sector;**
- **That expanded rights be accorded to occupants within the Residential Tenancies Act 2010 (NSW) to capture residents who are excluded by a tighter definition of 'registrable boarding house' and not able to be otherwise classified as tenants**

Are the objects of the Boarding Houses Act 2012 still valid? Why or why not?

Whilst we are not in a position to comment in relation to assisted boarding houses, our experience providing information, advice and advocacy to residents in general boarding houses indicates that that the objects of the BHA remain just as valid in 2019 as they did in 2012.

Over the past several years, we have seen a steady rise in the cost of private rental accommodation, coupled with limited investment in social housing and no increase in government income support. The 2016 Census indicates that the number of homeless people living in Boarding Houses increased by 17% from 2011 to 17,503 residents.[1] We note that the greatest increase in boarding house residents was in NSW, which saw a 19% increase from 2011 to 6869 residents.[2]

To give a snapshot of the situation for people looking to rent in the Eastern Suburbs, the median rent for a 1 bedroom rental in Bondi Junction is $528 per week. The current maximum weekly income for a single person on Newstart with Rent Assistance is $382.85, a student on Austudy is $365.60, while the Disability Support Pension is $604.70.

Given the current rental market, and long waitlists for social housing[3] the boarding house industry continues to be one of the limited forms of accessible accommodation, providing rooms between $150-$250 a week.[4] Boarding houses have a captured market and vary greatly in terms of quality and safety.

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[1] Australian Bureau of Statistics, Census of Population and Housing: Estimating Homelessness 2016 < https://www.abs.gov.au/ausstats/abs@.nsf/mf/2049.0> accessed 7 October 2019.

[2] Ibid.

[3] The expected wait list for a studio or one bedroom social housing property where rent is capped at between 25-30% of household income is between 5-10 years.

[4] From Newtown Neighbourhood Centre's Low Cost Accommodation List, 15 May 2019 <https://www.newtowncentre.org/uploads/5/1/5/0/51502997/15th_may.pdf

Are there any types of premises which should be included in or excluded from the Act?

The definition of a registrable boarding house is currently a premises that provides beds, for a fee or reward, for use by 5 or more residents (not counting any residents who are proprietors or managers of the premises, or relatives of proprietors or managers).[5]

We propose narrowing the definition to focus on commercial businesses operating as boarding houses whilst at the same time removing the exclusions placed on educational colleges and halls of residence.

We propose these changes for the following reasons:

1. The current definition makes identification of registrable boarding houses impossible

The current definition does not correlate with society's expectations of what a boarding house is.

Under the current definition, units in apartment blocks, suburban family homes and granny flats could all be registrable boarding houses.

We would argue that the common view of a boarding house is that of a large premises, usually free standing, with a large number of rooms for let.[6] Under BHA definition, a number of share households could inadvertently be 'accidental boarding houses'.

Basing the definition on the number of beds for a fee or reward, rather than whether the premises openly operates as a commercial boarding house business makes it extremely difficult to readily identify boarding houses. This was noted as an issue for Area Supervisors and Census Collectors in the 2012 Census. The methodology for collection in private residences involved census collectors having to determine whether premises were boarding houses based on the number of unrelated occupants living in the premises (whether there were 5 or more people ordinarily residing in the premises), the income and employment status of the residents, residents' need for assistance with core activities amongst other factors.

Rules for estimating persons in boarding houses (private residences)

5 Boarding Houses Act 2012 (NSW) s. 5(2)

6 Stone, H., '*What's in a name?' Problems with the Definition of Registrable Boarding House Under the New South Wales Boarding Houses Act 2012*, Parity Magazine, Sept 2018 issue: Marginal Housing - Where to From Here?

13	Plus	All persons enumerated in a private dwelling which was classified as a group household, where the dwelling had at least four bedrooms or the number of bedrooms was 'Not stated' and the dwelling had at least five 'usual residents' where, for people reporting being at home, less than 60% of those people reported a weekly income of $600 or more and less than 60% reported a labour force status of 'employed' and less than 60% reported either attending any type of educational institution (above 'primary' level) or a labour force status of 'Employed, worked full-time' and less than 60% reported a need for assistance of 'Has a need for assistance with core activities'[abc]	Buildings classified in the Census as private dwellings-group households	3,343
14	Minus	Persons in step 13 in a dwelling with a landlord type of 'Real estate agent', 'State or territory housing authority', 'Person not in the same household-parent/other relative', or 'Employer-Government (includes Defence Housing Authority)'	Remove 'group houses' identified in step 13 above which have a landlord type which indicates they are rented privately, rented from a state/territory housing authority or employer sponsored housing (e.g. staff quarters), as on balance, they were not likely to be boarding houses	745
15	Minus	Persons in step 13 in a dwelling with a tenure type of 'Fully owned', 'Owned with a mortgage', or 'Being purchased under a rent/buy scheme'	Remove 'group houses' identified in step 13 above which have a tenure type which indicates they are on balance, most likely to be privately owned multi family households	764
16	Minus	Persons in step 13 in a dwelling located in a 'Caravan/residential park or camping ground', 'Marina', 'Manufactured home estate', or 'Retirement village (self-contained)'	Remove dwellings in locations such as retirement villages which, on balance, were unlikely to be the site of a boarding house	10
17	Minus	Persons in step 13 in a dwelling that was a 'Caravan, cabin, houseboat'	Remove small dwellings such as caravans which, on balance, were unlikely to be boarding houses	40
18	Minus	Persons in step 13 where at least 60% of the people who reported being 'At home' in that dwelling reported either a student status of 'Full-time student', 'Part-time student', or a labour force status of 'Employed, worked full-time'[b]	Remove dwellings that, on balance, were most likely to be student halls of residence or student households, or group houses with the majority of occupants employed full time and unlikely to house homeless people	137

19	Minus	Persons in step 13 where there are less than three persons enumerated in the dwelling	Remove all dwellings where there is not enough information about all the usual residents to conclude that the dwelling is likely to be a boarding house. The small numbers being enumerated and the reporting of several people away on Census night also strongly suggests family or group household rather than a rooming house	60
20	Minus	Persons in step 13 where every person in that dwelling reported a voluntary work status of 'Volunteer'[c]	Remove groups of people in households, who on balance, were most likely to be housed together and who volunteer their time (for example church groups who house people who work in the community sector assisting those with disabilities and volunteer their expertise)	89
21	Minus	Persons in step 13 where at least 90% of people in that dwelling reported a 'stated' religious belief	Remove those households who on balance, were most likely to be in religious institutions, such as convents	418
22	Minus	Persons in step 13 where every person in that dwelling reported either a usual address five years ago of 'Overseas in 2001' or 'Not stated', or was an 'Overseas visitor 2006' and at least one person in that dwelling reported either a usual address five years ago of 'Overseas in 2001' or was an 'Overseas visitor 2006'	Remove overseas visitors	210
23	Minus	Persons in step 13 where every person in that dwelling didn't state their weekly income, labour force status, type of educational institution, need for assistance, and the number of bedrooms in the dwelling	Remove dwellings where there is not enough information about the occupants to conclude that the dwelling is likely to be a boarding house	241
24	Minus	All persons who were already considered homeless in homeless operational groups 'Persons who are in improvised dwellings, tents or sleeping out', 'Persons in supported accommodation for the homeless' and 'Persons staying temporarily with other households'[d]	These people are already counted as homeless in the previous homeless operational groups, this step removes double counting	125
	Equals	**Those who are likely to be homeless[e]**		15,460

[a]In 2001 the weekly income cut off was $400/week.
[b]The variables 'number of people employed', 'student status (full or part time)' does not include visitors who reported a usual address elsewhere. For example a person who is visiting the dwelling and who is employed full-time doesn't impact on the identification of other people in the dwelling as being homeless.
[c]Steps 13 and 20 could not be applied in 2001 as information about need for assistance was not collected.
[d]In 2001 no overlap can be determined between this and the homeless operational group 'persons in supported accommodation for the homeless' because Census data was not use for supported accommodation in 2001.
[e]Imputed records where no form and no count was obtained by the collector and where no form but a count was obtained by the collector.

We note that some of the exclusions specified in the census metrix would remove premises that would meet the definition under the BHA, for instance, the removal of premises managed by a Real Estate Agent, those identified as 'student households' and those housing 'overseas visitors'. It is our experience that many private registrable boarding houses are specifically targeted to

students and/or overseas visitors and we are now seeing more boarding houses being managed by the Real Estate Industry.

An issue met by the census collectors, and still just as relevant today, is that residents and proprietors did not necessarily self identify as living in a registrable boarding house.

To demonstrate this point, EATS conducted an online search on Flatmates.com and Gumtree.com over a period of two weeks in early 2019 for rooms to rent within Sydney's Eastern Suburbs and found ninety-five properties that met the definition of a boarding house under the BHA in providing 5 or more beds for fee or reward.

Of these ninety five properties, only one property advertised itself as a boarding house. Instead, premises were consistently referred to as 'share houses'. Given that a proprietor has greater control over, and less obligations to, residents under the BHA as opposed to the RTA, it can only be assumed that proprietors are not realising that the set up of these properties meets the BHA's definition.

Whilst the current definition is admirable in its attempt to instill rights in as many residents as possible and cover as many accommodation forms as possible within a diverse sector, it is clear that it is not workable in any practical sense.

2. <u>The nature of the private share housing market is changeable</u>

Unlike commercial businesses, a residential premise can have an ever changing dynamic of household types, which may mean that the premises falls under the BHA definition at some times, but may be excluded at other times as the make-up of the household changes. It and it is impossible to track or manage this. For example, a three bedroom apartment may have a single resident, 3 residents, or 12 residents across the course of a year. We cannot imagine that such premises were originally intended to be regulated under the legislation.

At the same time, the Act refers to the 'proprietor' of a registrable boarding house as bearing the responsibility for notifying the Commissioner of particulars about registrable boarding houses, and paying the registration fee amongst other obligations and duties. Proprietors who do not comply with their obligations under the BHA may be liable for penalties. In a commercial business, the proprietor would be able to be identified, whereas we know of a number of premises where the owner of the property rents the premises to a head tenant who subsequently fills the premises with bunk beds.

In such a case, is the proprietor, the owner of the property, even if they have not authorised the number of occupants, or would the proprietor be the head tenant, who is limited in what they can do, in terms of meeting the requirements imposed by the *Local Government Act 1993* and the *Environmental Planning and Assessment Act 1976*?

3. Definition does not reflect legal understanding

In the same sense, a definition that focuses simply on the number of beds is misleading and does not correlate with case law on the subject of whether an agreement is a residential tenancy. Not all properties that are rented by five or more individual people are boarding houses, and this definition confuses residents and advocates when trying to determine whether a renter is a tenant or occupant.

The definition of a registrable boarding house as 'five or more beds for a fee or reward' does not consider the issue of resident mastery, one of the key factors in determining whether a resident is a tenant or a boarder/lodger.[7] If a resident has their own room, and they are able to exercise mastery over that room, then they could legally be defined as a tenant and have their agreement covered by the *Residential Tenancies Act 2010* (NSW). This would be the case regardless of whether the premises was registered as a boarding house or not. The BHA does not consider the subjective circumstances of the case, and has, if anything, caused greater confusion.

Example:

Resident A lives in a self contained studio room in a large premises providing 5 or more beds. The premises is called a 'Boarding House' by the owner. Resident A does not receive any services. Resident A was given a lodging agreement. A cleaner cleans the common areas. There are no house rules at the premises, but one resident collects the rent for the owner. The owner does not live on site.

Under the definition provided in the BHA, Resident A may believe that they are a boarder/lodger as the premises is a registrable boarding house. However, it is likely that resident A is actually a tenant.

[7] See here for greater detail: https://cityfutures.be.unsw.edu.au/research/projects/boarding-houses-new-south-wales-growth-change-and-implications-equitable-density/

It is not unusual for our service to be contacted by people in the position of Resident A and we provide a uniform response. We advise the caller that they might be a boarder covered by the BHA, in which case their rights are limited and based on what is 'reasonable', however the resident might be able to argue the Residential Tenancies Act applies, and that they are a tenant with significantly more rights and protections.

We advise that the only way that they can know for certain is through an application to the NSW Civil and Administrative Tribunal (NCAT) to determine their legal status and we cannot predict which way that will go. We also have to advise residents that they would not be protected from eviction if they are a boarder or lodger under the BHA.

4. Definition provides an opportunity to exploit vulnerable tenants

As well as the definition making it very difficult for us, as advocates, to advise people as to what category of renter they fall into, we would also point out that it provides opportunities for landlords to easily pick and choose a resident's status to suit their needs.

A savvy landlord can effectively downgrade an occupants legal rights by exerting more control over the property. Organising cleaning services, providing food, or simply accessing the premises can change the nature of the agreement. If enough control is exercised by the landlord to minimise the independence of the resident, that same resident loses the rights they would have had previously under a Residential Tenancy. This reflects how poorly the BHA protects occupants rights as we have real world examples of unscrupulous landlords trying to hamstring tenants by claiming the BHA applies where it does not.

Our service has direct experience with this scenario. Over 2018-2019 we were inundated with calls from International students living in a number of premises managed by different businesses sharing the same directors. Students were signed up to 'lodging agreements', were charged various fees on top of their rent, had unauthorised sums of money deducted from their credit cards and were made to pay 'security deposits'. We understand over $400,000 in so called 'security deposits' were not lodged with the Rental Bond Board[8]. The students had self contained rooms with no services provided. There were no caretakers and the owners did not live on site. We

[8] https://www.smh.com.au/politics/nsw/she-disappeared-how-high-flying-ashleigh-crashed-back-to-earth-20190331-p519d5.html (accessed 7 October 2019)

suspected that these students were in fact tenants, and were able to establish this via NCAT determination in a number of instances.[9]

Despite the directors being advised that the students were actually tenants by NCAT, they refused to acknowledge this, citing the '5 or more beds definition'. They continued to sign subsequent tenants to 'lodging agreements' for some time. We submit that it was convenient and financially beneficial for them to do so - they were able to take advantage of the interest earned from the students' bonds, use the money held in trust as they saw fit, limit their responsibilities to tenants and to continue to leverage fees and charges otherwise prohibited under the *Residential Tenancies Act 2010* (NSW).

Should anything be changed, or added to, the list of information provided to the Commissioner?

We would like to see the addition of ABN/ACN where applicable.

For Assisted Boarding Houses, we submit that the number of staff ordinarily employed, the staff to resident ratios and staff qualifications should be included (e.g. registered nurse, assistant in nursing etc)

Is the information on the public Register sufficient? Why or why not?

Additional information could be provided on the public register to provide more detail as to the specific features of the boarding house. We would like to see information regarding the types of services provided by the boarding house, e.g. meals, whether the premises has specific physical access provisions/modifications and whether the premises is targeted at a particular type of clientele, e.g. students or female only.

What other information could be added to, or removed from, the public Register?

We submit that inclusion of the details of enforcement action would be a disincentive for unscrupulous proprietors to self-register.

9 Ibid

Whilst we acknowledge that it is in the public interest for such information to be publicly available, our greater concern is that premises will not be registered, will avoid detection by local Council and will not comply with the *Local Government Act 1993* or the *Environmental Planning and Assessment Act 1979*.

It is not our experience that residents make choices on boarding house accommodation based on whether the boarding house complies with relevant legislative instruments. Decisions around accommodation are more likely to be made based on location and cost. Residents often do not have the time or resources to access the register, which is more likely to be used by advocates and community workers in their work assisting those who are homeless.

The reality is, residents have limited choices in regards to their accommodation and safety can be a secondary consideration.

Should the Commissioner have the power to remove the details of a boarding house from the public Register under prescribed circumstances, if it has ceased to be used as a boarding house?

Yes. It would make sense to have this set out as a power within the Act. An issue we have observed with the Boarding Houses Register is that it is not up to date. We would submit that such a power would be useful in ensuring that the list is current.

How could we improve the local regulation of boarding houses?

We propose that local regulation may be able to be improved in two ways:

1. As discussed above, tightening the definition of registrable boarding house - the current definition makes it near impossible for local councils to identify premises as registrable boarding houses and does not accord with community and even Council assumptions of boarding houses as visible businesses. Often Councils must rely on proprietors to self-register or complaints from neighbours/residents to trigger an investigation;

2. Currently, there is insufficient resourcing to enable local councils to regulate boarding houses. We would advocate for additional funding for local councils to be able to fulfil their compliance investigations and ongoing enforcement activities (although we note that with a tightening of the definition, the need for additional resourcing would be reduced).[10]

[10] We understand that the Tenants Union of NSW has proposed that security deposits be held by the Rental Bond Board and that the interest be put towards advocacy, community education and regulation and we would strongly support this proposal.

3. Investigators should be given powers to enter premises for the purpose of conducting inquiries as to whether a premises is a registrable boarding house without the consent of the proprietor. As discussed above, a boarding house can be contained within any type of premise. Investigators cannot rely on proprietors or residents to self identify, and the ability to enter the premises would allow investigators to determine the number of beds, ordinary residents etc;

4. Penalties for failing to register should be increased and enforced - there is no real disadvantage in not registering and the chances that a proprietor will be caught out are currently very low. Safety of residents is paramount and registration enables a premises to be checked for compliance with the *Local Government Act* 1993 or the *Environmental Planning and Assessment Ac*t 1979. This is vital.

We note that increased funding to Local Councils is essential in order for point 4 to be realised. We would suggest that the revenue generated from the registration fees go directly to Council.

Should councils be required to let NSW Fair Trading know of enforcement action against boarding houses, so that it can be recorded in the Register?

As stated above, we are concerned that providing details of enforcement action on the publicly accessible part of the register is a disincentive for unscrupulous boarding house proprietors to register.

We are also concerned that Local Councils are currently underfunded to carry out many of their prescribed duties under various legislative instruments including the BHA. Requiring councils to inform NSW FT about enforcement actions imposes another burden on councils with no practical benefit (on this point, we would like to know what NSW FT would do with compliance data obtained and whether this would be collected for NSW FT instigated investigations or data analysis with a view to addressing systemic issues in the industry).

We also note that Local Councils have discretion as to whether they take enforcement action against proprietors and that Councils often weigh up a number of factors, including the impact of enforcement action on residents. We would submit that this is appropriate. Local Councils have an understanding of local communities and resources. We would be concerned that Councils would lose this discretion if required to report to NSW FT and could anticipate the possibility of benchmarking etc.

Are there any provisions of the Standard Occupancy Agreement which should be changed, or are any additional provisions required? (see Appendix A of the Discussion Paper)

It is essential that the proprietor's contact details should specify their phone number, email address and address for service. This information is necessary for a resident to be able to apply to the NSW Civil and Administrative Tribunal.

It is our experience that residents do not necessarily know the name and address of the proprietor. Sometimes proprietors deliberately conceal their identity to residents.

The following case study is typical when insufficient information is given:

> *'Sarah' had a written lodging agreement. The landlord lives at the premises. There are more than 5 people living in the premises and many house rules. There is a cleaner employed to clean the common areas and all rooms are provided furnished.*
>
> *Sarah has left the premises on bad terms with the landlord. She attempted to have the landlord repay her security deposit, the landlord refused to pay all of the security deposit back. Sarah now needs to apply to NCAT but does not have the landlord's full name, phone number or email address. She is unsure whether this is sufficient as an address for service.*

We would also recommend that the contact details of any caretaker/manager should be included and the ABN/ACN, business name and trading name (if relevant).

Do you have any comments on the use of either the Standard Occupancy Agreement, or other occupancy agreements?

We have not seen any proprietor adopt the Standard Occupancy Agreement. It is perhaps because the standard form agreement has not been given sufficient publicity and proprietors are unaware that it exists.

We would like to see the standard form agreement made mandatory. To the extent that additional terms and conditions are required, these could be included as 'additional terms' similar to the operation of standard form residential tenancy agreements.

How aware are you of the occupancy principles?

Our service provided submissions in relation to the original formulation of the principles. We are familiar with all of the Principles and advise residents about them in our day to day work.

We are aware of their deficiency as well and routinely have to inform boarding house occupants that while these principles exist, there is currently no mechanism to contest an eviction and

occupants must be aware that pushing to have the principles adhered to may well result in the proprietor evicting them.

Should the occupancy principles be handed separately to each resident when they enter a boarding house or is it enough to include them in the Occupancy Agreement?

As stated, we would like to see the Standard Form Agreement made mandatory, which already sets out the occupancy principles, however we see no harm in reiterating these principles by requiring proprietors provide residents with a separate copy of the occupancy principles when they enter a boarding house as best practice. We do not see that this should be a mandatory requirement so long as the agreement between the parties articulates the principles and residents are given a copy of the written agreement as standard.

On that point, we note that currently there is no explicit obligation under the BHA for a proprietor to provide a resident with a copy of the agreement, only that any agreement be in writing.

We would advocate for the Act to specify that the proprietor provide a copy of the agreement to the resident.

Should the occupancy principles be clearly displayed on a notice board in a common area in the boarding house?

Yes. Again, the issue is about awareness and promoting an understanding of the principles by both proprietors and residents. It should not be assumed that residents are able to access information about the occupancy principles through other means such as via the Internet. Information regarding the occupancy principles should be as accessible as possible.

Are the occupancy principles useful and appropriate? (see Appendix B of the Discussion Paper) For example, are there any changes which should be made to the principles or any other matters which should be covered?

The occupancy principles are of limited use for two main reasons:

Firstly, and most vitally, there is no principle to allow residents to challenge terminations. This is a fundamental oversight, and undermines the principles substantially.

We have noted that the only principle residents are enforcing is principle 8, concerning the return of the security deposit within 14 days of the resident leaving the premises. This is a stand-alone principle in that it relates to rights outside the term of the agreement.

Without the right to challenge terminations, it is our experience that residents will not seek to enforce any of the other principles for fear that they will face eviction. Many residents would prefer to simply live with issues rather than complain and move elsewhere when they have the capacity to do so.

> *Tom was living in a boarding house. There were bedbugs in the premises. Tom decided to simply leave. Tom did not give a termination notice as required in the lodging agreement. The proprietor refused to return his full security deposit. Tom went to NCAT to get his security deposit back and agreed to a partial refund.*
>
> *Mario lives in an unregistered boarding house. The proprietor lives on site. Mario and other residents have been receiving harassing emails from the proprietor and Mario has had the proprietor dispose of some of his belongings without consent. Mario was promised that he would have privacy in the premises, and that certain alterations would be made to his room to make it more livable. These promises have not been followed through. Mario is now planning to move out.*

Secondly, the Occupancy Principles are framed in terms of 'reasonable', for example, '*reasonable state of cleanliness, reasonable state of repair*'. Proprietors and residents are expected to consider the subjective circumstances of the case in order to determine whether the principles are being adhered to.

It is extremely difficult for a lay person to determine whether standards are reasonable in a particular context. As advocates we would usually look to case-law to try to obtain a point of reference, however, we are not seeing any prescriptive case law coming though NCAT, and we know that this is often because residents fear eviction if they pursue their rights.

We would advocate for:

1. an additional occupancy principle providing residents with the right to challenge the reasonableness of the grounds for an eviction and Tribunal discretion to decline to grant terminations based on the circumstances of the case;

2. The introduction of prescriptive grounds in the BHA , similar to the *Residential Tenancies Act 2010* (NSW) under which an agreement can be terminated to prevent proprietors from evicting residents frivolously or vexatiously[11]

3. That the subjective 'reasonable' benchmark be replaced with minimum standards. We submit that the term 'reasonable' is problematic as it introduces a subjective assessment of the circumstances - *should a resident paying $150 a week be entitled to the same level of repair as someone paying $350? What is a reasonable state of repair for a premises built in the 1950's?*

Are the occupancy principles being complied with? If not, why not?

It is our experience that in the majority of cases they are not.

We understand that there was an initial rush by proprietors to comply with many aspects of the BHA including the occupancy principles, however, 7 years later, residents are mostly in the same position they were prior to the introduction of the Act. The only real achievement, in relation to general boarding houses, has been that residents have utilised NCAT for the recovery of security deposits.

The lack of compliance, and residents' perception that there is little that they can do about this situation is captured in the following interview:

> *'Paul' lives with 40 other men in a premises with two bathrooms.*
> *He discussed the lack of privacy, the need for repairs in the building and the despondency and dissatisfaction he has with his housing situation.*
>
> *Paul advised that he has not requested repairs due to fears of a fee increase or termination. Paul is currently on the waiting list for social housing and he sees boarding houses as his only affordable housing option.*

[11] We note that the suggested standard form agreement contains a table setting out a number of grounds for termination, and we would consider this to be a good starting point.

We would submit that while the BHA acknowledges that boarding houses must be more than mere shelter through the occupancy principles

> *The object of this Act is to establish an appropriate regulatory framework for the delivery of quality services to residents of registrable boarding houses, and for the promotion and protection of the wellbeing of such residents*[12]

Cases like Paul's demonstrate that occupancy principles are at this stage little more than unachievable ideals.

Why are residents failing to assert their rights?

It is our experience that the occupancy principles are not being complied with for a number of reasons:

Lack of knowledge about the occupancy principles

Seven years post BHA it is apparent to us through our casework that many residents do not know about the occupancy principles. They may be aware that they have *'rights'* but do not know where to find these rights or how to enforce them. Residents often contact us wanting to know whether they have rights at all.

We understand that funding was provided to community services, including the Tenants' Union of NSW in the early years of the BHA to educate residents about the Act and the Occupancy Principles. We would advocate for additional resources to be channelled towards further community education activities.

Threat of un-contestable eviction

Occupants of boarding houses are unlikely to try and enforce their occupancy principles when they risk the constant threat of eviction and they do not have any mechanism to challenge this.

This is recognised as the major deficiency of the Act in our view, as we must warn boarding house occupants that although their occupancy agreement may say they are entitled to certain

[12] *Boarding Houses Act 2012* (NSW) s.3.

principles, there is nothing to stop their request being met with an uncontestable termination notice:

> *Gerald has been a resident in his current boarding house for a number of years.*
> *He made inappropriate comments to another resident, which admits to and has apologised for.*
>
> *The proprietor has since referred to this incident and alleged that he's been violent to a number of other residents, which Gerald disputes. The proprietor has also accused of failing to keep his room sufficiently clean. He's been told to leave on the basis that the proprietor 'doesn't want to let the room out anymore'.*
>
> *Gerald was advised by our service that he will not be able to challenge the grounds of the eviction at NCAT. despite the fact that he disputes the allegations. Gerald was advised that the best thing to do is to look for alternative accommodation and try to negotiate with the landlord for more time.*

Whilst there has not been a specific study on the experiences of boarding house residents in relation to eviction, we note that a study in March 2019 by the Tenants' Union of NSW and Marrickville Legal Centre, '*Lives Turned Upside Down - NSW Renters' Experiences of No Ground Evictions*'[13], reports on the paranoia that private tenants experience at the prospect of a 'no grounds' 90-day termination notice, identifying that as many as 75% of tenants surveyed have held back from reporting repairs due to fear of an uncontestable no grounds eviction. All terminations under the BHA are short term uncontestable evictions - all residents we engage with have either been evicted previously, been threatened with eviction or known someone who has been evicted.

Fear of rent increase

Another issue of concern to many residents is that they are already have limited financial resources (see page 2 of this report) and are concerned that any requests, particularly relating to repairs, will result in increased fees. This point was highlighted in a report by the Tenants Union of NSW 5 years after the introduction of the BHA, where it was reported:

[13] https://files.tenants.org.au/policy/2019-Lives-turned-upside-down.pdf

Residents and their advocates tell us that they agree to cheap fixes, attempt their own repairs or resign themselves to living in unsafe conditions rather than ask for repairs, simply because they are concerned that the occupancy fee may rise as a result, to a level they cannot afford.[14]

Occupancy principle 6 only stipulates that residents be given no less than 4 weeks written notice of a fee increase. Proprietors can transfer the costs of upkeep or repairs into an occupancy fee so long as they give four weeks written notice. There is no limit on how often the fee can be raised.

We would submit that it is appropriate that the scope of Occupancy Principle 6 is expanded to limit occupation fee increases to one increase per calendar year, or only when the proprietor undertakes major and extensive repair works or makes significant improvements to the premises.

Should any other information be provided to a resident when they move into a boarding house? For example, a fact sheet with information about access to outside services, such as dental, Housing NSW, casework psychologists.

Information relating to services that can provide mediation, advocacy services such as the TAAS, Fair Trading and NCAT would be useful for residents.

Whilst it is outside the scope of our service, we have no in principle objection to a factsheet with access to appropriate and relevant social support services being provided to residents.

Should any information be provided to operators of boarding houses, for example, a fact sheet outlining their responsibilities?

Yes. It is our experience that proprietors are not complying with their obligations under the Act. It has been indicated that this may be due to a lack of knowledge regarding their responsibilities. As a fellow worker from the TAAS network commented to the Tenants Union of NSW in 2018:

'We think most [proprietors] are ignorant rather than malicious'.[15]

We would support a factsheet being provided to proprietors informing them of their responsibilities and would also push for resources to be invested in education campaigns for both residents and proprietors.

[14] Tenants Union of NSW, 'Five years of the Boarding Houses Act in NSW - a report by the Tenants Union of NSW, March 2018 < https://files.tenants.org.au/policy/2018-BHAct-5YearReport-FINAL-LPR.pdf> at p 18.
[15] Ibid, p. 9.

Are the occupancy principle provisions for termination and notice working or are there any changes which should be made?

The occupancy principle relating to terminations - Occupancy Principle 10, only provides that a resident know why they are being evicted, and that they be given reasonable notice of the eviction.

Residents are, in our experience, usually given details of why they are being evicted, and we do not believe that the introduction of Occupancy Principle 10 has affected this. We would seek statutory clarification on what constitutes a 'serious breach'. This ties into our view that terminations should be able to be challenged at NCAT. This is essential as we have seen many instances where proprietors have sought to terminate on minor breaches of the house rules, for example, having a room which '*smells bad*', or '*having a shower after 10pm*'.

We have observed that the suggested notice periods for termination provided in the Standard Form Agreement are not being adopted by proprietors and it is rare to see notice periods for termination set out agreements.

Residents that contact us are usually given extremely narrow time periods to leave a premises (usually less than 24-48 hours). In most cases, we would argue that this is insufficient notice as it usually does not give the resident sufficient time to find alternative accommodation and move their goods.

Do the suggested notice periods in the Standard Occupancy Agreement constitute "reasonable notice" for terminating an agreement by either a proprietor or a resident? If not, why not?

We would suggest that there needs to be a recognition that for many residents, a boarding house is not a transitory arrangement - these places are increasingly becoming their long term homes. The suggested termination periods fail to recognise many residents' desires for stability, lack of alternative options and the disruption of moving. It is not unusual for residents to reside in these premises for years at a time, collect significant amounts of belonging and cultivate a sense of home and community.

Whilst we agree with short time periods for instances of violence or threats of violence, we would argue for increased notice periods for continued minor breaches to two weeks, and we would argue that there should be a prescribed period between a warning notice and the termination notice in instances of continued and serious breach (e.g. 1 week), and then a notice period of an additional 1 week for the termination notice itself.

We would argue for an increase in the no grounds termination notice period, and a statutory recognition of the additional time needed for long term residents to move, similar to the extended period of occupation for tenants of more than 20 years under the *Residential Tenancies Act* 2010 (NSW) after the agreement has been formally terminated.

Should a proprietor be required to provide a reason for terminating an agreement? Why or why not?

Yes. It is important to be able to determine whether the proprietor's motivations for terminating the agreement justify the disruption of moving for the resident - knowledge of why the landlord seeks to end the agreement is inherent in being able to make that judgement.

As stated above, we know of proprietors who terminate residents for frivolous or unsubstantiated reasons -if an additional occupancy principle is to be brought in to allow residents to challenge evictions, it is anticipated that proprietors will opt to give 'no ground' terminations as a way of avoiding the eviction being challenged by a resident. No grounds terminations will 'tie the hands' of Tribunal members to determine whether the termination is appropriate in the circumstances of the case.

Do the current provisions provide sufficient security for residents of boarding houses?

No. the Tribunal has no jurisdiction to determine is a termination notice is valid, and occupants can be evicted (including by the use of reasonable force) by the proprietor without any independent oversight.

As stated above, this is an inherent deficiency in the BHA, which has resulted in no real practical uptake of the occupancy principles by residents. Rights have been articulated to an extent, but are no closer to being realised.

It is clear that none of these occupancy principles can improve the living conditions and tenure for boarding house residents as long as there is no ability to challenge a termination. These theoretical rights have no practical use as long as the NSW Civil and Administrative Tribunal lacks the ability to review a termination notice and declare it invalid. The best a resident can hope for is more time to leave the property; hardly worth the time and cost of a tribunal application.

Currently, under the BHA, all terminations are valid. Occupants have reported to EATS being terminated for reasons as frivolous as body odor; there is no mechanism to contest this.

The BHA must outline what reasons are valid to justify termination and allow for the contesting of ground and notice periods at the Tribunal. We would anticipate that many terminations would not be challenged by residents, however, there must be an avenue for truly unfair terminations to be invalidated otherwise the occupancy principles are, in practice, mute.

This is vital as the occupancy principles are good. The Act has done an astute job of identifying the key issues that are essential to maintain the dignity of residents. They must be usable.

How aware are you of the dispute resolution mechanisms available for house residents and proprietors?

We are aware that Occupancy Principle 11 prescribes that residents and proprietors should try to resolve disputes using reasonable alternative dispute resolution mechanisms. We would usually refer residents seeking alternative dispute resolution to their local Community Justice Centre.

How effective and appropriate are the current dispute resolution processes?

We are yet to know of any residents that have sought to access ADR services to resolve disputes with their proprietor. Given the nature of boarding house accommodation - i.e., the caretaker or proprietor maintaining a level of control and access, the fact that many residents do not know what dispute resolution is, and the fact that residents often do not want to engage with outside organisations, particularly government, we find in the majority of cases residents will simply leave. The issue at that point that that they have reasonable time to find alternative accommodation and move their belongings.

Do you have any other suggestions to encourage the early resolution of boarding house disputes and to reduce the number of boarding house disputes?

At this point, we would say that the number of disputes that we are seeing are very low, particularly when we consider the number of register-able boarding houses we believe to be in our catchment area of Eastern Sydney. Most residents who contact our service seek information about their rights, but then express a reluctance to assert them, on the basis that they may be evicted.

We think that the best way to encourage the early resolution of boarding house disputes is to provide residents with real powers to challenge evictions. This will give residents protection to be able to assert their rights and negotiate with proprietors on a more even footing. After this, we believe that there may be some value in a designated external service, similar to that provided by

NSW FT in relation to strata matters to provide free mediation services for residents and proprietors.

An (un)Safe and (un)Secure Sector

The Boarding Houses Act was enacted after a scathing Coroner's report into six deaths in one boarding house. The occupancy principles articulate the recognition of a need for both the safety and security of occupants.

These vital principles are completely ineffective without a means for occupants to challenge evictions. The Coroner's report examined the need for safety and care within the sector, and the occupancy principles attempt to articulate these needs as rights, however the absence of any mechanism to challenge evictions utterly undermines any emphasis the Act may have tried to place on occupant safety.

Research has shown clear links between eviction and worsening mental health, particularly anxiety and depression. A 2016 Swedish study published in the Journal of Epidemiology and Community Health found that people who have faced or experienced eviction are four times are likely to die by suicide than the rest of the population.[16]

The BHA cannot claim to protect the safety and health of occupants while it remains so easy for proprietors to evict them. Research from the Council to Homeless Persons has shown that individuals how experience long-term rough sleeping have an average life expectancy of 47 years and are 11 times more likely to experience violence.[17] Rough sleeping is the reality for many boarding house occupants who are between accommodation, and the inability to contest termination notices will continue to confirm that reality.

It is not enough to call for safety within boarding house. Any true attempt to protect the safety of boarding houses occupants must safeguard them from unfair evictions. Safety of tenure is vital to personal safety. The BHA must recognise the vulnerability of those that utilize the sector and make it harder for occupants to be evicted into potential homelessness.

[16] Yerko Rojas & Sten-Ake Stenberg (2016) Evictions and suicide: a follow-up study of almost 22 000 Swedish households in the wake of the global financial crisis, J Epidemiol Community Health 2016;70:409-413.

[17] Council to Homeless Persons. (2018). *Counting homeless deaths: remembering those who died while homeless - Council to Homeless Persons*. [online] Available at: https://chp.org.au/counting-homeless-deaths-remembering-those-who-died-while-homeless/ [Accessed 8 Oct. 2019].

This is relevant as more and more Sydneysiders are turning to shared housing as a means of coping with the current housing affordability crisis; particularly the case in our catchment area. Bondi Beach and Bondi Junction have the second highest rates of room sharing after the Sydney CBD, and Waverly LGA has the highest percentage of homes leasing to rent-paying visitors of any Sydney LGA[18]

People need affordable accommodation and between increasingly unmanageable rents and impossible waiting lists for social housing, it is difficult to imagine that a proprietor offering a bed for $100-200 is going to struggle to find an occupant. People are more willing to enter shared accommodation in later stages of life and it is vital that, if makeshift boarding houses are on the rise, that their occupants have more than a list of principles but a genuinely secure and safe housing tenure.[19] There will be a market for new-age boarding houses aims for older occupants, and it is important that the legislation that these occupants may find themselves caught by is fully able to guarantee them their rights.

In summation, The BHA has admirable goals however is deficient in its ability to translate these goals into tangible rights for occupants. Our recommendations are based on what we believe are needed to shape the Act into a working piece of legislation for the future.

[18] Zahra Nasreen & Kristian Ruming (2019) Room Sharing in Sydney: A Complex Mix of Affordability, Overcrowding and Profit Maximisation, Urban Policy and Research, 37:2, 151-169, DOI: 10.1080/08111146.2018.1556632.

[19] Sophia Maalsen (2019). *Generation Share: why more older Australians are living in share houses*. [online] The Conversation. Available at: http://theconversation.com/generation-share-why-more-older-australians-are-living-in-share-houses-107183 [Accessed 8 Oct. 2019].