



Community Housing
INDUSTRY ASSOCIATION

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CHIA Submission

ACNC: Commissioners Interpretation Statement Review

ACNC – Consultation on the Commissioner’s Interpretation Statement – Provision of Housing by Charities

Executive Summary

CHIA is the peak body representing not for profit community housing organisations (CHOs) across Australia. Our 170+ members manage a \$40 billion-plus portfolio of more than 100,000 homes, housing people on low and moderate incomes who find it hard to access affordable and appropriate tenancies in the private market.

The Community Housing Industry Association (CHIA) welcomes the opportunity to submit recommendations for the updated Commissioner’s Interpretation Statement (CIS). Our submission has been informed by consultation with our members and their experience with the ACNC. It also reflects the policy and funding environment in which our members operate. Critically we also consider the scale of housing disadvantage in Australia. Housing disadvantage is experienced not just by the nation’s poorest households but, in many locations, by moderate income earners (such as key workers) who are unable to afford suitable market housing anywhere close to where they work. Similarly, there are households with particular needs (e.g. people with disability) who are disadvantaged due to the scarcity of market-provided accommodation with necessary features.

Overall, we believe the current CIS provides, at a high level, reasonable guidance on who may legitimately benefit from charitable housing. Similarly, the principles it sets out wisely recognise that housing disadvantage is broader in scope than simple poverty. Appendix A to the CIS is, however, less clear, and somewhat archaic and should be replaced by more specific and targeted guidance including case study examples and links to background material explaining housing affordability issues.

There is also scope to update the section on commercial activities; with a more principles-based approach and guidance about the evidence housing providers could rely on to demonstrate that proceeds from commercial activities are used solely for charitable purposes. Identification of affordable (as opposed to social) housing provision as a commercial activity fails to recognise that overwhelmingly affordable rental housing is used to accommodate people who experience housing disadvantage. While the CIS does provide detail regarding the ACNC’s views on the meaning of ‘poverty’ in this context, the CIS appendix does not provide additional detail regarding the ACNC’s view on ‘disadvantage’ and how that may otherwise differ from ‘poverty’ in the context of charitable housing.

Two areas where the CIS needs to be expanded concern relations with government. Most charitable housing is provided by registered community housing organisations who are subject to domain-specific government regulation and are required to operate in accordance with government policy on, for example, eligibility for housing and allocation priorities. The CIS needs to be clear on what practice is consistent with the ACNC’s view of charitable law and where the ACNC believe there are inconsistencies there should be mechanisms for these to be resolved with government. The second area where there is scope for improvement is in the specification of clear principles and guidance for explaining and assessing private benefit in the context of regulatory requirements of government.

Finally, there should be links with other guidance operated by the ACNC and specifically the Commissioner's Interpretation Statement on public benevolent institutions (CIS 2016/03). It would be helpful if the CIS set out the ACNC's views on the differences between allowable charitable activities of a PBI as opposed to other charitable housing organisations. In particular, its views on the meaning of the relief of 'disadvantage' which does not appear relevant for PBIs (given their objects must be benevolent relief relating to 'poverty or distress' only – in accordance with CIS 2016/03) but may well be for other housing organisations.

Below, we have made suggestions for what the new CIS could contain. We have also taken the opportunity to make recommendations for how the ACNC could improve engagement with the community housing industry and its government stakeholders. CHIA will, through its members, assist the ACNC in preparing case studies and reviewing the proposed changes to the CIS. Our concern is to of course ensure that our members operate in consistency with the Charities legislation while being enabled to provide housing and services to the many Australian households that are unable to access suitable and affordable housing.

Recommendations

Process

- The ACNC should establish a stakeholder engagement system with the industry and its key regulatory and policy agencies. This should allow for periodic review of the operating environment and for day to day issues to be raised and addressed. (Recommendation 2)
- The ACNC should ensure its regulatory staff have a well-informed understanding of the charitable housing operating environment, including regulatory policy and requirements in each State and Territory. The CIS should be accompanied by references to background material explaining housing demand, government policy and CHO performance. (Recommendation 3)
- The ACNC should ensure that its regulatory approach is aligned with the proposed policy outcomes of community housing-specific regulatory regimes to benefit from their expertise in the sector (Recommendation 6)
- The assessment of PBI status should where be consistent with other ACNC guidance where it considers an organisation's charitable purpose. (Recommendation 10)

Updated CIS

- There may be scope for the new CIS to be supported by case study examples or links to reports to provide guidance to both ACNC staff and charitable organisations on how housing meets charitable purposes (Recommendation 1)
- The updated CIS should include an explanation or reference to how affordable housing rents are calculated (Recommendation 4)
- The updated CIS should remove references to affordable housing as automatically 'commercial' activity and recognise that it is used to alleviate housing 'disadvantage' as set out in 2.7. This would not affect the requirement for individual organisations to demonstrate the consistency of housing allocations with the categories in 2.7 (Recommendation 5)
- The updated CIS should set out the principles and clear guidance about how CHO commercial activities will be treated and the evidence the ACNC considers is relevant to demonstrate how they are being used to further the charitable objects of the relevant organisation. (Recommendation 7)
- CHIA suggests that the updated CIS sets out clear principles to which shared equity and rent to buy schemes must adhere. These principles should be subject to consultation with the sector. Relevant case study examples should be provided (Recommendation 8)
- The new CIS must clearly set out the principles and guidance for both CHOs and potential partners on what is permissible to assist in the design of rent to buy, shared equity and other similar schemes. Case study examples should also be prepared (Recommendation 9)

ACNC – Consultation on the Commissioner’s Interpretation Statement – Provision of Housing by Charities

Introduction

The Community Housing Industry Association (CHIA) welcomes the opportunity to provide feedback on the Commissioner’s Interpretation Statement CIS 2014/02.

CHIA is the peak body representing not for profit community housing organisations (CHOs) across Australia. The industry provides one in five of Australia’s social rental properties, complementing public housing. CHOs manage a \$40 billion-plus portfolio of more than 100,000 homes, housing people on low and moderate incomes who find it hard to access affordable and appropriate tenancies in the private market. Our 170 plus members include the largest (managing over 10,000 dwellings) to those with less than 100 homes. Our members provide a diverse range of housing for Aboriginal people, people with disabilities and the formerly homeless.

Introduction

The ACNC intends to update the Commissioner’s Interpretation Statement (CIS) (attached to the email) covering the provision of housing by charities. The CIS provides guidance to the ACNC on how to interpret the charities law (legislation and common law) as it applies to housing providers. It is non-binding but highly influential. This version was produced in 2014 and addresses five specific issues:

- What charitable purposes may be fulfilled through housing provision
- To whom charitable housing can be provided
- What kinds of housing can be provided
- How commercial activity fits with the provision of charitable housing
- What kinds of interaction can occur between Government and charitable housing providers

The review process has, we understand, been prompted by a recognition that the CIS is six years old and that it should be updated to reflect the current policy and funding / financing developments, to respond to problems identified in Community Housing Organisations’ interaction with the ACNC and to clarify / simplify the language in the CIS.

There is no public call for submissions and no discussion document. The ACNC acknowledges a need to consider current practices in the charity sector while at the same time ensuring that they operate within the bounds of the law. In this context they need to abide by the *ACNC Act 2012*, the *Charities Act 2013*, and all relevant case law – of which there has been very little since the CIS was produced. The 2008 [Word Investments Ltd](#) case remains the most significant in terms of establishing that ‘institutions may decide to pursue “asset protection” strategies, by incorporating separate entities to raise funds for their charitable purposes’, and in setting out the principles and reasons on which the decision was based.

As part of the review, the ACNC has consulted with various legal experts and charity sector leaders. We suggest there should be engagement with the three regulatory regimes and the relevant government departments and agencies that set contractual, policy and financing frameworks under which CHOs are obliged to operate. Any consultation without regard to those regimes and policy frameworks is unlikely to

provide clarity or meaningful guidance so that the CIS can be updated to reflect the increasing complexity of the sector.

Community Housing and its role in meeting Australia's housing needs

Australia is facing a massive housing challenge that has only become greater since the CIS was published. The proportion of Australia's dwellings that are social housing has declined significantly over the last 25 years at a time when market housing has become much less affordable. There is mounting evidence of Australia's shortfall of housing affordable to households in the bottom two income quintiles. Research commissioned by CHIA NSW and Homelessness NSW in 2016, which built on prior AHURI research, identified a shortfall of over 650,000 homes across Australia affordable to households in the bottom two income quintiles. Accounting for projected household growth to 2036, more than one million additional social/affordable rental homes will be needed to meet the needs of these lower income households over the next 20 years¹. The failure to supply sufficient homes compounds housing stress, again amply demonstrated by other robust research and analysis. We draw on a few examples below:

- More than half of the of low-income households in rental housing – some 1.3 million people – face housing costs exceeding 30% of their income, leaving them without enough remaining funds for essentials like food and clothing².
- The private rental market has not supplied enough dwellings at rents (i.e. \$202 or less per week) affordable to households in the bottom income quintile. By 2016 the national deficit of such dwellings had risen to 212,000. While the situation for private renters in the second lowest quintile is less extreme, the availability of homes affordable to this group (i.e. rented at below \$355 per week) is substantially compromised by such homes being occupied by higher income earners.³
- Using the projected number of households in Australia (ABS 2015) the number of social housing dwellings per 100 households has declined from 5.1 per 100 households in 2007–08 to 4.6 in 2017–18⁴. No reliable figures exist on the additional new social and affordable homes currently planned for the next five years but even on optimistic assumptions it is highly unlikely to exceed 10% of what is required. Factoring in the loss of affordable homes through the expiry of incentives awarded under the National Rental Affordability Scheme (NRAS) and other time limited schemes, as well as continued public housing sales and demolitions, the prospective net increase in social and affordable homes over the next five years is likely to be barely above zero. Unless there is a change of course by Australian governments, social and affordable housing provision per capita will continue to contract, just as it has for the past 25 years.
- A more meaningful measure of the decline in social housing supply is the reduction in the annual number of such properties being let to new tenants. This results from the decline of gross provision (see above), from the reduced number of newly built homes coming onstream, and from the contracting availability of affordable 'move on' accommodation (meaning fewer existing tenants have the capacity to transition into the private market). Therefore, *'Considering both public housing and*

¹ Troy L, van den Nouwelant R, Randolph W (2018) Filling the Gap - Estimating need and costs of social and affordable housing delivery http://communityhousing.org.au/wp-content/uploads/2019/03/Modelling_costs_of_housing_provision_FINAL.pdf

² Productivity Commission (2019) Vulnerable Private Renters: Evidence and Options

³ Hulse, K., Reynolds, M., Nygaard, C., Parkinson, S. and Yates, J. (2019) *The supply of affordable private rental housing in Australian cities: short-term and longer-term changes*, AHURI Final Report No. 323, Australian Housing and Urban Research Institute Limited, Melbourne, <https://www.ahuri.edu.au/research/final-reports/323>, doi:10.18408/ahuri-5120101.

⁴ <https://www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia-2019/contents/social-housing-dwellings#sh1>

community housing, the gross number of social rental lettings dropped from 52,000 in 1997 to 35,000 in 2017 – an absolute decline of a third⁵. Pro rata to population, this represents an effective reduction in social housing supply of some 50%’ (UNSW City Futures Research Centre submission to Parliamentary Inquiry on Homelessness 2020).

At the Federal level the government’s infrastructure agency Infrastructure Australia in its 2019 Audit⁶ has recognised that ‘*access to safe, adequate and affordable housing is a crucial foundation for enabling a person’s physical and mental health and wellbeing. Without access to appropriate housing, people are unable to focus on other aspects of their lives (such as health, education and employment) and are unable to contribute productively to society*’ and that many Australians currently do not have their housing needs met by the market. The audit clearly outlines the problem - i.e. that ‘*the social housing system suffers from a lack of funding, an ageing housing stock with high maintenance needs, increased demand due to housing affordability issues, insufficient funding to increase the supply of dwellings in the system, and tenants with increasingly diverse needs*’.

Not-for-profit CHOs are a critically important part of Australia’s housing system. The number of homes managed by the community housing sector has more than tripled in recent years (from 32,300 in 2006, to 100,200 dwellings in 2019: a 210% increase or 67,900 dwellings⁷). Since the CIS was published in 2014, an additional 30,000 homes have been added. The increase in dwellings has largely come from transfers of ownership or management of public housing dwellings to community housing organisations, though larger CHOs have used government subsidy programs to construct new homes. In 2020 the community housing sector owns and / or manages almost 25% of total social housing and while their development pipeline is small, CHOs are adding the lion’s share of all housing affordable to households in the lower two income quintiles. Government policy settings are consistent with this trend and it is therefore likely to continue.

CHOs are predominantly charitable organisations and rely on their status to provide services and accommodation to households locked out of the private market. Understanding the system in which CHOs operate and the way in which this influences their businesses is critical for the ACNC, to inform both the CIS update and its day to day interaction with the sector.

The current CIS already recognises that the provision of charitable housing extends beyond the relief of poverty. Section 2 is comprehensive and includes the groups for whom we provide housing. It sensibly avoids attempting to set income thresholds for eligibility for charitable housing, recognising that other factors also impact on households disadvantage, including location, the **availability** of low cost housing and distress and disadvantage that comes from a person’s particular circumstances. Some of our members have raised concerns that interactions with ACNC staff have on occasions exposed a lack of familiarity with the operation of the housing market and the scale of housing disadvantage. There is anxiety that ACNC staff do not always appear to be applying section 2 of the CIS to their assessments. There may be scope for the new CIS to be supported by (1) case study examples to illustrate the ACNC’s view on some of the households our sector assists under particular categories (e.g. 2.7.2 and 2.7.6) and (2) links to reports that explain rental affordability e.g. the Anglicare rental affordability snapshot⁸ (**Recommendation 1**)

⁵ Pawson, H., Milligan, V. & Yates, J. (2020) Housing Policy in Australia: A case for system reform; Singapore: Palgrave Macmillan

⁶ <https://www.infrastructureaustralia.gov.au/publications/australian-infrastructure-audit-2019>

⁷ <https://www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia-2020/contents/social-housing-dwellings>

⁸ https://www.anglicare.com.au/news-media/rental-affordability-snapshot/?gclid=CjwKCAjw2Jb7BRBHEiwAXTR4jRWP8tTWcjvU_qLvETrD58J7McZKL82fc_nfm4pGVN1aKc9QCkWGShoCyssQAvD_BwE

CHIA also believes that more regular engagement with the industry and its key regulatory and policy agencies would allow for periodic review of the sector's operating environment and provide a mechanism for day to day issues to be raised and responded to. [\(Recommendation 2\)](#)

CHOs' Operating Context

The Productivity Commission's Report on Government Services (ROGS)⁹ defines community housing as rental housing provided to low-to-moderate income and/or special needs households, managed by community-based organisations that lease properties from government or have received a capital or recurrent subsidy from government. While that definition does reflect the historical role of CHOs, the landscape is changing which is driving CHOs to undertake other activities including, potentially, rent to buy or shared equity, as well as to fund those activities using other means such as through NHFIC or commercial lending arrangements.

There are circa 552 CHOs across Australia, and they differ substantially in size and scale. The largest 38 providers manage 82.5% of homes and while the average size of these larger community housing portfolios is 2,357 there are many far smaller organisations. However, despite this diversity, the mission and ethos of those that are charitable are similar. In addition, they operate within a regulatory and policy system that sets overall objectives, places constraints on their operations and directs a substantial amount of what they can do.

Important in the context of the CIS is the fact that State and Territory governments set eligibility criteria for social housing, usually require CHOs to allocate from a common housing register and determine the priority household categories for allocations.

The current CIS is clear in 2.7 that 'eligibility for government assistance' including 'access to public housing' (which should be updated from public to social housing in the new CIS) is relevant to determining whether a person is in poverty and thus someone a charity can assist with housing. Eligibility criteria for social housing varies between jurisdictions but within jurisdictions criteria are generally consistent for public and community housing providers. Table 18A.49 in the ROGS housing data (2019 edition, not 2020)¹⁰ sets out these criteria.

At first glance some of the eligibility criteria particularly regarding liquid asset thresholds may seem generous and indeed it has led some ACNC officials to question whether CHOs are fulfilling a charitable purpose by housing people from the social housing waiting list. Apart from the clear guidance in the CIS that social / public housing eligibility is an indicator of disadvantage, the ACNC should be reassured that allocations from all state and territory registers are overwhelmingly made to the most disadvantaged. It could hardly be otherwise given the scarcity of accommodation.

The ROGS provides evidence that CHOs overwhelmingly allocate homes to the most disadvantaged groups on the social housing waiting list. Table 18A.17 shows that almost 82% of allocations in 2017/18 went to priority need groups. This means people who were not only eligible in terms of having very low incomes, but also assessed as affected by other serious disadvantage(s) impeding their ability to secure suitable housing in the private market.

⁹ <https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/housing-and-homelessness/housing>

¹⁰ <https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/housing-and-homelessness/housing>

CHIA is concerned that at least one CHO may be refused charitable status on the grounds that the relevant state social housing eligibility criteria are considered to be too broad - i.e. where it would be technically possible for an applicant to be assessed as eligible for social housing despite possession of an 'unacceptable' level of assets (albeit having a very low income). Considering that prioritisation of eligible applicants for a tenancy offer is highly dependent on assessed need (likely to be compromised by ownership of assets) this is essentially a technicality. An adverse decision based on this concern would therefore be mistaken and, appears to us to discount one of the clear indicia of poverty in the CIS, being social housing eligibility. Moreover, it would have dire consequences for the relief of housing disadvantage in Australia.

CHOs provide long term secure social housing and tenants are not required to move out if their income increases beyond 'social housing eligibility'. This is, in any case, a relatively rare occurrence given the extremely strict rationing that nowadays governs access to social housing but CHOs are committed to the principle of security of tenure. Often social housing is what provides the stability for an individual to make a success of employment. It is also unfortunately true that, in Australia's contemporary economy, much employment is low paid and insecure, and tenants can too frequently slip back into unemployment. Some ACNC staff have questioned whether CHOs that allow these low paid workers to continue to occupy social housing are fulfilling their charitable purpose. We believe they are. This is because, in our view, the continued provision of housing despite the (potentially temporary) increase in income is still relevant to ensuring the person's 'poverty' is relieved in the long-term. We suspect the views of the ACNC staff may exist because the ACNC need more information about the realities for low income workers (with potentially unstable employment) in the Australian housing market.

If the ACNC's view is that the provision of housing to certain persons who meet state government eligibility criteria is not charitable (in the required sense for registration), the ACNC should clearly identify this in the CIS. It may be that consultation between the ACNC, and relevant state regulators is necessary.

Recommendation 3

The ACNC should ensure its regulatory staff have a well-informed understanding of the charitable housing operating environment. The CIS should be accompanied by references to background material explaining housing demand, government policy and CHO performance. An alternative is for the ACNC to outsource or collaborate with the regulatory authorities overseeing community housing when undertaking assessments of registered entities. We believe this would provide ACNC staff with a better insight into current operating conditions which will assist in informing them of what may be 'charitable' in a contemporary context.

Some CHOs also provide affordable housing – i.e. rental housing typically targeted to low income workers but which may equally house people on very low incomes, who might otherwise be eligible for social housing, or occasionally moderate income earners in localities where housing is particularly expensive. It remains for most CHOs a minority tenure but has increased primarily because government funding schemes have favoured it. Affordable housing is distinguished from social housing largely by its rent setting model. While social housing tenants' rents are a % of their income, affordable housing rents are typically set at a discount to market rent, generally capped at 74.9%. Larger discounting takes place as CHOs need to ensure that low income households are not placed in rental stress. The 30/40 rule¹¹ has become generally accepted benchmark for whether a household in the bottom two income quintiles is in housing stress. CHOs thus adjust the discount to ensure certain tenants pay no more than 30% of their net household income. Some CHOs have indicated that ACNC staff have queried whether this discounting method for

¹¹ <https://www.ahuri.edu.au/research/ahuri-briefs/3040-indicator>

some individuals is akin to a private benefit. We disagree. This clearly is a misunderstanding on the part of the ACNC about how rents are calculated to prevent rental stress, that is, to relieve poverty. The updated CIS should provide ACNC staff (and CHOs) with a reference to how rent calculations are performed and what the ACNC considers acceptable to avoid providing a private benefit. [\(Recommendation 4\)](#)

There are many different affordable housing programs with different eligibility criteria. Most are open to low to moderate income groups - i.e. many of those housed will meet the criteria for households who are being relieved of poverty. Information about the income profiles of households in affordable housing is patchy. Analysis in NSW (the largest jurisdiction) suggests that almost half (46%) of households have a Centrelink payment as their main income source¹².

The current CIS seems to imply that one government scheme (the National Rental Affordability Scheme – NRAS) is considered a commercial activity. As used by charitable CHOs this is not the case. The households who are assisted in both NRAS supported schemes and other affordable housing overwhelmingly meet at least one if not more of the criteria in clause 2.7 of the CIS.

[Recommendation 5](#)

The updated CIS should remove references to ‘affordable’ housing as automatically being considered a ‘commercial activity’ and recognise that it is used to alleviate poverty or housing disadvantage as set out in 2.7. This would not remove any requirement for an individual organisation to demonstrate that its allocations are consistent with the categories in 2.7.

Since the CIS was published the regulatory environment has changes substantially with the establishment of the National Regulatory System for Community Housing (NRSCH). The NRSCH operates everywhere except Victoria and WA which both chose to retain their own systems. All three systems are, however, relatively consistent. The compliance systems provide assurance to stakeholders that CHOs operate in conformance with contractual and regulatory obligations. The ACNC should ensure that its regulatory approach is aligned with the community housing registration regimes, to benefit from their greater expertise in the sector [\(Recommendation 6\)](#).

The provision of government support to construct much needed social and affordable housing has in recent years been severely constrained and frequently required CHOs to undertake commercial activities to part finance schemes using for example the profit from market sales. Some CHOs have also set up social enterprises such as not for profit estate agencies to partly enable the funding of tenant support services. The current CIS and the Word Investments case provide clarity that these commercial activities are allowable, but the new CIS could set out the key principles that the ACNC will use to assess compliance. [\(Recommendation 7\)](#)

Housing Types in the CIS – Shared Equity and Rent to Buy

Both shared equity and rent to buy schemes are a very small proportion of the housing provided by CHOs. The vast majority of CHOs are not providing this type of accommodation. However, CHIA is of the opinion that shared equity is charitable housing and is consistent with charitable purpose where it is provided to households whose circumstances are consistent with the factors described in section 2.7 of the current CIS.

¹² <http://communityhousing.org.au/wp-content/uploads/2018/12/StateoftheIndustry-web.pdf>

There has been concern expressed by the ACNC that individuals participating in shared equity schemes may be receiving a private benefit, in the form of enjoying a capital gain on sale. While potentially true, the proportion of the gain would reflect the contribution made by the individual. None of the gain attributable to the input of the charitable entity would 'leak' to the individual. This part of the capital gain remains with the CHO for use in other schemes.

Recommendation 8

CHIA suggests that the updated CIS sets out clear principles to which shared equity and rent to buy schemes must adhere. These principles should be subject to consultation with the sector.

Relationships with Government

Earlier in the submission we have explained that registered CHOs operate within a policy and funding framework set principally by the state and territory governments. The current CIS does not acknowledge this situation. In the process of producing this submission it has come to our notice that ACNC staff have expressed concern about how some government policy could impact on charitable purpose. We noted earlier that there has already been one case where a state's social housing eligibility criteria (to which a CHO must conform) are considered to conflict with charitable purpose. While we believe in this instance the ACNC has misunderstood the situation, there should be channels established where issues can be resolved to avoid decisions that impact on the whole sector.

As set out above, if the ACNC believes that the policy and funding frameworks set by state and territory governments are inconsistent (in certain respects) with charitable purpose, the CIS should clearly identify this.

Private Benefit

Earlier in the submission we noted that parts of the ACNC have questioned whether some individuals are receiving a private benefit in social housing. Another example potentially raising concerns about private benefit is where private landlords offer their properties to CHOs at low or peppercorn rents for long lease periods. These homes are then subleased for the purpose of social housing. CHOs would be responsible for repairs, maintenance, and upgrades on such a property as specified in the agreement. Our view is that the gain (in improved property condition) to the landlord should not be considered as a private benefit if the gain is commensurate with the value of the foregone rent.

In recent years the construction of new social and affordable housing has generally involved combining multiple sources of finance and funding to achieve feasibility. In many cases this mix will include private finance, government subsidy and cross subsidisation from market products.

The community housing sector would prefer a government funding mechanism that was more generous, reduced complexity and lowered risk. However, in the current policy environment, government schemes generally seek to minimise the subsidy amount and increasingly seek a 'return' on the government's investment. The ACNC should make clear its views about what is permissible in the design of such funding mechanisms and specifically how they would determine, in any particular case, whether there was a private benefit to government. The ACNC should be establishing relations with relevant parts of state, territory, and commonwealth government so that its views are sought as a routine part of scheme / program design before those schemes are rolled out to CHOs and the community.

Our view is that there will increasingly be schemes where CHOs will partner with non charitable institutions possibly in special purpose vehicles. The CHO's aim will be to ensure that the value created in any such structure or arrangement, that can be attributed to charitable benefits, will flow back to the CHO. In addition, the gain that a non charitable partner can take from an arrangement should be proportionate to the financing / funding contribution it makes. We would not consider that arrangement to confer a private benefit in circumstances where any gain is proportionate to risk. Again, guidance from the ACNC on what is permissible in this regard should be set out in the CIS.

The new CIS must clearly set out the principles and guidance for CHOs and potential partners (including government) on what is considered provision of a private benefit and what is not. That guidance will be used to assist in the design of projects and schemes. Case study examples should also be prepared to assist in interpretation. ([Recommendation 9](#))

Public Benevolent Institution (PBI) Status

We appreciate that the assessment of PBI status is a separate to charitable status. That said most of our members are PBIs and thus a tailored and consistent approach should be applied when assessing the hurdles for obtaining PBI status with the ACNC. The experience of one CHO indicates the ACNC may have a view that moderate income households cannot be assisted by a PBI (within its charitable purposes). There have been inconsistent views expressed by different ACNC officers.

The term 'public benevolent institution' is not defined in legislation and therefore, the term takes its ordinary meaning, informed by judicial interpretation (particularly the Full Federal Court decision in *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC] 69). The ACNC's administrative interpretation and practice with respect to the registration of public benevolent institutions are set out in: the Commissioner's Interpretation Statement on public benevolent institutions (CIS 2016/03); and the ACNC Factsheet titled 'Public benevolent institutions and the ACNC' (PBI Factsheet). That guidance should be addressed in the CIS in the context of housing charities.

Broadly, case law and the Commissioner's guidance dictate that each word in the phrase 'public benevolent institution' is an individual element that must be met by the entity seeking registration. Accordingly, in order to be a public benevolent institution, an entity must:

- be 'public' in the required sense;
- have as its main purpose the provision of benevolent relief to people in need; and
- be an institution.

Citing the ACNC's statement in CIS 2016/03: 7.2.3 The focus overall should be on an organisation's purposes, rather than its activities in isolation. The activities are relevant insofar as they are a signpost to the organisation's purposes. In the case of the CHO providing information to CHIA, the ACNC queried the status of persons categorised as 'low' and 'moderate' income households in terms of whether their circumstances are of such seriousness as will arouse community compassion and thus engender the provision of relief. Clearly the CHO in a case such as this would need to demonstrate that the households it was assisting were in need of benevolent relief but moderate income earners should not, having regard to what is the 'ordinary meaning' of benevolence, be automatically excluded from assistance by charitable

institutions that are PBIs.

Recommendation 10

The assessment of PBI status should be consistent with the CIS and other ACNC guidance where it considers an organisation's charitable purpose.