



Law Council  
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*Legal Practice Section*

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Dear Joanna,

**COMMISSIONER'S INTERPRETATION STATEMENT CIS2014/02 PROVISION OF HOUSING BY CHARITIES**

This submission has been prepared by the Charities and Not-for-profits Committee of the Law Council of Australia's Legal Practice Section (**the Committee**). The Committee welcomes the opportunity to make a submission to the Australian Charities and Not-for-profits Commission (**ACNC**) in relation to the refresh of the Commissioner's Interpretation Statement CIS 2014/02 Provision of Housing by Charities.

This submission supplements our earlier submission of 10 September 2020 on the revision of the Commissioner's Interpretation Statement CIS2014/02 Provision of Housing by Charities. In this submission, the Committee addresses the revised draft of that CIS released for comment on 19 July 2021 (**Revised Housing CIS**).

The Committee welcomes those of the revisions which:

- (a) Retain commendable aspects of the original Housing CIS;
- (b) Provide clearer guidance on the provision of housing by ownership in addition to rental accommodation;
- (c) Provide extended guidance on the relationship between the provision of housing by charities and the provision of housing by government; and
- (d) Revise the definition of "not-for-profit".

The Committee also supports the consolidation of the statement and Appendix into a single statement.

However, as explained below, the Revised Housing CIS does not provide sufficient clarity in relation to the Commissioner's view in certain areas. Nor does it contain a clear statement explaining why it is needed.

In the following submission the Committee makes some general comments followed by recommendations for specific amendments to the Revised Housing CIS.

## **Clarification of the need for this CIS**

The Committee suggests the Revised Housing CIS should start with a statement of why the Commissioner considers a CIS is needed in respect of the provision of housing, along with a statement explaining which housing providers the Commissioner intends the CIS to refer to.

In this regard, section 4.2 should be moved to the beginning and the CIS should then clarify that only some charities providing housing are considered in the CIS, and not the full spectrum of charities which provide housing.

This lack of a clear rationale for the CIS is referred to further below in this submission.

## **The Revised Housing CIS and the PBI CIS**

There are aspects of the Revised Housing CIS that specifically address public benevolent institutions (**PBIs**). At the same time, the Commissioner's Interpretation Statement: Public Benevolent Institutions (**PBI CIS**) is currently being revised. The Committee encourages the Commissioner to consider finalising these two CISs together because they may inform one another.

In addition, if the Commissioner sees a need to provide interpretation specifically for PBIs in relation to the provision of housing, then that guidance might be best placed in the PBI CIS. In the submission that follows we have highlighted where there is confusion created by specific reference to PBIs, requiring a charity to cross reference the two CISs to deduce the appropriate guidance.

## **The provision of housing is not limited to advancing social or public welfare**

Section 2.1.2 of the Revised Housing CIS makes clear that the provision of housing may come within one or more of the charitable purposes set out in the Charities Act.

However, at section 2.1.3, the Revised Housing CIS states that its focus will be on the purpose of advancing social or public welfare. The Revised Housing CIS thus says little on the question of when the provision of housing may be a means of achieving any other charitable purpose.

In the minute accompanying the Revised Housing CIS those making submissions were invited to give examples of charities that provide housing to advance health or other purposes beneficial to the community.

The Committee will be better able to provide any such examples if we have context for what specific uncertainty the Revised Housing CIS is to address. We reasonably assume that an interpretation statement is needed because there are particular questions that the Commissioner has determined need clarification. If these have arisen in relation to charitable purposes other than advancing social or public welfare, then please provide us with that context and we can then hopefully assist with examples.

The Committee assumes there is a need for the Revised Housing CIS to provide clarity around questions of private benefit as opposed to public benefit in discounted accommodation, particularly long-term leasing or home ownership schemes. However, this is not clear in the Revised Housing CIS and it is not until the reader gets to section 4.2 that an explanation is given as to what the ACNC considers is covered by 'providing housing'.

Section 4.2 is very broad and would include student accommodation, rehabilitation housing for those recovering from illness or injury, respite accommodation, accommodation for religious practitioners, and accommodation as part of employment with a charity. However, charities that provide housing for the purposes of advancing education, health or religion are not referred to in the CIS, nor is the incidental provision of accommodation.

In the Committee's submission of 10 September 2020, we argued the Housing CIS ought to consider the place of housing under s 12(1)(k) of the Act: 'any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j)'.

While the Committee acknowledges that the Commissioner now seeks submissions focused on inaccuracies or errors, we wish to restate our view that the Revised Housing CIS should address the question of housing under s 12(1)(k) of the Act.

In particular, the Committee submits that the Revised Housing CIS should make clear that the provision of housing might be a means of achieving purposes such as community development or urban and rural regeneration, which are charitable purposes under s 12(1)(k) of the Act.

The Revised Housing CIS should clarify the Commissioner's understanding of the law in relation to:

- 'affordable housing' i.e. where the housing is provided to essential workers to enable them to live near their workplaces in locations with unaffordable housing; and
- The prevention of poverty, distress or disadvantage by the provision of housing to those at risk of housing stress.

The Committee submits that these are both examples of the provision of housing to address the relief of disadvantage, and/or in furtherance a charitable purpose under s 12(1)(k).

A more detailed exposition of our views on the provision of housing under s 12(1)(k) of the *Charities Act 2013* (Cth) is set out in our submission of 10 September 2020, at [18]-[29].

## **Specific comments and suggested amendments**

1. References throughout the Revised Housing CIS to what the "ACNC considers" should be references to what the "Commissioner considers".
2. Section 1.2.1 suggests that there is a limit to which a charitable purpose could be pursued by the provision of housing. Any such suggestion must be rejected. The law of charities is not concerned with the extent to which a charitable purpose is pursued by a particular type of activity.
3. In Section 1.2.2 there is a heading "Whether a Public Benevolent Institution can provide housing". The heading should be changed to, for example, "Public Benevolent Institutions and the Provision of Housing".
4. In section 2.1.2, the Committee recommends that the sub-paragraph should read:

The *Charities Act 2013* (Cth) (the *Charities Act*) provides a statutory definition of 'charity' for Commonwealth purposes. The provision of housing ~~may fall within~~ is an activity that may be undertaken by an entity with one or more of the charitable purposes set out in the *Charities Act*.

5. In relation to section 2.1.3, we refer to our general comments above. The Revised Housing CIS is broader in its focus than PBI housing providers, which are likely better dealt with through the PBI CIS.
6. Section 2.2.1 reads as though section 15 of the *Charities Act* provides a definition of advancing social or public welfare, which it does not. Section 15 provides examples, without limitation. This is particularly important in relation to the provision of housing because we submit that it is not only for the relief of need that housing can be provided in furtherance of charitable purpose.

Thus, section 2.2.1 should be amended to read:

The *Charities Act* ~~defines the~~ refers to the purpose of advancing social or public welfare (section 12(1)(c)) ~~to include~~ which includes, without limitation, the purposes of: ...

7. Given the statement in section 2.2.3, it would be helpful to understand what is covered by 'distress and disadvantage' other than poverty, age and disability. Also helpful would be a discussion of what might constitute 'evidence to the contrary', such that the purpose in question does not meet the public benefit test. The Committee understands this to be the point of tension relating to the provision of housing, and the reason why the sector needs the CIS.
8. In section 2.3 explaining what is meant by the relief of poverty in relation to housing we suggest the Commissioner could start by acknowledging that in Australia it is expected that a person should have access to safe and fit-for-purpose accommodation. The Committee also suggests the Commissioner not refer to the 'Australian community' as this gives no real guidance. Instead, the Commissioner could bring forward the recognition of many of the issues in section 2.5, and in particular sections 2.5.1.7, 2.5.2 and 2.5.3.
9. Section 2.3.1 should be amended to read:

Therefore, in the context of housing, a charity with the purpose of relieving poverty might pursue this by ~~is~~ providing housing assistance to ensure ~~of~~ a modest standard of living to people who cannot afford, from their own resources, accommodation that would give them a modest standard of living in the ~~Australian~~ applicable community.

10. Sections 2.3.2 to 2.3.7 would benefit from a clear statement of principle followed by the case reference and discussion. As currently drafted, the case examples are less user friendly than they could be.
11. Section 2.3.6, footnote 20 cites *Community Housing Ltd v Clarence Valley Council* (2015) 90 NSWLR 292, [55]. The pinpoint reference appears to be [43]-[52]. Moreover, the section says that "The Court stated that these terms were relative and not absolute

concepts". The Court did not state this even if it may be inferred from the judgment and so the wording of the section should be revised accordingly.

12. Section 2.3.7, footnote 21 cites *Community Housing Ltd v Clarence Valley Council* (2015) 90 NSWLR 292, [74] (Harrison J). This reference should be to *Community Housing Limited v Clarence Valley Council* [2014] NSWLEC 193, [74] (Harrison J), upheld in *Community Housing Ltd v Clarence Valley Council* (2015) 90 NSWLR 292, [65]-[88].
13. It would be helpful to know whether section 2.3.8 is intended to clarify the meaning of the last sentence in section 2.3.7. That is, is the question of 'housing stress' the same as 'whether the households in question are able to fund accommodation that would give them a modest standard of living in the Australian [applicable] community'? It is arguable that the need for 'affordable housing' comes within not being able to fund accommodation to provide a modest standard of living. However, those with this need may not be within the bottom 40% on Australia's income distribution. The Revised Housing CIS should clarify how these sections sit together and should address the issues the Commissioner will consider in relation to 'affordable housing'.
14. The third sentence of section 2.3.8 would benefit from a comparator. For example, does this mean less than the statistically average Australian?
15. The Committee recommend the last two sentences of section 2.3.8 be amended to read:

The Commissioner recognises that such discounting ~~is likely to be~~ consistent with a charitable purpose of providing housing for the relief of poverty and not unjustified private benefit. That is, the Commissioner accepts that households that meet the 30/40 rule are likely to be ~~assuming that the households are~~ unable to provide a modest standard of living in the Australian community.

16. The Committee recommends that section 2.3.9 needs to be expanded to explain what the Commissioner expects by way of on-going monitoring of recipients of housing. The Revised Housing CIS explains in detail how a charity needs to assess an applicant for housing (eg, 30/40 rule) but once the recipient is in discounted accommodation the 30/40 rule will not be applicable (thanks to the very provision of the housing in question). It is of limited assistance for the Commissioner to say charities should retain evidence 'of this nature' to ensure they provide housing for the relief of poverty. If and when discounted accommodation should cease to be provided, is a point of uncertainty that the CIS could address.
17. In addition, section 2.4 should be expanded to cover more examples of distress or disadvantage. In particular, it would be helpful for this section to address the question of essential workers or shift workers unable to afford to live geographically close to their place of work.
18. Sections 2.5.1.6 and 2.5.1.7 rightly point out that the following factors are relevant when considering whether a person is in poverty, distress or disadvantage such that they need relief through the provision of housing:
  - "geographical location";
  - "the need to obtain accommodation in that location and its surrounds";
  - "the cost and availability of accommodation in their location"; and

- “the income required to acquire and maintain accommodation in that area and its surrounds”.

The Committee submit that these factors should be referred to and explained in sections 2.3 and 2.4 and we note they are equally important when considering whether housing is a means by which charitable purposes under s 12(1)(k) might be furthered. The Revised Housing CIS should spell this out explicitly.

19. Section 2.5.1.2, footnote 27 cites *Community Housing Ltd v Clarence Valley Council* (2015) 90 NSWLR 292, [56]. However, that source does not refer to specific disadvantage nor list examples such as domestic violence.

20. The Committee recommend section 2.5.2 be amended to read:

For this reason, any information provided in relation to the local context, rather than a national average relating to income, cost of housing and housing availability, will ~~may~~ be taken into account when assessing the factors relevant to poverty.

This provides clear guidance without requiring the Commissioner to be independently informed about the local contexts.

21. The Committee recommend that section 2.5.3 be amended to place emphasis on private benefit rather than any notion that the Commissioner applies a means test to the beneficiaries of a charity:

The Commissioner will consider these factors in assessing whether an entity providing housing meets the requirements for registration as a charity, or whether the provision of housing constitutes impermissible private benefit. ~~whether the intended beneficiaries of a housing provider need housing provided to relieve their poverty, distress or disadvantage.~~

22. The Committee recommend section 2.6.4 be clarified as follows:

The housing provided to the elderly by not-for-profit retirement and aged care facilities can be seen to relieve needs arising from old age, and so can be considered in furtherance of charitable purposes.

Moreover, this section should clarify whether there is any meaningful distinction between a retirement village for over 55s and an aged care facility. The section presently bundles the two together. However, retirement villages are often separate from aged care facilities and vice versa. In the Commissioner’s view, do the residents of a retirement village need to be ‘in need of care’ or can they just be above a certain age?

23. The Committee recommend section 2.6.5 be clarified by the following amendments:

Providing additional services such as meals, assistance with shopping and other essentials, may also be carried out in furtherance of a charitable purpose. Other services that may be seen as ‘luxuries’, such as entertainment, can also further charitable purposes or purposes that are ~~be~~ ancillary to the charitable purpose of caring for and supporting the aged, and will not necessarily prevent an organisation from being considered charitable.

In addition, some guidance would be helpful on the question of when the provision of “luxuries” becomes substantial enough to cease to be ancillary.

24. The Committee recommend section 2.6.6 be clarified by the following minor amendments:

Similarly, providing housing to relieve the needs of individuals with disabilities ~~may~~ will be in furtherance of a considered charitable purpose.

25. The heading to section 3 should be renamed as set out above but also clarified – in what circumstances would any of the charities described in section 2 not also be eligible to be a PBI? As currently worded section 3 invites the reader to investigate the differences between what is stated in section 2 with the PBI CIS and from this exercise discern some differences which make the provider charitable but not a PBI. This creates confusion as currently presented.

26. The Committee recommends section 3.1 should be amended to read:

A PBI is a charitable institution ~~with a main purpose of providing benevolent relief to 'people in need'~~ that is organised, conducted for, or promotes the relief of poverty, sickness, disability, destitution, suffering, misfortune or helplessness.

27. The propositions set out in section 5.5 are drawn from the New Zealand case of *Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502, which is not binding authority in Australian law. Moreover, that case was disapproved and not followed in *South Australian Employers' Chamber of Commerce and Industry Inc v Commissioner of State Taxation* [2017] SASC 127 at [152]. These facts should be acknowledged.
28. The propositions in section 5.5 say nothing about whether providing housing by way of home ownership as opposed to rental accommodation might further a charitable purpose, such as community development or urban or rural regeneration, under s 12(1)(k) of the Charities Act.
29. At section 5.7.4 there is a reference to footnote 48. It is not clear what is meant by this. We recommend it be clarified.
30. At section 5.8 the decision *Habitat for Humanity* [1995] 4 Decisions of the Charity Commissioners 13 is discussed. It should be acknowledged that this is a UK decision.
31. Section 6 should be expanded to acknowledge that there may be reasons for commercial activities other than funding the discounted accommodation. Such reasons include providing and improving amenities, services and the liveability of the housing facility.
32. The Committee submits that section 6.4 needs clarifying. Currently, it refers to relief of poverty only and it is unclear whether that is intentional. Low-cost accommodation can be provided for reasons other than relief of poverty. We request that this section be further clarified so that the precise point to be made by the Commissioner here is clear.
33. At section 7.3 the Committee recommends a minor amendment to the last sentence as follows:

Some medium-income tenants may need relief from 'poverty, distress or disadvantage' and providing housing to them would be in furtherance of a charitable purpose.

The Committee would welcome the opportunity to discuss this submission with the ACNC. In the first instance, please contact the Committee Chair, Ms Seak-King Huang on [shuang@milnerhuang.com.au](mailto:shuang@milnerhuang.com.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Michael Tidball', with a horizontal line underneath.

**Michael Tidball**  
**Chief Executive Officer**