



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

CONSULTATION

BOARDERS AND LODGERS C-RIS

September 2016

Table of Contents

MESSAGE FROM THE COMMISSIONER FOR CONSUMER PROTECTION	i
TERMINOLOGY USED IN THIS PAPER	ii
1. ABOUT THIS PAPER	1
1.1. Purpose of this consultation regulatory impact statement	1
1.2. How to have your say.....	1
2. ABOUT THE ISSUE	3
2.1. The boarding and lodging sector.....	3
2.1.1. Boarding house residents.....	3
2.1.2. Types of boarding and lodging	4
2.1.3. Difference between rooming houses and boarding.....	5
3. EXISTING LAWS IN WA	7
3.1. Purpose of this review.....	7
3.2. Current laws in WA regulating the boarding sector.....	7
3.2.1. Common law	7
3.2.2. <i>Health Act 1911</i>	8
3.2.3. Building Code of Australia	8
3.2.4. Australian Consumer Law.....	9
3.3. Are the current laws effective?.....	9
3.3.1. Data from Department of Commerce	9
3.3.2. Stakeholder workshops	10
3.4. Is there a need for Government intervention?	12
4. OPTIONS FOR CONSIDERATION	14
4.1. Other jurisdictions.....	14
4.2. Option 1 - Status quo	15
4.3. Option 2 - Modified tenancy regulation.....	16
4.4. Option 3 - Occupancy principles	18
4.5. Option 4 - Include a definition of boarders in the <i>Residential Tenancies Act 1987</i>	21
4.6. Option 5 - Voluntary Code of Practice	23
4.7. Option 6 - Other options	24
5. OTHER ISSUES	26
5.1. Threshold numbers	26
5.2. Magistrates Court or State Administrative Tribunal	27
5.3. Registration of boarding houses	27
5.4. Other issues.....	29
6. IMPLEMENTATION AND EVALUATION.....	30
7. NEXT STEPS	30

Although every care has been taken to ensure accuracy in the preparation of this paper, the information has been produced as general guidance for persons wishing to make submissions to the Boarders and Lodgers consultation. The contents of the paper do not constitute legal advice or legal information and do not constitute Government policy. This paper should not be used as a substitute for a related Act or professional advice.

This publication is free. The Department of Commerce has no objection to copying all or part of this document. Due recognition of the source would be appreciated.

National Relay Service: 13 36 77. This publication is available on request in alternative formats to assist people with special needs. Call 1300 304 054.

MESSAGE FROM THE COMMISSIONER FOR CONSUMER PROTECTION

Review of the regulation of the boarding and lodging industry in Western Australia

I am pleased to release this Consultation Regulatory Impact Statement as a crucial first step in providing advice to the Government on whether it is necessary and appropriate to introduce new laws to regulate the boarding and lodging (boarding) industry in Western Australia.

Affordable housing is a key issue for many Western Australians and boarding accommodation is increasingly playing a significant role in the delivery of affordable rental accommodation within our community. Although the *Residential Tenancies Act 1987* (the RT Act) establishes rights and obligations for landlords and tenants in traditional rental arrangements, it does not apply to boarding agreements. The regulation of boarding agreements falls into the area of the common law, which can be difficult to locate, identify and understand.

For this reason, the final report of the statutory review of the RT Act, in 2008 made the recommendation that the Act be amended to include boarders and lodgers, but not before there was further targeted research and consultation to fully understand the issues that affect this industry.¹

Housing is one of the rare issues that impacts upon everyone in our community. The Department of Commerce – Consumer Protection Division (Consumer Protection) is therefore keen to hear from as many members of the community as possible, irrespective of whether their experience is that of a resident, a landlord, a neighbour, a property manager, a local government authority or one of the many support groups that work within this industry.

This is an important review that will help shape the Government's future policy direction and legislative reform agenda in relation to the boarding industry. I therefore encourage everyone with an interest in boarding accommodation to provide input to the review.

David Hillyard

A/COMMISSIONER FOR CONSUMER PROTECTION

¹ Department of Consumer and Employment Protection 'Review of the Residential Tenancies Act 1987 (WA): Policy Report January 2008' p 3-7.

TERMINOLOGY USED IN THIS PAPER

The following is a summary of key terms used in this paper.

Australian Consumer Law	The Australian Consumer Law (ACL) replaced previous Commonwealth, state and territory consumer protection legislation in fair trading acts. The provisions are contained in Part XI and Schedule 2 of the <i>Competition and Consumer Act 2010</i> (formerly the <i>Trade Practices Act 1974</i>). Relevant provisions are mirrored in the <i>Australian Consumer Law (WA)</i> which is a schedule to the <i>Fair Trading Act 2010 (WA)</i> .
Boarder	A boarder generally stays at another person's house paying rent with meals supplied by the landlord. Boarders also receive services such as meals, laundry and/or cleaning.
Boarding	In this paper, refers to both boarding and lodging house accommodation.
Boarding house	A term often used interchangeably with lodging house. May also provide meals and other services such as laundry to residents.
Commissioner	The Commissioner for Consumer Protection
Consumer Protection	Department of Commerce – Consumer Protection Division
Housing Authority	The State Government statutory authority established under the <i>Housing Act 1980</i> to facilitate access to affordable and secure housing for people on low incomes. Services provided by the Housing Authority include provision of subsidised rental properties, provision of bond assistance loans to people in private rental accommodation and funding of not-for-profit community based organisations to provide subsidised rental and boarding house accommodation.
Licence to occupy	An agreement between a landlord and resident for a resident to occupy premises but does not give the resident a proprietary interest in the land therefore the resident cannot exclude others, including the landlord, from the premises. A landlord can terminate a licence agreement at any time, subject to the terms of the licence.
Lodger	A lodger generally stays at another person's house and pays rent but is generally not supplied with meals or other services.
Lodging house	The <i>Health Act 1911</i> defines a lodging house as meaning any building or structure, permanent or otherwise, and any part thereof, in which provision is made for lodging or boarding more than 6 persons, exclusive of the family of the keeper. Excluded from this definition are premises licensed under a publican's licence, hotels, accommodation for students in a non-government school and residential flats. The term is often used interchangeably with boarding house.
Magistrates Court	State court that has jurisdiction to resolve disputes under the <i>Residential Tenancies Act 1987</i> and boarder disputes under the common law.
National Shelter	National Shelter is a non-government peak organisation that advocates for improved housing access, affordability, appropriateness, safety and security for people on low incomes.
Private rooming house	Privately owned rooming houses are distinguished from boarding houses or rooming houses run by not-for-profit organisations which tend to cater to people who are homeless or at risk of homelessness through the provision of additional support services. Private rooming houses do not tend to provide additional support services and the emphasis generally tends to be on maximising the number of residents occupying the premises in order to maximise profit.
Room by room rental	Another term for a rooming house.

Rooming house	House or apartment that has been converted into a rooming house. Residents have occupancy of their own room and share common areas such as bathrooms, kitchen and living room.
RT Act	The <i>Residential Tenancies Act 1987</i> - the Act in Western Australian that regulates traditional tenancy arrangements between landlords and residential tenants.
Share house	House or apartment where unrelated people live. The residents themselves choose their co-tenants and there is usually one lease agreement between the landlord and all of the residents jointly.
State Administrative Tribunal or SAT	The State Government administrative tribunal that can be designated as the entity to resolve disputes under different state Acts.

1. ABOUT THIS PAPER

1.1. Purpose of this consultation regulatory impact statement

The report of the review of the *Residential Tenancies Act 1987* (the RT Act) identified the need to conduct targeted research and consultation with a view to including within the RT Act provisions to regulate the boarding and lodging (boarding) sector.² Western Australia is now the only Australian jurisdiction that does not have some form of specific statutory regulation of the boarding sector, otherwise often referred to as rooming accommodation or room by room rentals. In investigating the need for any form of new regulation, the Government is committed to a rigorous regulatory impact assessment process aimed at carefully considering the fundamental question of whether regulatory action is required, or if policy objectives can be achieved by alternate measures, meaning lower costs for business and the community. In developing any legislation, the potential costs of regulation must be carefully considered and weighed against the potential benefits.

The purpose of this Consultation Regulatory Impact Statement (Consultation RIS) is to examine the need for changes to the regulation of the boarding sector within a regulatory impact assessment framework. This paper presents possible options for action and seeks feedback from stakeholders in relation to the viability of those options. Stakeholders are also welcome to outline other options which they consider may be appropriate. Importantly, feedback as to the potential costs and benefits of the various options that have been presented or those that may be suggested by stakeholders should also be provided.

1.2. How to have your say

Making a submission

You are invited to make a submission to this consultation. There is no specified format for submissions. You are welcome to:

- write a short letter outlining your views;
- respond to questions included in this paper; or
- complete a short survey (which can be found online by visiting www.commerce.wa.gov.au/consultations).

Who are you?

When making your submission please let us know which part of the sector you are from. For example, whether you are a resident, landlord or a not-for-profit organisation operating a boarding house; and what type of premises you live in or operate (for example, a stand-alone house divided into separate rooms, or a purpose built lodging house).

² Department of Consumer and Employment Protection 'Review of the Residential Tenancies Act 1987 (WA): Policy Report January 2008' p 3-7.

Where to send submissions

Submissions can be mailed to:

Review of Boarding/Lodging Regulation
Department of Commerce
(Consumer Protection Division)
Locked Bag 14
Cloisters Square WA 6850

Or emailed to: consultations@commerce.wa.gov.au

Or made online at: www.commerce.wa.gov.au/consultations

Review updates

You can keep up to date with the progress of the consultation at www.commerce.wa.gov.au.

How input will be used

The information gathered from this stage of the consultation process will assist in assessing the various options outlined in this paper or raised by stakeholders, and developing proposals for consideration by the Government.

Information provided may become public

After the consultation period concludes, all responses received may be made publicly available on the Department of Commerce website. Please note that because your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate that in your submission. As submissions made in response to this paper may be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become available to the public.

Submissions close

The closing date for submissions is: 16 December 2016.

2. ABOUT THE ISSUE

2.1. The boarding and lodging sector

2.1.1. Boarding house residents

Boarding houses were first established in the 1800s as reputable premises providing safe and respectable accommodation for single or married tradesmen, single gentlemen, and visitors to the city. Usually, daily meals, laundry and housekeeping were also provided.

Over time, the role of a boarding house has changed. Boarding houses are now seen as a low cost form of accommodation and source of emergency housing. They provide accommodation for people who are generally unable to access other private rental accommodation or social housing. This may be due to an inability to afford rental costs, a lack of references, a preference for shared accommodation or a need for additional support services.

The boarding house sector continues to play an important role in providing affordable accommodation in Western Australia (WA). Occupants of boarding houses are often vulnerable people on low incomes who are seeking affordable accommodation, such as the unemployed, disability pensioners and single parents. Some boarding houses provide support services for those with mental illness, a drug history or the homeless. However, students, particularly international students, seasonal workers, backpackers, fly in/fly out workers and retirees may also use boarding arrangements, as do those who choose this style of housing for reasons such as low establishment costs and flexibility.

Data issued by the Australian Bureau of Statistics (ABS), from the 2011 census showed that the number of persons staying in “boarding houses” in WA was 1,337.³ The ABS data includes properties identified by the operator as boarding houses/private hotel and large apparently unrelated group households that are not student halls of residence, retirement villages, nursing homes or religious institutions.⁴ The ABS uses cross referencing from census responses to limit the errors. These figures are likely to understate the situation in WA as smaller boarding arrangements would not be detected and operators of illegal and overcrowded dwellings may not respond accurately to the census about resident numbers.

The majority of boarding house residents, as defined in the ABS census, were males. 1,016 males stayed in boarding houses, and 321 women. Seventy one percent of residents were in the 19 to 64 age group.

All Persons Staying in Boarding Houses in Western Australia: 2011 Census

<i>Age group (years)</i>	<i>No. of residents</i>
Under 12	16
12-18	42
19-24	198
25-34	280

³ Australian Bureau of Statistics, Census of Population and Housing: Estimating Homelessness 2049.0, p. 26.

⁴ Australian Bureau of Statistics, Census of Population and Housing: Estimating Homelessness 2049.0, Appendix 2, Estimation Methodology, p. 84.

<i>Age group (years)</i>	<i>No. of residents</i>
35-44	212
45-54	256
55-64	188
65-74	90
75 and over	55
<i>Males and Females</i>	
Number of Males	1016
Number of Females	321
<i>Indigenous and Non-Indigenous</i>	
Indigenous	72
Non-Indigenous	967
Not Stated	298
<i>Assistance Required for Core Activities⁵</i>	
Has need for assistance with core activities	60
Does not have need for assistance with core activities	940
Not stated	338

Source: Australian Bureau of Statistics, Census of Population and Housing: Estimating Homelessness, 2049.0, p.26.

Reliable and current data on the number of people residing in boarding accommodation in WA is difficult to obtain. Factors affecting obtaining such data may include:

- a large proportion of boarding house operators being either unaware of the need to register with their local government, or simply choosing not to register; or
- a boarding house operator not having to register a premises where six or less people reside.

It is anticipated that feedback to this CRIS will improve the data available about the sector.

2.1.2. Types of boarding and lodging

Boarding and lodging arrangements (boarding) can cover a wide range of types of accommodation. The term boarding will be used throughout the paper to refer to this entire category of accommodation.

A recent study by the Australian Housing and Urban Research Institute (AHURI)⁶ identified three types of boarding houses which are useful for this consultation:

- Large, often inner city, boarding houses, operated either by private landlords or not-for-profit community housing organisations. Usually has on-site management.

⁵ Assistance required for core activities means 'those people needing help or assistance in one or more of the three core activity areas of self-care, mobility and communication, because of a long-term health condition (lasting six months or more), a disability (lasting six months or more), or old age' Australian Bureau of Statistics 2011 Census Dictionary.

⁶ *Marginal Rental Housing – what is it and how should it be managed?* AHURI Research and Policy Bulletin Issue 177 August 2014.

- New model or mini boarding houses. These are usually existing suburban homes or apartments that have been converted into a boarding house (sometimes referred to as a rooming house). Residents will have occupancy of their own room and will share common areas such as bathrooms, kitchen and living room. This form of housing is distinguished from a share house because the landlord will have a separate agreement with each resident in a boarding house.
- Hotels and motels where managers permit residents to stay for extended periods of time. This form of accommodation may often be utilised by fly in/fly out workers.

Some other common examples of boarding arrangements may include:

- backpackers hostels;
- serviced apartments;
- crisis accommodation funded by the Commonwealth and State Government's Supported Accommodation Assistance Programme; and
- student accommodation services.

Accommodation that is provided for short stay or holidays is not considered to be boarding house accommodation for the purposes of this consultation. Therefore, sites such as AirBNB, if they are used to arrange short stay and holiday accommodation, are not intended to be identified as boarding houses services. School related boarding services, other than accommodation services provided by for-profit entities on behalf of tertiary institutions, are also excluded from the concept of boarding arrangements.

2.1.3. Difference between rooming houses and boarding

The terms boarder and rooming house resident occur throughout legislation in other states and territories. There can be a tendency to use the terms interchangeably, however at law, boarders and rooming house residents are different.

With both boarders and rooming house residents,⁷ living arrangements generally involve the sharing of amenities and spaces, such as shared bathrooms, kitchens, laundries, living rooms, recreational spaces and even bedrooms. Often both boarding houses and rooming houses have house rules in place that have been set by the landlord. The house rules guide the use of the shared facilities and the everyday behaviour of the residents. In both situations, the landlord chooses who will reside in the premises and will have a separate agreement with each individual resident.

However, boarders, unlike rooming house residents, do not have “exclusive possession” of the premises or part of the premises, such as the bedroom. The landlord keeps control over the boarding premises and may access any part of the premises. Generally, the landlord or caretaker is physically present at the boarding premises. Services such as cleaning, linen or meals can also be part of a boarding arrangement.

Often, a person who may think of themselves as a boarder in WA, is in fact a tenant as they have exclusive possession of their room. This is the case even though they share common facilities with other residents in a rooming house or room by room rental.

⁷ Term used to refer to residents in room by room rentals.

Some jurisdictions, such as New South Wales, South Australia and Tasmania, expressly regulate boarding arrangements, while others, such as Queensland and Victoria, despite regulating rooming accommodation, continue to exclude boarders and lodgers from their legislation.⁸

⁸ *Residential Tenancies and Rooming Accommodation Act 2008*, s32; and “Types of Rental Agreements” accessed at <http://www.consumer.vic.gov.au/housing-and-accommodation/renting/applying-for-a-rental-property-or-room/types-of-rental-agreements> on 9 June 2015.

3. EXISTING LAWS IN WA

3.1. Purpose of this review

The purpose of this review is to determine whether further regulation of the boarding and lodging sector in Western Australia is required. The objective in undertaking this review is to ensure that the rights and obligations of residents and landlords are understood and upheld in a way that does not adversely impact the sustainability of the boarding house sector as an affordable and accessible form of housing.

Some of the key factors for consideration that may apply in this situation include:

- certainty of definition and application;
- minimum standards for accommodation that are both safe and sustainable;
- core rights and responsibilities of landlords and residents;
- effective mechanisms for dealing with violent or anti-social behaviour; and
- access to timely and efficient dispute resolution for all parties.

It is important to remember that this review is not about increasing the availability of boarding accommodation in the marketplace. Nor is this review about the local government, planning or health laws that regulate the establishment, keeping or running of a boarding house. These are matters for the relevant government departments or individual local governments.

3.2. Current laws in WA regulating the boarding sector

When considering the appropriate level and nature of laws that are required to regulate the relationship between a person living as a boarder and their landlord, it is useful to understand the laws that currently apply and whether these laws achieve the stated objective.

3.2.1. Common law

Boarders and their landlords have rights and responsibilities under common law provisions. Common law is the body of law that courts create and define through court decisions, as opposed to law that is contained in legislation approved by Parliament.⁹ Since common law is drawn from court decisions, these rights and responsibilities can be unclear or complex and may change over time as more court decisions are made.

At common law, the process for working out if a person is a boarder or a tenant can be complex. It is important to note that the occupant is not considered a boarder merely because the agreement they sign with the landlord calls them a boarder. The High Court of Australia has held that it is the substance of the right to occupy that matter, not the title or form of the agreement.¹⁰

At common law, a boarder has a “licence” to occupy and use premises rather than a lease. A licence is different from a lease in that a licence merely gives someone personal permission to enter upon the land or the premises and to use it for specified purposes; in this instance,

⁹ *State of Western Australia v Commonwealth, High Court of Australia* (1995) 128 ALR 1, 63 per Mason, CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh, JJ .

¹⁰ *Radaich v Smith* (1959) 101 CLR 209.

for accommodation.¹¹ The boarder is not given any legal right to exclusive possession of the premises and cannot exclude anyone, in particular the landlord, from the premises. This is distinct from a lease agreement which gives the tenant an interest in the premises and the legally protected right to exclude any other person, including the landlord, from the premises for the term of the lease. The boarder also cannot assign their licence to another individual. According to Hasluck J, the boarder is “like an inmate in another person’s house”.¹²

The rights and responsibilities of the boarder are generally set out in the licence agreement which forms the contract between the parties. The agreement will often include a requirement that the boarder also comply with the house rules as set by the landlord.

As a boarder has only a licence to occupy premises, boarders can be evicted by the landlord merely withdrawing permission for them to be on their property. The landlord can ask the boarder to leave, without reason, at any time, subject to the terms of the licence agreement.

Unlike a tenant, if a boarder remains in the premises after the landlord requests them to leave, the landlord does not require a court order to regain possession of the premises. The landlord is entitled to evict the boarder themselves or with the assistance of the police.

If a boarder believes that the landlord has unlawfully terminated the licence agreement, the boarder can take civil action against the landlord for breach of contract.

3.2.2. Health Act 1911

Under the *Health Act 1911*, premises are required to be registered with a local government authority if more than six unrelated people live there for pay or reward. Premises licensed under the *Liquor Control Act 1988* are not required to be registered, nor are buildings comprised of residential flats.

Registered boarding houses are subject to health, fire and safety requirements. Registered boarding houses must maintain a register of boarders and have an on-site “keeper” (caretaker).

Local governments may establish additional local laws for registered boarding houses for matters such as the amount of registration fees, fire safety, construction, cleanliness, lighting, ventilation, drainage, sanitation and disinfection of premises.

The requirement to register premises as a boarding house applies to all providers of boarding house accommodation, including not-for-profit social housing providers, the Housing Authority, backpackers’ hostels and owners of private boarding houses if they house more than six unrelated people for pay or reward.

3.2.3. Building Code of Australia

The Building Code of Australia is a National Code that applies to all states and territories under state building control legislation. Regulation 5 of the *Building Regulations 1989 (WA)* adopts the Building Code of Australia and requires all building work to comply with the Code.

The Building Code of Australia classifies buildings by their use. Under the Code, a boarding house will either be a Class 1(b) building if it does not exceed capacity for 12 persons or 300m² in floor area, or a Class 3 building if it is a larger scale boarding house.

¹¹ *Radaich v Smith* (1959) 101 CLR 209, 221.

¹² *Commissioner for Fair Trading v Voulon & ors* [2005] WASC 229, para 81.

The construction, access and exits, and health and amenity requirements of different types of buildings are mandated in the Building Code of Australia and are determined by factors such as the number of occupants, the class of building and the building's height in storeys. For example, larger boarding houses have to comply with a higher level of fire safety standards. The *Building Act 2011 (WA)* provides for local government and other authorised persons to obtain entry warrants for compliance purposes and issue building orders requiring rectification of building work or evacuation of premises, among other things, if there is reason to believe the building or use of the premises does not comply with the Act.

3.2.4. Australian Consumer Law

The Australian Consumer Law (ACL) applies across Australia and provides a range of general consumer protections. In Western Australia the ACL has been enacted as the Australian Consumer Law (WA) as a schedule to the *Fair Trading Act 2010 (WA)*. Boarders may have some causes of action against a landlord under the ACL if it can be argued that the provision of their accommodation is a form of engaging in "trade or commerce".

The ACL provides general protections for consumers. For example, the ACL requires that services be fit for a particular purpose.¹³ In an April 2011 decision, the NSW Consumer, Trader and Tenancy Tribunal, found that a boarding house was not fit for the purpose of accommodation and ordered that the landlord pay the boarder compensation (*Stephen Doran v Alfred Lia* 20 April 2011 (GEN 10/57830)).¹⁴

The ACL prohibits specific unfair practices in trade or commerce including false or misleading representations about goods or services,¹⁵ and harassment and coercion.¹⁶ For example, if a landlord or property manager were to complete a property condition report without regard for the accuracy of the document or were to make representations about the conditions at the property or additional services that were to be included in the cost of the rent that were later found to be false, the landlord or property manager could be found to be in breach of the ACL.

The ACL also provides for the voiding of unfair contract terms in standard form consumer contracts. To be successful in this type of action an ACL regulator (such as the Commissioner) would need to establish that the contract is a standard term contract and that the contract is considered "unfair" under the ACL. If the court finds the term to be unfair, it can make a declaration that the term is void however the agreement is not necessarily terminated if it can continue to operate without the "unfair term".

3.3. Are the current laws effective?

3.3.1. Data from Department of Commerce

Consumer Protection provides general advice to landlords and boarders. From 1 July 2012 to 31 May 2015, Consumer Protection received 1,969 enquiries and 31 complaints regarding boarding arrangements. The number of enquiries to Consumer Protection's contact centre about boarding issues increased substantially in March 2014, jumping from an average of

¹³ Section 61 ACL.

¹⁴ Redfern Legal Centre Publishing *The Law Handbook* (Thomson Reuters, 12th ed, 2012) 814.

¹⁵ Section 29 ACL in respect of representations about goods and services and s30 ACL in respect of representations made about interests in land.

¹⁶ Section 50 ACL.

43.2 enquiries per month to 73.8 per month from this time onwards. It is unclear what is responsible for this increase.

The number of written complaints received is not considered to be statistically significant and while the data may not demonstrate evidence of any issues being of significant concern, the information is included to ensure completeness. Consumer Protection does not generally conciliate complaints in relation to boarding and this may be the reason for the low number of complaints. Most complaints relate to bond disputes, with other issues including:

- conditions at the property, for example smoking on the premises;
- termination of agreement for matters such as erratic or violent behaviour;
- inadequate cleaning of the premises following termination of the agreement;
- return of keys; and
- unpaid bills.

3.3.2. Stakeholder workshops

During 2012 and 2013, Consumer Protection hosted workshops and meetings with key stakeholder groups to identify key issues affecting the sector. Key stakeholder groups included:

- tenant or resident advocates;
- not-for-profit accommodation providers;
- private (for-profit) rental accommodation providers and property managers; and
- local governments.

The general perception is that there is a need for new regulation, if only to provide greater certainty as to whether an arrangement is one of boarding or tenancy, as well as to regulate such matters as resident bonds and termination of the agreement in the event of dangerous or violent behaviour by the tenant. The table below summarises the main issues as identified in these workshops.

<i>Stakeholder</i>	<i>Key issues</i>
Resident advocates	<ul style="list-style-type: none"> • Privacy • Getting the bond back • Payment of rent • Penalties charged e.g. for failure to pay rent • Termination process in general • The ability to terminate a tenancy without notice • Services being removed e.g. internet access removed, washing machine removed • Consistent/fair lease agreement (some support for a

<i>Stakeholder</i>	<i>Key issues</i>
	<p>standard prescribed lease agreement)</p> <ul style="list-style-type: none"> • Dispute resolution processes • Maintenance and repairs • Overcrowding • Unsafe living conditions, e.g. no smoke alarms
Not-for-profit accommodation providers	<ul style="list-style-type: none"> • Improved laws to protect vulnerable residents in boarding and lodging situations, both in private and not-for-profit services • Consistent access for boarders to bond assistance loans from the Housing Authority • Ability to quickly refund the bond as boarders are more transient and need faster access to their bond refund • Better laws to assist with responding to emergency situations, such as violence to other residents • Security of rooms and facilities for residents
Private (for-profit) accommodation providers and property managers	<ul style="list-style-type: none"> • Ability to evict a resident where there is violence or aggressive or anti-social behaviour towards other residents, e.g. drug taking or excessive drunkenness etc. • Any new regulation should be flexible and have minimal administrative costs/burdens, otherwise people will not offer this type of accommodation • Cleaning of common areas
Local governments	<ul style="list-style-type: none"> • Impact of privately run boarding houses/rooming houses on local amenity, for example, excessive parking on the street, rubbish left on verges, overcrowding of premises, excessive noise • Health risks to residents from overcrowding and burden on sanitation systems, safety of electrical, plumbing and other modifications • Being able to identify privately operating boarding houses and being able to control their impact on the community

3.4. Is there a need for Government intervention?

Boarding houses are often referred to by stakeholders as marginal housing.¹⁷ The ABS counts persons residing in boarding houses as homeless due to the lack of security of tenure often faced by these residents. National Shelter argues that by acknowledging the marginality of boarding housing, we better understand the key issues facing residents, landlords and governments as they seek to regulate the industry.¹⁸

While not all residents of boarding houses would consider themselves to be vulnerable, it is broadly accepted that people residing in boarding houses have limited incomes and for a range of reasons, limited accommodation options. For example, many residents in boarding houses have high support needs as a consequence of mental illness, physical illness, disability or drug and alcohol addiction.¹⁹ According to the 2011 Census, 43 percent of residents recorded as living in boarding houses received less than \$400 per week in income.²⁰

Shelter WA estimates that a large proportion of international students who study in WA live in boarding houses.²¹ The Town of Vincent, when responding to complaints of overcrowding and unsafe living conditions in boarding houses in 2012 noted that the residents were primarily overseas students, migrants and temporary visa holders.²²

National Shelter notes that people turn to boarding houses for a number of reasons²³. These include:

- the need for urgent housing due to escaping from violence, or other crisis and emergency scenarios;
- lack of financial resources which means boarding houses are more accessible due to their low up-front costs;
- exclusion from other more secure forms of housing due to eviction, particularly from public housing, and/or being listed on a residential tenancy database;
- exclusion from the mainstream rental market due to discrimination and/or lack of rental history; and
- other limitations, such as lack of accommodation due to resource booms and the like.

The circumstances noted above can have many negative impacts. For example, people experiencing poverty, discrimination and other hardships are often reluctant to seek to enforce their rights against a landlord out of fear of eviction as they simply do not have alternative accommodation options to fall back on. This leaves these tenants very vulnerable to exploitation.²⁴

¹⁷ See for example AHURI, *Marginal Rental Housing – what is it and how should it be managed?* AHURI Research and Policy Bulletin Issue 177 August 2014; National Shelter Inc *Marginal Tenures – A National Picture: A policy paper on boarding houses, caravan parks and other marginal tenures* February 2011.

¹⁸ National Shelter, *ibid*, 2.

¹⁹ Matthew Lovering *Officially homeless, actually housed* AHURI Evidence Review 036.

²⁰ *Ibid*.

²¹ Shelter WA, *Boarders and Lodgers Fact Sheet*, 1.

²² Emma Wynne *Landlords cash in with unofficial boarding houses for desperate renters* ABC News 4 September 2012.

²³ *Ibid*, 3.

²⁴ *Ibid*.

People living in crisis and with disadvantage often do not display the same living skills as others and life can be chaotic. A concentration of people in crisis, with mental illness and drug and alcohol addiction, can lead to a build-up of tension within a confined living space, such as a boarding house, which can result in violence between residents and/or against the landlord. This presents unique challenges for other residents and for landlords in being able to respond in a timely and appropriate manner.

There have also been many tragic deaths over the years in boarding houses, largely due to overcrowding which prevented safe exit during fires,²⁵ but also due to lack of hygiene leading to spread of disease and other conditions such as undernourishment.²⁶

In recent years there has been an expansion of the “mini” or private boarding houses, the majority of which fly under the radar of regulation and usually only come to the attention of local councils when neighbours complain about noise, excessive street parking and excessive rubbish. Many of these establishments will have converted established homes into “boarding houses” by dividing bedrooms and even living spaces and garages into lettable spaces.²⁷ These houses are often overcrowded, such as was evidenced in the cases that were prosecuted in the Town of Vincent.²⁸ Unfortunately, as noted above, the residents themselves are often reluctant to complain due to a lack of affordable alternative accommodation.

Not all examples of boarding housing are negative. There are many positive examples of boarding houses in WA that provide emergency, transition and long-term accommodation to individuals and families. The City of Fremantle, for example, has advised Consumer Protection that it has a long positive relationship with boarding houses that operate in that region. Boarding houses are an invaluable component of the social housing framework. Quality boarding houses address the need for affordable accommodation, and accompany this with support services, such as health services, drug and alcohol counselling, integration into work and/or education, and the company of other residents. They seek to empower tenants and do not seek to exploit their vulnerability. Importantly, they ensure the safety and well-being of tenants by complying with building codes and local government by-laws.

Boarding as a housing option is likely to remain an important source of long-term accommodation, as there continues to be evidence of a lack of affordable housing.²⁹ The question that remains, therefore, is whether regulation of residency arrangements is needed to ensure that the rights and obligations of residents and landlords are understood and maintained in a way that boarding, or rooming accommodation, presents a viable, affordable and accessible housing option without the element of marginality.

²⁵ See for example the coronial inquiry into the death of 15 residents in the Palace Backpackers Hostel in 2000, http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/86647/cif-childers-palace-hostel-fire-20060707.pdf and coronial inquiry into death of three international students in a rooming house in Footscray in 2008 http://www.coronerscourt.vic.gov.au/resources/4a3bc272-7d0a-4184-8e79-7003fca94012/sunilramanlalpatel_004108.pdf.

²⁶ See for example coronial inquiry into death of six people at 300 Hostel Marrickville NSW in 2009, <http://www.coroners.justice.nsw.gov.au/Documents/hostel%20findings.pdf>, and coronial inquiry into death of three residents at Sunshine Lodge Mittagong, NSW in 2011, <http://www.coroners.justice.nsw.gov.au/Pages/findings.aspx>.

²⁷ Above n 8, 17.

²⁸ Joe Spagnolo, ‘Ten cram bedroom’ 2 September 2012 *Sunday Times*, 27.

²⁹ <http://www.abc.net.au/news/2015-10-28/consider-housing-affordability-key-public-infrastructure-issue/6893742>; <http://www.anglicarewa.org.au/news/article/30042015-207/rental-affordability-demonstrates-a-widening-gap-in-perth.aspx>.

4. OPTIONS FOR CONSIDERATION

The purpose of this section is to canvas views on whether there is a need to change the manner in which the boarding house sector is regulated and if so, potential options for regulation. The options canvassed below are based on models currently being used in other states and territories in Australia. They are not an exhaustive list of possible options. Respondents to this consultation are welcome to suggest other alternatives. Likewise, a combination of options, such as status quo for some arrangements and more detailed regulations for other specified arrangements could also be considered.

This section outlines the possible impact of the proposed options on various stakeholders. Issues for consideration are also provided. These issues are not intended to limit discussion, but rather are provided as a prompt for further thought and debate. Responses that canvass a broader range of issues in addition to those listed are encouraged.

4.1. Other jurisdictions

Before outlining some options for Western Australia, it is useful to have a sense of how boarders are regulated in other jurisdictions. Each of the states and territories in Australia adopts a different approach to the regulation of boarders and/or rooming house residents. The table below summarises the approach in each jurisdiction.

State and territory approaches to boarding and rooming house regulation

<i>State</i>	<i>Name of Act</i>	<i>Boarders and lodgers</i>	<i>Rooming house residents</i>	<i>Prescriptive legislation³⁰ or occupancy principles³¹</i>
ACT	<i>Residential Tenancies Act 1997</i>	✓	✓	Occupancy Principles
NSW	<i>Boarding Houses Act 2012</i>	✓	✗	Occupancy Principles
NT	<i>Residential Tenancies Act</i>	✓	✗	Prescriptive Legislation
QLD	<i>Residential Tenancies And Rooming Accommodation Act 2008</i>	✗	✓	Prescriptive Legislation
SA	<i>Residential Tenancies Act 1995</i>	✗	✓	Prescriptive Legislation
TAS	<i>Residential Tenancies Act 1997</i>	✓	✓	Prescriptive Legislation
VIC	<i>Residential Tenancies Act 1997</i>	✗	✓	Prescriptive Legislation

³⁰ Prescriptive legislation is the term given to legislation that specifies exactly what is required for compliance and often how compliance is to be achieved.

³¹ Occupancy principles are overarching guidelines that provide a framework for compliance.

4.2. Option 1 - Status quo

Under this option the regulation of the residency relationship between boarder and landlord would continue under the common law.

Discussion

The common law in relation to boarders has developed over a long period and, despite its historical origins, is capable of responding to modern day scenarios.³²

The common law is flexible and adapts to all forms of boarding in the marketplace, because it is decided on a case by case basis. This flexibility is a strong argument in favour of retaining the status quo.

Further argument in favour of retaining the status quo is that there would not be any additional cost imposed on landlords, such as the cost of having new agreements developed and new house rules introduced. Such an argument could be short sighted, however, as a key criticism of the status quo is that the lack of certainty in the law for both boarders and landlords can lead to unnecessary and costly disputes, particularly if the dispute is taken to court for resolution. This is exacerbated in circumstances where the parties do not include all of the terms of the agreement in a written contract.

Another key criticism of the status quo is that it assumes both parties are of equal bargaining power and can therefore freely negotiate a residential agreement that is fair to both parties. As was noted in 3.3, residents of boarding houses are often marginalised and disadvantaged members of the community. Consequently, there is a risk that these persons will feel compelled to enter into agreements that are not balanced. As noted above, they are also reluctant to make complaints or seek legal remedy for a perceived infringement of their rights as a resident as there may be a perceived lack of clear protection against retaliatory eviction.

Impact analysis

The advantages of Option 1 for residents, landlords and government are that the status quo would be maintained meaning “business as usual” with no changes to current practices and no costs associated with having to comply with new laws. Potential disadvantages of this option include the continuing lack of certainty and clarity for all parties, which may lead to unnecessary costs, the risk that vulnerable residents are being taken advantage of and the ongoing reluctance of residents to challenge any infringement upon their rights in the absence of clear protection against retaliatory eviction.

Questions

4.2(a)	<i>Do you support maintaining the status quo in relation to regulation of the boarding sector; that is, making no changes to the current laws? If so, why? If not, why not?</i>
4.2(b)	<i>What are the costs or benefits which you believe would arise if the status quo is maintained? Please provide evidence for your response (including quantification) where possible.</i>
4.2(c)	<i>Do you have any additional comments to make with regard to this option?</i>

³² See for example *Commissioner for Fair Trading vs Voulon & Ors* [2005] WASC 229.

4.3. Option 2 - Modified tenancy regulation

Under this option, specific new laws based on the rights and responsibilities applicable to landlords and tenants under the RT Act would be developed, but would be modified to suit the requirements of the boarding sector. Boarders would be defined for the purposes of this regulation.

Discussion

A criticism of legislation across jurisdictions is that boarders do not have the same rights and protections as tenants do.³³ It could be argued that there is no sound reason for boarders to be treated less favourably than tenants.³⁴

It is, however, not as simple as having residential tenancy laws apply to boarding house scenarios, as there are key differences in the way these two housing options operate.

Some of these differences are:

- boarding houses often allow the resident to have their own bedroom while sharing common areas such as living spaces, kitchens and bathrooms (although, increasingly, private boarding houses are requiring residents to share bedrooms);
- residents in boarding houses do not choose their co-residents; this choice is made by the landlord, which increases the risk of incompatibility amongst residents; and
- residents in boarding houses and rooming houses tend to be more transient and seek to move at shorter notice.

Any regulatory regime must accommodate these differences. For example, due to the communal nature of boarding, consideration needs to be given to factors such as resident safety and the ability to terminate an agreement at short notice if a resident is posing a risk to the safety of others or are feeling threatened by the behaviour of others.

Victoria and Queensland³⁵ have implemented this type of model for the regulation of boarding houses.³⁶ In essence, the various rights and obligations of landlords and tenants under residential tenancy legislation have been modified to be more suited to a boarding house situation.³⁷ Examples of modification include the ability to inspect a boarding house room every four weeks as opposed to inspecting residential tenancy premises every six months;³⁸ the requirement to provide adequate security for a resident's property in their room as opposed to the requirement to provide locks on all external doors and windows;³⁹ and different notice periods for termination of agreement for breaches by the tenant or resident.⁴⁰

The types of factors that may be regulated under this model include:

- that the agreement between the parties is required to be in writing and include standard terms;

³³ see for example Adrian J Bradbrook, "Creeping Reforms to Landlord and Tenant Law" (2004) 10 *Australian Property Law Journal* 157,164.

³⁴ *Ibid.*

³⁵ The full version of the Queensland and Victorian acts can be viewed at www.austlii.edu.au.

³⁶ Referred to as rooming houses in Victoria and Queensland.

³⁷ *Residential Tenancies Act 1997* (Vic); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).

³⁸ *Residential Tenancies Act 1997* (Vic) ss86 and 137.

³⁹ *Residential Tenancies Act 1997* (Vic) ss70 and 123.

⁴⁰ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld), ss 329 and 369.

- whether room occupancy is shared or exclusive;
- rent (including rent in advance, records of rent paid, rent increases etc);
- security bonds (including limits on bonds, requiring the bond to be held with the Bond Administrator, receipt, etc);
- other fees and charges;
- rights and responsibilities of the parties in relation to the use and maintenance of the premises;
- services provided;
- conduct of the parties to each other and to other residents (including quiet enjoyment);
- house rules (including notice of and how rules are to be changed);
- right of entry to the room or premises;
- locks and security;
- termination of agreements;
- abandonment of premises and goods or documents; and
- action permissible if there is violence in the premises.

It is arguable that a greater level of protection that would be afforded by these factors could encourage residents to be more willing and feel better able to report non-compliant accommodation to regulators or to take action on their own behalf. This would reduce proactive compliance costs for government departments and local councils who currently have to seek out evidence of unregistered and/or unlawful boarding houses, and could encourage a greater level of cooperation in government proceedings taken against the operator should this prove appropriate.⁴¹

While this option would address the criticism that residents of boarding houses are not treated equitably with tenants, it is also important to recognise in any regulatory regime the potential impacts of increasing regulatory burden on landlords. Increased compliance and costs in operating a boarding house may dampen supply. This could result in a decline of boarding house stock available in the market place with a corresponding increase in the rent prices charged for the remaining facilities. Increased operational costs, such as costs associated with requiring written lease agreements, requiring receipts and other prescribed information to be given to residents and mandating the security to be provided in each room, would also likely be passed onto residents in the form of increased accommodation costs. This would have an impact on the affordability of this type of accommodation.

Impact analysis

An advantage of Option 2 is that it may result in greater certainty and clarity of rights leading to fewer disputes and reduced enforcement costs associated with dispute resolution. Greater certainty about rights and responsibilities may also encourage more boarding house accommodation, therefore increasing accommodation options for residents. This in turn could put downward pressure on accommodation costs. For government, an advantage of Option 2 may include reduced reliance on public housing due to greater security of tenure and improved living conditions in boarding houses.

⁴¹ Tenants Union ACT submission to the Legislative Assembly for the Australian Capital Territory Standing Committee On Education, Training and Youth Affairs accessed at http://www.parliament.act.gov.au/_data/assets/pdf_file/0006/372336/16_Tenants_Union_ACT.pdf.

Introducing new laws always involves some degree of cost. Therefore, disadvantages of Option 2 include that it may result in increased costs for landlords, although these will most likely be one off and minimal, such as developing a written tenancy agreement that is compliant with the new laws, developing compliant house rules, and ensuring all rooms have adequate secure storage for a resident's property. The counter argument may be that these are minimum expectations of the community. However, if there are ongoing increased costs brought about by the requirement to comply with new laws, these costs may be passed on to residents in the form of increased rent charges.

New laws would also mean increased costs for government in having to administer and monitor compliance with the new laws.

Questions	
4.3(a)	<i>Do you support the introduction of laws based on the Residential Tenancies Act 1987 but modified for the boarding sector? Why or why not?</i>
4.3(b)	<i>If this option is pursued, what factors/areas of boarding or rooming should be included in the legislation?</i>
4.3(c)	<i>What factors should not be regulated?</i>
4.3(d)	<i>To what extent are written agreements currently used for boarding agreements?</i>
4.3(e)	<i>What are the perceived costs and benefits of this model? Please provide evidence in support of your answer (including quantification) where possible.</i>
4.3(f)	<i>Do you have any additional comments to make with regard to this option?</i>

4.4. Option 3 - Occupancy principles

Under this option an overarching set of principles would be implemented within the framework of residential tenancy law. Parties will remain free to negotiate the terms of their residency agreements within the parameters of these occupancy principles. Boarders and lodgers would be defined for the purposes of this regulation.

Discussion

A potential criticism of Option 2 is that the increased regulatory burden on landlords may increase the cost of providing boarding or rooming house accommodation and these increased costs will either be passed on to residents, the majority of whom could ill afford an increase to their cost of living, or alternatively could result in a number of the facilities closing down.

One means of addressing this criticism while still providing some protection for vulnerable residents would be to adopt the model in the ACT⁴² and NSW.⁴³ Both of these jurisdictions have implemented occupancy principles into their tenancy legislation. The occupancy principles provide a framework of protection for residents' rights, within which the parties remain free to negotiate their own contracts. The occupancy principles are far less prescriptive than the provisions relating to residential tenancy agreements, allowing for greater variation in what may be negotiated and agreed upon between the parties.

⁴² *Residential Tenancies Act 1997 (ACT)* - section 71E.

⁴³ *Boarding Houses Act 2012 (NSW)* – section 30(1) and schedule 1.

As a guide to what might be included in occupancy principles if this model is adopted, the occupancy principles contained within the ACT legislation⁴⁴ are set out below.

Residential Tenancies Act 1997 (ACT)

Occupancy principles

- a) an occupant is entitled to live in premises that are—
 - reasonably clean;
 - in a reasonable state of repair; and
 - reasonably secure;
- b) an occupant is entitled to know the rules of the premises before moving in;
- c) an occupant is entitled to the certainty of having the occupancy agreement in writing if the occupancy continues for longer than 6 weeks;
- d) an occupant is entitled to quiet enjoyment of the premises;
- e) a grantor is entitled to enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes;
- f) an occupant is entitled to 8 weeks' notice before the grantor increases the amount to be paid for the right to occupy the premises;
- g) an occupant is entitled to know why and how the occupancy may be terminated, including how much notice will be given before eviction;
- h) an occupant must not be evicted without reasonable notice; and
- i) a grantor and occupant should try to resolve disputes using reasonable dispute resolution

While this option would provide a framework of some protection for residents and minimise the impact of regulatory change on landlords by allowing them to negotiate terms with residents, this model relies to a large extent on the assumption that the parties have equal bargaining power and that residents are able to negotiate fair terms and conditions. Often this is not the case. As noted by the Tenants Union ACT, “the Act does not prevent the creation of completely one-sided exploitative occupancy agreements”.⁴⁵ For example, in July 2010 the ACT Government had cause to evict approximately 110 men, women and children from four separate premises in Canberra due to the premises being overcrowded, unsanitary and unsafe.⁴⁶ The Tenants Union ACT submitted that the occupancy principles do not create

⁴⁴ The full version of the ACT legislation can be viewed at www.austlii.edu.au.

⁴⁵ Tenants Union ACT submission to the Legislative Assembly for the Australian Capital Territory Standing Committee on Education, Training and Youth Affairs accessed at http://www.parliament.act.gov.au/_data/assets/pdf_file/0006/372336/16_Tenants_Union_ACT.pdf.

⁴⁶ Tenants Union ACT Winter/Spring 2010 Newsletter accessed at www.tenantsact.org.au/LiteratureRetrieve.aspx?ID=44983

an express requirement for premises to be habitable.⁴⁷ While this is the view of the Tenants Union ACT, the Department considers that it is arguable that the requirement for premises to be reasonably clean and in a reasonable state of repair gives rise to an implicit requirement that the premises be habitable. The Tenants Union ACT also argues that the occupancy principles do not operate to prohibit overcrowding.⁴⁸ It is important to note that the unfair contract terms provisions within the ACL may assist to void unfair contract terms within a boarding agreement but it will not terminate the whole agreement.

The Tenants Union ACT has reportedly noted that while the occupancy principles are good in theory, because they are just general principles, it is more difficult for a resident to enforce their rights. Clearer rights are established under a more prescriptive regime such as is provided for tenants under residential tenancy legislation.⁴⁹

Impact analysis

An advantage of Option 3 is that it may provide landlords and residents with greater certainty and clarity of rights than the common law, which may lead to fewer disputes and reduced costs associated with dispute resolution. However, a possible disadvantage with this option is that the occupancy principles are more generalised and less prescriptive than those outlined in Option 2. This may impact on any dispute resolution value associated with this option.

Option 3 may also provide greater flexibility as it will allow landlords and residents to negotiate terms into agreements provided those terms fit within the broad framework established by the principles. A disadvantage may be that the power imbalance that often exists between a landlord and resident will continue and result in some exploitative agreements.

As per Option 2, there may be an increase in compliance costs for landlords however these are likely to be minimal and one-offs, for example, developing compliant agreements and house rules.

A disadvantage for government under Option 3 is that although it provides a legislative framework for the regulation of the sector, the occupancy principles may be so broad as to make them difficult to enforce. For example, if there were to be a case like the one in the ACT cited above, in the absence of an express provision under proposed occupancy principles prohibiting overcrowding, it may be difficult for Consumer Protection to secure a successful prosecution despite the treatment that residents may have endured.

Questions

- | | |
|---------------|---|
| 4.4(a) | <i>Do you support the introduction of occupancy principles to regulate the boarding sector? Why or why not?</i> |
| 4.4(b) | <i>What do you perceive would be the costs and benefits of this model? Please provide evidence in support of your answer (including quantification) where possible.</i> |

⁴⁷ Tenants Union ACT submission to the Legislative Assembly for the Australian Capital Territory Standing Committee on Education, Training and Youth Affairs accessed at http://www.parliament.act.gov.au/_data/assets/pdf_file/0006/372336/16_Tenants_Union_ACT.pdf.

⁴⁸ Ibid.

⁴⁹ Tenants Advice Service WA Briefing Paper re Boarders and Lodgers August 2010.

Questions	
4.4(c)	<i>If occupancy principles were to be introduced, what matters should be included in the occupancy principles?</i>
4.4(d)	<i>Are any other safeguards for either residents or landlords needed under this model?</i>
4.4(e)	<i>If the Consumer Protection were to develop guidelines to the occupancy principals, would this assist parties to more readily enforce their rights under this option?</i>
4.4(f)	<i>Do you have any additional comments to make with regard to this option?</i>

4.5. Option 4 - Include a definition of boarders in the *Residential Tenancies Act 1987*

Under this option, the regulation of boarders would remain under the common law; however a definition of boarders would be inserted in the RT Act for the purpose of clarifying exactly which circumstances are considered to be boarding and therefore not subject to the Act. This option would create a clearer distinction between boarders and tenants without changing the legal relationship between the landlord and resident. The purpose of inserting the definition is to minimise the incidence of confusion that currently exists within the marketplace.

Discussion

As previously noted, it can be very difficult for a landlord and resident to know whether their arrangement is one of tenant or boarder. Consumer Protection receives a number of enquiries each year from landlords and residents wanting to know whether their particular relationship is one of a residential tenancy or boarding, or more often, enquiring as to a particular aspect of the relationship, such as eviction. It often becomes clear during the course of the conversation that the parties have misunderstood the legal nature of their arrangement.

Perhaps one of the greatest contributors to the confusion is the changing nature of accommodation available in the marketplace. Traditionally, houses were let as whole premises under a single lease, and boarding houses looked more like a dormitory or a bed and breakfast style facility where people shared common areas such as bathrooms and living rooms. In more recent times, there has evolved a widespread practice of leasing a house room by room to unrelated and unconnected individuals. In these situations, people have assumed that because the tenant does not have exclusive possession of the whole house they are a boarder. According to the law, however, this is not the determining factor. Hasluck J noted that the definition of a residential tenancy agreement in the RT Act altered the traditional common law position.⁵⁰ The RT Act defines a residential tenancy agreement as

“any agreement, whether or not in writing and whether express or implied, under which any person for valuable consideration grants to any other person a right to

⁵⁰ *Commissioner for Fair Trading v Voulon & Ors* [2005] WASC 229 [38].

*occupy, whether exclusively or otherwise, any residential premises, or part of residential premises, for the purpose of residence”.*⁵¹

Hasluck J found that the test in WA law of whether a person is a lodger to be as follows:

*“The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises.”*⁵²

Importantly, Hasluck J reaffirmed that this test applies to the actual circumstances or relationship between the parties. It does not matter that the written agreement between the parties might be labelled as “boarding licence” or some similar term.

Consumer Protection is of the view that the majority of room by room rentals that operate in the current market are in fact tenancies, not boarding. Depending on the documents that make up the agreement and the circumstances of a person’s situation, a person is more likely to be a boarder if:

- the landlord keeps control and authority over the house (even if the boarder has a key) and comes into the house without any notice;
- the landlord provides attendance or services (e.g. cleaning, linen or meals) that require the landlord or his agents to exercise unrestricted access to and use of the premises;
- there are house rules;
- the landlord or their representative lives on site;
- the length of time of the agreement or the length of time the boarder is entitled to stay in the house is generally short-term; and
- the landlord and boarder only need to give a very short period of notice to leave.

Given the degree of complexity that currently exists in determining whether a person is a tenant or a boarder, and given the approach in some of the other jurisdictions to legislate for roomers but not for boarders, it would appear that there may be merit in including a definition in the RT Act to provide certainty as to what is regulated by the Act and what will remain outside the ambit of the Act.

Impact analysis

Option 4 provides greater certainty as to who is a boarder and therefore excluded from the RT Act. It would provide clarity for some who share rooms in a house and make clear that the RT Act applies. Unless a landlord finds themselves having to comply with the RT Act, the advantages of Option 4 for residents, landlords and government are that the status quo would be maintained, meaning “business as usual”, with no changes to current practices and costs associated with having to comply with new laws.

Potential disadvantages of this option include the continuing lack of certainty and clarity about rights and obligations for parties who are not defined as tenants, which may result in there being no savings in enforcement costs, the risk that vulnerable residents are being taken advantage of and the ongoing reluctance of residents to challenge any infringement upon their rights in the absence of clear protection against retaliatory eviction.

⁵¹ s3.

⁵² *Commissioner for Fair Trading v Voulon & Ors* [2005] WASC 229 [81].

Questions	
4.5(a)	<i>Do you support amending the Residential Tenancies Act 1987 to include a definition of boarder and lodger but otherwise leave the regulation of boarders as it currently is under the common law? Why or why not?</i>
4.5(b)	<i>What do you perceive to be the costs and benefits of this option? Please provide evidence in support of your response (including quantification) where possible.</i>
4.5(c)	<i>Should there be a different definition for roomers and boarders or should they be defined in the RT Act as being the same thing?</i>
4.5(d)	<i>Do you have any additional comments to make with regard to this option?</i>

4.6. Option 5 - Voluntary Code of Practice

According to Consumer Affairs Victoria, a voluntary code of conduct aims to help industry members improve business practices and meet their regulatory obligations. It sets out specific standards of conduct – voluntarily agreed to by signatories – about how industry members deal with each other and their customers. An effective industry code can provide greater protection for consumers and reduce the regulatory burden for business.⁵³

Discussion

Voluntary codes of practice are often viewed as a viable alternative to government regulation. However, in this case, there is likely to be considerable costs for operators associated with this option.

To be successful, voluntary codes of conduct require the presence of a strong industry association. There is currently no unified industry association that would cover all of the accommodation providers that operate within the boarding sector. Establishing such an association would not only be difficult and time consuming given the disparate nature of accommodation providers, the cost of establishing such an association would likely be prohibitive for the many smaller individual operators in the marketplace.

There would also be compliance costs associated with this model. Where voluntary codes of conduct are in place, a signatory to the code must develop written policies and procedures and submit themselves to regular audit in order to demonstrate a sufficient level of compliance with the code. These costs can be considerable, particularly if the operator were a private landlord offering residential premises as boarding accommodation.

Impact analysis

An advantage of option 5 for residents is that compliance with the code will act as a flag to residents that the accommodation meets a benchmark standard. This may lead to better accommodation outcomes for residents and may result in fewer disputes. For landlords, the benefits are that voluntary codes of practice are generally less intrusive than regulation,⁵⁴

⁵³ <https://www.consumer.vic.gov.au/resources-and-education/develop-a-code-of-conduct/about-voluntary-industry-codes>.

⁵⁴ Ibid.

and there is a greater sense of ownership of the system as the standards have been set by members of the association. Voluntary codes of practice are also easier to amend to adapt to changing conditions and do not have to rely on government to amend legislation. An advantage for government is that there are no regulatory or compliance costs associated with Option 5.

A clear disadvantage of this option is that there is currently no industry association to which a substantial proportion of the operators in the boarding house marketplace belong and therefore there is no overarching body that could develop a voluntary code of practice. Consequently, there is likely to be considerable upfront cost in trying to establish an industry association in the first instance, even before a voluntary code could be drafted. Furthermore, as the boarding house sector contains a disparate group of participants providing different types of accommodation, it is unlikely that they would see themselves as having a common purpose.

Questions	
4.6(a)	<i>Do you support developing a voluntary code of practice for the boarding house sector? Why or why not?</i>
4.6(b)	<i>What do you perceive to be the costs and benefits of this option? Please provide evidence to support your answer (including quantification) where possible.</i>
4.6(c)	<i>Do you have any additional comment to make with regard to this option?</i>

4.7. Option 6 - Other options

Stakeholders are invited to suggest alternative options to those described above that they believe will achieve the objective of ensuring that residents and landlords' rights and obligations are understood, and upheld in a way that maintains boarding accommodation as an affordable and accessible form of housing in Western Australia.

Stakeholders are asked to outline alternative options as clearly and as detailed as possible. This includes identifying and quantifying, where possible, the costs and benefits of the option for landlords, residents and government.

Summary of the Options

The table below summarises the options presented in this Consultation RIS.

Option Number	Summary of Option
1	Status quo – boarding agreements will continue to be exempt from the RT Act and would continue to be subject to the common law.
2	Modified tenancy regulation – development of specific new laws mirroring the laws under the RT Act, modified to suit boarding circumstances.
3	Occupancy principles – development of overarching principles that

<i>Option Number</i>	<i>Summary of Option</i>
	would operate within the RT Act. Parties would be free to negotiate terms and conditions for a boarding agreement provided the terms and conditions comply with the principles.
4	Inserts a definition of boarder into the RT Act – boarding agreements would continue to be exempt from the RT Act and subject to the common law, however there would be greater clarity as to which agreements are boarding agreements.
5	Voluntary industry code of practice – an industry association would need to be formed and then develop a code of practice outlining parties’ rights and responsibilities. Members of the association choose whether to comply with the code and must be able to demonstrate compliance with the code by way of audit in order to market their business as being compliant. Compliance with the code acts as an indicator to consumers that the accommodation meets a certain standard.
6	Other options as proposed by stakeholders.

5. OTHER ISSUES

Irrespective of which of the options is preferred by stakeholders and provides the greatest extent of benefit over costs, there are additional matters that require consideration.

5.1. Threshold numbers

Many of the jurisdictions require a minimum number of persons to be residing in the premises before the boarding or rooming house legislation applies. These minimum numbers of residents are set out in the table below. Premises that make available accommodation for less than the minimum number of residents are excluded from the respective laws of the state or territory.

Minimum number of residents required by each state or territory in order for boarding or rooming house laws to apply.

<i>State or Territory</i>	<i>Minimum number of residents</i>
ACT	N/A
NSW	5 persons
NT	3 persons
QLD	3 rooms
SA	3 persons
TAS	3 rooms where the owner resides in same house
VIC	4 persons

This approach has come under criticism on the basis that all boarders and roomers have the same need for protection under the law, not only those in larger facilities.⁵⁵

Questions

5.1(a) *If there is to be regulation of boarders in Western Australia, should this apply only above a certain prescribed number of residents or rooms, or should it apply to all boarding arrangements? Please give reasons for your answer to help us understand your position.*

5.1(b) *If the regulation is to apply only above a prescribed number of residents or rooms, what should the prescribed number be and why?*

5.1(c) *Do you have any additional comments to make with regard to this issue?*

⁵⁵ Adrian J Bradbrook, "Creeping Reforms to Landlord and Tenant Law" (2004) 10 *Australian Property Law Journal* 157,164.

5.2. Magistrates Court or State Administrative Tribunal

Currently disputes arising under the RT Act fall within the jurisdiction of the Magistrates Court small disputes division. Disputes relating to boarding and lodging arrangements under the common law also fall to the Magistrates Court. However, disputes arising under other tenancy and accommodation related legislation in WA, including the *Residential Parks (Long-stay Tenants) Act 2006* and the *Retirement Villages Act 1992* fall within the jurisdiction of the State Administrative Tribunal (SAT).

The issue for consideration is, if there is to be a change from the common law regulation of boarders to a form of statutory regulation, should disputes arising under the new laws continue to be dealt with by the Magistrates Court or by the SAT?

Questions	
5.2(a)	<i>If there is to be regulation of boarders in Western Australia, should jurisdiction for disputes remain with the Magistrates Court or should they be dealt with in the SAT? Why?</i>
5.2(b)	<i>What would be the costs and benefits of your preferred option? Please provide evidence (including quantification) if possible. Are you able to identify costs and benefits of your non-preferred option?</i>
5.2(c)	<i>Do you have any additional comments to make with regard to jurisdiction of disputes?</i>

5.3. Registration of boarding houses

The *Health Act 1911* requires lodging (boarding) houses to be registered with the relevant local government authority if more than six unrelated people are accommodated there. Operators offering accommodation to six or less unrelated residents are not required to be registered with any government authority.

The table below sets out the registration requirements for rooming houses and/or boarding houses in New South Wales, Queensland and Victoria. There do not appear to be registration requirements for boarding houses in the Australian Capital Territory, Northern Territory, South Australia or Tasmania.

State or Territory	Legislation	Registration requirements
NSW	<i>Boarding Houses Act 2012, s9</i>	Boarding houses that offer accommodation for five or more persons must be registered
QLD	<i>Residential Services (Accreditation) Act 2002, s9</i>	A rooming house or boarding house that can house at least four persons must be registered
VIC	<i>Public Health and Wellbeing Act 2008, s67</i>	Rooming houses must be registered. A rooming house is defined as premises that have rooms available for lease if not less than four people may be accommodated there

The issue for consideration is whether the existing registration requirements in Western Australia work effectively to produce appropriate outcomes for boarding house operators, residents and government regulators.

Issue

One of the concerns raised by local government is that there are an increasing number of unregistered boarding houses operating within the state. These tend to be properties owned and managed by private landlords where the leasing is undertaken on a room-by-room basis.

The unregistered boarding houses pose considerable difficulty for local government. Often the first time a local government authority becomes aware of an unregistered boarding house is when complaints are received in respect to overcrowding, noise, rubbish left on the verge and excessive cars parked in the street.

The increase in unregistered boarding houses has uncovered some recent examples of excessive overcrowding and dangerous conditions. For example, during investigations in the Town of Vincent in 2011 and 2012, it was reported that eight residents were found to be sharing a one bedroom boarding house.⁵⁶ In another example, inspectors found 29 residents living in a two bedroom house.⁵⁷ Similarly, City of Canning inspectors uncovered a property where 19 people were residing in a townhouse. In this instance it was the head tenant who had made temporary changes to the premises to create additional sleeping spaces.⁵⁸

Overcrowding to this extent leads to exploitation of individuals, poor sanitation, poor health, and unacceptable levels of risk to safety. State coroners' investigations into fires in Victoria and Queensland highlight the tragic consequences of overcrowding and insufficient fire safety measures in shared accommodation. In Victoria in 2009, the coroner investigated the deaths of two young people in premises above a restaurant which resulted from faulty electrical wiring. The premises had been subleased to seven to nine occupants and partitions and locks on the bedroom doors had been added to the premises.

The Victorian coroner found deficiencies in the smoke alarms, construction of bedroom doors, fire separation between the boarding house on the first floor and the restaurant, and locks on the bedroom doors which prevented exit in the event of a fire. The local council was also found to have failed to successfully administer the relevant and sometimes complex legislation. In March 2013, rooming house standards⁵⁹ were introduced under the *Residential Tenancies Act 1997* (Vic) and are enforced by Consumer Affairs Victoria.

In Queensland in 2000, a fire burnt down the Palace Backpackers Hostel killing 15 people. The Queensland coroner, Mr Michael Barnes, noted "...it was a savage reminder of the danger of fire and a warning that unless proper precautions are taken, crowded accommodation facilities can be extremely dangerous." The fire was deliberately lit by an occupant of the premises. The coroner found that the legislative framework regulating fire safety left a significant gap between existing buildings where no change of building

⁵⁶ <http://www.abc.net.au/local/stories/2012/09/04/3582526.htm>.

⁵⁷ <http://www.abc.net.au/news/2012-10-13/lodgings-feature/4311724>.

⁵⁸ Taken from discussions with the City of Canning.

⁵⁹ What the coroner referred to as boarding houses are referred to as rooming houses in the *Residential Tenancies Act 1997* (Vic).

classification was required for building work carried out, compared to new buildings which were covered by an extensive and adequate fire safety regulatory scheme. In addition, alterations to the building had increased the fire load and occupancy levels, however building approval and overcrowding was not sufficiently followed up by the local council. Strong legislative and compliance action was subsequently introduced with fire safety requirements under the *Fire and Rescue Service Act 1990* (Qld) developed for buildings used to accommodate six or more occupants who share access to toilet/bathroom facilities. These types of buildings include backpackers' hostels, boarding houses, bed and breakfast, farm-stay, share houses or similar types of accommodation.

By requiring all boarding houses, including those with six or less unrelated residents, to be registered, local government authorities and other relevant government departments would have a greater ability to monitor and control living conditions to ensure compliance with the law and prevent exploitation of tenants. Registers incur costs to maintain, both to boarding house proprietors in providing registration information and to government to fund the department that is charged with administering the register. There would also be additional costs incurred in conducting inspections to ensure compliance with registration requirements.

Compulsory registration of all boarding houses may also result in costs for landlords whose properties are currently non-compliant with building standards or who house excessive numbers of boarders in their premises. In the former case, landlords may incur one-off costs to bring their properties into compliance with building and other laws. These costs could be recovered by the landlord over time. In the latter case, landlords would be forced to reduce the number of residents they accommodate in their premises. This could result in landlords increasing rental costs for remaining residents to offset lost revenue. The latter may also have an impact for residents as it would result in fewer accommodation spaces available. The cost to residents, however, would be offset by improved health and safety standards in boarding accommodation.

Questions	
5.3(a)	<i>Is registration necessary? Why or why not? If yes, Are the current registration requirements effective? Why or why not?</i>
5.3(b)	<i>If registration is necessary and the current requirements are not considered to be effective, what should be the registration requirements for boarding houses in Western Australia (i.e. what criteria would determine registration and what detail should be held on the register)?</i>
5.3(c)	<i>What do you perceive to be the costs and benefits of the registration requirements you recommend? Please include evidence for your answer (including quantification) where possible.</i>
5.3(d)	<i>Do you have any additional comments with regard to registration of boarding houses?</i>

5.4. Other issues

This paper has endeavoured to cover matters that appear to be the most significant issues affecting the tenancy arrangements in relation to the boarding sector in Western Australia.

Consumer Protection is, however, keen to hear if there are other issues of concern regarding boarding and lodging tenancy arrangements that have not been raised by this paper.

Questions

5.4(a) *Are there any other matters in relation to the boarding house tenancy arrangements that have not been raised? If so, please provide an explanation of the issue/s and any quantification possible.*

6. IMPLEMENTATION AND EVALUATION

Implementation

Implementation of any of the options (except for Option 1, status quo) would require amendment to existing legislation, principally the RT Act, or a new standalone piece of legislation. There may be a need for consequential amendment of other legislation, subject to the option adopted.

Options 2 and 3 would require consideration to be given to the extent to which the provisions would apply to existing agreements. Transitional provisions may need to be drafted to take account of agreements already in place.

Stakeholders should take into account the costs associated with amending and implementing regulatory reform as part of their discussion on perceived costs and benefits of each option.

The costs and benefits of implementation will be included in the assessment of each option in the Decision RIS.

Evaluation

Evaluation of the implemented option will be undertaken in accordance with government policy and practice. The evaluation process will be outlined in the Decision RIS once a preferred option has been identified.

7. NEXT STEPS

Stakeholder feedback in response to this Consultation RIS will assist the Government in deciding whether reforms are needed and, if so, the shape of those reforms.

Following analysis of submissions to the Consultation RIS, a Decision RIS will be prepared. The Decision RIS will analyse the impacts of the various options and will be used by Government to guide its decisions. The Decision RIS will be published via Consumer Protection's website once the Government's decision is made public.

Department of Commerce

Consumer Protection Division

Level 2, 140 William Street, Perth, Western Australia 6000

Advice Line: 1300 304 054

Admin: 6251 1400

Facsimile: 6251 1401

TTY: 9282 0800

Email: consumer@commerce.wa.gov.au

National Relay Service: 13 36 77

www.commerce.wa.gov.au/consumerprotection

Regional offices

Great Southern

Unit 2, 129 Aberdeen St
ALBANY WA 6330
PO Box 832
ALBANY WA 6331
Ph: 9842 8366

South West

8th Floor, 61 Victoria St
BUNBURY WA 6230
PO Box 1747
BUNBURY WA 6231
Ph: 9722 2888

Mid West

Shop 3, Post Office Plaza
50-52 Durlacher St
GERALDTON WA 6530
PO Box 1447
GERALDTON WA 6531
Ph: 9920 9800

Goldfields/Esperance

Suite 4, 37 Brookman St
KALGOORLIE WA 6430
PO Box 10154
KALGOORLIE WA 6433
Ph: 9026 3250

North West

12 Hedland Place
KARRATHA WA 6714
PO Box 5
KARRATHA WA 6714
Ph: 9185 0900

Kimberley

Woody's Arcade
7/15 Dampier Terrace
BROOME WA 6725
PO Box 1449
BROOME WA 6725
Ph: 9191 8400

Department of **Commerce**
Consumer Protection Division

Advice Line on 1300 304 054
Gordon Stephenson House
Level 2/140 William Street
Perth Western Australia 6000

Locked Bag 14 Cloisters Square
Western Australia 6850
Administration: (08) 6251 1400
Facsimile: (08) 6251 1401
National Relay Service: 13 36 77
TTY: 9282 0800
Website: www.commerce.wa.gov.au
Email: consumer@commerce.wa.gov.au

Regional Offices

Goldfields/Esperance	(08) 9026 3250
Great Southern	(08) 9842 8366
Kimberley	(08) 9191 8400
Mid-West	(08) 9920 9800
North-West	(08) 9185 0900
South-West	(08) 9722 2888



This publication is available on request in other formats to assist people with special needs.