
Guidance Notes

to be read in conjunction with the

**NSW Community Housing Partnership Framework
August 2022**

Prepared by the NSW Community Housing Industry Council
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Communities and Justice

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Foreword

I am pleased to present to you, on behalf of the Community Housing Industry Council (the Council), the Guidance Notes to accompany the NSW Community Housing Partnership Framework (the Framework).

These documents respond to a Council business plan goal to develop a shared understanding of financial risk allocation and management in transactions across the community and affordable housing industry.

These Guidance Notes support the implementation of the Framework. The Framework sets out objectives and principles to guide NSW Government transactions with registered community housing providers (CHPs) for the delivery of social and affordable housing infrastructure and services.

These Guidance Notes provide practical advice to government agencies and registered CHPs so they can enter into clearly defined and mutually beneficial business partnerships for social and affordable housing transactions. They are intended to be 'living documents' and will be reviewed and updated over time.

The approach proposed is not mandatory, but rather aims to represent 'good practice' options for all parties. It encourages all parties engaged in structuring, negotiating and contract drafting to consider the analysis and recommendations carefully when entering into these transactions, and implement it where possible and appropriate.

The documents have been developed with broad input from a wide range of stakeholders with expertise in this area from across the community housing industry. This includes government agencies (the Department of Communities and Justice, Land and Housing Corporation, the Aboriginal Housing Office, Landcom, Department of Planning and Environment and NSW Treasury), community housing providers and industry partners from the legal, procurement and financial sectors.

All Council members, including those from the government agencies represented, have endorsed or endorsed in principle the documents for publication and implementation.

We hope you find these documents useful and that they add value to any social and affordable housing transaction you are considering. If you have any comments or feedback you would like to provide, please email the NSW Community Housing Industry Council secretariat at: NSWCommunityHousingIndustryCouncil@fac.s.nsw.gov.au

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Chair – NSW Community Housing Industry Council
August 2022

Contents

Purpose	5
NSW Community Housing Partnership Framework	5
Guidance notes	6
Guidance Note 1: Engagement and co-design	6
Guidance Note 2: Managing risks associated with unforeseen circumstances	10
Guidance Note 3: Managing risks associated with information provided/not provided during procurement processes	14
Guidance Note 4: Managing risks associated with change of law	17
Guidance Note 5: Managing risks associated with compliance failures and default	20
Guidance Note 6: Minimising compliance and reporting burden	23
Guidance Note 7: Avoiding and managing disputes	25

Purpose

These Guidance Notes are presented as a working document which can be reviewed and updated regularly as needed to incorporate ongoing learning from transactions between government housing agencies and registered community housing providers.

Over time, additional practice examples and supporting material may be added and individual Guidance Notes reviewed to ensure they remain consistent with the NSW Government Procurement Policy objectives and the requirements of regulation and legislation.

The Guidance Notes are designed to help NSW Government agencies take advantage of the benefits of partnerships¹ with registered Community Housing Providers (CHPs) – leveraging existing legislative and regulatory controls to streamline and simplify commercial dealings while promoting full consistency with the NSW Government Procurement Policy objectives to maximise value for money, contestability and social outcomes.

The Guidance Notes are intended to provide practical advice and tools that make it easier and cheaper for NSW Government agencies and registered CHPs to do business – while retaining the flexibility for a tailored and nuanced approach to individual transactions to reflect NSW Government objectives and project-specific requirements. They are non-binding and supplementary to the requirements of regulation and legislation.

NSW Community Housing Partnership Framework

The NSW Community Housing Partnership Framework (the Framework) sets out the proposed objectives and principles for partnerships between NSW Government agencies and registered CHPs for the delivery of social and affordable housing infrastructure and services.

The objectives of the CHIC Partnership Framework are to:

- achieve best value for money – by aligning the shared commitment of the NSW Government and registered CHPs to public value outcomes within a competitive marketplace
- make it easier for NSW Government agencies and registered CHPs to do business – by leveraging regulatory and standardised transactional controls to streamline and simplify procurement and contracting arrangements and to minimise duplicative compliance and reporting arrangements
- promote innovation – by leveraging registered CHP access to finance, concessions and networks to promote new models and greater flexibility to better meet future demand and changing needs
- promote viability and sustainability – by adopting commercial principles and contract conditions that appropriately take into account their potential impact on registered CHP viability and outcomes for vulnerable tenants.

Click [here](#) to go to the NSW Community Housing Partnership Framework.

¹ As used in this document, 'partnership' includes all forms of collaboration, joint venturing and other formal and informal ways of working together

Guidance notes

Guidance Note 1: Engagement and co-design

1.1 Framework principles

The NSW Community Housing Partnership Framework (the Framework) recommends embedding engagement and co-design principles into commissioning and procurement processes for community housing programs with a registered CHP based on:

- legislative recognition in both the NSW Housing Act 2001 and the Community Housing Providers (Adoption of National Law) Act 2012 that a key part of improving social and affordable housing outcomes involves developing community housing as “a viable and diversified component of the New South Wales social housing sector”
- recognition that the national regulatory system provides assurance to government that registered CHPs have already demonstrated their suitability to deliver social and affordable housing outcomes at different risk levels (with significant regulatory controls already in place to deal with monitoring registered CHPs and the risks of registered CHPs failing to meet performance standards)
- the increasing interdependence of NSW Government agencies and registered CHPs working together collaboratively as part of a shared, multi-provider service system.

1.2 Practice guidance

- Have the parties engaged early enough to innovate?
 - ✓ Planning for early engagement between government and industry to ensure the program design and contracting framework:
 - allows enough flexibility to promote and reward innovation
 - is as simple as possible to achieve the intended outcomes within acceptable risk parameters
 - leverages existing controls through the national regulatory system (both in the procurement process and subsequent contracting)
 - takes into account the potential impacts on registered CHP viability.
 - ✓ Planning for early engagement/market soundings to scope options and seek alignment on roles and responsibilities, contracting structure, risk allocation, commercial principles, and the role of the private sector (including opportunities to challenge proposed design or commercial constraints).
 - ✓ Documenting and communicating key expectations, accountabilities and the nature of opportunities for different registered CHPs (including opportunities for Tier 2/3 registered CHPs and Aboriginal CHPs).

- Have the parties adequately assessed opportunities, risks and unintended outcomes?
 - ✓ Assessing and communicating opportunities and risks to the achievement of the NSW Government policy objectives and the corporate objectives of the partners of NSW Government agencies:
 - Engagement with the other NSW Government housing agencies to obtain advice on opportunities, risks and unintended outcomes.
 - Engagement with NSW Department of Premier and Cabinet and NSW Treasury to obtain advice on alignment with NSW Government social policy objectives.
 - ✓ Assessing and communicating opportunities and risks to the achievement of the outcomes in the National Regulatory Code – in particular, the impact on registered CHP financial viability and meeting standards for housing services and asset management:
 - Engagement with the NSW Registrar of Community Housing to obtain independent advice on opportunities, risks and unintended outcomes. Specifically, this could include engaging with the NSW Registrar's to obtain the NSW Registrar's opinion on those matters, including contractual matters, which could affect a registered CHP's ability to continue to perform at the requisite standards in accordance with the 7 Performance Outcomes under the National Regulatory Code (e.g. cost implications of complying with asset management contractual obligations; costs associated with bidding for projects).
 - Engagement with industry partners (including industry peak bodies, NHFIC, and private investors) to obtain feedback on opportunities, risks and unintended outcomes.

- Have the parties allowed for competitive dialogue to improve value for money?
 - ✓ Documenting and communicating opportunities for competitive dialogues within agreed confidentiality and probity parameters.
 - ✓ Documenting and communicating expectations about due diligence that is required to be undertaken by the parties – consistent with the nature of the legal and commercial framework for the project.
 - ✓ Establishing clear principles and processes for dispute avoidance and dispute resolution.

- Have the parties explored opportunities for direct dealings or select tender?
 - ✓ Can a direct dealings policy be applied which could avoid the need for costly procurement processes (where direct dealings are appropriately within the parameters set by the NSW Government Procurement Policy)?
 - ✓ Can a select tendering process be used to reduce overall industry costs associated with tendering (where a select tender is appropriately within the parameters set by the NSW Government Procurement Policy)?
 - Select tender to invited registered CHPs with specific capabilities.
 - ✓ EOI/shortlisting process to ensure extensive tender preparations and due diligence are only required from initial proposals that are assessed as highly competitive.

- Have the parties incorporated lessons learnt from comparable programs into the commissioning and procurement process?
 - ✓ Undertaking formal post-implementation review of major programs to identify lessons learnt.
 - ✓ Documenting and communicating how lessons learnt and continuous improvement are incorporated into the commissioning and procurement process.

1.3 Legal guidance

Engagement and co-design are fully recognised within the NSW Government Procurement Policy as appropriate and effective strategies to maximise value for money, contestability and social outcomes.

At the same time, NSW Government agencies and registered CHPs are subject to various probity, confidentiality and commercial-in-confidence constraints that need to be balanced against commitments to open and transparent communication. NSW Government agencies and registered CHPs will also need to consider how best to regulate conflicts of interest and the ownership of any intellectual property (IP) involved in engagement and co-design.

The objectives of the CHIC Partnership Framework can be supported by the parties adopting proactive strategies which seek to mitigate potential legal and commercial barriers. They include:

Managing probity requirements

Under the *Public Works and Procurement Act 1912* and the NSW Government Procurement Policy, NSW Government agencies are required to comply with specific probity principles, including promoting fair and open competition by not discriminating, and treating all potential suppliers equitably. This does not prohibit early engagement with proponents; however, NSW Government agencies must ensure that engagement is managed in a fair and equitable manner.

For example, an interactive tender process that enables engagement and working with co-design principles, and promotes feedback from, each individual tenderer on an open and transparent basis could satisfy probity requirements. It should be backed by clear tender guidelines to ensure all participants have consistent expectations and a clear understanding of the process.

Whilst engaging with registered CHPs, NSW Government agencies should ensure they do not accept or encourage unsolicited proposals which could jeopardise the transparency of the procurement process.² Unsolicited proposals must not bypass tender processes, and should only be considered for uniquely innovative projects. All unsolicited proposals must be referred to the NSW Department of Premier and Cabinet, and will only be approved if they are sufficiently unique to warrant direct dealing with the proponent(s).³

Managing conflicts of interest

Managing conflicts of interest can be achieved by requiring registered CHPs to disclose any conflicts of interest that exist as a condition precedent to partaking in the engagement and co-design process, and ensuring that registered CHPs have continuing obligations to notify the relevant NSW Government agency if any conflict arises. A clear regime for dealing with any such conflicts should be established and made known to all participants at the outset of an engagement and co-design process.

² Unsolicited Proposals are a proposition to the government from a proponent over a commercial proposition, where the government has not requested the proposal. See NSW Government Procurement Policy Framework.

³ See Unsolicited Proposals: Guide for Submission and Assessment (August 2017).

Managing confidentiality

To effectively participate in early engagement and co-design, the relevant NSW Government agencies and registered CHPs may require access to the other's confidential information.

NSW Government agencies will want to protect disclosure of their sensitive information and are required to safeguard confidential supplier information obtained during procurement processes.⁴

A duty of confidentiality may be implied during a tender process.⁵ However, to ensure clarity as to the parties' obligations in relation to confidentiality, a confidentiality agreement that covers each party's obligations (including those under relevant privacy laws) should be in place from the commencement of the engagement process with the relevant registered CHPs.

Ownership of intellectual property (IP)

To adequately address IP issues, the following should be considered:

- How to manage the disclosure of IP (if any) of NSW Government agencies to registered CHPs.
- The ownership of the rights to the IP presented by registered CHPs during the engagement phase.

In order to avoid disputes relating to the disclosure and ownership of IP, it is recommended that, before participating in engagement and co-design, the relevant NSW Government agency and registered CHPs enter into an agreement to the effect that the ownership and exclusive use of any IP remains with its creator until an agreed time. For example, the agreement could stipulate that upon being nominated as preferred tenderer, the registered CHP grants an irrevocable and royalty-free licence to the NSW Government agency to use the IP in connection with the project.⁶ Alternatively, if the NSW Government agency requires ownership of all the project IP, the ownership of the IP developed by or on behalf of the registered CHP in connection with the project may transfer to the NSW Government agency upon the registered CHP being nominated as preferred tenderer.

1.4 Supporting material/practice examples

- Land and Housing Corporation CHP Small Scale Direct Dealing Policy (December 2020)
- Landcom Lachlan's Line, Macquarie Park affordable housing project (Co-design Process, June 2020)
- Innovation Fund Co-design Framework (Department of Communities and Justice, 2020)
- Social and Affordable Housing Fund — Dispute Avoidance Board (DCJ / FACS SAHF Service Agreement, 2020)

⁴ NSW Government Procurement Policy Framework (February 2021).

⁵ See for example *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2012] ACTSC 126.

⁶ Note that this is the preferred approach under the NSW Government Procurement Policy Framework (February 2021).

Guidance Note 2: Managing risks associated with unforeseen circumstances

2.1 Framework principles

The NSW Community Housing Partnership Framework (the Framework) is underpinned by the assumption that registered CHPs that seek to enter into large-scale, capital-intensive, commercially-focused partnerships with NSW Government agencies have the resources and business experience to appropriately analyse and price risk — and, where necessary based on appropriate risk allocation, to undertake the sophisticated due diligence to understand the potential impacts on their business.

At the same time, the Framework acknowledges the legislatively recognised role of registered CHPs in the NSW *Housing Act 2001* and the *Community Housing Providers (Adoption of National Law) Act 2012* — which seek to ensure that registered CHPs remain a viable and diversified component of the NSW social housing sector.

As a general principle, each risk should lie with the party best positioned to manage it. Where risk allocation for unforeseen circumstances is outside of the control of registered CHPs, consideration should be given to the impact that any risk transfer may have on the financial viability of registered CHPs. Specifically, the transfer of open-ended, uncapped risks to registered CHPs is undesirable as:

- it may financially burden the registered CHP in an inappropriate way
- it may put at risk the ability of the CHP to demonstrate ongoing financial viability as required to maintain its registration. Deregistration would lead to the CHP being wound-up, with potential flow-on reputational risks to the social housing system and NSW Government.
- it could ultimately result in increased costs for the NSW Government and the NSW Government agency — both as direct costs brought about by meeting their responsibility to vulnerable social housing tenants and indirect costs that stem from reputational damage and loss of trust in the social housing system. This would be the case even if the registered CHP had priced or partially priced the risk and the NSW Government agency had paid (whether upfront or over time) the registered CHP to take the risk as part of the agreed contractual payments.

2.2 Practice guidance

- Have the parties explicitly identified and analysed the impact of any risk transfer related to unforeseen circumstances on the registered CHP's financial viability and broader NSW Government policy objectives?
 - ✓ Identifying risks related to unforeseen circumstances that could impact on the intended program or transaction outcomes — including, but not limited to:
 - site availability
 - remediation of contamination
 - development approval delays
 - epidemic
 - change in underlying cost drivers (e.g. insurance premiums, interest rates).

- ✓ Analysing the impact of any risk transfer related to unforeseen circumstances on the registered CHP's financial viability – with due consideration given to whether:
 - the risk is quantifiable and its financial consequences can be capped
 - the risk is quantifiable and able to be adequately insured against or passed on to a third party by the registered CHP
 - the risk could precipitate the insolvency of the registered CHP (and the subsequent termination of tenancy agreements with vulnerable tenants).
- ✓ Obtaining advice on the potential impact of any proposed risk transfers related to unforeseen circumstances on the registered CHP's financial viability and broader NSW Government policy objectives:
 - Engagement with the Registrar of Community Housing in relation to potential impact on the registered CHP's financial viability.
 - Engagement with the other NSW Government housing agencies, NSW Treasury and NSW Department of Premier and Cabinet in relation to potential impact on broader NSW Government policy objectives.
- Have the parties explored opportunities to adequately mitigate the impact of any risk transfer related to unforeseen circumstances on the registered CHP's financial viability and broader NSW Government policy objectives?
 - ✓ Opportunities for competitive dialogues to mitigate the impact of any risk transfer related to unforeseen circumstances through:
 - a relief event and/or compensation event mechanism
 - identifying it as a shared risk between the registered CHP and the NSW Government agency – with specific contractual provisions and a framework for managing the commercial impacts if the risk is realised.
- Have the parties incorporated a dispute avoidance or dispute resolution mechanisms into the commercial and contractual framework?
 - ✓ Opportunities for independent dispute avoidance and dispute resolution related to any risk transfer and unanticipated outcomes related to unforeseen circumstances.

2.3 Legal guidance

Unforeseen circumstances in housing projects can range from site issues (such as contamination and access) to changes in law (which is dealt with in Guidance Note 4) and force majeure events (such as war, natural disaster, industrial action and epidemics). Contractual arrangements that anticipate a broad spectrum of these events are more likely to be commercially and financially sustainable.

The Framework promotes an approach to risk allocation with respect to unforeseen circumstances that is intended to preserve the financial viability of registered CHPs, through adoption of strategies to address the circumstances and their consequences, including:

Insurance

Many risks involved in community housing projects are quantifiable and able to be adequately insured against at a reasonable cost (taking into account the deductible under the insurance policy). Where

such an insurable risk is appropriately allocated to a registered CHP, in general it should obtain the required insurance.

Contracts between NSW Government agencies and registered CHPs should contain clear insurance requirements (including liability caps) and allocate responsibility. Insurances to be considered include the usual contract works insurance, industrial special risks, public liability and professional indemnity insurance, and may also include others such as project specific insurance depending on the nature of the project.

If the risk is uninsurable (or if the deductible is unreasonably large), then the Framework recommends not transferring the risk to registered CHPs.

Contracts between NSW Government agencies and registered CHPs should include specific provisions to deal with:

- situations where the risk is initially insured, but the insurance market subsequently stops offering insurance cover (see relief mechanisms below)
- situations where the risk is insured but the insurer fails to or refuses to pay
- payment of deductibles.

NSW Government agencies should assess the impact of deductibles under required insurance policies and who is contractually obligated to pay this amount. Where the deductible is excessive, the registered CHP may not have adequate funds to pay the deductible and thus trigger the insurance payout. NSW Government agencies should consider whether it is appropriate to be responsible for certain deductibles or include a cost sharing mechanism, whereby the deductible is apportioned between the parties should they need to make a claim on the insurance.

Downstream risk allocation

Another way to mitigate risk for both the relevant NSW Government agency and registered CHP is to transfer risk downstream. Provisions in subcontracts and consultancy agreements can ensure that certain risks are passed on (in full or part) to third parties who are best placed to manage them (e.g. builders, engineers, architects, etc.). However, the ability and willingness of third parties to accept risk transfer and at what price should be assessed early in the procurement process, with the aim that inappropriate risks do not end up with the registered CHPs.

Site issues and contamination

The greatest and most costly risks in housing projects frequently stem from site issues; in particular, undetected contamination such as asbestos or Per- and Polyfluoroalkyl Substances (PFAS). Latent condition provisions are often incorporated into contracts to allow contractors financial relief, relief from KPIs and/or extensions of time when a physical condition is detected at a site which could not have been reasonably foreseen or anticipated by the contractor at the time they priced the works. When partnering with registered CHPs, as opposed to private contractors, it is particularly important that the relief granted under these provisions is adequate to prevent financial hardship for the registered CHP, especially when the cost of remediation becomes significant.

Whilst provisions allowing for financial relief, relief from KPIs and/or extensions of time are not uncommon in major contracts, it needs to be remembered that such provisions might provide little or no value to a registered CHP if it does not have the additional funds to cover the period between the occurrence of the unforeseen circumstances and when the provisions come into effect, or if the provisions only provide partial relief to the registered CHP and/or if the registered CHP does not have the expertise to manage the unforeseen circumstances and their consequences.

A potential approach might, for example, involve:

- the relevant NSW Government agency being responsible for all contamination on sites it owns or owned until acquired by the registered CHP as part of the procurement process
- in respect of other sites, the registered CHP being responsible (perhaps up to a monetary limit) for contamination that was or should have been identified prior to an agreed date, such as the contract date or the date the registered CHP becomes the preferred proponent, and the risks and consequences of other contamination being addressed on another agreed basis
- the NSW Government agency procuring at its own cost a detailed due diligence report – and making it available to the registered CHP on a basis that the registered CHP can rely on it for the purposes of tendering.

Relief mechanisms

As noted above, it is prudent for partnerships with registered CHPs to incorporate sufficient relief and/or compensation mechanisms to deal with unforeseen circumstances including contamination, industrial action, war, epidemics, natural disasters, insurable risks becoming uninsurable, etc. These circumstances are beyond the control of registered CHPs and thus it does not seem appropriate or equitable for them to absorb all their consequences. Contractual regimes relating to such events, extensions of time and responsibility for costs should be established, whereby the risk and cost is apportioned between the NSW Government agency and registered CHP on an agreed, fair basis, taking into account the parties' positions and the potential effects on the registered CHP. This may involve, for example, capping the liability of the registered CHP in relation to such events, assigning a percentage of the costs from any such event to each party and/or increasing the contract price to mitigate the financial impact on the registered CHP.

The significance of relief mechanisms in relation to unforeseen circumstances has been clearly illustrated by the impact of COVID-19 on a registered CHP's ability to adhere to contractual KPIs, completion dates and budget constraints. Registered CHPs have also been required to deal with the financial implications of tenants' legal entitlements to rent relief during the pandemic. It is critical that contractual regimes relating to such events are clear and take into account the financial impact on registered CHPs and the capacity of registered CHPs to manage such risks.

Guidance Note 3: Managing risks associated with information provided/not provided during procurement processes

3.1 Framework principles

The NSW Community Housing Partnership Framework (the Framework) promotes a values-based approach to transactions between NSW Government agencies and registered CHPs – underpinned by a set of principles that commit the parties to work together collaboratively and in good faith. These principles cover:

- **Trust:** developing and maintaining a level of trust and adherence to agreed decisions between the parties
- **Openness and transparency:** keeping both parties informed of the other's intentions, direction and way of working to avoid surprises
- **Flexibility:** adapting to changes through dialogue between the parties
- **Interdependence:** recognition of the separate but interrelated interests, rights and responsibilities of both parties.

The Framework acknowledges that registered CHPs that seek to enter into large-scale, commercially focused partnerships with NSW Government agencies must have the resources and capability to undertake the due diligence to accurately price their bid based on the information provided during the procurement process – taking into account any warranties or guarantees provided by the NSW Government agency in relation to the accuracy, suitability, adequacy or completeness of the information provided.

As a general principle, where a warranty or guarantee in relation to the tender information is provided, registered CHPs will be expected to bear the risk and duty of care to accurately price their bid.

Where the NSW Government agency declares that it will give no warranties or guarantees nor owe any duty of care in relation to the accuracy, suitability, adequacy or completeness of the tender information provided, consideration should be given to the mechanisms available to registered CHPs to collect and verify the required information, and the impact that any risk transfer may have on the financial viability of the registered CHPs. Specifically:

- The extent to which registered CHPs can independently access and verify the required information, e.g. access to social housing properties to assess property conditions prior to entering into a lease.
- The reasonableness of the time and cost associated with accessing and verifying the information that is not warranted.
- The extent to which the contract allows for negotiated variations in the original service offering where a material difference to the information provided is found.

3.2 Practice guidance

- Have the parties identified and analysed the impact of any risk transfer related to information provided/not provided in tenders on the registered CHP's financial viability and broader NSW Government policy objectives?

- ✓ Identifying risks related to information provided/not provided that could impact on the intended program or transaction outcomes – including, but not limited to:
 - social and affordable housing policies
 - complexity of tenant needs and costs of providing tenancy-related support
 - social housing property conditions
 - tender requirements to use third-party providers to deliver part of the service, e.g. existing maintenance contractor.
- ✓ Analysing the impact of any risk transfer related to information provided/not provided on the registered CHP's financial viability – with due consideration given to whether:
 - the registered CHPs can independently source and verify any information that is not warranted, e.g. access to social housing properties to assess property conditions prior to entering into a lease
 - the reasonableness of the time and cost associated with accessing and verifying the information that is not warranted
 - the potential financial impacts on the registered CHPs if a material difference is found with the information provided.
- ✓ Obtaining advice from the Registrar of Community Housing on the potential impact of any proposed risk transfers related to the information provided/not provided on the registered CHP's financial viability.
- Have the parties explored opportunities to adequately mitigate the impact of any risk transfer related to information provided/not provided?
 - ✓ Opportunities for competitive dialogues through:
 - a relief event and/or compensation event mechanism
 - identifying it as a shared risk between the registered CHP and the NSW Government agency – with specific contractual provisions and a framework for managing the commercial impacts if the risk is realised
 - independent dispute avoidance and dispute resolution related to unanticipated outcomes related to information provided/not provided.

It is worth noting that preparation by the NSW Government agency of an appropriate and a warranted information package as part of a procurement process which may be relied on by registered CHPs may often be the most suitable way of addressing the lack of information parity and potentially avoiding complications, costs and delays post the procurement process. In such an approach, the NSW Government agency should allow itself sufficient time to identify, verify and curate the information prior to inviting the registered CHP to participate in the procurement process.

3.3 Legal guidance

For a partnership between the NSW Government agency and registered CHPs to operate optimally, the information provided during the procurement process must be as comprehensive, accurate and up to date as possible and, unless for good reason this is not feasible, should be subject to a warranty. If this approach is followed, registered CHPs should be in a position to appropriately price the relevant

contract and understand the potential risks involved, reducing the potential for disputes during the project.

In any event, relief and/or compensation mechanisms should be put in place to account for circumstances in which information was not provided, the information provided was inaccurate or incomplete or where additional information comes to light that has an effect on material aspects of a project.

Contractual regimes should ensure that any financial impacts resulting from these circumstances are apportioned between the NSW Government agency and registered CHP on an equitable basis, taking into account the parties' positions and the potential effects on the registered CHP. For example:

- where information within the control of or otherwise available to the NSW Government agency was not provided to the registered CHP, it may be appropriate for the NSW government agency to bear the financial impacts that arise
- in respect of information subject to a warranty by the NSW Government agency, in general the risk of such information being incorrect or incomplete should be borne by the NSW Government agency
- where information cannot be warranted by the NSW Government agency and the registered CHP has had the chance to independently verify the information, request additional information and/or conduct relevant inquiries, the procurement process must allow the registered CHP reasonable time to do so and additionally, it may be more appropriate for the registered CHP to bear the risk or to apportion the risk between the parties.

Each procurement process should have clear requirements as to the degree (if any) to which the registered CHPs involved are required to inspect any property and/or independently verify any information provided by the NSW Government agency. Due consideration should be given to the time and cost associated with inspections and verifying information and the financial impact this may have on the registered CHP.

Where acceptable to the NSW Government agency, the registered CHP should be entitled to rely on information with an unqualified warranty from the NSW Government agency. For example, that the relevant information provided is true, complete and accurate and not misleading by inclusion or omission. Where such a warranty cannot be given, rather than not providing a warranty or reliance, the NSW Government agency should consider whether a lesser warranty may be appropriate. For example:

- the relevant information is true and accurate
- the information in each document provided gives a fair and reasonable representation of the matters to which that document relates.

In respect of risks and costs from the perspective of a registered CHP, an unqualified warranty and reliance, together with an indemnity from the NSW Government agency for breach, represents the ideal position. However, NSW Government agencies would need to consider their position and requirements in each procurement process with registered CHPs.

Disputes that arise during a project in relation to information that was or was not provided during the procurement process should be appropriately managed under the dispute resolution framework in the relevant contract. As to avoiding and managing disputes, see Guidance Note 7.

Guidance Note 4: Managing risks associated with change of law

4.1 Framework principles

The NSW Community Housing Partnership Framework (the Framework) recognises the separate but interrelated interests, rights and responsibilities of the NSW Government and registered CHPs in delivering social policy outcomes – by leveraging registered CHP access to rental housing assistance (e.g. Commonwealth Rent Assistance) and tax concessions for registered charities (e.g. GST).

The Registrar of Community Housing has highlighted that registered CHPs operate with very modest margins – with financial viability underpinned by ongoing access to rent assistance and tax concessions. Any adverse change of law associated with Commonwealth Rent Assistance or access to tax concessions could create very significant viability risks. For the purposes of this Guidance Note, changes of law could be Federal, State or both.

The Framework recommends that the risks of a change of law (being risks that may affect the project outcome, including through higher capital or operating costs or reduced returns, including those associated with GST or Commonwealth Rent Assistance) should not be transferred by NSW Government agencies to registered CHPs without due consideration of its impact on financial viability and the sustainability of the social housing system. For this purpose, law is broadly defined to mean laws, regulations and government policies.

Significant contracts between government agencies and the private sector (i.e. outside the social and affordable housing sector) often distinguish between changes of law that (1) affect any business (known as a general or non-discriminatory change of law), (2) are changes in specific laws that do not affect the general course of any business, but only the specific sector in which the relevant project company operates (generally known as specific changes in law) or (3) are “discriminatory” changes of law specifically addressed to a project or a project company. In broad terms, there will be full compensation for discriminatory changes of law, the risks of non-discriminatory changes in law are typically borne by the private sector and there is a variety of practices with respect to specific changes of law that are not discriminatory changes of law.

However, in the context of contracts between NSW Government agencies and registered CHPs, the key issue should not be the type of change of law, but the effect on the registered CHP and the social and affordable housing sector. In general, where a change of law (regardless of what it is) has an adverse effect on a registered CHP in respect of a relevant transaction, the primary consideration should be whether the registered CHP should be compensated so that it is effectively in the same position as if the change of law had not occurred.

The Framework seeks to promote best practice approaches to the development of legislative, regulatory and policy changes – including identifying and analysing any adverse impacts of changes on the financial viability of contracted and regulated registered CHPs (where changes are outside of existing policy frameworks). Such an approach will be best supported where the drafting and consultation process includes early engagement with registered CHPs and the Registrar of Community Housing.

4.2 Practice guidance

- Have the parties identified and analysed the impact of any risk transfer related to change of law on the registered CHP's financial viability and broader government policy objectives?
 - ✓ Identifying risks related to change of law that could impact on the intended program or transaction outcomes – including, but not limited to:
 - GST
 - Tax concessions
 - Commonwealth Rent Assistance
 - NSW Government social and affordable housing policies that registered CHPs are required to comply with.
 - ✓ Analysing the impact of any risk transfer related to change of law on the registered CHP's financial viability – including obtaining advice from the Registrar of Community Housing on the potential impact of any proposed risk transfers related to change of law.
- Have the parties explored opportunities to adequately mitigate the impact of any risk transfer related to change of law?
 - ✓ Identifying change of law as a shared risk between the registered CHP and the NSW Government – with specific contractual provisions and a framework for managing the commercial impacts if the risk is realised.

4.3 Legal guidance

Contracts between NSW Government agencies and registered CHPs should address succinctly changes of law and appropriate risk allocation or sharing mechanisms to manage their impact.

The relevant provisions should cover changes of law in respect of any law, regulatory requirement or applicable policy that may adversely impact on the position of the registered CHP in connection with the relevant project, and address their consequences.

Given registered CHPs' crucial role in the NSW social and affordable housing sector, NSW Government agencies should, in relation to each procurement process, consider whether the registered CHPs involved should be kept whole in relation to any adverse impacts of a change in law.

In respect of an adverse impact on the registered CHP in connection with a change of law, the contractual arrangements could allocate this risk to the NSW Government agency, and include compensation mechanisms to address any adverse consequences for the registered CHP (which could be subject to a de minimis threshold). Alternatively, the consequences could be shared.

If the NSW Government agency does not wish to compensate the registered CHP for all change of law events, a contract could include a concept of "qualifying changes of law". These events (which would include discriminatory changes of law and could include changes in respect of GST, tax concessions, Commonwealth Rent Assistance and applicable NSW Government policies) would entitle the registered CHP to automatic compensation. In respect of changes of law that are not qualifying changes of law, the risks could be apportioned between the parties in the context of their effect on the registered CHP (including its financial viability). Where risks are apportioned, it could also be appropriate for the risks allocated to the registered CHP to be capped at a monetary amount. This would allow the registered

CHP to take into account, at the outset, the potential maximum impact of any change of law that may occur.

Clear contractual provisions in relation to change of law should promote certainty and reduce the potential for disputes. Certainty in this regard should also provide greater comfort for financiers who are considering providing finance to registered CHPs in relation to NSW Government procurement processes.

Guidance Note 5: Managing risks associated with compliance failures and default

5.1 Framework principles

The NSW Community Housing Partnership Framework (the Framework) promotes a values-based approach to transactions between NSW Government agencies and registered CHPs – underpinned by a set of principles that commit the parties to work together collaboratively and in good faith.

The Framework acknowledges that registered CHPs that seek to enter into large-scale, commercially focused partnerships with NSW Government agencies must have the resources and capability to manage risk associated with compliance and performance failures. It is appropriate for contracts to include provisions for abatements for services not delivered and default where serious compliance and performance failures occur.

As a general principle, abatements provisions and corresponding default and termination rights should be drafted to reflect the separate but interrelated interests, rights and responsibilities of both NSW Government agencies and registered CHPs in delivering social and affordable housing outcomes. Specifically, the use of absolute and unconditional and/or hair-trigger abatement and default rights in favour of NSW Government agencies are undesirable because:

- NSW Government agencies would prefer not to take action to wind up a registered CHP in relation to risks that NSW Government agencies allocated to the CHP if an alternative course of action is available and appropriate
- it could ultimately result in increased costs for the NSW Government – as both direct costs brought about by meeting its responsibility to vulnerable social housing tenants and indirect costs that stem from reputational damage and loss of trust in the social housing system.

5.2 Practice guidance

- Have the parties identified and analysed the impact of any abatement, default and termination provisions on the registered CHP's financial viability and broader government policy objectives?
 - ✓ Identifying risks related to proposed abatement, default and termination provisions that could impact on the intended program or transaction outcomes – including, but not limited to:
 - Service system capacity to address service gaps as a result of applying abatements or default provisions.
 - Reputation risks associated with negative outcomes for vulnerable households as a result of applying abatements or default provisions.
 - ✓ Analysing the impact of any abatement, default and termination provisions on the registered CHP's financial viability and capacity to continue to meet the outcomes of the National Regulatory Code – including obtaining advice from the Registrar of Community Housing on the potential impact of any proposed abatement, default and termination provisions.

- Have the parties drafted any abatement, default and termination provisions to adequately reflect the interrelated interests, rights and responsibilities of both NSW Government agencies and registered CHPs in delivering social and affordable housing outcomes?
 - ✓ Avoiding absolute and unconditional and/or hair-trigger abatement and default rights in favour of one party.
 - ✓ Drafting abatement, default and termination provisions to best reflect endeavours of both parties.
- Have the parties explored opportunities to adequately mitigate the impact of significant compliance and performance failures?
 - ✓ Developing protocols for early identification and engagement to discuss potential compliance and performance risks – before action needs to be escalated.
 - ✓ Regular, ongoing communication to discuss compliance and performance risks.

5.3 Legal guidance

Strong relationships between NSW Government agencies and registered CHPs are vital to maintain the financial viability of registered CHPs and facilitate the long-term development of the social and affordable housing sector. It is therefore in the interests of all for contracts to avoid, or at least minimise, abatements, default and termination rights, except in relation to the most significant adverse events or circumstances, and to include provisions that work towards reducing their likelihood.

An important part of managing risks associated with compliance failures and default is ensuring that the compliance regime is appropriate. The focus should be on the key requirements in respect of the relevant project and, wherever possible, take advantage of the compliance framework that is already in place, including under applicable law, the National Regulatory Code and community housing agreements. Additional obligations should only be proposed if they do not, in substance, already apply and are essential to managing performance or risks in the project at hand.

There can be a tendency in preparing contracts and in commercial negotiations to duplicate provisions (in substance rather than form) and to “bulk up” the provisions relating to abatements, defaults and termination rights. Such an approach should be avoided wherever possible. Often a simple, clear framework together with a “less is more” approach is sufficient and preferable.

Given the goal for NSW Government agencies and registered CHPs to collaborate in good faith and the role and position of registered CHPs, abatements, events of default and termination may be seen as options of last resort. In respect of most compliance failures, a review event regime would seem appropriate. Such a regime would specify what a review event is (in general, review events should be significant compliance failures or circumstances that indicate that a real problem may arise in the future) and set out a series of steps that must be taken when a review event occurs. These steps would focus on bringing the parties together, within a prescribed period, to work in good faith to discuss the relevant review event, address its consequences and put in place agreed mechanisms to ensure that it does not occur again. The review event procedure should require the registered CHP to prepare, and comply with, a remedy plan approved by the relevant NSW Government agency.

Events of default and termination rights would still have a role. For example, in relation to:

- a registered CHP not participating in good faith in a review event process or failing to comply with a remedy plan
- insolvency
- deregistration as a CHP.

Where a default does occur and is remediable, the registered CHP should be afforded a reasonable period to put forward a plan for remedy and then to commence to remedy the default before the NSW Government agency may exercise rights in relation to it.

While abatement provisions can be useful in commercial contracts, use of such provisions in contracts between NSW Government agencies and registered CHPs may not sit well with the aim of collaborating to achieve better outcomes in the social and affordable housing sector and maintain the financial viability of CHPs. Abatement regimes generally permit the withholding (in part or whole) of an agreed payment for work or services performed, due to a failure to comply with certain contractual obligations or agreed KPIs. Their use should be limited in contracts with registered CHPs and a review event regime should in general be preferred. Where abatement regimes are used, they should be discretionary and not applied automatically, they should adopt a graduated approach, any abatements should reset annually and the registered CHP should be able to reduce or extinguish abatements – for example, by over performance. In addition, replacing a registered CHP under a contract instead of applying abatements may be a better outcome for the relevant tenants and the sector as a whole.

Termination rights should arise only where there is a subsisting default that cannot be remedied or has not been remedied after a prescribed, reasonable period. Where termination does occur, NSW Government agencies should consider whether the registered CHPs, given their special role and status, should receive any compensation or reimbursement of costs for the period up until the date of termination.

Guidance Note 6: Minimising compliance and reporting burden

6.1 Framework principles

The NSW Community Housing Partnership Framework (the Framework) promotes leveraging the existing NRSCH regulatory framework and overarching community housing agreement compliance and reporting obligations to minimise additional costs in meeting contract-specific compliance and reporting obligations.

As a general principle, the CHIC recommends using these existing controls as the default arrangements for compliance and performance reporting – and any departure from them should have to be explained on an “if not, why not” basis. Additional compliance and reporting requirements should be introduced solely on the basis of the need to manage program- or transaction-specific compliance or performance risks.

6.2 Practice guidance

- Have the parties identified opportunities to reduce tendering costs by leveraging existing compliance and performance information?
 - ✓ Identifying opportunities to leverage existing assurance and performance information provided through the NRSCH, including:
 - Demonstrating organisational capability to meet tenancy and asset management standards (covered in Outcomes 1 and 2 of the National Regulatory Code).
 - Demonstrating organisational capability to work in partnership to promote community housing and to contribute to socially inclusive communities (covered in Outcome 3 of the National Regulatory Code).
 - Demonstrating organisational capability to meet governance, probity and management standards (covered in Outcomes 4, 5 and 6 of the National Regulatory Code).
 - Demonstrating organisational capability to meet financial viability standards (covered in Outcome 7 of the National Regulatory Code).
- Have the parties identified and analysed the costs and impact of any contract-specific compliance and reporting obligations?
 - ✓ Identifying opportunities to leverage ongoing compliance information provided through the NRSCH.
 - ✓ Analysing the value and impact of any additional transaction-specific compliance and reporting obligations on the registered CHP’s capacity to continue to meet the outcomes of the National Regulatory Code – including obtaining advice from the Registrar of Community Housing on the potential duplication of compliance and reporting obligations.
- Have the parties explored opportunities to reduce or eliminate any duplication of compliance and reporting obligations?
 - ✓ Developing information sharing protocols with the Registrar of Community Housing.

- ✓ Standardising collection and reporting of performance information (e.g. common definitions for data collection items, standard reporting formats).

6.3 Legal guidance

Contractual reporting and compliance obligations are of course an important aspect of NSW Government contracts, including its contracts with registered CHPs. In relation to those with registered CHPs, the Framework recognises the need to reduce the time and cost associated with compliance and reporting obligations. A simple and efficient way of doing this is to take advantage of the extensive obligations and controls that already exist, including under applicable legislation, the NRC and community housing agreements (referred to as Existing CHP Regime hereafter).

Utilising the Existing CHP Regime should significantly reduce the need for contract-specific compliance and reporting obligations. Where contract-specific obligations are required, NSW Government agencies should take into account the financial impact such obligations may have on registered CHPs, and ensure that the obligations are not unnecessarily burdensome.

From a drafting perspective, this would entail, wherever possible, provisions that expressly refer to the Existing CHP Regime (or elements of it), rather than bespoke provisions in respect of new or additional obligations. For example:

- Rather than separate reporting in relation to similar matters, a registered CHP could be required to provide each report that is prepared in relation to demonstrating compliance with Performance Outcome 7: Financial Viability, the annual compliance report issued by the Registrar of Community Housing and any material notices to or from the Registrar of Community Housing or a housing agency.
- There could be general obligations on the registered CHP to:
 - have appropriate mechanisms, resources and procedures in place to ensure compliance with the Existing CHP Regime
 - ensure that performance standards under the Existing CHP Regime are met
 - comply with any obligation imposed by the Registrar of Community Housing or a housing agency.

There could be notification obligations on a registered CHP in relation to any failures to observe any of the general obligations referred to above.

If NSW Government agencies decide that separate or additional reporting may be required in certain cases, they should consider adopting standard reporting forms for registered CHPs so as to promote efficiency and reduce the potential for duplication of information, particularly where a registered CHP is involved in, or becomes involved in, multiple procurement processes.

Finally, in relation to any compliance failure by a registered CHP, any steps being taken by that registered CHP to satisfy the Registrar of Community Housing that the failure is being addressed should be taken into account. If the Registrar of Community Housing is satisfied that a failure has been appropriately addressed and is unlikely to be repeated, this could be deemed to remedy the failure for the purposes of a contract with NSW Government agencies.

Guidance Note 7: Avoiding and managing disputes

7.1 Framework principles

The NSW Community Housing Partnership Framework (the Framework) promotes a proactive approach to avoiding and managing disputes between NSW Government agencies and registered CHPs – underpinned by:

- legislative recognition in both the NSW *Housing Act 2001* and the *Community Housing Providers (Adoption of National Law) Act 2012* that a key part of improving social and affordable housing outcomes involves developing community housing as “a viable and diversified component of the New South Wales social housing sector”
- recognition that the national regulatory system provides assurance to government that registered CHPs have already demonstrated their suitability to deliver social and affordable housing outcomes at different risk levels (with significant regulatory controls already in place to deal with monitoring registered CHPs and the risks of registered CHPs failing to meet performance standards)
- the increasing interdependence of government and registered CHPs working collaboratively as part of a shared, multi-provider service system.

7.2 Practice guidance

- Have the parties incorporated lessons learnt from comparable programs into the commissioning and procurement process?
 - ✓ Undertaking formal post-implementations review of major programs to identify lessons learnt.
 - ✓ Documenting and communicating how lessons learnt and continuous improvement are incorporated into the commissioning and procurement process.
- Have the parties incorporated a dispute avoidance or dispute resolution mechanisms into the commercial and contractual framework?
 - ✓ Opportunities for independent dispute avoidance and dispute resolution related to any risk transfer and unanticipated outcomes related to unforeseen circumstances.

7.3 Legal guidance

In the interests of fostering the interdependent relationship of the NSW Government and registered CHPs and preserving the financial viability of registered CHPs, disputes should be avoided where possible, and appropriately managed and resolved when they do arise.

An important part of avoiding disputes could be ensuring that the contractual framework between NSW Government agencies and registered CHPs is based on a collaborative contracting approach. Under that approach, issues which could result in disputes in conventional procurement models would, in the first instance, be addressed through good faith discussions, negotiation and mutually satisfactory resolution. Another important part of avoiding disputes is ensuring that the contractual obligations of the registered CHP are appropriate and not unnecessarily burdensome – e.g. they do not involve inappropriate transfer of risks to the registered CHP and, wherever possible, take advantage of requirements that already apply such as under the National Regulatory Code.

Where disputes arise, it is in the interests of both the parties to resolve the dispute as efficiently as possible, with minimal costs. Contracts between NSW Government agencies and registered CHPs should therefore include balanced dispute resolution provisions, aimed at avoiding costly and time-consuming litigation. Dispute resolution clauses that require a tiered disputes process, whereby the parties must discuss and negotiate for a reasonable period before any formal dispute proceedings can be commenced, should be the norm. For example, a clause which requires the parties to confer within, say, 14 days after receiving a notice of dispute, to resolve the dispute, would be appropriate. If the dispute is not resolved within a prescribed period of time, the dispute may then be escalated within the parties (e.g. to senior officers). If that is not successful, the dispute could then be referred to more formal dispute resolution. It would seem preferable that NSW Government agencies elect to utilise mediation, arbitration or expert determination as the formal dispute resolution mechanism, as these methods are generally far more cost and time efficient than litigation and allow the dispute to remain confidential. Confidential dispute resolution should assist in preserving the reputation of each of, and maintaining the relationship between, NSW Government agencies and registered CHPs.

Where the contract contains a clause referring the dispute to arbitration (i.e. an arbitration agreement), in general, neither party will be able to commence court proceedings. In the event that the contract does not contain an arbitration agreement, it would seem prudent to include a clause that requires each party to exhaust all dispute resolution procedures under the contract before initiating court proceedings (unless urgent or exceptional circumstances apply).