Law Council
OF AUSTRALIA

Legal Practice Section

16 December 2025

Sue Woodward AM
Commissioner
Australian Charities and Not-for-profits Commission
GPO Box 5108
Melbourne VIC 3001

By email: CIS@acnc.gov.au

Dear Commissioner Woodward

Draft Commissioner's Interpretation Statement on Charities' provision of housing

1. This submission has been prepared by the Charities and Not-for-profits Committee of the Law Council of Australia's Legal Practice Section. The Committee welcomes the opportunity to make a submission to the ACNC in relation to the draft Commissioner's Interpretation Statement on Charities' provision of housing (**CIS**).

2. The Committee welcomes the draft update of this CIS and agrees that it substantially achieves its aims of:

   - clarifying the ACNC's approach to assessing poverty, distress and disadvantage in relation to the provision of housing by charities—however, we request some more clarity in the CIS as to when a housing organisation is eligible as a PBI given the focus of the CIS is on the relief of poverty, distress and disadvantage in relation to the provision of housing;
   - providing guidance on tenant cohorts that are commonly prioritised for housing;
   - updating home ownership guidance to make clear where the ACNC will accept that any private benefit is incidental or ancillary;
   - providing more detailed guidance on how we assess benefits to third parties, including private and public investors; and
   - provide new guidance on multi-party Special Purpose Vehicles for new and existing charities, including in relation to managing complex structures and governance risks.

3. The main areas in the CIS that we recommend be reviewed by the ACNC, and clarified, relate to the overlap in the CIS of the not-for-profit (**NFP**) meaning, private benefits and an independent non-charitable purpose versus an incidental purpose.

4. We have made some comments in the CIS (**attached)** and also set out our explanations below. In summary:

   - The CIS currently mixes the concepts of NPF, private benefit and independent, non-charitable purpose.
   - The concept of NFP is about ensuring that all the assets and income of the charity are applied for its purposes and not distributed to its members in their capacity as members.
   - Private benefits are benefits provided outside of the beneficiary class (or in excess of reasonable benefits to the beneficiary class).
   - Providing private benefits may indicate an independent, non-charitable purpose if it is not incidental to the charitable purpose.

Not-for-profit

5. The meaning given in the CIS for being an NFP mixes this requirement with the provision of private benefits. This is not correct and does not reflect the model wording for constituent documents provided by the ACNC to satisfy this requirement. It will be clearer if the NFP requirement is kept separate to the private benefits discussion as the NFP requirement is primarily about ensuring all the assets and income are applied for the charitable purposes.

6. Paragraph 11 of the CIS incorrectly refers to an NFP as not operating for "the profit, personal gain or other benefit of particular people or organisations (for example, its members, the people who run the organisation, or their friends or relatives)". The committee appreciates that this is taken from the statement the ACNC has on its website for NFP. But this definition refers to the private benefit which may indicate a non-charitable independent purpose rather than the NFP requirement. The NFP requirement is about ensuring all the assets and income of the charity are applied for its purposes and not distributed to its members in their capacity as members.

7. Paragraph 14 refers to paragraphs 104 and 110 for further guidance.

   - Paragraph 104 relates to private benefits:
     - It incorrectly states that, to meet the NFP requirement, a charity cannot provide unreasonable or excessive benefits or payments to third parties. The cross-referenced paragraph in the Explanatory Memorandum to the *Charities Bill 2013* does not say this is part of the NFP requirement, and is in a section describing private benefits.
     - The NFP requirement is concerned with distributions of profit to its members in their capacity as members and so the reference to 'distributions of profit' in the context of providing private benefits is confusing and unnecessary.
   - Paragraph 110 does not seem to refer to the NFP requirement.

8. Paragraph 22 does not need the words in brackets, which refer to direct distributions of profit.

9. In the context of housing providers, it may assist in explaining the NFP requirement with the restriction on equity investment.

Private benefits and non-charitable purpose

10. The explanation of private benefits needs clarifying to distinguish the elements. It will be a 'private' benefit if the benefit is to a non-beneficiary of the charity. It will be a benefit, for example, if it is below market rent or above market investment returns. It is not a private benefit if it is provision of goods or services at fair market rates but such an activity will be relevant in determining charitable purpose and whether the purpose of doing this activity is a means to achieve the charitable purpose, or an end in itself.

11. The explanation of private benefits in the context of bringing either an incidental purpose or an independent non-charitable purpose is in many different places in the CIS. The committee considers that it will be more helpful to collect these explanations under a heading near the beginning of the CIS 'Private Benefits' and ensuring the language is consistent throughout the CIS.

12. Paragraph 9 refers to the concept of incidental purposes, which is relevant to the discussions on private benefit, but paragraph 21 is the first explanation of private benefit.

13. The explanation of private benefits currently in paragraph 65 could be moved to this part of the CIS as it is clear and correct. Similarly, the clear and correct statement along the lines of that in paragraph 111 could also be moved to this part of the CIS to explain the consequence of providing private benefits as an end in itself—i.e. not necessary or incidental to, or a consequence of, carrying out the charitable purpose.

14. The provision of private benefits will not be viewed as an independent non-charitable purpose if it is a means of achieving, or naturally tends to go with achieving, or is a necessary or incidental consequence of, the carrying out of the charitable purposes. The references to 'merely incidental' or sometimes just 'incidental' and sometimes 'ancillary and incidental' are confusing—especially the insertion of the word 'merely'. In addition, slightly different formulations are used in different paragraphs (cf paragraphs 9 and 22). The committee suggests that these words be reviewed throughout the CIS for consistency (see, for example, paragraphs 22, 23, 64, 98,101) and an overarching definition be provided at the start which is then referred to throughout.

15. If the introductory words of paragraph 23 are reviewed, as noted above, the remainder of this paragraph is clear and helpful.

16. Paragraph 86 could more clearly explain that, where the private benefits are not necessary or incidental to, or a consequence of, the carrying out of the charitable purposes, this will be considered an independent non-charitable purpose (and that is why such benefits are 'impermissible' though there does not appear to be any need to refer to 'impermissible private benefits' and the committee suggests this is deleted as it is potentially confusing).

17. Paragraphs 102 and 103 are very helpful and the statements and explanations regarding private benefit and independent non-charitable purpose in the CIS need to be consistent with these paragraphs.

18. The Committee would welcome the opportunity to discuss this submission with the ACNC. In the first instance, please contact the Charities and Not-for-profits Committee Chair, Alice Macdougall [redacted]

Yours sincerely



Greg McIntyre SC
Chair, Legal Practice Section

Committee's responses to the specific aspects set out in the Consultation

Consultation Paragraph[1]	Response
Requirements for registration as a charity	
Paragraph 9: The ACNC accepts that a purpose will be incidental or ancillary to an organisation's charitable purpose if it is a means of achieving, or naturally tends to go with achieving, or is a necessary or incidental consequence of the activities done to carry out the charitable purpose.[2] Ancillary or incidental does not mean a purpose that is minor in quantitative terms.[3]	We suggest you have a separate heading for private benefit and collect all the paragraphs dealing with this - in particular 21,22, 23, 65 and 111. And note that this is referred to throughout the CIS as 'incidental' and review the CIS to ensure this is used consistently. In particular delete 'merely' as this is confusing. It is important to include not just the means and the ancillary but the consequence aspect of 'incidental and ancillary purposes'. In Inland Revenue Commissioners v Forrest, Lord Macnaghten asks whether the benefit to a civil engineer of joining the Institution of Civil Engineers is "the purpose of the society, or is it an incidental, though an important and perhaps a necessary, consequence of the way in which the institution does its work in the pursuit of science?" Lord Millet in Re Crown Forestry Rental Trust [2004] [2004] 4 All ER, [36] quoted in Rotary Club of Melbourne Inc v Commissioner of State Revenue (2018) 58 VR 70, [47]: i. "The distinction is between ends, means and consequences. The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost."

[1] Some wording in paragraphs is underlined for the purposes of making comments.

[2] See, eg, *Navy Health Ltd v Deputy Commissioner of Taxation* (2007) 163 FCR 1; [2007] FCA 931, [65], C*ongregational Union of New South Wales v Thistlethwayte* 1952) 87 CLR 375 and *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436. Inland Revenue Commissioners v Forrest (1890) 15 app Cas 334, Rotary Club of Melbourne Inc v Commissioner of State Revenue (2018) 58 VR 70, [47]:

[3] *Navy Health Ltd v Deputy Commissioner of Taxation* (2007) 163 FCR 1; [2007] FCA 931, [65].

Consultation Paragraph[1]	Response
Not-for-profit	
Paragraph 11: Charities are required to be not-for-profit.[4] A not-for-profit is generally an organisation that does not operate for the profit, personal gain or other benefit of particular people or organisations (for example, its members, the people who run the organisation, or their friends or relatives).	This wording mixes the strict not-for-profit meaning with a purpose of providing private benefit. We realise that this is on the website but it does not reflect the acceptable NFP clause. We suggest this sentence is replaced by: 'Being a not-for-profit means that the assets and income of the charity are applied solely to further its purposes and no portion can be provided to the members of the charity in their capacity as members. Where a housing provider's members are charities with substantially the same purposes, it will be consistent with carrying out the housing provider's purposes and the NFP requirement for the housing provider to support its members in their capacity as charities with similar purposes.' It is worth adding the comment as to providing benefits to members in furtherance of the charitable purposes as this is not uncommon in housing groups of charities and the use of SPVs and is reflected in the ACNC's website.
Public Benefit	
Paragraph 21: If a charity provides benefits to people who are not the intended beneficiaries—or who fall outside the class of people the charity pursues its purpose for—those benefits are known as 'private benefits'.	This is not correct. It won't be a 'benefit' to provide housing at market rental to non beneficiaries. The issue is not private benefit but this goes to the reasons why the charity is doing this and goes to purpose. This last statement could be replaced with: 'it can only do so if it is necessary and consistent with, or a consequence of, carrying out the charitable purpose.'
Paragraph 22: An organisation will continue to meet the definition of charity where it provides private benefits (as opposed to direct distributions of profit) that are merely incidental to the achievement of its purpose. A private benefit will be incidental where it is a	Please see our comments in the letter and review this paragraph for consistency and clarity. The explanation of private benefits currently in paragraph 65 could be moved to a part of the CIS explaining private benefit as it is clear and correct. Similarly, the clear and correct statement along the lines of that in paragraph 111 could also be moved to this part of the CIS to explain the consequence of

[4] *Charities Act 2013* (Cth) s 5.

Consultation Paragraph[1]	Response
necessary consequence or by-product of carrying out its charitable purpose.[5]	providing private benefits as an end in itself: ie not necessary or incidental to, or a consequence of, carrying out the charitable purpose. It needs to be clearer that private benefit goes to the purpose of the entity.
Relief of Poverty	
Paragraph 26: In Australia it is recognised that everyone should have access to safe and suitable accommodation as a basic necessity. A charity with a purpose of relieving poverty may support this by helping people who cannot, by drawing on their own resources, afford appropriate housing. This assistance may relate to housing in an area where the person reasonably chooses to live, and where the housing would provide a modest standard of living in the applicable Australian community.	What is reasonable? The examples seem to require a greater connection than is suggested by 'reasonably chooses' such as support or health services. Please provide more examples.
Paragraph 30: The ACNC takes a holistic and multi-factor approach to poverty (set out at paragraph 39 below). The Commissioner will not assume household poverty based solely on income levels, assets thresholds or classifications as "very low", "low" or "moderate" income earners.[6] This is appropriate since charity law must be flexible to address changing needs over time, and a contemporary conception of poverty is not limited to financial hardship. Poverty is 'a complex state of affairs linked to various social issues including drug and alcohol misuse and family violence.'[7]	Check the paragraphs in footnote 27 reference and change to [51]–[52]. At footnote 28, the reference should be to para [51].

[5] *Charities Act 2013* (Cth) s 6(3). See, eg, *Inland Revenue Commissioners v City of Glascow Police Athletic Association* [1953] AC 380, 396, *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 670 and *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318.

[6] *Community Housing Ltd v Clarence Valley Council* [2014] NSWLEC 193, [74] (Harrison J) upheld in *Community Housing Ltd v Clarence Valley Council* (2015) 90 NSWLR 292, [65]-[88]. The judgment of Harrison J refers to moderate income, 'whatever "moderate" may mean at any particular time.'

[7] *YWCA Australia v Chief Commissioner of State Revenue* [2020] NSWSC 1798, [52].

Consultation Paragraph[1]	Response
Paragraph 33: The Commissioner recognises that, in Australia, the 30/40 rule is often used as a benchmark for whether a household is experiencing "housing stress". The 30/40 rule refers to households with housing costs of more than 30% of the household income, and with income in the bottom 40% of Australia's income distribution.[8] Households that meet the 30/40 rule have less income available for other essential costs[9] and are less able to maintain a modest standard of living in Australia. Some housing providers discount what they charge to households that meet the 30/40 rule to ensure the housing costs do not exceed 30% of the household income. The Commissioner recognises that such discounting is likely to be consistent with a charitable purpose of providing housing for the relief of poverty.[10]	At footnote 31, check link or don't embed a link in the footnote.
Factors relevant in determining poverty, distress or disadvantage	
Paragraph 39: Several factors may be relevant in determining whether a person is in poverty, distress or disadvantage such that they need relief through the provision of housing. These include: • their income and assets[11] • any specific disadvantage or distress they may have suffered (for example, a person escaping domestic violence needing refuge or crisis accommodation) • their eligibility for government assistance relevant to the relief of poverty (for example,	With respect to 'their geographic location and their need to obtain accommodation' etc, compare this to 'reasonably chooses' and the examples. This is a key factor and would benefit from more explanation.

[8] Yates J 2007, Housing affordability and financial stress, NRV3 Research paper 6, Melbourne: AHURI.
[9] AHURI, *Understanding the 30:40 indicator of housing affordability stress* (23 May 2019), https://www.ahuri.edu.au/research/ahuri-briefs/3040-indicator.
[10] This is assuming that the households are unable to provide a modest standard of living in the applicable Australian community.
[11] *Common Equity Housing Ltd v Commissioner of State Revenue* (1996) 33 ATR 77; *Trustees of the Mary Clark Home v Anderson* [1904] 2 KB 645.

Consultation Paragraph[1]	Response
means tested social security payments, rent assistance, or access to social housing (including public and community housing))[12] • their dependents and the needs of the dependents [13] • the cost of providing the other necessities of life[14] • the suitability of their existing accommodation (including state of repair and overcrowding) • their ability to sustain a successful tenancy or live independently, without appropriate support in place • any verified long-term barriers to accessing or maintaining other housing options, including discrimination • their geographical location and their need to obtain accommodation in that location and its surrounds, and the cost and availability of accommodation in their location, and the income required to acquire and maintain accommodation in that area and its surrounds	
Paragraph 41: Many households whose needs might have been met in the private rental market may find that changing market conditions now make it extremely difficult to find suitable housing in the area where they need to live. Some of these households may have scope to move somewhere more affordable, but for others, choices may be limited, and it may not be reasonable to relocate or commute. For this reason, the Commissioner accepts that	With respect to underlined paragraphs, see above comments on this issue.

[12] The Commissioner considers this to be a relevant factor because eligibility for means tested social security payments is generally indicative of "poverty" in a legal sense, as is eligibility for rent assistance or public housing.

[13] The Commissioner considers that this factor is relevant to determining the level of resources required to deliver accommodation that would provide a modest standard of living in the Australian community for a given household.

[14] The Commissioner considers that this factor is relevant to determining whether overall, the cost of providing the necessities of life, including housing, is such that a modest standard of living is not able to be achieved.

Consultation Paragraph[1]	Response
it is relevant to consider a household's need to live in a particular location when determining whether that household is experiencing poverty, distress or disadvantage.	
Home ownership (including shared equity and rent to buy)	
Paragraph 64: However, providing housing through a home ownership scheme rather than rental assistance or access to other forms of accommodation may lead to beneficiaries receiving a private benefit that is not ancillary or not incidental to a charitable purpose.[15]	With respect to the underlined words, we suggest it would be clearer to state: '...may demonstrate a purpose which is not directed to the relief of poverty, distress or disadvantage due to beneficiaries receiving a private benefit that is not incidental to that charitable purpose.' With respect to footnote 59 the Queenstown Lakes decision has been disapproved in South Australian Chamber of Commerce case. Consider whether this case should be relied on as it may have been decided differently in Australia. NZ takes a narrower view of private benefit. Consider moving the cross-reference to Rowntree to para 63 since it was considered charitable.
Paragraph 65: A private benefit is generally a benefit that a person receives *other than* as a beneficiary. However, the over-provision of a benefit to a beneficiary or benefit that does significantly more than meet or relieve a recognised charitable need may also become an unacceptable private benefit for ACNC purposes	Add in "indicating a non-charitable purpose".[16]
Paragraph 66: Charities can adopt a range of safeguards to increase the likelihood that private benefits are merely incidental to a charitable purpose. For example:	We suggest re-writing the first sentence: Charities can adopt a range of safeguards to increase the likelihood that assistance in home ownership are in furtherance of or incidental to a charitable purpose.

[15] *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-485-1818 [24 June 2011], [41] (MacKenzie J), [71]; *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288.

[16] Dal Pont, G.E. *Law of Charity* (LexisNexis Butterworths, 2021), [8.4]; *City of Hawthorn v Victorian Welfare Association* [1970] VR 205, 209 (Smith J; Pape and Gillard JJ agreeing).

Consultation Paragraph[1]	Response
• restrictions or conditions on the disposal of the home during the loan repayment period or on the death of the beneficiary, and prescribing how any proceeds from the sale are to be allocated if the restrictions or conditions are not complied with as a deterrent • where individuals are not required to provide a significant deposit to qualify for a home ownership scheme because this may mean that they are not in poverty • for a property co-owned by a charity and a household, each contributes equity and each is entitled to the proportionate share of equity on disposal, limiting the household's equity uplift and allowing the charity to recycle profits and reinvest in supplying new homes[17] • providing housing on condition that the property is not used for purposes other than as a residence for the individuals, or else it will not continue to be relieving their need for housing[18] • in a home ownership scheme for relief of poverty, including a mechanism to review the arrangements if a beneficiary's financial position improves to the point that they can afford a commercial mortgage.[19]	With respect to underlined second bullet point, this is a test of eligibility not private benefit? With respect to footnote 63, the decisions of the UK Charity Commission are only available on payment of a fee, so consider seeing if the ACNC can download a copy of the decision to be available on its website?

[17] A similar arrangement was endorsed by the Court in *Joseph Rowntree Memorial Trust Housing Association Ltd and others v Attorney-General* [1983] 1 All ER 288.

[18] Sensible exceptions, for example, to seek medical treatment may be contemplated.

[19] *Garfield Poverty Trust* [1995] 3 Decision of the Charity Commissioners 7; *Habitat for Humanity* [1995] 4 Decisions of the Charity Commissioners 13.

Consultation Paragraph[1]	Response
Paragraph 67: An example of the factor set out in the first dot point at paragraph **66.**, is the United Kingdom decision of *Habitat for Humanity*.[20] In that decision, the loans provided to beneficiaries were subject to the following conditions: a) if the beneficiary disposed of the property within 20 years, they would have to repay the loan together with a proportion of the then market value of the house calculated by reference to the number of years the loan had existed; and b) if the beneficiary died, or if there was any other disposition, then the loan and a similar proportion of the increase in value became payable to Habitat for Humanity.	With respect to footnote 64, the decisions of the UK Charity Commission are only available on payment of a fee so consider seeing if the ACNC can download a copy of the decision to be available on its website?
Definitions	We suggest that the Definitions section would be better at the beginning of the document.
Affordable Rental Housing	
Paragraph 75: For example, merely providing housing at a discount to market rates to tenants who are not experiencing a recognised charitable need, or who are not selected on the basis of a transparent and needs-based assessment, is unlikely to be for the charitable purpose of relieving poverty, distress or disadvantage.	This is unlikely to be any charitable purpose and may indicate a non-charitable private benefit purpose. This should be clarified and not limited to relief of poverty, distress or disadvantage.
Paragraph 77: The Commissioner recognises that some households that are eligible for affordable housing programs may be experiencing poverty, distress or disadvantage. If affordable housing tenure is offered to households experiencing poverty, it may be necessary for the housing provider to provide further discounting to ensure	This is confusing as this will still be a charitable purpose of relieving distress and disadvantage and to some extent relieving poverty by providing an essential element: ie housing. Why is this paragraph helpful or necessary? If anything, the fact that the person may still be in poverty but has housing is confirmed to be a charitable purpose.

[20] *Habitat for Humanity* [1995] 4 Decisions of the Charity Commissioners 13.

Consultation Paragraph[1]	Response
that the provision of housing is genuinely affordable and for the charitable purpose of relieving poverty.[21] In many locations, a 25% reduction to market rent may leave households in a position of ongoing poverty. In these circumstances it may be more difficult to establish that the affordable housing activity is being pursued for a charitable purpose of relieving poverty.	
Key Worker Housing	
Paragraph 78: Some housing programs, including affordable housing, may seek to target key workers. There is no consistent definition of a 'key worker'. For the purposes of this Statement, a key worker generally is someone employed to perform a key civic job or essential service to benefit the public, and who generally must be physically present to perform their job (for example, a support worker for someone with a disability). This includes people employed in the public, charity or not-for-profit sectors, or by another employer engaged in providing equivalent services to benefit the public.	This section deals only with affordable housing and no other examples such as where key workers are provided discounted or free accommodation to incentivise them to work in an area such rural or remote areas. Either include these examples or limit this sentence to refer only to affordable housing for key workers.
Paragraph 86: In contrast, if key workers are selected without regard to such matters and are eligible for housing support based on their occupation alone, this may indicate the key worker housing is not provided for the purpose of advancing social or public welfare or, alternatively, may involve the provision of impermissible private benefits to key workers (that are more than merely incidental).[22]	Delete—see our comment on para 24

[21] See paragraph 0 of this Statement for an example of such discounting.

[22] For guidance on how we assess incidental and non-charitable purposes, see paragraph **Error! Reference source not found.** to **Error! Reference source not found.** and **Error! Reference source not found.**-**Error! Reference source not found.**. Cases about professional and member-based associations and purposes that involve industry and commerce are illustrative of how incidental private benefit can be identified. See, eg, *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318, *Re Chamber of Commerce and Industry of Western Australia (Inc) and Commissioner of State Revenue* [2012] WASAT 146.

Consultation Paragraph[1]	Response
Conducting commercial activities to raise funds (including mixed-tenure developments)	Given the comment in para 96 this heading should be Mixed tenure developments (including conducting commercial activities to raise funds)
Paragraph 95: To provide a simple example, a mixed-tenure development may offer rental accommodation at two price points—one level at lower cost and the second at a higher cost. The lower cost accommodation may be more easily identified as being for the relief of poverty, provided the beneficiaries meet the requirements outlined in paragraphs 25 to42. If the higher cost accommodation is to be provided for the purpose of relieving poverty, the tenants must either be in need of relief from poverty (in which case the rent may be discounted if appropriate) or the rental arrangement must be structured to fund its charitable purpose. If the latter is asserted, the charity must be able to demonstrate a clear intention to generate funds that can be applied to the core charitable purpose.	With respect to underlined words, and this must be at least market rent or it would be a private benefit - the ACNC should explain that a clear intention can be demonstrated by ensuring the rent is at market rates.
Paragraph 96: Beyond cross-subsidising the cost of social and affordable housing for a charitable purpose and opening up additional funding mechanisms, the Commissioner recognises that charitable housing providers may wish to pursue mixed-tenure developments for other reasons. For example, preventing a high concentration of households experiencing poverty, distress or disadvantage in one place and improving the quality, amenity, inclusion	With respect to underlined words, explain that this may allow below market rents?

Consultation Paragraph[1]	Response
and liveability of the housing for residents.[23]	
Paragraph 98: An organisation that proposes to undertake commercial activities to fund its housing provision should consider how it can evidence that the profits from any commercial activities are to be used to pursue a charitable purpose and do not amount to an independent non-charitable purpose.[24] If an organisation provides housing to people who are not in need of charitable relief, the evidence would also need to demonstrate the benefits to such residents are merely incidental or ancillary to its charitable purpose.[25]	Market rent to non-beneficiaries is not really an issue of private benefit but more an issue of purpose. The question is: is the reason to enable the charitable purpose and therefore is the proportion and amount reasonable in this context.
Paragraph 99: Evidence of an organisation's purpose could be in its governing rules, its operational or business plan, website, history of formation, annual report and in financial records showing that profits from commercial activities are in fact used to fund housing to pursue a charitable purpose.	With respect to underlined words, for a charitable purpose.
Paragraph 100: Sometimes the circumstances and history of an organisation's formation or incorporation may support a finding of an independent, non-charitable purpose.[26] For example, an organisation's history of formation may be relevant where an existing for-profit property developer seeks to establish a not-for-profit housing organisation and to retain a strong level of control over the governance and operations of the not-for-profit entity, including by designing	To be consistent with the references to Word Investments and VWL in footnote 74 please add 'when viewed holistically'. This sounds like this factor (an organisation's history of formation may be relevant where an existing for-profit property developer seeks to establish a not-for-profit housing organisation and to retain a strong level of control over the governance and operations of the not-for-profit) could be determinative rather than one aspect of a holistic review. Many charitable

[23] Khor, L., Taylor, L., Glackin, S., Rowley, S., Siebel, S., Tinios, D., Aziz, R. (2023) From mixed tenure development to mixed tenure neighbourhoods, AHURI Final Report No. 412, Australian Housing and Urban Research Institute Limited, Melbourne, <ahuri.edu.au/research/final-reports/412>.

[24] That is, a purpose that is and end itself and not merely incidental or ancillary to and in furtherance of a charitable purpose.

[25] For further guidance on how we assess whether private benefits are incidental or ancillary, see paragraphs 8 to 10 and 20 to 24 .

[26] See, eg, *Commissioner of Taxation v Word Investments* (2008) 236 CLR 204, 217 (Gummow, Hayne, Heydon and Crennan JJ); *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318, 352.

Consultation Paragraph[1]	Response
arrangements between the parties that are designed to benefit the for-profit company and are not on commercial, arms-length terms.	SPVs are set up by for-profits with controls over governance and operations. With respect to the latter underlining, it is this aspect that demonstrates the lack of charitable purpose not the level of control over the governance and operations which may be necessary under the terms of the financing arrangements. Please review as this suggests that for profit entities cannot control the governance or operations of a charity which is not correct.
Commercial arrangements with third parties (including public and private investors)	
Paragraph 102: An organisation is more likely to demonstrate that it is furthering its charitable purposes if, for example:	Paras 102 and 103 are very helpful and the statements and explanations regarding private benefit and independent non-charitable purpose in the CIS need to be consistent with these paragraphs.
Paragraph 104: Similarly, to meet the not-for-profit requirement, charities must not provide benefits or payments to third parties, including officers, suppliers and associates that exceed what is reasonable or appropriate.[27] Even if a commercial activity is generating profits for a charitable purpose, unreasonable or excessive payments, service fees and investment returns can be viewed as distributions of profit, prior to the application of profits to charitable objects.[28] In these circumstances, the organisation will not meet the not-for-profit requirement and so will not be eligible for registration as a charity.	The underlined text is incorrect - this is not the NFP requirement but relates to private benefit. We suggest this is deleted. The reference in the EM referred to in the footnote is in relation to private benefits and it does not state this is required to meet the NFP requirement. This ("can be viewed as distributions of profit, prior to the application of profits to charitable objects") is an issue of private benefit and not the NFP requirement, unless it is a distribution of profit to its members in their capacity as members. in relation to the footnotes these also are referring to private benefit not the NFP requirement. Section 6 of Charities Act deals with public benefit and does not refer to profits. The reference to profits in this paragraph comes from Dal Pont's book (cited)and it is used in the context of applying profits for the charitable purpose and notes distributions of profits infringe the proscription against private benefit.

[27] Explanatory Memorandum to the Charities Bill 2013, [1.69].
[28] *Charities Act 2013* (Cth) s 6(3), Dal Pont, G.E. *Law of Charity* (LexisNexis Butterworths, 2021), [2.17], [3.25] – [3.29].

Consultation Paragraph[1]	Response
	Suggest replacing the NFP requirement with the public benefit requirement in having charitable purposes.
Multi-party Special Purpose Vehicles (SPV)	
Paragraph 110: Some multi-party SPVs may seek to apply for registration as a charity. A multi-party SPV that carries on a commercial enterprise will not be charitable simply because it is controlled by or associated with another organisation that is charitable.[29] It is the purpose of the multi-party SPV itself, not the purpose of its members or associates, that must be determined. Charitable status cannot be attributed to an organisation merely on the basis that it generates some funds for a charity.	At the moment this underlined statement doesn't sit well with paragraphs 89 - 93 on Word Investments and we suggest your intended meaning should be clarified by expanding the statement.
Paragraph 112: Governance and contractual arrangements for multi-party SPVs can be complex. Below are some considerations for charities to keep in mind when deciding whether to form a multi-party SPV and which may be relevant to the ACNC's assessment of a multi-party SPV's entitlement to registration as a charity: • the nature of an investor's contribution to the SPV and the terms for repaying any debt finance. Charities must operate on a not-for-profit basis and cannot access equity finance from investors • whether the SPV's housing assets for social and affordable housing can be converted or subject to a change in use (for example to market rental) during the funding period. If assets can have a change in use, the organisation must be able to	This (underlined text) should be expanded to explain that charities should ensure the debt financing terms are fair and reasonable in the investment market and reinforce that charities cannot issue equity and pay profit distributions to shareholders.

[29] Explanatory Memorandum to the Charities Bill 2013, [1.43].

Consultation Paragraph[1]	Response
demonstrate how this furthers the organisation's charitable purpose • what happens to the SPV's housing assets when the funding program ends or when the SPV winds up? In some cases, assets may be transferred to a charitable community housing provider which ensures assets continue to be used for a charitable purpose. However, if assets are sold or 'divested' prior to winding up—with sale proceeds distributed among the members or returned to investors—the organisation must be able to demonstrate that this furthers its charitable purpose, and is consistent with its character as a not-for-profit organisation.	This (underlined text) needs to be explained in the context of the NFP requirement - as no distributions to members in their capacity as members but may be acceptable if distributed to a member which is another charity in furtherance of the purposes?
Government housing schemes	
Paragraph 114: On the other hand, an organisation providing housing in a manner coincidental with government policy, or with the assistance of government funding, incentives, or subsidies, is not necessarily ineligible for registration as a charity.[30] Again the focus is on determining if the organisation's purpose is charitable under the *Charities Act*.	The way this is worded indicates that government funding is neutral or may point away from charitable purpose. In fact it is the opposite. Australian courts have recognised the significance of government funding in determining that a particular charity has charitable purposes for the public benefit (see for example *South Australian Employers' Chamber of Commerce and Industry Incorporated v Commissioner of State Taxation* [2017] SASC 127 at [265] and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* (2005) 219 ALR 647 at [63]). In *Commissioner of Taxation v Triton Foundation* (2005) 147 FCR 362, the Court took into account '(1) Triton's history, in particular that it was created

[30] *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* [2006] HCA 43.

Consultation Paragraph[1]	Response
	following upon an initiative sponsored by the Federal Government; (2) that Triton was in receipt of state government funding' to conclude that 'its principal object and activities can fairly be regarded as beneficial to the public as a whole'.
Can a Public Benevolent Institution provide housing?	Reconsider this part as: Many if not most housing providers are PBIs The majority of the CIS references the relief of poverty, distress and disadvantage see para 15–19, pp 25, etc People in housing need may not be in poverty but are clearly distressed the ACNC should clarify if it accepts this as within a PBI Clarify whether affordable housing referred to in para 67 comes within PBI.
Relationships with government	Change the heading as government funding and incentives are dealt with above and this section deals with the winding up provisions only.
Examples of how we will apply this Commissioner's Interpretation Statement	
Example 1 (Factors relevant to determining poverty, distress or disadvantage) Organisation A prioritises tenants that meet eligibility rules for its dwellings in this regional city. These rules include income limits and asset thresholds that are higher than the state social housing thresholds, and which also consider a tenant's need to live in that location (including, for example, a need to live close to health and other essential support services). *Organisation A is likely to be a charity with an 'advancing social or public welfare' purpose.*	With respect to underlined text, could more examples be provided such as where the children go to school, where the person's employment is, where all their family and friends are? Also, being close to religious communities?

Consultation Paragraph[1]	Response
Even if a few of its tenants were not be eligible for government assistance, and could afford to access housing that would provide a moderate standard of living in a different location, Organisation A provided adequate information to demonstrate that its tenant selection criteria targeted people experiencing poverty, distress or disadvantage in line with the factors set out in paragraph 39 of this Statement (including local context and a household's need to obtain accommodation in that location).	The example should also clarify that Organisation A is eligible to be a PBI.
Example 2 (Home ownership) Organisation B's objects are to relieve poverty, distress or disadvantage by providing support to people in need so they can purchase their own home. The organisation's efforts particularly focus on families with single incomes and dependents. Organisation B operates in an area where affordable rental accommodation and social housing are in very short supply. It has detailed selection criteria that focuses on households earning low incomes who are eligible for government assistance, and for whom relocating is not a reasonable alternative.	With respect to underlined text, could examples be provided please?

Consultation Paragraph[1]	Response
Example 5 (Affordable housing and commercial activities) … *Organisation F appears to have an 'advancing social or public welfare' purpose. To support the efficient assessment of applications of this kind, we recommend that applicants provide detailed submissions, including in relation to governance, tenant selection, tenancy management and financing.*	With respect to underlined text, how detailed - a letter outlining these matters or copies of the underlying agreements?
Example 7 (Key worker housing) Organisation G's objects include addressing housing disadvantage by providing housing to key workers in need, as well as caring for and supporting the aged or individuals with disabilities. **…** *Organisation G is likely to be a charity with an 'advancing social or public welfare' purpose. It provided information that some of the tenants eligible for its key worker scheme will be experiencing poverty, including cleaners for the not-for-profit aged care facility.* **…** ***Note:*** *If Organisation G's key worker scheme is also open to key workers in occupations that cannot be said to advance social or public welfare, then it will need to consider if this activity is in furtherance of a different charitable purpose, or is merely incidental or ancillary to its 'advancing social or public welfare' purposes.*	With respect to underlined text, the example will be more helpful if it is limited to either 'in need of affordable housing' or not necessarily in need but in order to provide the aged care. With respect to underlined text, why is this information relevant when it relates only to some of the tenants? Poverty is not a requirement in order to be a charity. Is the point here that cleaners in aged care are considered to be key workers? We are not sure as to the point being made in this note as the example does refer to key workers in need which the CIS provides is sufficient to be a charity advancing social or public welfare' purposes?