

Housing Diversity State Environmental Planning Policy Explanation of Intended Effect

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NSW Department of Planning, Industry and Environment

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The NSW Young Lawyers Environment and Planning Committee (**Committee**) make the following submission in response to the Housing Diversity State Environmental Planning Policy (**Housing Diversity SEPP**) Explanation of Intended Effect (**EIE**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO₂ (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The NSW Young Lawyers Environment and Planning Committee comprises of a group of approximately 250 members interested in our natural and built environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of recommendations

1. The proposed Housing Diversity SEPP should set affordable rent requirements for a set percentage of dwellings where rent is set as a proportion of a household's income, with low to medium-income households charged a set percentage (for example, between 25% and 30%) of their before tax income for rent.
2. A student-centric approach is recommended in planning decisions relating to student housing. A student-centric approach in this context means that decisions about student accommodation are made with reference to the best interests of students. Understandings about the best interests of students should be guided by consultation with the students about their needs
3. The proposed 10 m² minimum room size for student housing is recommended to be implemented as a non-discretionary, 'must not refuse,' provision.
4. All new co-living premises (in addition to student housing and build to rent development) should be designed in accordance with passive solar and net zero emissions principles to minimise the ongoing operating costs of the premises as well as mitigate and/or offset the ecological impact of construction and operation.
5. Co-living plans of management should not restrict various types of companion animals that can be kept in the private rooms on the premises.
6. The requirement for boarding houses to be run by a not for profit community housing provider is supported but should be prospective in operation only.
7. The proposed change to remove boarding houses as a mandatory use within the R2 zone should not be made.
8. The 20% maximum for variation of Housing Diversity SEPP development standards is not recommended.
9. A broader review of the *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (Seniors SEPP)* should be undertaken to ensure that the Housing Diversity SEPP provisions:
 - provide incentives to encourage supply and diversity in housing in line with projected demand;
 - align with relevant strategic plans and policies; and
 - provide meaningful guidance for good design of housing for seniors and people with disability.

Introduction

The Committee welcomes the opportunity to comment on the EIE. A broader range of housing diversity is sorely needed across the state, and more flexibility to construct different types of non-traditional housing stock would benefit communities and employers alike. However, this needs to be done in a manner which respects community consultation and does not unreasonably prevent councils from maintaining a reasonable degree of development control over residential and mixed use zones.

The Committee encourages the Department to see the Housing Diversity SEPP as an opportunity to stimulate a range of affordable and suitable housing options being made available and commercially viable to developers across the state, in addition to merely a lever to possibly assist in the economic recovery of the state. Further, this SEPP represents an opportunity for the goal of ecologically sustainable development to be achieved in terms of mandating higher building efficiency levels and striving towards carbon neutral development.

The Committee makes a number of recommendations in this respect.

1. Introducing new housing types

a) Build-to-rent housing

In order to address the ongoing challenges of housing affordability and social cohesion, and contribute to a post-pandemic recovery, planning policy needs to become pro-active and purposeful.¹ The Household, Income and Labour Dynamics in Australia survey shows the rate of housing stress² in Sydney was 10.1% between 2001 and 2004 but reached an all-time high of 13% between 2013 and 2016.³ Renters in Australia have been the category of people most affected by housing stress,⁴ in that nationally one in five low and middle-income renters are in housing stress compared with one in 10 of those with a mortgage.⁵

A global study of affordability in major developed international housing markets⁶ shows that Australia has a 'median price to income multiple' of 6.9 times their annual household income. This is substantially higher than the United States, United Kingdom, Singapore, Ireland and Canada (ranging from 3.9 to 4.8). And of the studied markets by Demographia, only New Zealand (9.0) and Hong Kong (20.9) were higher.⁷

However, we do not agree that a proposal to incentivise the delivery of build-to-rent (**BTR**) housing through the NSW planning system will be actively providing secure, long term rental options in the current context.

¹ 'Land policy for affordable and inclusive housing, An international review', *An international review* (Web page) <<https://smartland.fi/wp-content/uploads/Land-policy-for-affordable-and-inclusive-housing-an-international-review.pdf>>, 17.

² Housing stress occurs when the household has an income level in the bottom 40 per cent of income distribution and is paying more than 30 per cent of its income in housing costs. 'Understanding the 30:40 indicator of housing affordability stress', *AHURi* (Web page) <<https://www.ahuri.edu.au/research/ahuri-briefs/3040-indicator>>.

³ '13th Annual Statistical Report of the HILDA Survey Waves 1 to 16', *HILDA Statistical Reports* (Web page) <<https://melbourneinstitute.unimelb.edu.au/hilda/publications/hilda-statistical-reports>> 46-51.

⁴ *Ibid*, 46.

⁵ Matt Wade, 'Housing Stress in Sydney hits a new high', *The Sydney Morning Herald* (online, 30 July 2018) <<https://www.smh.com.au/business/the-economy/housing-stress-in-sydney-hits-a-new-high-20180730-p4zui1.html>>.

⁶ '15th Annual Demographia International Housing Affordability Survey: 2019', *Demographia* (Web page) <<http://www.demographia.com/dhi2019.pdf>>.

⁷ 'Exploring NSW Housing Affordability', *EPS* (Web page) <<https://epssolutions.maps.arcgis.com/apps/Cascade/index.html?appid=350f3ba2e36c43d8b129b6791c836ba6>>.

BTR schemes around the world have shown us that investment funds and real estate investment trusts (**REITs**) such as Vonovia and Blackstone have expanded to become significant managers of residential rental property across Europe and the US through mortgage defaults and privatisation of social housing. The attraction of foreign capital to REITs has accelerated the flow of global finance into local housing markets, reducing local access to home ownership amongst young and middle-income households and catalysing the creation of new niche BTR residential construction sector.⁸

In addition to the above, the description of the BTR as part of a government solution to the need for more rental housing during the recovery from COVID-19, and generation of more construction jobs is also flawed. As an example, in the UK, the introduction of a similar scheme, Buy-to-Let, meant to enable a BTR market in the country. However, underlying issues around demographic change, affordability, access to mortgage credit, risks for working households and investors, returns on other investment and the outcomes of government macroeconomic policy lie at the core of the low growth of the BTR sector.⁹

In proposing to shift towards more profitable forms of affordable housing and negotiating incentives by means of local planning obligations in the proposed Housing Diversity SEPP to deliver BTR housing development, we suggest that, similarly to what happened in other countries, Australia's current housing problems may not be reduced by institutional investors. Rather, this scheme is focused on profitable investment arrangements, and investors will most likely capitalise on gaps in affordable housing and are unlikely to provide for a more stable rental sector or reduce inequalities accordingly.¹⁰ Global investors, being private equity firms benefitting from tax concessions, have no history of investment to addressing local housing needs, promote community partnerships or neighbourhood improvements. The focus of such entities will most likely be about the extraction of surplus revenue from managing and selling housing assets for the benefit of trust managers and REIT unit holders. As financial abstract entities, REITs will value liquidity above all and therefore value flexible regulation of rents and lease contracts. Hence, any power to raise rents and terminate a tenant's lease or water down similar tenant friendly protections will be viewed positively as this improves revenue, liquidity and allows for raising capital.¹¹ The conception of housing tenancies in terms of assets, liquidity and revenue was exemplified by a real estate analyst Lu-Andrews follows:

*'tenant bankruptcy has a less negative or more positive effect of a landlord's stock returns in a good economic condition. Their story is consistent with growth option theory that, in the event of a tenant's bankruptcy, the landlord firm can exercise the growth option associated with the departure of the tenant, and thus generate higher stock returns.'*¹²

⁸ 'Land policy for affordable and inclusive housing, An international review', *An international review* (Web page) <<https://smartland.fi/wp-content/uploads/Land-policy-for-affordable-and-inclusive-housing-an-international-review.pdf>> 55-57.

⁹ Kath Scanlon, Christine Whitehead and Peter Williams, *Taking Stock, Understanding the effects of recent policy measures on the private rented sector and Buy-to-Let* (LSE London, May 2016) 41 <<https://www.lse.ac.uk/business-and-consultancy/consulting/consulting-reports/taking-stock>>.

¹⁰ Gertjan Wijburg, 'Financialised Privatisation, Affordable Housing and Institutional Investment: The Case of England', *Critical Housing Analysis* Volume 7, Issue 1, 115 <<http://www.housing-critical.com/home-page-1/financialised-privatisation-affordable-housing->>>.

¹¹ Julie Lawson and Hannu Ruonavaara, 'Land policy for affordable and inclusive housing, An international review', *An international review* (Web page) <<https://smartland.fi/wp-content/uploads/Land-policy-for-affordable-and-inclusive-housing-an-international-review.pdf>> 56.

¹² Ran Lu-Andrews, 'Tenant Quality and REIT Liquidity Management' (2017) *Journal of Real Estate Financial Economics* 54:277 <<https://link.springer.com/article/10.1007/s11146-016-9575-y>>.

To combat these challenges, protecting and expanding the scarce supply of affordable and social housing will require a far more strategic and proactive approach to planning policy by both state and federal governments in the immediate future.

Recommendation - social housing investment as a policy priority

According to Melbourne University, 'one of the best investments a government could make during a pandemic is in Australia's flagging social housing system.'¹³

The same publication adds that '[h]ousing inequalities have always compounded and reflected inequalities in health, wellbeing and productivity. The imperative to stay home during COVID-19 has amplified these effects, highlighting the need for investment in affordable and stable housing for low income households. A recent report from the Australia Institute, a think tank researching public policy, highlighted key criteria for choosing appropriate fiscal policies in a pandemic. It recommended targeting populations with a high propensity to consume, activities that create high employment and projects with obvious co-benefits, like improved health outcomes and reduced homelessness. Social housing meets all these criteria.'¹⁴

The BTR incentives proposed to be adopted in the Housing Diversity SEPP, that is likely to target medium to high-income households, does not meet the criteria.

As currently there are no impediments in the NSW planning system to the development of new housing for rental purposes, we do not recommend adopting the proposed BTR housing scheme as it stands, because it does not respond to the underlying and pressing policy issues around affordable and stable rental housing.

In the event that BTR stays as a component of the Housing Diversity SEPP, we recommend that the proposed SEPP should set affordable rent requirements where rent is set as a proportion of a household's income, low to medium-income households may be charged between 25 and 30% of their before tax income for rent. This should be part of a broader integrated BTR housing affordability program. This kind of threshold provides protection from harsher standards which could be imposed by local councils.

Inclusive design

As the government 'will develop specific advice about the parts of *State Environmental Planning Policy No 65 – (Design Quality of Residential Apartment Development)* that are particular to the build-to-rent typology', we recommend that the new development design, should by default accommodate for the needs of people living with a disability, by identifying particular needs, provide inclusive modes of communication and foster effective collaboration with disability services providers.¹⁵

Recommendation 1: That the Housing Diversity SEPP set affordable rent requirements for a set percentage of dwellings where rent is set as a proportion of a household's income, with low to medium-income households charged a set percentage (for example, between 25% and 30%) of their before tax income for rent.

¹³ Katrina Raynor et al, 'Investing in social housing during a pandemic', *Pursuit The University of Melbourne* (Web page) <<https://pursuit.unimelb.edu.au/articles/investing-in-social-housing-during-a-pandemic>>.

¹⁴ Katrina Raynor et al, 'Investing in social housing during a pandemic', *Pursuit, The University of Melbourne* (Web page) <<https://pursuit.unimelb.edu.au/articles/investing-in-social-housing-during-a-pandemic>>.

¹⁵ Ibid.

b) Purpose-built student housing

The Committee welcomes the proposal to incorporate a new definition for, ‘*student housing*,’ in the *Standard Instrument – Principal Local Environmental Plan (Standard Instrument)* prescribed in accordance with s 3.20 of the *Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)*. The Committee recommends that planning decisions affecting students, both international and domestic, should be made with a student-centred approach.

The need for a student-centred approach to planning student accommodation

Tertiary education services and associated travel comprised Australia’s fourth largest export and was valued at AUD \$41 billion in 2019.¹⁶ The Committee further notes the decline in this export following the implementation of travel restrictions and associated measures to mitigate the public health risks associated with the COVID-19 pandemic.¹⁷ The recovery of this industry is critical to the economic recovery of Australia in the aftermath of the pandemic.¹⁸

A strong supply of accommodation that meets the needs of international students is a key driver of a rewarding student experience. Current problems distorting the student housing market include a shortage of supply in areas proximate to universities, associated upward pressure on rent and the consequent development of an unregulated shadow market in boarding houses and homestays. Students responding to a survey in the Ryde local government area were more likely to report dissatisfaction with their accommodation arrangements if they were staying in a homestay or a boarding house.¹⁹

The problems associated with unregulated boarding houses and homestays are exacerbated by the vulnerability of the international student demographic. Students often pay a deposit on accommodation before arriving and this leaves them in a vulnerable bargaining position if the accommodation is not as advertised online. Students entering boarding houses and homestays may not enter into a residential tenancy agreement under the *Residential Tenancies Act 2010 (NSW)* or an occupancy agreement under the *Boarding Houses Act 2012 (NSW)* and therefore may not benefit from the protections associated with such an agreement, including the provision of a condition report and deposit of the bond with the Office of Fair Trading. Students can be isolated from support networks in their home countries and may be less likely to assert their rights due to cultural differences around communication and confrontation. All of these factors make it critical to have a variety of fit-for-purpose housing options for students that are appropriately regulated, to ensure both quality and quantity of supply.

The Committee notes that there are many stakeholders in the market for student accommodation such as developers, tertiary education institutions, government and residents. The needs of all stakeholders will be best served with a student-centred approach to planning decision making. A student-centred approach in this context means that decisions about student accommodation are made with reference to the best interests of students. Decisions should be made with “thick” context about what value looks like for this demographic, including preferences for the use of private and shared spaces, price range and location. The Committee submits that this would be best achieved by involving students in the decision making process through formal

¹⁶ Department of Foreign Affairs and Trade, ‘Australia’s Top 25 Exports, Goods & Services,’ *Trade statistics* (Webpage, August 2020) <<https://www.dfat.gov.au/trade/resources/trade-statistics/trade-in-goods-and-services/australias-trade-in-goods-and-services-2019>>.

¹⁷ Peter Hurley, *Issues Paper: International Students Vital to Coronavirus Recovery* (Issues Paper, 2020) 1, <<https://www.vu.edu.au/sites/default/files/issues-brief-international-students-covid.pdf>>.

¹⁸ *Ibid.*

¹⁹ Scott Cox, Submission No 22 to Social Policy Committee, *Inquiry into student accommodation*, (6 October 2011), 2, <<https://www.parliament.nsw.gov.au/ladocs/submissions/50003/sub%20no%20no%2022%20city%20of%20ryde.pdf>>.

consultation in the design and planning of their buildings. Accommodation planned in this context will deliver a more rewarding student experience and meet demand in the shape it currently presents in the market. This will also return better incomes for investors, which is critical to motivate an increase in supply.

Recommendation 2: That a student-centred approach is adopted in planning decisions relating to student housing. A student-centred approach in this context means that decisions about student accommodation are made with reference to the best interests of students. Understandings about the best interests of students should be guided by consultation with the students about their needs.

The need for a definition of, ‘student housing’

The Committee submits that a chronic shortage of supply lies at the heart of problems in the market for international student accommodation. On this basis, the Committee challenges the scope of the proposed definition of, ‘student housing,’ which currently includes fully self-contained dwellings. Research by Urbis suggests that international students arriving from all of the major source countries are flexible with their living arrangements and commonly live in shared accommodation.²⁰ Medium and high density student accommodation in areas proximate to universities, which are already typically zoned for this density, better meets demand in the market.

Counterbalanced against the need to increase supply is the need to deliver appropriately sized rooms that meet student needs and expectations. The Committee recommends that the proposed 10 m² minimum room size should be a non-discretionary, ‘must not refuse,’ provision. The minimum room size of 10 m² is consistent with industry practice in different jurisdictions, as noted in the EIE (page 11). While innovation should always be encouraged, it is difficult to imagine how a room size less than 10 m² could possibly meet the needs of students. Allowing developers to propose a smaller room size runs the risk that rooms will be approved which do not deliver adequate internal amenity and do not offer adequate shared facilities to compensate for the deficit in room size. Recent lock-down restrictions associated with COVID-19 highlight the importance of having sufficient indoor space for both physical and psychological well-being.

Recommendation 3: That the proposed 10 m² minimum room size for student housing be implemented as a non-discretionary, ‘must not refuse,’ provision.

c) Co-living

The Committee generally agrees with the outline proposed in the EIE, and with the rationale behind the introduction of this sub-set of the boarding house. It is acknowledged that this form of living is becoming increasingly popular in continental Europe, where the concept of owning property is less entrenched in national psyches than in Australia. The Committee sees this form of living as attractive to young professionals and couples seeking to stay close to employment hubs as well as to friends and family, being in areas otherwise unaffordable to purchase into or unsustainable to rent in the long term (due to the reduced living requirements for younger demographics).

The Committee strongly encourages the creation of next generation design guidelines for the development of co-living premises. The Housing Diversity SEPP represents an opportunity for co-living premises to be

²⁰ Urbis, *Student Accommodation – Mid year market update 2019* (Market update) 2.3 “Room Preferences,” <<https://urbis.com.au/app/uploads/2019/09/P0014238-Student-Accommodation-%E2%80%93-Mid-Year-Market-Update-Condensed-Version-18092019.pdf>>.

constructed to a higher level of ecological sustainability given the whole-of-building ownership model that is proposed to be employed for the management of these premises.

The 'Co-living Design Guide' could mandate a minimum rating of five Green Stars and employ low embodied emissions construction techniques, such as minimising the use of concrete and requiring complete energy use offset measures such as complete rooftop coverage of PV arrays, a suitable quantity of kilowatt-hour battery storage in the basement or services room, and any remaining power requirements to be addressed by off-site renewable energy sources by way of community power networks or power purchase agreements from renewable energy wholesalers. Other measures could include complete rainwater capture on site in addition to greywater plumbing throughout the building, and passive solar design measures employed wherever permissible by site or topography constraints to minimise artificial heating and cooling measures required.

The Committee sees this as an integral and critical measure that would assist in pursuing the NSW government goal of net zero emissions by 2050.

Recommendation 4: That all new co-living premises (in addition to student housing and build to rent development) be designed in accordance with passive solar and net zero emissions principles to minimise the ongoing operating costs of the premises as well as mitigate and/or offset the ecological impact of construction and operation.

Consideration would have to be made for the structure of on-site management and the enforceability of rules of occupation, similar to current approach with plans of management. However, unlike with other boarding house arrangements, it is anticipated that co-living premises permit a broader range of pets such as dogs, cats, birds, snakes or other less orthodox species of animal.

The plan of management for a co-living premises would need to accommodate for this different style of companion animal requirements.

Recommendation 5: That co-living plans of management not restrict various types of companion animals that can be kept in the private rooms on the premises.

2. Updating existing provisions

a) Proposed changes to the boarding house provision of the ARHSEPP

Boarding house development is proposed to be affordable

The Committee strongly supports the concept of ensuring that 'traditional' boarding houses (as opposed to the new BTR and co-living style of alternative housing options) are preserved as affordable housing.

The proposal to have boarding houses managed by a not for profit community housing provider (**CHP**) is supported, but it is recommended that this be a requirement with a savings and transitional provision that means that all boarding houses approved prior to the Housing Diversity SEPP eventually coming into force can maintain their current management structure. The Committee is aware of a number of boarding house operators that operate on very low margins due to difficulties in the approval process and the limitation on the

number of boarders on site. The retrospective imposition of a new management provider would, in those circumstances, be inequitable.

Recommendation 6: The requirement for boarding houses to be run by a not for profit community housing provider is supported but should be prospective in operation only.

The other proposed changes to the definition for a 'traditional' boarding house are supported, as the Committee acknowledges the importance of this type of alternative and affordable housing close to important service providers such as hospitals, universities and employment hubs.

Boarding houses not mandated in R2 zone

The Committee notes with some concern the proposal that boarding houses will no longer be an expressly permissible use in R2 zones. The changes to the *State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARHSEPP)* in February 2019 imposed an appropriate regime change so as to ensure that boarding houses in those zones do not present as anything other than a large detached dwelling house. The Committee contends that these proposed changes were sufficient to address amenity, bulk, scale and character concerns, and accordingly the Committee recommends that boarding houses remain a permissible use on R2 zoned land. It is important that low paid workers are able to find accommodation in residential areas in close proximity to transport and employment hubs.

Recommendation 7: The proposed change to remove boarding houses as a mandatory use within the R2 zone should not be made.

Proposed 20% FSR bonus for boarding house development

This proposed change is supported by the Committee for the sake of maintaining uniformity and consistency in decision making by Councils (and the Land and Environment Court on appeal).

Car parking

The Committee similarly agrees with the proposed changes to minimum car parking rates, noting that private car ownership is expected to be a declining trend amongst those living in affordable housing due to the uptake in ride hailing services, improvements in access to public transport and the eventual shift towards autonomous vehicles.

Group homes

The Committee approves of any measure to permit speedier approval pathways for group homes, being a much needed form of housing with no adverse amenity impacts to the surrounding natural and built environment.

Amendments to Part 3 of the ARHSEPP

The Committee approves of all proposed changes to this part of the SEPP, particularly the change requiring the onus of proving that a dwelling is in fact a low rental dwelling to fall on the applicant.

Second dwellings in rural zones

The Committee agrees with this amendment, noting that it has been a long-term deficiency of this SEPP to permit secondary dwellings of a reasonable size in rural areas, and approves of the decision to hand this aspect of the decision-making process back to local councils to set a desired standard.

b) Proposed amendments seniors housing provisions

The Committee welcomes updates to the Seniors SEPP that align definitions with the Standard Instrument.

The Committee generally agrees with the proposed definitions to be updated. In particular, the Committee welcomes aligning the definition of ‘people with a disability’ with the broader definition in the Standard Instrument. The definition in the Standard Instrument better aligns with current understandings of disability and reflects international standards for the term.²¹

The Committee submits that a broader review of the Seniors SEPP provides an opportunity to promote good design consistently across housing developments for seniors and people with a disability. Under the current SEPP, there are only applicable guidelines for urban infill self-care development²² (which must be considered under cl 31). While Part 3, Division 2 sets out Design Principles that are generally applicable, these are broadly expressed and do not serve as a meaningful guide to assist in design or assessment of seniors housing. The Department could consider developing a Seniors Housing Design Code as a guide for best-practice design for housing for seniors and people with disability.²³ The code should set out guidelines for the different types of development, as well as different local contexts (e.g. urban, rural, and coastal). Similar to the current cl 31, the Code could be identified in the Seniors SEPP as a consideration in determining a development application.

We note that, in addition to “height” and “people with a disability” there are other terms in the Seniors SEPP that may require alignment with definitions in other EPIs and the EP&A Act.

The Committee also agrees that updates are required to Sch 1, identifying Environmentally Sensitive Land to which the Seniors SEPP is not to apply.²⁴ The terms used in the current Sch 1 are broad and may not match with terms used to identify land in Local Environmental Plans. “Terrestrial Biodiversity” is used in a number of LEPs,²⁵ but does not clearly correspond with any of the descriptors in Sch 1, the closest of which are “conservation” or “critical habitat”. The current Sch 1 may also unnecessarily be excluding land from the operation of the SEPP. For example, the listing of “water catchment” in Sch 1 (l), captures land under the *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011* (including the regional centre of Goulburn) regardless of how the land is zoned.

The most significant changes to the Seniors SEPP are the proposals to clarify that development standards in an LEP prevail to the extent of any inconsistency with the SEPP, and that development standards in the Seniors SEPP could be varied using cl 4.6 of the Standard Instrument, but only to a maximum of 20%. These

²¹ See, eg, World Health Organisation, *Disability and health fact sheet*, <<https://www.who.int/news-room/fact-sheets/detail/disability-and-health>> (16 January 2018).

²² Department of Infrastructure, Planning and Natural Resources, *Seniors Living Policy: Urban Design Guideline for Infill Development* (2004).

²³ Matthew Paduch, *Designing Housing for Older People: The need for a design code*, (Bachelor of Planning Thesis, University of NSW, 2008) 73-91 accessed 31/08/2020 <https://www.be.unsw.edu.au/sites/default/files/upload/pdf/schools_and_engagement/resources/_notes/5A2_35.pdf>.

²⁴ Per Seniors SEPP cl 4(6).

²⁵ See e.g., *Goulburn Mulwaree Local Environmental Plan 2009* cl 7.2; *Hornsby Local Environmental Plan 2013* cl 6.4.

amendments should be approached with caution, given the potential for fragmentation and inconsistency in housing standards. In this respect, we note that certain standards such as the location and access requirements in cl 26²⁶ should remain consistent and do not require adaptation for local contexts.

The maximum of 20% variation from Seniors SEPP standards also has the potential to operate arbitrarily, particularly where the standards are not expressed in simple numerical terms. As an example, cl 26(2)(a) and (3) set out various acceptable gradients to apply over specified short distances, as well as a standard for the overall average gradient. The application of the 20% limit to such a standard is open to interpretation, which may be the source of disagreement between applicants and consent authorities. Other standards, such as transport requirements, are not numerical and should be excluded from the operation of the 20% limit. We note that, in any case, applicants are required to demonstrate that “compliance with the development standard is unreasonable or unnecessary in the circumstances of the case” in order to justify a departure from a standard.²⁷

Recommendation 8: The 20% maximum for variation of SEPP development standards is not recommended.

Apart from the proposed changes, the Department should consider undertaking a broader review of the Seniors SEPP and its effectiveness in achieving its aims of increasing supply and diversity, efficient use of infrastructure and services, and good design.

Location and access to facilities provisions

The Committee agrees with the proposed amendment to provisions regarding location and access to facilities. In particular, we note the Housing Strategy for NSW Discussion Paper (May 2020) which outlines the importance of planning for people to ‘age in place’ and the need to have diverse and accessible housing to facilitate this.²⁸ Housing diversity must encompass accessibility both in a locality and financial sense.

The investigation by the Greater Sydney Commission in October 2019 found that the Site Compatibility Certificate (**SCC**) approval pathway overall made a modest contribution to the senior housing supply in NSW.²⁹ In particular, where SCCs were issued for senior housing on rural land:

- Applications were concentrated in a few LGAs and the resultant supply (independent living units and residential aged care facilities) was a small part of the housing market that accommodates the growing aged and disabled population;³⁰ and
- The ad hoc nature of these developments makes it difficult to factor into strategic planning for required infrastructure.³¹

²⁶ While cl 26 is not in Part 4 (Development Standards to be complied with), the clause has been interpreted as a standard, not a prohibition: *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153

²⁷ Standard Instrument cl 4.6.

²⁸ NSW Department of Planning, Industry and Environment, A Housing Strategy for NSW: Discussion Paper (May 2020) <<https://www.planning.nsw.gov.au/-/media/Files/DPE/Discussion-papers/Policy-and-legislation/Housing/A-Housing-Strategy-for-NSW--Discussion-Paper-2020-05-29.pdf>>.

²⁹ Greater Sydney Commission, *Investigation into the cumulative impacts of Seniors Housing in the rural areas of The Hills and Hornsby local government areas*, Report (2019) 34 (accessed 31/08/2020) <http://businesspapers.hornsby.nsw.gov.au/Open/2020/04/GM_08042020_AGN_files/GM_08042020_AGN_Attachment_14299_1.PDF>.

³⁰ Ibid 2.

³¹ Ibid 65.

It should also be recognised that housing preferences are diverse, with only about ten per cent of people aged over 65 live in a retirement village or nursing home.³² Similarly, only five per cent of people with disability live in a non-private dwelling such as a group home or aged care facility where care is provided.³³ Seniors' preferences, including for 'aging in place' in their local communities, should be taken into account to ensure that incentives under the Seniors SEPP are encouraging the right housing mix. Recommendation 7 of the GSC report proposed some potential planning incentives for investigation, including allowing seniors housing where shop top housing is permitted with development consent.³⁴

In order to promote the efficient use of infrastructure and services, the SEPP should facilitate planned approaches rather than ad hoc developments. The Seniors SEPP will require greater alignment with new policies at that State and local levels, including the NSW Housing Strategy, District Plans, Local Strategic Planning Statements, and Local Housing Strategies.

Recommendation 9: A broader review of the Seniors SEPP should be undertaken to ensure that the new SEPP provisions:

- provide incentives to encourage supply and diversity in housing in line with projected demand;
- align with relevant strategic plans and policies; and
- provide meaningful guidance for good design of housing for seniors and people with disability.

Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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³² NSW Department of Planning, Industry and Environment, "A Housing Strategy for NSW" (Discussion Paper May 2020) 45 accessed 31/08/2020 <<https://www.planning.nsw.gov.au/-/media/Files/DPE/Discussion-papers/Policy-and-legislation/Housing/A-Housing-Strategy-for-NSW--Discussion-Paper-2020-05-29.pdf>>.

³³ Ibid 47.

³⁴ Greater Sydney Commission, *Investigation into the cumulative impacts of Seniors Housing in the rural areas of The Hills and Hornsby local government areas*, Report (2019) 69.