

About the Tenants' Union NSW

The Tenants' Union of NSW is the peak body representing the interests of tenants in New South Wales, including tenants in social housing and residents of boarding houses. We are recognised as a key stakeholder by a number of government departments, particularly in relation to housing and renting.

We are a Community Legal Centre specialising in residential tenancy law and policy, and the main resourcing body for the state-wide network of Tenants Advice and Advocacy Services (TAASs) in New South Wales. Collectively the TAASs and TUNSW provide information, advice and advocacy to tens of thousands of renters across New South Wales each year.

About this submission

We are pleased to provide comment on the [Explanation of Intended Effect](#) (EIE) for the proposed new Housing Diversity SEPP. The Tenants' Union of NSW recently provided substantial feedback on the [discussion paper on A Housing Strategy for NSW](#). These comments draw and expand on the feedback provided in [our submission](#). Our comments on the Explanation of Intended Effect will primarily be focused on the changes proposed in relation to:

- Build to rent housing
- Boarding Houses, co-living and purpose-built student housing, and the
- Social housing provisions of the ARHSEPP

The Explanation of Intended Effect explains the need for consolidation of three identified existing housing related SEPPs: the State Environmental Planning Policy (Affordable Rental Housing) 2009; the State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004; and the State Environmental Planning Policy No 70 – Affordable Housing (Revised Schemes). Consolidation will also allow, the EIE explains, for the SEPPs' updating and amending on the basis this is required towards fulfilling government's commitment to ensuring there is adequate supply of new dwellings that are affordable, well-designed and located in places that people want to live. It acknowledges affordability as a key challenge across NSW, and particularly in the Sydney metropolitan area, and that a more stable rental sector that delivers on security and stability for those who rent their homes is required.

The acknowledgement that our current housing system has failed to deliver on this is helpful. We also agree that an updating and amending of the SEPPs is required. However, we are concerned with an approach to facilitate delivery of affordability and stability that seeks to reduce the costs of development by reducing amenity for residents. We refer to a reduction of amenity across a range of housing types in terms of the various proposed amendments that allow for smaller rooms, reduced privacy and security, shared facilities, possible reduction in accessibility, and potentially insecure tenure to better bolster 'viability' for development of particular housing types. Lower income households have been failed by a housing system that has not delivered them affordable housing. We believe the 'demand' for smaller, 'compact' housing types might be better understood as evidence of this failure

rather than as a desire on the part of people on lower incomes for compromised design and amenity, and lesser, more insecure renting arrangements (leasing agreements).

We are concerned that the range of proposed new SEPP provisions are not generally referenced within a broader strategy of reform to more effectively support the supply of new, additional social and affordable housing. Such a strategy, [we have suggested elsewhere](#), should include reform of tax settings at both the state and Commonwealth level, and significant capital investment from both levels of government in public and community housing to improve existing stock, and build new, additional social housing.

We recognise it is not within scope or the role of planning instruments to address or 'fix' systemic issues such as a lack of affordable and secure rental housing. We highlight this only to make the point changes to planning provisions that may reduce amenity for residents of new housing, or fast-track and thereby reduce the opportunity for stakeholder and community consultation should not be pursued on the basis that they are a real solution to these problems.

To further discuss our comments please feel free to contact Jemima Mowbray, Policy and Advocacy Coordinator, Tenants' Union of NSW on mobile: 0433 584 050, or by email: jemima.mowbray@tenantsunion.org.au.

Build to Rent Housing

The Tenants' Union of NSW generally considers Build to Rent to be a positive development in terms of providing diversity of housing options for renters. However, a better tenant experience is not assured without some clear requirements and accountability around how positive outcomes especially in relation to security of tenure and affordability will be delivered.

We acknowledge that the NSW Government has recently made a clear commitment to support Build to Rent developments through removing the barrier to developments imposed by the previous land tax structure to provide a 50% discount on land valuations for the purposes of calculating land tax in build to rent developments. The discount was explained on the basis of the potential such housing holds for providing affordability and stability for renting households.

In our submission to the Discussion Paper on the NSW Housing Strategy which also noted this potential, we recommended that such a substantial subsidy only be made available for Built to Rent properties where a better tenant experience can be demonstrated. We suggested this could be achieved by including within the guidelines, clear requirements and accountability mechanisms in relation to security of tenure, affordability and tenant participation outcomes. Generally, we urge further consideration be given regards appropriate models and safeguards or mechanisms for delivering on a better tenant experience before further support by way of further subsidy or – specifically with reference to the proposed HD SEPP – benefits including expanded permissibility, lower rates of parking and a state approval pathway are provided to new build to rent developments.

Towards this and specifically in relation to any further subsidy or exemptions being considered, we draw attention to the concerns raised by Institute for Culture and Society, Western Sydney University and the advice against the pursuit and implementation of for-profit models.¹ This is supported by the LandCom findings that except where supported by some form of public subsidy or under rezoning, Build to Rent will not generate affordable housing. Nor will it significantly ease wider housing affordability.² LandCom also found that it is not really achievable without a strategic national framework that integrates tax reform, revenue support, land and planning levers, because it will fail to generate rental at scale. In this regard Australia will continue to lag comparable countries like the US and UK.

In terms of the examples currently in NSW we have not seen affordable rents or security of tenure, nor tenant participation or mechanisms for reporting against these elements that would justify significant ongoing government subsidy or support. Perhaps further consideration should be given to whether the proposed HD SEPP could play a role in establishing such mechanisms for build to rent housing to report against.

The mechanisms could be, for example, requirements around security and affordability in build to rent properties, such that developers would need to be able to demonstrate for each previous year, and going forward commit for each coming year they have or will provide:

- **stability** as measured by a minimum percentage of long-term residents (where this is defined as continuous occupancy of 3+ years, or since commencement of

¹ Institute for Culture and Society WSU (2020), *Submission: Discussion Paper - Housing Strategy for NSW*, https://www.westernsydney.edu.au/_data/assets/pdf_file/0020/1731143/housing-strategy-for-nsw-submission-ics.pdf, accessed 18 September 2020

² Landcom (2019), *Build-to-rent in Australia: Product feasibility and potential affordable housing contribution*, p9, https://cityfutures.be.unsw.edu.au/documents/558/LCOM_0000_Build_to_Rent_Report_WEB.pdf, accessed 18 September 2020

the Build to Rent property, whichever is shorter), and

- **affordability** as measured by a minimum percentage of available dwellings being affordable according to the current definition of affordable rent (see definition set out in AHRSEPP).

We are aware Shelter NSW has provided comment on the Explanation of Intended Effect, and support their comments regards subdivision of Build to Rent developments requiring change of use approval at the point of subdivision, and that specific design guidance be appropriately set out in the Design and Place SEPP.

We more firmly express the view that a building that can be converted for sale and owner-occupation in a mere 15 years is not properly called build-to-rent. The ability to reconfigure and seek development consent should not be entirely closed off to allow for adaption to change, but the costs of doing so should be significant, including potentially a refund of land tax exemptions and other financial benefits received by the developer on the basis that the development would be build-to-rent. The recently launched build-to-rent development 'LIV' promises residents the 'security of ownership'³ which would not be reflected in a development that could fundamentally alter the premises use, and the presumed eviction of its residents, after such a short time. This is especially true as build-to-rent developments will have received a premium rent specifically for their promise of a different tenure that could not be so easily lodged.

We can contrast this removal from your home after 15 years without compensation with redevelopments under a Strata Scheme Development Act which place significant consideration and barriers to a significant life upheaval, including a voting process and financial reward in the form of a purchase of an appreciated asset. If sub-division of the premises were to occur, first-right-of-refusal to purchase or the continued occupation as a tenant with protected lease terms should be a bare minimum. This appropriately allows for the separate treatment of the asset without disturbing the occupants use.

Boarding Houses, Co-living and purpose-built Student Housing

Proposed requirement for affordability in new boarding houses

There is an overall issue arising from the lack of a broader strategy and understanding of the housing system. Boarding houses are increasingly unsuited to either their built form or management, performing a role of filling the gap of a lack of supply of social housing. The proposed definition of boarding house requires the management of boarding houses by registered Community Housing Providers. If the Community Housing Provider was able to provide housing, whether with their own finances or in partnership with a private developer, the argument for them to provide boarding houses rather than a form of housing resembling co-living appears unsupported.

We welcome the proposed change to the boarding house definition to require the boarding house development to be affordable. We note the proposed definition does not set out or include a specific definition of affordable for boarding houses. Currently the ARHSEPP includes a definition at section 6, Part 1 that defines affordable housing as housing for very low, low- and moderate-income households where the household pays no more than 30% of their gross income in rent or a reduced rent set in relation to market as per the NRAS scheme. Consideration should be given as to whether it would be more appropriate to target boarding house accommodation to very low- and low-income households, possibly by

³LIV Website archival view as at 18th September 2020:
https://web.archive.org/web/20200918024717if_/https://www.livmirvac.com/

providing a minimum ratio number of very low- and low-income residents accommodated. We appreciate some cross subsidisation with residents on medium incomes may be required to ensure viability of developments, but note the development of boarding houses as opposed to other forms of compact housing seeks to ensure affordability for people across a range of lower to medium incomes. A ratio would help ensure delivery on this intention.

There appears to be an assumption that premises managed by community housing providers will inevitably be affordable. This is a questionable assumption. Community Housing Providers are only limited in their activity where they are operating under a grant from government that does so, or are registered as a charity.⁴ Neither of these are guaranteed to be the case in the current definition.

Further, where a community housing provider is a charity, the inclusion of housing for moderate income residents in the boarding house will constitute a commercial activity that supports the charitable activities of the organisation. Under the current definition this can result in housing targeted entirely at moderate income earners or higher after 10 years, with no provision for housing for low or very low-income people in the development. This does not align with the current profile of boarding house residents, especially given the separation of co-living and purpose-built student housing from the definition.

We recommend providing a specific definition of affordability for boarding houses that limits rents in such developments be set only in relation to the income of the resident, though we note the definition could appropriately set an upper cap on rents that refers to local market rents to account for local conditions.

We also recommend that some measure of reasonable management of boarding houses be included, as is currently done for the existing land tax exemption for boarding houses. Eligibility for the exemption set out in the guidelines requires at least 80% of residents were long term during the previous year, where long term is defined as “a boarder or lodger who used and occupied a bed or a room or a suite of rooms for a continuous period of at least 3 months.”⁵

10-year duration limit on affordability requirement

We do not support a 10-year duration limit on the affordability requirement for boarding houses. As we understand it the intention of existing and proposed boarding houses provisions has been to allow ongoing provision of affordable housing within communities. The delivery of this form of housing is encouraged by way of allowing more compact accommodation (smaller rooms, shared facilities, etc.), a substantial density bonus (+20% FSR) and mandated development in a broad range of zones (noting the EIE proposes boarding houses will no longer be mandated in R2 Low Density Residential Zones). Given this, we do not feel it is appropriate to allow developments to revert to market rents after 10 years. Removing the requirement for affordability after 10 years would not simply affect affordability, but also the security of housing for residents who very likely entered into the agreement for rental housing (whether that be an occupancy agreement or a residential tenancy agreement) on the basis of longer-term affordability.

⁴ Australian Charities and Not-for-Profits Commission (2014) *Commissioners Interpretation Statement – Provision of housing by charities* CIS2014/02 <https://www.acnc.gov.au/tools/guidance/commissioners-interpretation-statements/provision-housing-charities> accessed 18 September 2020

⁵ Revenue NSW (2020) *Exemption: land used and occupied primarily for a boarding house – 2020 tax year*, <https://www.revenue.nsw.gov.au/help-centre/resources-library/lt06>, accessed 18 September 2020

Leasing arrangements in boarding houses, co-living and purpose-built student housing

The Tenants' Union does not support a requirement for accommodation provided in boarding houses developed under the new HD-SEPP to be leased under occupancy agreements in the Boarding Houses Act. As with the *Boarding Houses Act 2012* occupants should be defined without reference to their leasing arrangement. This allows providers and residents to assess whether an occupancy agreement under the *Boarding Houses Act 2012* or a tenancy agreement under the *Residential Tenancies Act 2010* is most appropriate for their circumstances.

Given the nature of the self-contained accommodation provided through co-living we do believe the HD-SEPP could usefully mandate that leasing arrangements for co-living developments be leased through tenancy agreements under *the Residential Tenancies Act 2010*.

As we understand it the introduction of purpose-built student housing as a new housing type under the HD-SEPP would not have any interaction with the current exemption for residential colleges and halls of residence in education institutions outlined in the regulations of the *Residential Tenancies Act 2010* (part 4, section 31). This is appropriate. As with co-living arrangements, the HD-SEPP might usefully mandate that leasing arrangements in purpose-built student accommodation, other than where an exemption applies, be leased under residential tenancy agreements.

Social housing provisions of the ARHSEPP

The Tenants' Union of NSW appreciates and understands the stated intention for the updating of the social housing provisions of the ARHSEPP to ensure NSW Land and Housing Corporation (LAHC) can deliver new housing projects, especially given the demonstrated need for new and additional social housing. We also take note of LAHC's development model under the Future Directions for Social Housing in NSW, which includes a mixture of social, affordable and private housing. We understand the benefit an expanded ability for self-assessment and self-approval provides LAHC, allowing them to better utilise a diverse range of delivery pathways.

However, we suggest given the benefit provided by expanded self-assessment and self-approval, the HD-SEPP should offset the loss of community and local Council oversight with minimum social and affordable housing targets for any proposed self-assessed and/or self-approved LAHC development. Minimum targets should refer to the overall *increase* in number of residents who will be housed (rather than units of housing) in social and affordable housing in the proposed new developments, with reference to the number of residents in social and affordable housing in the existing dwellings (i.e. prior to redevelopment).

Other comments

Inclusionary planning provisions

As noted above we are aware Shelter NSW has provided comment on the Explanation of Intended Effect. We support and recommend to you their comments on inclusionary planning provisions, in particular:

- the density bonus that currently applies to in-fill housing should not be provided to private developers of time limited affordable housing
- the current definition of affordable housing be amended to account for local rental markets, such that where rents are based on household income a cap is in place to

ensure this does not rise above a reduced market-based rent (e.g. rents set as per the NRAS scheme).

- the setting of more ambitious targets for delivery of affordable housing, noting that while this is beyond the scope of the HD-SEPP it might appropriately be linked to a broader affordable housing strategy that mandates social and affordable housing targets. The Tenants' Union supports calls for implementation of inclusionary zoning, with targets of at least 15% new and additional social and affordable housing on all new developments on private land and at least 30% on government land applied across the whole developments.

Application of lift access exemption

We are concerned about the exemption from lift access as set out in the Seniors SEPP in general, and do not support the further exemption to allow LAHC to apply the exemption for all seniors housing developments including dwellings that are not proposed to be used for social housing.

Proposed amendments to ARHSEPP provisions: Group Homes

The EIE proposes amendments to the existing ARHSEPP to facilitate the development of new group homes, stating group homes are an important accommodation choice for people with a disability or people who are socially disadvantaged. We would like to recommend to you the People with Disability Australia submission to the Disability Royal Commission, '[Realising Our Right to Live Independently in the Community](#)'.⁶ The submission highlights the role of group homes, and other congregate living situations like assisted boarding houses, in perpetuating violence and abuse committed against people with disability. In particular we draw your attention to recommendations 2, and 14 – 19. The submission calls for the phasing out of group homes, with recommendation 18 in particular identifying the urgent need to close group homes and provide alternative affordable community-based housing:

“Recommendation 18: That all governments be required to develop and implement a plan to close all boarding houses and rooming houses, and place people with disability currently living in these premises into contemporary, accessible and affordable housing.”

⁶ People with Disability Australia (2020) *Realising our right to live independently in the community* <https://pwd.org.au/wp-content/uploads/2020/07/PWDA-Sub-DRC-Group-Homes-June-2020.pdf> accessed at 18 September 2020