Shelter
NEW SOUTH WALES

SHELTER NSW SUBMISSION

Department of Planning and Environment (DPE) - Draft Housing SEPP - Social and Affordable Housing Reforms.

18 October 2023

About Shelter NSW

Founded in 1975, Shelter NSW is a non-profit organisation that is concerned about the housing crisis in NSW and the rising trends of homelessness, housing rental stress as well as impacts of poor-quality housing, particularly on low-income households.

Shelter NSW conducts housing research and advocacy on housing reforms, representing a diverse range of household types that aim to plan for equitable growth to benefit our economy, society and environment.

Shelter NSW is a member-based organisation engaging our members, experts and partners that represents a diverse network of other organisations and individuals who share and can advance a vision of a sustainable housing system that provides a secure home for all.

Introduction

Shelter NSW appreciates the opportunity to provide a submission on the draft amendment to State Environmental Planning Policy (SEPP) (Housing) 2021 and the associated amendments to the Environment Planning & Assessment Regulation.

Shelter NSW acknowledges that inclusionary housing policies that incentivise developers to provide affordable housing within private development can support overall affordable housing production, however the effectiveness of these policies in practice is dependent on the features, economic feasibility, design and locational aspects of the specific policy.

Shelter NSW therefore generally supports any intent to support the delivery of more affordable housing, however we strongly believe in this instance that the proposed policy amendments will not be effective in achieving this important public benefit and may also have unintended built form impacts and environmental planning consequences that will result in negative community response to the development of affordable housing through the planning system.

We outline our concerns under the headings below.

Misdiagnosis of the issue of low historic uptake

The Practice Note (p5) advises that '*There has been low uptake of these in-fill affordable housing provisions. This has been attributed to: difficulty in accommodating the full FSR bonus while complying with development standards and other local planning controls… and inadequacy of the FSR bonus to overcome the cost of delivering and retaining affordable housing for 15 years.*'

Whilst accommodation of the FSR bonus may be a possible impediment, this does not appear to necessarily be causally or predominantly linked to low uptake. There are other obvious underlying issues that can explain historic low uptake, including (but not limited to):

- that the policy is voluntary instead of mandatory,
- that private interests do not wish to incorporate affordable housing dwellings within private developments;
- that different areas with different market conditions have different economic drivers, making some locations less attractive for development, and
- that bonus mechanisms will often be intrinsically discordant with Local Environmental Plans and Development Control Plans making approval pathways more difficult and worthwhile avoiding.

In light of these reasons, it is considered that the new policy will likely not solve the previous perceived issues and is instead likely to repeat past mistakes, and is unlikely to be any more successful than the previous policy was at delivering affordable housing at any meaningful volume.

The policy will decrease the affordable housing delivered

The proposed in-fill affordable housing provisions intends to '*incentivise and support the delivery of affordable housing under the Housing SEPP*' (Practice Note p4), however the proposed new policy will reduce the affordable housing delivered in each development compared to the current policy, from a minimum of 20% to 15%, whilst at the same time increasing floor space ratio bonus from 20% to 30%, as well as allowing 30% additional building height

beyond local controls. This is effectively 'giving away' more development potential for less affordable housing public benefit and cannot be supported.

The policy is only voluntary rather than mandatory

The proposed policy is voluntary. This means that developers must 'opt-in' to the policy for it to be effective. Therefore, the policy may not be taken up by developers. There is no guarantee of an outcome, good or otherwise.

Research undertaken for Shelter NSW (forthcoming) shows that policies that mandate affordable housing inclusion (for example, through inclusionary zoning mechanisms) have tended to deliver more affordable housing dwellings per annum than voluntary policies with similar objectives.

For this reason, Shelter NSW supports a broad mandatory inclusionary zoning approach as opposed to the proposed voluntary bonus mechanism. Also, a voluntary bonus mechanism has the potential to compete with the introduction of a broad mandatory inclusionary zoning system and therefore should not be a continuing feature of the SEPP Housing (2021). Further, it is noted that a bonus mechanism has the potential to inflate landowner expectations and at the same time puts the onus on the public to bear the costs associated with increased density and population.

The policy does not adequately direct the location of affordable housing provision

Apart from requiring sites to be in an 'accessible area' within Greater Sydney, Newcastle and Wollongong, and within walking distance of commercially-zoned land in other areas of the State, there are no other specific geographical requirements in the policy to ensure any affordable housing is actually delivered where it is most needed.

Research undertaken for Shelter NSW (forthcoming) shows that whilst inclusionary housing policies that apply to a broad geographic area have

tended to be more successful than small scale policies with limited areas, they can deliver affordable housing outcomes in a geographically 'uneven' way.

Research undertaken by Professor Peter Phibbs on 'Affordable Housing Height and Density Bonus Schemes' for Shelter (August 2023) shows that the policy will only work effectively in those places where market conditions are most favourable, for example high land value locations[1] . This may not align with areas of most need.

Phibbs research (August 2023) points out that whilst the impact of bonus schemes like the one current proposed are often blunted by the aspirations of land owners to capture the uplift. The current proposal will have a positive impact in terms of unlocking some apartment developments that although approved are not being built because they are no longer feasible as a result of construction cost and interest rate increases. However, the policy is unlikely to bring forward a range of apartment developments in Eastern Harbour City which would be a benefit to housing supply as well as affordable housing provision.

Conversely, the scheme could be improved by not making it open ended, and varying the nature of the bonus and/or the duration of affordable housing provision to better reflect the large variations in land values across Sydney

A mandatory inclusionary policy system can better direct development to specifically target areas where affordable housing is most wanted and needed and do so in a consistent and coordinated way.

Any development delivered under the proposed draft policy should therefore be expected to be inconsistent and uncoordinated. There is also a serious question of how the required services and infrastructure can be put in place for the additional 'unplanned' population density.

[1] Phibbs, Peter. August 2023.The Affordable Housing Height and Density Bonus Scheme DRAFT Report to Shelter NSW. EPIC DOT GOV Pty Ltd

The policy does not provide affordable housing for an adequate period

The policy only delivers affordable housing for a period of 15 years, after which time the dwellings can revert to market-rate. Consideration should also be given to the displacement of affordable housing tenants once the dwelling is no longer affordable and the dwelling has not been replaced elsewhere nearby. This phenomenon has been experienced recently with NRAS-funded dwellings reverting to market after 10 years and there is nothing to prevent the same being repeated here. It does not seem reasonable that the planning benefit of additional FSR and height is in perpetuity (or for the life of the building) when the public benefit of affordable housing exists only for a limited period of time. The public benefit should match the planning benefit.

Research undertaken for Shelter NSW (forthcoming) shows that when the affordability term for dwellings delivered through inclusionary housing policies is short, the overall impact on affordable housing supply is very small, as dwellings leave the program at the same time that new dwellings enter it.

Further, the research shows that over 90% of inclusionary housing schemes operating in the US have affordability terms of at least 30 years. In California, the long-standing State-wide density bonus policy requires affordable dwellings delivered under the policy to remain affordable for at least 55 years. Research on the performance of inclusionary housing schemes in the US demonstrates that a longer affordability term is not associated with a lower level of overall dwelling production. In the UK, affordable housing delivered through the planning system is owned by community housing providers which ensures all dwellings remain affordable in perpetuity.

The period that affordable housing remains affordable must be much longer than 15 years, ideally in perpetuity. Ownership of the dwellings by a not-for-profit community housing provider can enable this as an outcome. A mandatory inclusionary zoning policy could include a provision to require this to occur.

Bonus mechanisms assume 'under-zoning' or imply 'over-development'

Bonus FSR and height mechanisms are a poor approach to planning for affordable housing linked with short term outcomes. The use of such a large a bonus mechanism assumes that the area they are applied to is currently 'under-zoned' and can comfortably accommodate additional density and height without impact. If this is actually the case, a far better planning approach is for the area in question to undergo a formal planning proposal process to increase height and density standards within the Local Environmental Plan to the desirable environmental limit, implementing an inclusionary zoning requirement at the same time. An area-wide Planning Proposal process has the benefit of community consultation, whereas a bonus mechanism on a site-by-site basis does not. In this way, bonus mechanisms can undermine trust in the planning system with the community experiencing unexpected and out-of-character built form outcomes in their area.

In the alternative, the area the FSR and height bonus is applied to can already be zoned to its desirable environmental limit. This situation might typically occur in recently masterplanned precincts which are already 'maximised'/'optimised' in terms of yield. In this instance, bonus FSR and height are considered 'over-development' causing unanticipated and undesirable built form and environmental impacts, which again can undermine confidence in the planning system.

In both circumstances, the bonus mechanism will create uncertainty and tension in the approvals process, further eroding confidence in the planning system. For example, because FSR and height controls are, in many Local Environmental Plans, already poorly coordinated with inadequate height to accommodate the floor space, an additional 30% of both will exacerbate this issue to create greater misalignment. Another example could be that existing Development Control Plan provisions may not be capable of adequately addressing height increases due to an absence of controls for upper level setbacks where there are unanticipated additional floors proposed.

A mandatory inclusionary zoning approach would avoid this issue as the mechanism to achieve affordable housing is attained *within* the LEP FSR and height controls, rather than a mechanism which is achieved *on top of* the LEP controls.

The further problem of a bonus on a bonus

The Practice Note (p6) states that the FSR bonus is '*in addition to the maximum permissible FSR for the residential accommodation component of the development (including any bonus available under a local environmental plan)*.' The Practice Note (p7) states that the height bonus is '*130% of the maximum permissible building height for the land (including any bonus available under a local environmental plan)*'. Whilst it is agreed that the bonus mechanism, where used, should be 'on top of' any local provision which has already been factored into potential redevelopment feasibility, this may result in unintended, compounded and unacceptable building scale increases in some situations.

An example of an issue with the height bonus might be in Ashfield town centre where Inner West LEP 2022 Clause 4.3A allows for buildings to exceed the maximum building height limit by 7m for inclusion of affordable housing in areas where the base LEP height is 23m. The proposed height bonus would therefore allow for a maximum building height of 39m ((23m + 7m) x 1.3) in an area mapped as 23m. This is equivalent to 170% of the base height, translating to approximately 12 storeys next to 7 storeys. Such a disparity in height between buildings is likely to have unanticipated environmental impacts such as overshadowing, overlooking, streetscape character and significant implications for traffic.

There is also a growing concern that developers are double dipping on these planning bonuses and this should be clarified before the release of the Infill Housing legislation amendments to the Housing SEPP (2021). One example is developers will use a site compatibility pathway, take all the bonuses associated with that pathway and then use the infill housing bonuses on top.

No design guidance for integrating affordable housing

The proposed SEPP Housing Clause 19 provides a limited list of 'non-discretionary development standards' however no design guidance is offered in relation to how affordable housing dwellings should be integrated within a development.

Research undertaken for Shelter NSW (forthcoming) shows that many longstanding inclusionary housing policies contain detailed design guidelines and requirements for the design and location of affordable dwellings within a development. For example, New York City's density bonus policy defines the minimum proportion of affordable dwellings that should have one or two bedrooms and where the dwellings should be located within a building. This highlights the importance of clearly defining expectations to ensure that affordable housing dwellings are appropriate for target needs groups and that there are not significant discrepancies in quality between affordable and market dwellings within a project.

There currently does not appear to be any provisions which prevents, for example, all of the allocated affordable housing dwellings from being south-facing with no sun, single-aspect with no cross ventilation and facing on to a noisy road, whilst market dwellings are located above with daylight and views. Shelter NSW is aware of several recent developments that incorporate affordable housing where this has been the case. Design guidance is required to ensure that residential amenity is allocated equitably and fairly between the different tenured apartments. Design guidance may also be useful in designing dwellings to meet the requirements of community housing providers that will be managing those dwellings.

Inappropriate rent setting for tenants

Clause 13 of SEPP Housing defines very low, low and moderate income households in two ways. The first is that the gross income of the household sits within a range of the median household income and that the household pays no more than 30% of its gross income in rent. The second is that the household

is eligible to occupy rental accommodation under National Rental Affordability Scheme and pays no more rent than the rent charged under that scheme. Clause 12 of the National Rental Affordability Scheme Regulations 2020 relating to maximum rent states that '*no incentive is available for any period during which the rent charged for the dwellings is not at least 20% less than the market value rent for the dwelling*.'

It is essential that affordable housing units delivered are based on 30/40 rule that tenant pay no more than 30% of household income and that they must be managed by a community housing provider (See definition below) [2]

Research undertaken for Shelter NSW (forthcoming) shows that to avoid targeting of the uppermost eligible income group, some US jurisdictions have specified requirements for the proportion of affordable housing dwellings delivered through an inclusionary zoning policy that need to be affordable to very low, low and moderate income households, or offer a scaled density bonus based on providing housing that meets the needs of lower versus higher income groups. Further, the research shows that some US jurisdictions that set their density bonus and affordable housing contributions requirements based on a cost-benefit analysis saw greater utilisation of the incentive compared to jurisdictions that did not. This kind of mechanism links the amount of planning benefit created with the amount public provided in an evidenced-based way.

Inadequate exhibition period and public availability

As can be seen from the extent of concerns raised in this submission, the proposed changes to the SEPP Housing In-fill Affordable Housing provisions are substantially different to that previously exhibited version (December 2022 - January 2023) and even incorporate completely new elements such as a height

[2] (2) State Environmental Planning Policy (SEPP) (Housing) 2021
13 Affordable housing—the Act, s 1.4(1)
(1) In this Policy, a household is taken to be a very low-income household, low-income household or moderate-income household if—
(a) the household—
(i) has a gross income within the following ranges of percentages of the median household income for Greater Sydney or the Rest of NSW—
(A) very low-income household—less than 50%,
(B) low-income household—50–less than 80%,
(C) moderate-income household—80–120%, and
(ii) pays no more than 30% of the gross income in rent,

bonus. To provide an opportunity for proper stakeholder feedback, the extent of the proposed changes should have been advertised publicly online and for a longer period of time, rather than in a limited way for only three weeks.

Consolidation of SEPP 65 into SEPP Housing

The repeal of SEPP 65 and its consolidation into SEPP Housing is generally supported, and the redrafting of clauses is considered to in the most part be an improvement, however some changes are beyond the scope of a housekeeping amendment and create differences that are not considered positive, are not supported and should be reconsidered (see related comments in **APPENDIX 1** and **2**). Again, to provide an opportunity for proper stakeholder feedback, the extent of the proposed changes should have been advertised publicly online and for a longer period of time, rather than in a limited way for only three weeks.

KEY RECOMMENDATIONS

Shelter NSW recommends —

- That the proposed bonus mechanism is unlikely to be successful, and should be reviewed to take in locational disparities
- That until it is reviewed that the in-fill affordable housing provision not be a continuing feature of Housing SEPP.
- That the Government proactively supports a more suitable planning approach to achieve affordable housing in the form of a broad mandatory inclusionary zoning mechanism. Such an approach can direct the location of affordable housing provision to where it is most needed in a consistent and coordinated way, and can be achieved *within* LEP controls (rather than *on top of* them) avoiding the inherent conflict with the planning system.
- That the proposed period of 15 years is wholly inadequate and that delivery of affordable housing in perpetuity should be mandated, potentially through direct ownership by not-for-profit community housing providers.

- That design guidance on integrating affordable housing within private development be provided to ensure that dwellings are appropriately designed and are required to have equitable access to residential amenity.
- That rent setting for tenants is based on percentage of gross household income, and not on a percentage of market value rent, to ensure that the dwelling is actually affordable for the occupants and that a range of household income types be required to be accommodated in affordable housing delivered under the policy.
- That, in any case, the detailed commentary of Shelter NSW on the draft amendment to the SEPP Housing clauses (**APPENDIX 1**) and the draft amendment to the EP&A Regulation clauses (**APPENDIX 2**) be taken into careful consideration to improve planning outcomes.

Shelter NSW would be pleased to be involved and contribute to any further development of the policy.

APPENDIX 1
Commentary on Draft State Environmental Planning Policy Amendment (Housing) 2023

	DRAFT CLAUSE	COMMENTARY
[7]	**Division 1 In-fill affordable housing**	
[7] 15B	**Definition** In this division— ***residential development*** means development for the following purposes— (a) attached dwellings, (b) dual occupancies, (c) dwelling houses, (d) manor houses, (e) multi dwelling housing, (f) multi dwelling housing (terraces), (g) residential flat buildings, (h) semi-detached dwellings, (i) shop top housing.	• Unclear whether policy applies to seniors housing when also another form of residential development. This aspect should be clarified within SEPP Housing or potentially through a planning circular. This is a legacy issue.

[7] 16	**Development to which division applies** (1) This division applies to residential development if— (a) the development is permitted with consent under another environmental planning instrument, and (b) at least 15% of the gross floor area of the part of the building resulting from the development that is used for residential development will be used for the purposes of affordable housing, not including any other affordable housing required to be provided in the building under another provision of another environmental planning instrument, and (c) for development on land in the Greater Sydney region, Newcastle region or Wollongong region—all or part of the development is within an accessible area, and (d) for development on other land—all or part of the development is within 800m walking distance of land within 1 or more of the following zones or an equivalent land use zone— (i) Zone B1 Neighbourhood Centre, (ii) Zone B2 Local Centre, (iii) Zone B4 Mixed Use. (2) In this division, residential development carried out by, or on land owned by, the Aboriginal Housing Office or the Land and Housing Corporation is taken to be used for the purposes of affordable housing. (3) In this section— ***Newcastle region*** means the City of Cessnock, City of Lake Macquarie, City of Maitland, City of Newcastle and Port Stephens local government areas. ***Wollongong region*** means the Kiama, City of Shellharbour and City of Wollongong local government areas.	• 15% affordable housing represents a decrease in the affordable housing delivered and not supported (see body of submission above). • The policy does not adequately direct the location of affordable housing provision (see body of submission above). This is a legacy issue.
[7] 17	**Additional floor space ratio** (1) The maximum floor space ratio for development to which this division applies is 130% of the maximum permissible floor space ratio for residential accommodation on the land. (2) Despite subsection (1), the maximum floor space ratio for nominated development is the greater of— (a) 130% of the maximum permissible floor space ratio for residential accommodation on the land, or (b) the maximum permissible floor space ratio for residential accommodation on the land plus— (i) if the affordable housing component is at least 50%—0.5:1, or (ii) otherwise—affordable housing component:1. (3) In this section— ***affordable housing component***, of a building, means the percentage of the gross floor area of the part of the building used for residential development that will be used for affordable housing. ***nominated development*** means development to which this division applies that is carried out— (a) by or on behalf of, or on land owned by, a relevant authority or a registered community housing provider, and (b) on land with a maximum permissible floor space ratio for residential accommodation of 2:1 or less.	• The 30% FSR bonus is not supported (see body of submission above). • The alternative controls for nominated development in 17(2)(b) appear to have the potential to mathematically disadvantage sites which have a maximum permissible floor space ratio of greater than 2.0:1 but less than ~2.3:1.
[7] 18	**Additional building height** The maximum height of a building resulting from development to which this division applies is 130% of the maximum permissible building height for the land if the building is used for residential flat buildings or shop top housing.	• The 30% height bonus is not supported (see body of submission above).

[7] 19	**Non-discretionary development standards—the Act, s 4.15** (1) The object of this section is to identify development standards for particular matters relating to development for the purposes of in-fill affordable housing that, if complied with, prevent the consent authority from requiring more onerous standards for the matters (2) The following are non-discretionary development standards in relation to the carrying out of development to which this division applies— (a) a minimum site area of 450m, (b) for a development application made by a social housing provider or Landcom—at least 35m2 of landscaped area per dwelling, (c) if paragraph (b) does not apply—at least 30% of the site area is landscaped area, (d) a deep soil zone on at least 15% of the site area, where— (i) each deep soil zone has minimum dimensions of 3m, and (ii) if practicable, at least 65% of the deep soil zone is located at the rear of the site, (e) living rooms and private open spaces in at least 70% of the dwellings receive at least 3 hours of direct solar access between 9am and 3pm at mid-winter, (f) for a development application made by a social housing provider or Landcom for development on land in an accessible area— (i) for each dwelling containing 1 bedroom—at least 0.4 parking spaces, or (ii) for each dwelling containing 2 bedrooms at least 0.5 parking spaces, or (iii) for each dwelling containing at least 3 bedrooms— at least 1 parking space, (g) if paragraph (f) does not apply— (i) for each dwelling containing 1 bedroom—at least 0.5 parking spaces, or (ii) for each dwelling containing 2 bedrooms—at least 1 parking space, or (iii) for each dwelling containing at least 3 bedrooms—at least 1.5 parking spaces, (h) for development for the purposes of residential flat buildings—the minimum internal area specified in the Apartment Design Guide for each type of apartment, (i) for development for the purposes of dual occupancies, manor houses or multi dwelling housing (terraces)—the minimum floor area specified in the Low Rise Housing Diversity Design Guide, (j) if paragraphs (h) and (i) do not apply, the following minimum floor areas— (i) for each dwelling containing 1 bedroom—65m , or (ii) for each dwelling containing 2 bedrooms—90m , or (iii) for each dwelling containing at least 3 bedrooms—115m2 plus 12m2 for each bedroom in addition to 3 bedrooms. (3) Subsection (2)(d) and (e) do not apply to development to which Chapter 4 applies.	• The exclusions at 19(3) are supported as those provisions conflict with the provisions of the Apartment Design Guide. The exclusions in 19(3) should also include 19(2)(b) for landscaped area. For denser residential apartment developments, the required landscape area at 35m2 per dwelling can quickly exceed the site area and not be achievable. For example, a 1000m2 site must have non-compliant landscaped are when there are more than ~28 apartments.

[7] 20	**Design requirements** (1) Development consent must not be granted to development for the purposes of dual occupancies, manor houses or multi dwelling housing (terraces) to which this division applies unless the consent authority has considered the Low Rise Housing Diversity Design Guide, to the extent to which the Guide is not inconsistent with this Policy. (2) Subsection (1) does not apply to development to which Chapter 4 applies. (3) Development consent must not be granted to development to which this division applies unless the consent authority has considered whether the design of the residential development is compatible with— (a) the desirable elements of the character of the local area, or (b) for precincts undergoing transition—the desired future character of the precinct	• Unclear whether policy applies to seniors housing when it also another form of 'residential development' such as multi dwelling housing. Does the Seniors Housing Design Guide apply instead or also? This aspect should be clarified within SEPP Housing or potentially through a planning circular. It is suggested that seniors housing should not 'overlap' with other forms of residential development. • The design requirement to consider whether the design is 'compatible' with the desirable elements of the character of the local area/desired future character invokes the NSW L&EC planning principle for 'compatibility of the proposal with the surrounding development' as expressed in Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 712 ¶21-31. At ¶21, Roseth SC states 'There are many dictionary definitions of *compatible*. The most apposite meaning in an urban design context is *capable of existing together in harmony*. *Compatibility* is thus different from *sameness*. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, ***though as the difference in these attributes increases, harmony is harder to achieve***' (emphasis added). An additional 30% height and floor space to a development is likely to be considered a significant difference, and therefore 'harmony' will be harder to achieve. At ¶27, in relation to height, Roseth SC states 'Buildings do not have to be the same height to be compatible. Where there are significant differences in height, it is easier to achieve compatibility when the change is ***gradual rather than abrupt***. The extent to which height differences are acceptable depends also on the ***consistency of height in the existing streetscape***' (emphasis added). A 30% height bonus (for example 6 storeys to 8 storeys), particularly when the bonus is on a voluntary basis and is unlikely to be consistent in any streetscape, is likely to be considered an 'abrupt' change. This design requirement is likely to create tension in the assessment of developments, similar to that historically experienced by new generation boarding houses which were subject to a similar clause.
[7] 21	**Must be used for affordable housing for at least 15 years** (1) Development consent must not be granted under this division unless the consent authority is satisfied that for a period of at least 15 years commencing on the day an occupation certificate is issued— (a) the affordable housing component of the residential development will be used for affordable housing, and (b) the affordable housing component will be managed by a registered community housing provider. (2) Subsection (1) does not apply to development on land owned by the Aboriginal Housing Office or the Land and Housing Corporation. (3) In this section— affordable housing component, in relation to development to which this division applies, means the dwellings used for the purposes of affordable housing in accordance with section 16(1)(b).	• The time period of 15 years is inadequate and is not supported (see body of submission above). • Whilst the affordable housing component is required to be managed by a community housing provider, there does not appear to be any provision provided which ensures that affordable housing is *actually occupied* by tenants for the time period. There is potential for the dwelling to remain empty for some or all of the time period and not achieve its objective.

[15]	**Must be used for affordable housing for at least 15 years** (2) Subsection (1) does not apply to development on land owned by the Aboriginal Housing Office or the Land and Housing Corporation.	• Unclear why development under Chapter 2, Part 2, Division 5 Residential flat buildings - social housing providers public authorities and joint ventures would be limited to a timeframe of 15 years. This is a legacy issue.
[17] 42	**Development may be carried out without consent** (1) Development for the purposes of residential development may be carried out without consent by or on behalf of— (a) a relevant authority, other than Landcom, and (b) Landcom, if all dwellings resulting from the residential development are used for affordable housing. (2) This division applies only if— (a) the development is permitted with development consent on the land under another environmental planning instrument, and (b) all buildings will have a height of not more than the higher of— (i) 11m, or (ii) the maximum permissible building height, and (c) all buildings will have a floor space ratio of not more than the greater of— (i) 0:65:1, or (ii) the maximum permissible floor space ratio, and (d) the development will result in 75 dwellings or less on a single site, and (e) for development on land in an accessible area—the development will result in at least the following— (i) for each dwelling containing 1 bedroom—0.4 parking spaces, (ii) for each dwelling containing 2 bedrooms—0.5 parking spaces, (iii) for each dwelling containing at least 3 bedrooms—1 parking space, and (f) for development on land that is not in an accessible area—the development will result in at least the following— (i) for each dwelling containing 1 bedroom—0.5 parking spaces, (ii) for each dwelling containing 2 bedrooms—1 parking space, (iii) for each dwelling containing at least 3 bedrooms—1.5 parking spaces, and (3) This division also applies to the following development if the development is permitted on the land under another environmental planning instrument— (a) the demolition of buildings and associated structures if the building or structure is on land that— (i) is non-heritage land, and (ii) is not identified in an environmental planning instrument as being within a heritage conservation area, (b) the subdivision of land and subdivision works. (4) This division does not apply to— (a) development to which Chapter 2, Part 2, Division 5 applies, or (b) development that is part of a project, or part of a stage of a project, that the Minister determined under the Act, former section 75P to be subject to the Act, Part 4. (5) State Environmental Planning Policy (Transport and Infrastructure) 2021, sections 2.15 and 2.17 apply to the development and, in the application of the sections— (a) a reference in section 2.15 to "this Chapter" is taken to be a reference to this section, and (b) a reference in the sections to a public authority is taken to be a reference to the relevant authority. (6) In this section— ***former section 75P*** means the Act, section 75P, as in force immediately before its repeal by the Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011. ***non-heritage land*** means land that— (a) does not contain a heritage item, and (b) is not the subject of an interim heritage order under the Heritage Act 1977, and (c) is not listed on the State Heritage Register.	• For development carried out without consent for residential development by the Aboriginal Housing Office and Land and Housing Corporation has been raised from 9m to 11m (42(2)(b)(i)) and the number of dwellings has been increased from 60 to 75 (42(2)(d)). The change in height now effectively captures development of three storeys in height which may include residential apartment development (as reflected in 144(6)). This aspect is not supported as impacts from this scale of development on adjoining properties and the public domain can be significant, and is why historically the SEPP 65 threshold was set at three storeys. The increase in height is not supported.

[41] 97	**Design of seniors housing** (1) In determining a development application for development for the purposes of seniors housing, a consent authority must consider the Seniors Housing Design Guide, published by the Department in [insert month] 2023. (2) Development consent must not be granted to development for the purposes of seniors housing unless the consent authority is satisfied that the design of the seniors housing demonstrates adequate consideration has been given to the design principles for seniors housing set out in Schedule 8.	• Unclear whether Apartment Design Guide applies to seniors when proposal is also residential apartment development? This aspect should be clarified within SEPP Housing or potentially through a planning circular. This is a legacy issue. It is suggested that seniors housing should not 'overlap 'with other forms of residential development.
[53]	**Chapter 4 Design of residential apartment development**	• The removal of the word 'quality' from the term 'Design ***quality***' throughout the amendments is considered to weaken the intention of the original policy and is not supported. The term 'design', on its own, is a neutral word which does not convey the same meaning as 'design quality.' Consider reinstating the term 'design quality' throughout, or alternatively consider using the term 'good design' to make a direct link to EP&A Act Object 1.3(g) 'to promote good design and amenity in the built environment.'
[53] 142	**Aims of chapter** (1) The aim of this chapter is to improve the design of residential apartment development in New South Wales for the following purposes— (a) to ensure residential apartment development contributes to the sustainable development of New South Wales by— (i) providing socially and environmentally sustainable housing, and (ii) being a long-term asset to the neighbourhood, and (iii) achieving the urban planning policies for the local and regional areas, (b) to achieve better built form and aesthetics of buildings, streetscapes and public spaces, (c) to better satisfy the increasing demand for residential apartment development, considering the following— (i) the changing social and demographic profile of the community, (ii) the needs of a wide range of people, including persons with disability, children and seniors, (d) to maximise the amenity, safety and security of the residents of residential apartment development and the community, (e) to minimise the consumption of energy from non-renewable resources, to conserve the environment and to reduce greenhouse gas emissions, (f) to contribute to the provision of a variety of dwelling types to meet population growth, (g) to support housing affordability, (h) to facilitate the timely and efficient assessment of applications for development to which this Policy applies. (2) This chapter recognises that the design of residential apartment development is significant because of the economic, environmental, cultural and social benefits of high quality design.	• Reinstate the word 'quality' in 142(1) — 'The aim of this chapter is to improve the design ***quality*** of residential apartment development…' • Consider the overlap of 142(1)(e) 'to minimise consumption of energy from non-renewable resources, to conserve the environment and to reduce greenhouse gas emissions', in light of proposed amendment [4] — 'State Environmental Planning Policy (Sustainable Buildings) 2022, Chapter 2 prevails to the extent of an inconsistency between that chapter and this policy, Chapter 4' and SEPP Sustainable Buildings Aims 1.3(e) 'to minimise the consumption of energy' and 1.3(f) 'to reduce greenhouse gas emissions'. • The retention of 'high quality design' in 142(2) is positive, but should be reflected in all relevant clauses throughout the amendment.

[53] 144	**Application of chapter** (1) In this policy, development to which this chapter applies is referred to as r***esidential apartment development.*** (2) This chapter applies to the following— (a) development for the purposes of residential flat buildings, (b) development for the purposes of shop top housing, (c) mixed use development with a residential accommodation component that does not include boarding houses or co-living housing, unless a local environmental plan provides that mixed use development including boarding houses or co-living housing is residential apartment development for this chapter. (3) This chapter applies to development only if— (a) the development consists of— (i) the erection of a new building, or (ii) the substantial redevelopment or refurbishment of an existing building, or (iii) the conversion of an existing building, and (b) the building is at least 3 storeys, not including underground car parking storeys, and (c) the building contains at least 4 dwellings. (4) If particular development comprises development used for purposes specified in subsection (2) and development used for other purposes, this chapter applies to the part of the development used for purposes specified in subsection (2) only. (5) This chapter does not apply to development that involves a class 1a or 1b building within the meaning of the Building Code of Australia only. (6) To avoid doubt, development to which Chapter 2, Part 2, Division 1, 5 or 6 applies may also be residential apartment development under this chapter. (7) In this section— ***underground car parking*** storey means a storey that provides for car parking that is— (a) below ground level (existing), or (b) less than 1.2m above ground level (existing).	• Unclear whether policy applies to seniors housing when also residential apartment development. This aspect should be clarified within SEPP Housing or potentially through a planning circular. Clause 144(6) could be used to confirm in the positive. This is a legacy issue. It is suggested that seniors housing should not 'overlap 'with other forms of residential development. • Unclear whether policy applies to other residential accommodation types (other than boarding houses or co-living), for example seniors housing or multi dwelling housing, when mixed use. The Standard Instrument LEP defines 'mixed use' simply as 'a building or place comprising 2 or more different land uses'. It is noted that the wording of 144(4) does not resolve this ambiguity. This aspect should be clarified within SEPP Housing or potentially through a planning circular. This is a legacy issue. • The meaning of 'substantial' in 144(3)(a)(ii) should be defined to provide clarity. This is a legacy issue. • The new definition of 'underground car parking storey' should be aligned with the Standard Instrument LEP definition of 'basement' — 'the space of a building where the floor level of that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing).' This is a legacy issue. • The word order of 144(5) suggests that a development which includes a component of class 1a or 1b development may be exempt from the provisions of this chapter. Move the word 'only' to immediately after 'class 1a and 1b building'.
[53] 145	**Design review panel to give advice on design quality of residential apartment development** (1) Before determining a development application or modification application for residential apartment development, the consent authority must refer the application to the design review panel for the local government area in which the development will be carried out for advice on the quality of the design of the development. (2) Subsection (1) does not apply if— (a) a design review panel has not been constituted for the local government area in which the development will be carried out, or (b) a competitive design process has been held. (3) This section does not apply to State significant development. (4) In this section— ***competitive design process*** means a design competition held in accordance with the 2023 Design Competition Guidelines published by the Department in [insert month] 2023.	• Reinstate the term 'design quality' in 145(1) — '…for advice on the ***design quality*** of the development.' • The exemption for State Significant Development in 145(3) is problematic. The larger and more prominent the development, the more the input of a design review panel should be required. All SSD applications should be referred to the State Design Review Panel. The SDRP should be given the same standing/recognition as a formally-constituted Design Review Panel under proposed Draft EP&A Regulation [20] 288A. • The definition of 'competitive design process' in 145(4) should acknowledge existing successful Competitive Design Policies such as that of the City of Sydney.

[53] 146	**Determination of development applications and modification applications for residential apartment development** (1) Development consent must not be granted to residential apartment development, and a development consent for residential apartment development must not be modified, unless the consent authority has considered the following— (a) the quality of the design of the development, evaluated in accordance with the design principles for residential apartment development set out in Schedule 9, (b) the Apartment Design Guide, (c) any advice received from a design review panel within 14 days after the consent authority referred the development application or modification application to the panel. (2) The 14-day period referred to in subsection (1)(c) does not increase or otherwise affect the period in which a development application or modification application must be determined by the consent authority. (3) To avoid doubt, subsection (1)(b) does not require a consent authority to require compliance with any development standards specified in the Apartment Design Guide. (4) This section does not apply to State significant development.	• Reinstate the term 'design quality' in 146(1)(a) — '…unless the consent authority has considered the following - (a) the ***design quality*** of the development…'. • 146(1)(b) should be limited to '***Parts 3 and 4 of*** the Apartment Design Guide' to mirror the requirements of Draft EP&A Regulation 29(2)(b)(ii) for design verification statements. Only Parts 3 and 4 of the ADG contain design criteria and design guidance and are suitable for use in design and assessment (see ADG p10). Other parts of the ADG are for information, strategic planning, and administration and are not suitable for use in design and assessment. This is a legacy issue. • The timing of 'within 14 days after the consent authority referred the development application' in 146(1)(c) may not allow time for the design review panel to meet and provide its advice. The 14 days should be measured from the time of ***review*** rather than referral. • The location of 146(3) in this clause implies that the provisions of the Apartment Design Guide are development standards, which is not the case. This clause should be moved back to 147 to relate to the three particular and identified development standards. • The redrafting of this clause from SEPP 65(29)(1) has removed the concepts of '***diminish or detract from the design quality, or compromise the design intent***'. These are important concepts which assist to maintain design quality in developments and should be reinstated. • The exemption for State Significant Development in 146(4) is problematic. Large and prominent residential apartment development should be assessed against the design quality principles and Parts 3 and 4 of the ADG and be referred to the (State) design review panel for advice. It is noted that, unlike DCPs which do not often form part of an SSD assessment, the design quality principles and the provisions of the Apartment Design Guide are framed to be 'universal' and capable of, and suitable to, being applied to any site in the state. • It is noted that EP&A Regulation 102(4) is no longer required as all modifications must now be referred to a design review panel under this clause.

[53] 147	**Non-discretionary development standards for residential apartment development—the Act, s 4.15** (1) This section identifies particular development standards for residential apartment development. (2) If the standards are complied with, the consent authority cannot require more onerous standards for the matters. (3) The following are non-discretionary development standards— (a) the car parking for the building must be equal to, or greater than, the recommended minimum amount of car parking specified in Part 3J of the Apartment Design Guide, (b) the internal area for each apartment must be equal to, or greater than, the recommended minimum internal area for the apartment type specified in Part 4D of the Apartment Design Guide, (c) the ceiling heights for the building must be equal to, or greater than, the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide.	• The wording of 147(3)(a) does not recognise jurisdictions with a maximum, rather than minimum, parking rate. This is a legacy issue.
[53] 148	**Apartment Design Guide prevails over development control plans** (1) This section applies if a development control plan and the Apartment Design Guide both specify a requirement, standard or control in relation to the following for residential apartment development— (a) visual privacy, (b) solar and daylight access, (c) common circulation and spaces, (d) apartment size and layout, (e) ceiling heights, (f) private open space and balconies, (g) natural ventilation, (h) storage. (2) A requirement, standard or control in the Apartment Design Guide prevails to the extent of an inconsistency. (3) This section applies regardless of when the development control plan was made.	• The rewording of this clause from SEPP 65 (6A) raises the question of whether the Apartment Design Guide objectives, design criteria and design guidance in fact contains any 'requirements, standards or controls' (apart from the development standards specified in 147(3)). It is essential that the status of the Apartment Design Guide provisions are given a formal status as 'requirements, standards or controls' to ensure their effectiveness in this clause. It is suggested that the intended weight and flexibility of an ADG provision is similar to that of a DCP provision as subject to EP&A Act 4.15(3A).
[56] Sch8 3	**Solar access and design for climate** The design of seniors housing should— (a) for development involving the erection of a new building—provide residents of the building with adequate daylight in a way that does not adversely impact the amount of daylight in neighbouring buildings, and (b) involve site planning, dwelling design and landscaping that reduces energy use and makes the best practicable use of natural ventilation, solar heating and lighting by locating the windows of living and dining areas in a northerly direction.	• The design principle refers to 'solar access' however (a) refers to 'daylight access'. The term 'solar access' should be added to the principle — '…with adequate daylight ***and solar access*** in a way that does not adversely impact the amount of daylight ***and solar access*** in neighbouring buildings…'. This is a legacy issue.
[56] Sch9	**Design principles for residential apartment development**	• Reinstate the word 'quality' — 'Design ***quality*** principles for residential apartment development'
[56] Sch9 1	**Context and neighbourhood character** (1) Good design responds and contributes to its context, which is the key natural and built features of an area, their relationship and the character they create when combined and also includes social, economic, health and environmental conditions. (2) Responding to context involves identifying the desirable elements of an area's existing or future character. (3) Well designed buildings respond to and enhance the qualities and identity of the area including the adjacent sites, streetscape and neighbourhood. (4) Consideration of local context is important for all sites, including sites in— (a) established areas, (b) areas undergoing change, (c) areas identified for change.	• Schedule 9(1)(2) could be strengthened through recognising that the existing or future character is as expressed through planning policies (and not by another party) — 'Responding to context involves identifying the desirable elements of an area's existing or future character ***as expressed through planning policies***.' This is a legacy issue.

[56] Sch9 4	**Sustainability** (1) Good design combines positive environmental, social and economic outcomes. (2) Good sustainable design includes the following— (a) use of natural cross ventilation and sunlight for the amenity and liveability of residents, (b) passive thermal design for ventilation, heating and cooling, which reduces reliance on technology and operation costs. (3) Good sustainable design also includes the following— (a) recycling and reuse of materials and waste, (b) use of sustainable materials, (c) deep soil zones for groundwater recharge and vegetation.	• Consider the overlap of Schedule 9(4)(2)(b) 'passive thermal design for ventilation, heating and cooling, which reduces reliance on technology and operation costs' in light of proposed amendment [4] — 'State Environmental Planning Policy (Sustainable Buildings) 2022, Chapter 2 prevails to the extent of an inconsistency between that chapter and this policy, Chapter 4' and SEPP Sustainable Buildings Aims 1.3(h) 'to ensure good thermal performance of buildings' and 1.3(e) 'to minimise the consumption of energy.' Schedule 9(4)(2)(b) could be reframed as' passive ~~***thermal***~~ design for ventilation, heating and cooling, which reduces reliance on technology and operation costs ***and increases resident comfort***' • Consider the overlap of Schedule 9(4)(3)(a) 'recycling and reuse of materials and waste' and Schedule 9(4)(3)(b) 'use of sustainable materials' in light of proposed amendment [4] — 'State Environmental Planning Policy (Sustainable Buildings) 2022, Chapter 2 prevails to the extent of an inconsistency between that chapter and this policy, Chapter 4' and SEPP Sustainable Buildings Aims 1.3(d) 'to monitor the embodied emissions of materials used in construction of buildings' • Schedule 9(4)(3)(c) could be strengthened through explicitly recognising that deep soil zones are used for the planting of canopy trees for urban cooling — 'deep soil zones for groundwater recharge, vegetation ***and the planting of canopy trees for urban cooling***.' This is a legacy issue.
[56] Sch9 6	**Amenity** (1) Good design positively influences internal and external amenity for residents and neighbours. (2) Good amenity contributes to positive living environments and resident well being. (3) Good amenity combines the following— (a) appropriate room dimensions and shapes, (b) access to sunlight, (c) natural ventilation, (d) outlook, (e) visual and acoustic privacy, (f) storage, (g) indoor and outdoor space, (h) efficient layouts and service areas, (i) ease of access for all age groups and degrees of mobility.	• Schedule 9(6)(3)(b) could be strengthened through adding the concept of 'daylight' to the principle — 'access to sunlight ***and daylight.***' This is a legacy issue. • Schedule 9(6)(3)(c) could be strengthened through adding the concept of 'natural cross ventilation' to the principle — 'natural ventilation ***and natural cross ventilation.***' This is a legacy issue.
[56] Sch9 9	**Aesthetics** (1) Good design achieves a built form that has good proportions and a balanced composition of elements, reflecting the internal layout and structure. (2) Good design uses a variety of materials, colours and textures. (3) The visual appearance of well designed residential apartment development responds to the existing or future local context, particularly desirable elements and repetitions of the streetscape.	• Schedule 9(9)(1) could be strengthened through adding the concept of 'design resolution' to the principle — 'Good design achieves a built form that has good proportions and a balanced ***and resolved*** composition of elements…' • Schedule 9(9)(2) could be strengthened through adding the concept of 'durability' to the principle — 'Good design uses a variety of materials, colours and textures ***which are robust, durable and low maintenance.'***

[58] Sch10	**Schedule 10 Dictionary** Omit the definition of accessible area, paragraphs (a) and (b). Insert instead— (a) 800m walking distance of— (i) a public entrance to a railway, metro or light rail station, or (ii) for a light rail station with no entrance—a platform of the light rail station, or (iii) a public entrance to a wharf from which a Sydney Ferries ferry service operates, or	• A definition of 'public entrance' should be provided for clarity. It is suggested, for instance, that a public entrance could be the point at which you can tap-on with an Opal card, a feature which is common to all forms of transport. This is a legacy issue.

APPENDIX 2
Commentary on Draft Environmental Planning and Assessment Amendment (Housing) Regulation 2023

[20] 288C	**Advice about design quality of residential apartment development** (1) The function of a design review panel is to review and give independent advice about the quality of the design of residential apartment development, including by evaluating residential apartment development in accordance with— (a) the design principles for residential apartment development, and (b) the Apartment Design Guide. (2) A design review panel may review and give advice on the request of— (a) a consent authority, or (b) a person making or proposed to make a development application or modification application. (3) A design review panel may review and give advice before or after a development application or modification application for residential apartment development is made. (4) A design review panel must give the review and advice to a consent authority within 14 days of the consent authority's request under subsection (2)(a). (5) This section does not apply to State significant development.	• Reinstate the term 'design quality' in 288C(1) — 'The function of the design review panel is to review and give independent advice about the ***design quality*** of residential apartment development…' • 288C(1)(b) should be limited to '***Parts 3 and 4 of*** the Apartment Design Guide' to mirror the requirements of Draft EP&A Regulation 29(2)(b)(ii) for design verification statements. Only Parts 3 and 4 of the ADG contain design criteria and design guidance and are suitable for use in design and assessment (see ADG p10). Other parts of the ADG are for information, strategic planning, and administration and are not suitable for use in design and assessment. • The timing of 'within 14 days of the consent authority's request' in 288C(4) may not allow time for the design review panel to meet and provide its advice. The 14 days should be measured from the time of ***review*** rather than request. • The exemption for State Significant Development in 288C is problematic. The larger and more prominent the development, the more the input of a design review panel should be required. All SSD applications should be referred to the State Design Review Panel. The SDRP should be given the same standing/recognition as a formally-constituted Design Review Panel under proposed [20] 288A.