

7 April 2017

Director, Industry and Infrastructure Policy
Department of Planning and Environment
PO Box 39
Sydney NSW 2001

By email: education.sepp@planning.nsw.gov.au

Dear Director,

**Submission on draft Education SEPP – State Environmental Planning Policy
(Education Establishments and Child Care Facilities) 2017 [NSW]**

Thank you for the opportunity to provide input on the draft Education SEPP.¹

EDO NSW is a community legal centre specialising in public interest environmental law. For over 30 years we have provided the NSW community with access to legal advice and other professional expertise relating to environmental and planning laws. We also have a dedicated Policy and Law Reform team that assists communities, groups and state and federal governments to improve environmental protection laws.

This submission addresses the following:

- 1. Education facilities generally (and concerns about exempt tree-clearing)**
- 2. Childcare centres**
- 3. Schools and Design Quality Principles**
- 4. Universities**
- 5. TAFE centres**

1. Education facilities generally

EDO NSW recognises the need to deliver well-planned education facilities in a timely way. At the same time, there is a need to ensure these facilities are well-planned, credibly assessed, adequately consulted on, and have minimal adverse impacts on the environment.

Through our community legal advice line, we have been made aware of significant community concerns about the placement or expansion of education facilities into environmentally sensitive areas, including endangered ecological communities,

¹ Available at: <http://www.planning.nsw.gov.au/Policy-and-Legislation/State-Environmental-Planning-Policies-Review/Draft-Education-SEPP>, accessed March 2017.

habitat for species threatened with extinction or heritage areas. Unfortunately the draft SEPP seems to continue and exacerbate these issues.

Despite the potential for competing public interests, education developments are often seen as proceeding 'under the radar' because they are dealt with via SEPPs and Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**). This can mean that public scrutiny, engagement and understanding of the planning process are all reduced because the development is able to proceed as 'exempt' or 'complying development', or (Part 5) 'development without consent'.

We recommend these concerns be addressed by:

- upfront strategic planning by the Education Department, Planning Department and local councils, to ensure environmentally sensitive areas are protected;
- genuine, upfront community notification, consultation and responses to submissions – with triggers for additional requirements for sensitive areas;
- principles and processes to require landscape-sensitive design in such areas, so that biodiversity and ecological integrity is a fundamental consideration; and
- full consideration of alternatives to avoid and minimise environmental impacts.

Particular concern – clearing up to 2 hectares of vegetation as exempt development

One of our major concerns with the draft Education SEPP is the proposal to allow up to 2 hectares' clearing of native vegetation for outdoor sports fields, courts and recreation facilities as 'exempt development'. This would apply to existing schools, universities and TAFE centres, and would not require community consultation.²

We note such development must satisfy general exempt development requirements (clause 15). However, any effect of the requirement to obtain tree-clearing approval in these circumstances is ambiguous (cl. 15(3)(g) – this refers to approvals under LEPs and the soon-to-be-repealed *Native Vegetation Act 2003*). Similarly, any interaction between such clearing and the forthcoming Biodiversity Conservation Act and Urban Vegetation SEPP is also ambiguous.

At present, the Infrastructure SEPP at least requires equivalent development and land-clearing to pass through the Part 5 environmental impact assessment process.³ Part 5 usually includes a small-scale Review of Environmental Factors (**REF**). A full-scale Environmental Impact Statement (**EIS**) is required if there is a significant effect

² Draft Education SEPP, clauses 32(1)(g), 42(1)(g) and 49(1)(g)

³ *SEPP (Infrastructure) 2007*, clause 29 (1)(v).

on the environment, including threatened species or ecological communities. In those rare cases, Office of Environment & Heritage oversight may also be required.⁴

We recommend the SEPP require Part 5 assessment for clearing of up to 2 hectares of native vegetation (or more). This should not be classified as exempt development.

Exempt development – Minimal environmental impact requirement

Importantly for the protection of sensitive areas, a class of development must be of 'minimal environmental impact' to qualify as exempt development under the Planning Act.⁵ We are concerned that no explanation is given as to why land-clearing for outdoor sports fields has moved from Part 5 to exempt development. Further, the draft SEPP does not refer to the 'minimal environmental impact' requirement, and no evidence is presented as to how clearing up to 2 ha would satisfy this requirement. Finally, as noted in our 2010 submission on the Infrastructure SEPP, there is limited guidance or checks and balances (transparent assessment, audits or investigations) to ensure this 'minimal impact' prerequisite is adequately and objectively met.

In addition to the above, we make two recommendations to address these concerns:

- if the native vegetation is significant to the community or environment (e.g. it is public open space or is habitat to threatened species), then community consultation and consideration of submissions should be required;
- develop guidance on how to assess whether an activity under the Education or Infrastructure SEPP is of 'minimal environmental impact', and a clear process in the SEPPs to demonstrate how the authority has determined this.⁶

2. Childcare centres (Draft SEPP Part 3)

Young children should have easy and safe access to the natural environment for their development, wellbeing and future stewardship of the natural world. Wherever possible, this principle should inform design and siting considerations for childcare centres. Below we recommend considering the application of other design principles.

It is also important that childcare centres (building footprints) do not adversely affect environmentally sensitive areas and interact respectfully with local and site-based heritage values.

⁴ *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**), sections 111-115.

⁵ 'Minimal environmental impact' is a prerequisite for carrying out 'exempt development' under s. 76(2) of the Planning Act.

⁶ This should include publishing any supporting studies, and providing a process for the community to provide comment, feedback, complain or report non-compliance with development standards.

Where childcare centres are proposed in or near environmentally sensitive areas or heritage areas, there needs to be a process to ensure impacts are properly assessed, public consultation occurs, and those areas are protected and not degraded.

Vehicle pollution is an issue for childcare centres near busy roads. The Government should review the public health literature on this issue, and consider planning assessments that require independent studies (and projections) of air quality during relevant times; and development controls that prevent childcare centres from setting up in high-traffic or high-pollution areas without appropriate standards for mitigation.

3. Schools (Draft SEPP Part 4) and Design Quality Principles (Schedule 4)

As per the general concerns above, it is not unusual that expansions or proposals for schools raise land use conflict between two socially positive uses – schools and natural bushland or green space.

The Government should consider measures to address these conflicts. For example:

- ways to protect and consult about environmental areas that may be affected by school developments or expansions;
- encouraging ‘bush school’ designs that may locate well-designed, low-impact schools in natural areas, or revegetate degraded areas, to expand availability of open space for students (and potentially the public) and enhance connections to nature; and
- identifying and resolving conflicts between, on one hand, preserving natural areas in and around schools, and on the other, bushfire safety requirements.

Schools – Design quality principles

Schedule 4 of the Draft SEPP sets out seven principles that must be considered by determining/consent authorities when considering a Part 4 development application for schools.⁷

In brief the principles cover the following matters: (1) context, built form and landscape; (2) sustainable, efficient and durable; (3) accessible and inclusive; (4) health and safety; (5) amenity; (6) whole of life, flexible and adaptive; and (7) aesthetics.

We generally support these principles, but note that biodiversity, heritage and Aboriginal cultural considerations are absent. We make the following recommendations for improvement:

⁷ Draft Education SEPP, clause 29(5).

- A new principle (or principle 1) should refer to **biodiversity and ecological integrity** as a fundamental consideration in planning school developments. In particular, this should begin with site selection; and include maintaining and improving existing biodiversity on-site and surrounds; avoiding and minimising clearing; and local native landscaping to maintain and improve biodiversity.
- A new principle (or principle 3) should refer to design and maintenance that encourages **environmental stewardship**, by involving staff and students in ongoing care of the environment, on-site and surrounds.
- A new principle (or principles 1, 3 or 5) should refer to **local heritage considerations, including Aboriginal culture**, heritage and stewardship.
- Principle 5 (**amenity**) and principle 7 (**aesthetics**) should be combined.
- Require these design principles to be considered for 'exempt' and 'complying development', and Part 5-assessable 'development without consent' (for example, clauses 30-33), with further requirements to sign-off and publish a statement as to how the design principles have been considered and applied.
- Consider applying the same or similar principles to all education facilities and childcare centres under the SEPP, not just school development applications.

Independent oversight of Part 5 environmental assessments, including private schools.

The Education SEPP and proposed amendments to the EP&A Regulation 2000 would appoint private school organisations as, effectively, self-assessment and determining authorities for their own schools. Private school organisations would be subject to a new Code to guide private school environmental assessments under Part 5 of the Act. While this is designed to be consistent with Part 5 assessments of public schools, it also highlights the lack of third party oversight of the assessment and approval process under Part 5, and the limited transparency and consultation prior to approval.

We therefore recommend introducing four additional safeguards:

- a requirement that the sign-off by Part 5 assessors state that the assessment is "accurate, complete and up-to-date", in addition to the proposed statement of "not false or misleading" (if the term "to the best of my knowledge" is included, this should also refer to all reasonable efforts to confirm accuracy, completeness, veracity etc);
- a mandatory independent peer review of REFs, prior to what is effectively self-approval - in particular where public open space, sensitive environmental or heritage areas are affected (even if no EIS is required);
- online publication of all documents at the time when local councils, neighbours or public authorities are consulted (on local council websites as well as school websites), and

- a mandatory post-approval audit and reporting process (some but not all of these elements may be proposed under the draft private school assessment Code).

These safeguards should at least apply for private schools and, arguably for consistency, public schools as well. Finally we note that the private school code does not apply to exempt development, including land-clearing, by private or public schools. Safeguards for exempt and complying development are therefore still required separately.

4. Universities (Draft SEPP Part 5)

As noted above, we recommend clear procedures including consultation and robust assessment where university development or expansion could affect or displace environmentally sensitive areas. The additional design principles noted above in relation to biodiversity and ecological integrity, environmental stewardship and heritage, should also apply to universities.

5. TAFE centres (Draft SEPP Part 6)

Similarly, we recommend clear procedures including consultation and robust assessment where TAFE development or expansion could affect or displace environmentally sensitive areas. The additional design principles noted above in relation to biodiversity and ecological integrity, environmental stewardship and heritage, should also apply to TAFE centres.

Conclusion

We hope this submission assists in progressing the draft Education SEPP. If there are any matters you would like to discuss, please contact me or Rachel Walmsley, Policy & Law Reform Director, on (02) 9262 6989 or by e-mail.

Yours sincerely,
EDO NSW



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