



7 April 2017  
Our Ref: DPE Submission

Department of Planning and Environment  
GPO Box 39  
SYDNEY NSW 2001

**Attention:** Director, Industry and Infrastructure Policy

**By Email:** [education.sepp@planning.nsw.gov.au](mailto:education.sepp@planning.nsw.gov.au)

Dear Sir, Madam,

**PUBLIC CONSULTATION DRAFT – STATE ENVIRONMENTAL PLANNING POLICY  
(EDUCATIONAL ESTABLISHMENTS AND CHILD CARE FACILITIES) 2017**

State Planning Services Pty Limited (**SPS**) and Holding Redlich have undertaken a review of draft *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (the draft SEPP)* which proposes changes to the planning system that are intended to make it easier for child-care providers, schools, TAFEs and universities to build new facilities and improve existing ones.

We note that the draft SEPP is intended to replace the educational establishment provisions within *State Environmental Planning Policy (Infrastructure) 2007 (I SEPP)* and include provision for the development of child-care facilities.

Furthermore, we note that the aim of the draft SEPP is, *“to facilitate the effective delivery of educational establishments and early childhood education and care facilities across the State by:*

- (a) improving regulatory certainty and efficiency through a consistent planning regime for educational establishments and early childhood education and care facilities, and*
- (b) simplifying and standardising planning approval pathways for educational establishments and early childhood education and care facilities (including identifying certain development of minimal environmental impact as exempt development), and*
- (c) establishing consistent State-wide assessment requirements and design considerations for educational establishments and early childhood education and care facilities to improve the quality of infrastructure delivered and to minimise impacts on surrounding areas, and*
- (d) allowing for the efficient development, redevelopment or use of surplus government-owned land, and*
- (e) providing for consultation with relevant public authorities about certain development during the assessment process or prior to development commencing, and*
- (f) aligning the NSW planning framework with the National Quality Framework that regulates early childhood education and care services, and*

- (g) *ensuring that proponents of new developments or modified premises meet the applicable requirements of the National Quality Framework for early childhood education and care services, and of the corresponding regime for State regulated education and care services, as part of the planning approval and development process."*

In summary, our review of the draft SEPP in this submission considers the following:

- (a) whether the aims are likely to be achieved if the draft SEPP is to be adopted in its current form;
- (b) whether the draft SEPP offers improvements over existing environmental planning instruments and policies that apply to educational establishments and early childhood education and child-care facilities in New South Wales; and
- (c) what recommendations are required, if any, to make it easier for child-care providers, schools, TAFE and universities to build new facilities and improve existing ones.

## **ACHIEVEMENT OF AIMS**

### **(a) Regulatory Certainty and Efficiency**

The draft SEPP introduces additional tiers and categories of development combined with a multitude of referral requirements and criteria which often cannot be fulfilled in the absence of a DA in practical scenarios. Consequently, if adopted in its current form, the draft SEPP results in regulatory uncertainty and an inefficient approach to the development of child-care facilities, schools, TAFE and universities.

Introducing merit-based/subjective Part 5 assessments for development that is 'permitted without consent' (a term which is often confused by the public with 'exempt' development) and requiring quasi-integrated approvals from State government authorities when lodging a CDC application does not assist with the achievement of regulatory certainty and efficiency.

Where a student cap that is imposed on a DA is taken up by an educational establishment, there is minimal scope under the draft SEPP for development that is permitted without consent or a CDC. While student caps can really only apply to non-government schools given the obligation for government schools to accept all children within a prescribed area, the reality is that upper limit caps are usually met (or in some cases breached) through enrolment growth over time.

The result is that the draft SEPP will induce less regulatory certainty and will ultimately end up being inefficient for all stakeholders involved. Hence, the draft SEPP does not achieve this aim.

### **(b) Simplification and Standardisation**

The draft SEPP introduces non-standard practices such as Council-only determinations of CDC applications for school development and still relies upon a range of State environmental planning policies, rather than just one, for the purposes of assessing school development.

In addition, the draft SEPP creates a range of cumbersome, inefficient processes, which are likely to only benefit a few stakeholders whilst at the same time restricting development far beyond the current provisions contained within I SEPP.

With the need to consider another environmental planning instrument, rather than an amendment to an existing policy, the list of applicable planning policies that apply to development has expanded, not contracted. This does not amount to simplification.

Accordingly, the draft SEPP does not simplify or standardise the process for undertaking development and therefore, does not achieve this aim.

**(c) Consistency of State-wide Assessment Requirements and Design Considerations**

The introduction of child care provisions into one policy is a positive initiative. However, no controls exist within the draft SEPP pertaining to boarding school accommodation or on-site accommodation for students and staff.

This means that the assessment of a proposal which includes boarding schools accommodation or on-site accommodation will still require reference to a range of planning instruments (including the Codes SEPP) rather than just one planning instrument and is less flexible for proponents of child-care facilities, schools, TAFEs and universities than I SEPP.

The draft SEPP introduces non-standard practices such as Council-only determinations of CDC applications for school development and is inconsistent with State-wide assessment requirements and design considerations. Accordingly, the draft SEPP does not achieve this aim.

**(d) Efficient Development, Redevelopment or Use of Surplus Government-owned Land**

Other than Site Compatibility Certificates, it is unclear how the draft SEPP seeks to promote the efficient development, redevelopment or use of surplus government-owned land.

**(e) Consultation with Relevant Public Authorities**

Consultation with Roads and Maritime Services (RMS) prior to submitting a CDC involving an increase of over 50 students will result in significant delays to an otherwise efficient CDC process.

Likewise, extensive consultation with the Department of Education will rely upon significant resources in order to cope with the influx of applications in the event that the draft SEPP is adopted in its current form.

Although there is no doubt that the draft SEPP includes consultation with relevant public authorities, this is likely to result in inefficiencies and additional time/cost delays to proponents. Also without the ability to either review any determination by RMS or the Department of Education or appeal on the merits against a deemed refusal many proponents will be reluctant to use these provisions given the uncertainties.

**(f) Alignment of the NSW planning framework with the National Quality Framework that regulates early childhood education and care services**

The draft SEPP succeeds in attempting to align the NSW planning framework with the National Quality Framework. However, imposing child-care facilities on all light industrial zones and low density residential zones may result in land use conflicts and will increase competition for non-core based land uses within these zones.

**(g) The National Quality Framework assessment criteria for early childhood education and care services to correspond with State regulated education and care services**

Refer above comments at (f).

## **IMPROVEMENT OVER EXISTING POLICIES**

The draft SEPP is less flexible than I SEPP and creates additional unnecessary complexity which is likely to be counter-productive having regard to the aims and justification associated with this Policy.

This submission identifies over 20 recommendations in relation to the draft SEPP (refer below).

Many of the recommendations indicate that proponents of child-care facilities, schools, TAFEs and universities (or owners of surrounding development) will be adversely affected by the draft SEPP. Despite good intentions, this is an inferior outcome and should not be supported by the Minister as the draft SEPP does not represent a significant improvement over existing policies.

## **RECOMMENDATIONS**

SPS and Holding Redlich wish to make the following recommendations in relation to the draft SEPP.

That:

1. It should not be only open to Councils to issue CDCs. Effectively designating councils as the consent authority for certain types of complying development runs counter to the 1998 changes to the Act which introduced complying development. That framework was influenced by the COAG principles on competitive neutrality and provided that either a council or an accredited certifier could determine an application for complying development.

### **Comments:**

- If the planning impacts of the development cannot be appropriately addressed within the pre-determined development standards frameworks for complying development then what is being proposed is outside the scope of what can be dealt with as complying.
  - If greater input by a consent authority is required, a development application should be lodged and the application should be determined on its merits by the appropriate consent authority, potentially having regard to certain non-discretionary development standards to ensure greater consistency between non-government and public schools.
  - If the planning impacts of the proposed development can be appropriately managed within the pre-determined development standards frameworks and so can be dealt with as complying then both the council and the accredited certifier should be able to issue the certificate.
2. The proposed introduction of referral requirements for CDC applications should be abolished.

### **Comments:**

- Imposing referral requirements on CDC applications will not work in practice.

- External referrals to the NSW Roads and Maritime Authority (**RMS**) and other State government organisations consume excess time and will reflect a conventional DA instead of offering a fast, efficient determination.
  - External referrals to government agencies should be confined to the DA process instead of adding an additional unnecessary tier to the approvals process for complying development in NSW.
  - It is trite to say that because these requirements apply before an application is lodged that they do not impact on determination times. Proponents are acutely aware of how long these sorts of processes take and their impact on project time frames.
3. Proposed amendments to the *Environmental Planning and Assessment Regulation 2000* (**EP&A Regulation**) which recognise a registered non-government school as a 'public authority' are confusing and should not be supported they do not accurately describe what a non-government school is.

#### **Comments:**

- No evidence has been put forward about how effective the provisions that allow government schools to carry out development without consent have been.
- As a matter of principle ideally there should be no real difference between the planning controls applying to both a government and a non-government school. The planning system should be concerned with the impact of the proposed development and not with who is proposing to carry out that development.
- While government and non-government schools should be subject to similar planning controls, their differences in the private and public domain are evident, but to even identify a government school as 'public authority' and allow it to carry out development without consent as somewhat misleading.
- The erection of buildings within the NSW planning system has traditionally been development with consent, determined by a consent authority under Part 4 of the *Environmental Planning & Assessment Act 1979* (**EP&A Act**).
- To allow buildings (as distinct from pipelines, drainage, electricity supply networks and other linear infrastructure) to be carried out as an activity does not sit well with the statutory scheme established by the EP&A Act.
- To compound that by seeking to identify development that may be carried out without consent by non-government providers and then to declare those providers to be a determining authority only seeks to further complicate a very unwieldy system.
- Again if the concerns are that the ordinary pathways for development with consent under Part 4 are not suitable for schools then rather than seeking to bypass those provisions why not address them directly by for example directly amending heights and floor space ratios in relevant LEPs, turning off competing provisions in DCPs as was done with child care facilities.
- For those same reasons, seeking to impose mandatory record-keeping requirement imposes an unfair burden on schools.
- If the impacts are the same and there can be no assurances about record keeping obligations because the requirements of the *Government Information (Public Access) Act 2009* (**GIPA Act**) do not apply then deal with the development as either with consent, exempt or complying (whichever is appropriate) rather than making

it an activity and impose GIPA Act type obligations on non-government schools.

4. Student and staff caps limiting numbers on a site should be removed from the draft SEPP.

**Comments:**

- Setting caps is a blunt instrument. What is acceptable on a given site should be largely governed by the site constraints and the planning impacts around overshadowing, traffic and to a lesser extent noise.
  - In reality student and staff caps will predominantly burden private schools as government schools are obliged to accept all students within a prescribed area.
  - In any event, no condition should be imposed without a strong planning reason and the promotion of an outcomes-based approach will not be embraced on a broad scale by consent authorities due to the difficulty regulating and enforcing
  - Any inequitable and unfair burden that is likely to unnecessarily discriminate between non-government and government schools should not be supported.
  - Student and staff caps do not promote the achievement of the aims of the draft SEPP and the associated planning circular does little more than contradict the aims of the Draft SEPP and therefore, should not be made.
  - If the reasons for justifying the draft SEPP include the importance of schools in the community, traffic considerations may need to be downgraded against the important objective of assisting in delivering school capacity. This could be done by either turning off competing provisions in DCPs or introducing appropriate non-discretionary development standards.
5. State significant development (**SSD**) should not include all new schools as some new schools represent local development that does not require input from the Minister for Planning (**the Minister**) as the consent authority.

**Comments:**

- Again decisions about who the consent authority should be should properly turn on the nature of the proposed development and how widely the proposed impacts will be.
- For development to be declared to be regionally significant the impacts should be the kind that straddle local government boundaries. It is not appropriate to seek to declare development to either be regionally or State significant on the basis that the applicant will somehow get a better hearing because they are dealing with someone other than the local council.
- We would suggest that the following thresholds should apply:
  - Only applications with a capital investment value (**CIV**) or more than \$100 million should fall within the category of SSD;
  - Only applications with a CIV between \$20 million and \$100 million should be 'regional development' that requires determination by a Joint Regional Planning Panel (**JRPP**).
  - Other development with a CIV below \$20 million should not be confined to CDC applications, and should be the subject of a DA.



6. In the interest of student and staff amenity together with the promotion of a healthy lifestyle that supports learning and reduces obesity, educational establishments should be required to provide a minimum area per student for the purposes of a playground or recreational open space.

**Comments:**

- Educational establishments should not be permitted to rely exclusively upon off-site means (i.e. use of public facilities) in which to compensate for any shortfall associated with an inferior development proposal or a constrained site.
- Potential conflicts between public and private use of recreational open space together with any compromise in amenity for the public, students and staff should be avoided.

7. Centre-based childcare facilities should not become permissible development on all IN2 Light Industrial zoned land.

**Comments:**

- This imposition may result in potential land use conflicts and create a situation whereby light industry will be competing with non-light industrial uses.

8. School buildings (such as classrooms, halls and offices) up to 22 metres in height setback only 10 metres off the boundary approved as part of a CDC should not require any design quality assessment.

**Comments:**

- The CDC process is generally associated with less community consultation/involvement with greater efficiency and should not be modified to resemble what is essentially a DA with subjective merit-based elements.
- The apparent need for a design quality assessment indicates that in the case of a CDC, the relevant numerical standards may potentially need to be reduced.

9. Sporting fields should not be exempt development and instead, should be included as part of a DA.

**Comments:**

- This type of development will create potential adverse impacts on amenity for surrounding development such as noise which otherwise requires a DA in order to ensure appropriate mitigation and conditions to address potential land-use conflicts.

10. Centre-based childcare facilities should not become permissible development on all R2 Low Density Residential zoned land.

**Issues:**

- This imposition may result in potential land use conflicts and create a situation whereby non-residential uses will be competing with residential uses.

- Flow-on effects include greater demand for residential land and less scope for facilitating policies that promote housing affordability.
11. The inability for a CDC to contravene any conditions of consent is restrictive and does not respect the integrity of a CDC as a form of development consent as defined by the EP&A Act.

**Comments:**

- Most if not all CDC applications will result in a contravention to a condition of development consent and therefore this aspect of the draft SEPP will render most CDC provisions impracticable and unworkable.
  - Where development that is permitted without consent involves an increase in student and staff numbers in the order of 10%, this component is not available if the conditions of consent associated with a DA have reached their capacity.
12. The draft SEPP needs to include provision for boarding schools and on-site accommodation facilities associated with educational establishments.

**Comments:**

- Many schools include on-site residential accommodation for students, yet the draft SEPP remains silent on this issue.
13. The draft SEPP needs to include provision for how an educational establishment is assessed when the maximum capacity of a site is reached (either by way of traffic investigations indicating that an upper limit cap has been exceeded, or by other reasons such as physical or geographical constraints).

**Comments:**

- A common factor amongst educational establishments is growth especially in terms of enrolments/students/staff.
14. All planning controls associated with educational establishments should be contained within the draft SEPP and not spread out across other environmental planning instruments such as *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (the Codes SEPP)*.

**Comments:**

- The Codes SEPP should specially exclude any application of educational establishment and child care development otherwise contained within the draft SEPP in order to simplify the location of relevant controls and reduce complexity, consistent with the aims of the draft SEPP.
  - Only one SEPP (not multiple SEPPs) should apply to child-care providers, schools, TAFEs and universities in NSW.
15. The CDC provisions within the draft SEPP do not allow for underground development such as car parks.

**Comments:**

- Underground development such as car parks can be largely imperceptible when associated with a building and should be supported as part of a CDC application.



16. The inability to undertake complying development on sites with heritage affectation is restrictive and reduces the flexibility for schools that has been available for much of the past decade.

**Comments:**

- This proposal will force schools to lodge DAs for work that was previously the subject of a CDC which is far more restrictive than I SEPP.

17. The requirement for a CDC with a building up to 22 metres in height to be accompanied by a written statement by a qualified designer that the design quality principles in the draft SEPP have been achieved introduces a subjective merit-based element into a process that has traditionally been prescriptive only and erodes the integrity of a code-assessable approach.

**Comments:**

- Subjective merit-based assessments should remain as part of the DA process and if not, the EP&A Act should be amended to ensure appropriate appeal mechanisms are in place to counter any misuse or abuse of this type of control.

18. The draft SEPP is a standalone policy and not an amendment to I SEPP thereby creating another layer of consideration to any proposal and contradicting efforts to simplify the planning system in NSW.

**Comments:**

- The I SEPP offers greater flexibility than the draft SEPP and if the planning system in NSW is to be simplified, this is unlikely to occur by adding additional environmental planning instruments together with additional tiers of restrictive options for the submission of applications.

19. The term 'development permitted without consent' is often confused with 'exempt' development, yet prescribed development such as a one storey library, classroom or carpark is able to occur subject to an environmental assessment under Part 5 of the EP&A Act. In order to reduce confusion and simplify the process, enhanced criteria may allow inclusion of this type of development as exempt development instead, thereby removing the need for 'development permitted without consent'.

**Comments:**

- Confusing terminology within environmental planning instruments which increases the complexity of the process without any significant gain should be avoided.
- A Part 5 assessment is a quasi-consent because without it, a proponent cannot proceed with the development to which 'development without consent' applies.

20. There is no justification for site compatibility certificates and this provision should be removed from the draft SEPP.

**Comments:**

- Where a site is deemed appropriate for a use that is currently not permissible in the relevant land use zone, a planning proposal can be lodged for a Gateway determination to change the zoning.
- In any event, the references in proposed clause 13 to the need for ‘... *information demonstrating that the proposal is **not inconsistent** with the relevant district plan made under Part 3B of the Act (district plan)*...’ should be changed (our emphasis in **bold**). Ideally, the wording should instead state ‘... *information demonstrating that the proposal **is consistent** with the relevant district plan made under Part 3B of the Act (district plan)*...’ (our emphasis in **bold**).
- Supporting documentation accompanying the draft SEPP supports the site compatibility certificate process on the basis that the provisions ‘*will also facilitate the disposal of surplus educational sites*’, yet this contradicts statistics which indicate an additional 172,000 students entering the public school system by 2031 with the need for 15 new schools each year.

21. A ‘Building the Education Revolution’ (**BER**) style approach similar to that adopted under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 (the NBJP Act)* (now repealed) and administered by the then Nation Building and Jobs Plan Taskforce (**NBJP Taskforce**) is more likely to create the change needed in NSW planning to promote educational establishments and other related development including child care facilities.

**Comments:**

- The post-global financial crisis (**GFC**) era demonstrated that a process that is both efficient and effective can be adopted in which to expedite development such as educational establishments and child care facilities that is regarded as being important infrastructure within the community.
- The draft SEPP places a reliance upon a professional consultant team to advise and guide proponents on the best approach to proceed with the development or redevelopment of a site as the process is far from being simplified or standardized, contrary to the rhetoric contained within the supporting documentation associated with the draft SEPP.
- The approach seems to be attempting to paper over some of the obvious deficiencies in the EP&A Act by trying to cobble together something that might be said to approach ‘code based development’ as foreshadowed in the Planning Bill 2013. In our view if the needs for new facilities and refurbishment of existing facilities is so pressing the changes to institute something more properly approaching the legislative scheme in the NBJP Act then those changes should be picked up as part of amendments to the Act rather than trying to establish such a system using the draft SEPP and the proposed amendments to the EP&A Regulation to try and achieve the desired result.

22. The new concurrence role for the NSW Department of Education for child care facilities requires additional resources and staff in order to ensure that the applications can be processed in a timely manner. Likewise, any traffic certificate from RMS for a CDC with an increase of more than 50 students will take a long time to be issued and will unnecessarily delay the issue of a CDC.

**Comments:**

- Where possible, a backlog and excess time delays associated with referrals to government authorities should be avoided.
23. The segregation of universities and TAFE colleges from schools with separate controls allowing tertiary institutions to undertake exempt development and other development without consent unnecessarily complicates the process and should not be upheld.

**Comments:**

- There is no reason why universities, TAFE colleges and schools cannot fall under the same umbrella being an 'educational establishment'.

**4. SYNOPSIS**

SPS and Holding Redlich have reviewed the draft SEPP together with the supporting exhibition material prepared by DPE and note the following positive elements:

1. Coordination of planning controls for child care facilities in one central location across the State of NSW; and
2. Attempts to create greater fairness between government and non-government educational establishments.

However, following review of the draft SEPP, this submission demonstrates that, in our opinion:

- (a) the aims of the draft SEPP are unlikely to be achieved if it is adopted in its current form;
- (b) the draft SEPP offers some improvement over existing environmental planning instruments and policies that apply to early childhood education and care facilities, but less flexibility and greater complexity for educational establishments; and
- (c) specific recommendations made herein, if adopted, will make it easier for child-care providers, schools, TAFEs and universities to build new facilities and improve existing ones.

A BER-style approach similar to that adopted under the NBJP Act (now repealed) and administered by the then NBJP Taskforce is more likely to create the change needed in NSW planning to promote educational establishments and other related development including child care facilities.

Ideally, DPE should refrain from referring the draft SEPP to the Minister for publication until such time as the recommendations herein can be addressed with subsequent re-exhibition for public comment. Please keep our office informed in this regard.

Should you require clarification of any matter, please do not hesitate to contact our office on 9552 1525.

Yours sincerely,

**STATE PLANNING SERVICES**

**HOLDING REDLICH**



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