Woollahra Council Submission - *Draft State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017*, and associated documents

Woollahra Council welcomes the opportunity to comment on the exhibition of the *Draft State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (the Draft SEPP) and associated documents. Our submission to the exhibition is attached.

Background

The Department of Planning and Environment (the Department) has prepared Draft planning legislation and guidelines to assist education providers when planning and designing education and child care facilities. These documents apply to child care facilities, schools, TAFEs and universities across NSW. The stated aims of these documents are to:

- Simplify and standardise planning approval pathways for educational establishments and child care facilities (including allowing certain development as exempt and complying development);
- Establish consistent State-wide assessment requirements and controls for educational establishments and child care facilities; and
- Align the National Quality Framework for Early Childhood Education and Care Facilities with the NSW planning system.

The Woollahra Local Government Area (LGA) accommodates twenty-one schools and twenty-eight child care facilities, as categorised in the table below.

Table 1: Existing Schools and Child Care Facilities in the Woollahra LGA

Schools	Primary	Secondary
Government	6	Nil
Non-government	9	6
Total = 21	15	6

Child Care	Preschool	Long day care
Community based	2	5
Private	3	18
Total = 28	5	23

The majority of schools and child care facilities are provided by the private sector. Fifteen of the twenty-one schools are non-government (approximately 70%), and twenty-one of the twenty-eight childcare centres are private (75%). The majority of these schools are relatively large and dominant land uses within our relatively small LGA (12 km^2). These large schools have large student and staff numbers, substantial land holdings which include recreational and sporting facilities that are used on weekdays, weekends and during school holidays. These schools include:

- Ascham School, Edgecliff
- Cranbrook School, Bellevue Hill
- Sydney Grammar - Edgecliff Preparatory School, Paddington
- Holy Cross, Woollahra
- Kambala Rose Bay
- Kincoppal Rose Bay
- McAuley Primary School Rose Bay
- Reddam House, Woollahra
- The Scots College, Bellevue Hill

Twenty of the twenty-one schools in the LGA are located on land zoned SP2 Infrastructure under *Woollahra Local Environmental Plan 2014* (WLEP). Also, twenty of the twenty-one schools adjoin land within one or more of the following zones:

- R2 Low Density Residential
- R3 Medium Density Residential
- RE1 Public Recreation
- RE2 Private Recreation

Schools have a major impact on traffic congestion and car parking in the LGA. A high proportion of parents drive their children to school and senior high school students regularly drive to school and park in local streets.

The LGA has a considerable amount of hills, ridgelines and steeply sloping land. Due to its orientation and extensive exposure to Sydney Harbour, a significant proportion of private and public land is fortunate to enjoy iconic views to the Sydney Opera House, Harbour Bridge, Sydney CBD skyline and views to the harbour, the lower north shore and the Sydney Harbour heads. Therefore, maintaining views and promoting view sharing are a significant planning and amenity issues for Council.

As there are no University or TAFE campuses located within the LGA. No comments have been provided for the sections of the Draft SEPP related to development associated with these land uses.

Woollahra Council comments about the Draft SEPP and associated documents

Council acknowledges the need to provide additional education establishments and childcare centres for a growing population. However, we believe this infrastructure should be developed in a well planned manner with appropriate merit assessment. We submit that there are shortcomings in the planning and assessment framework proposed by the Draft SEPP and associated documents. Our concerns are provided below.

1. General comments about the Draft SEPP

1.1 We generally do not support expanding the scope of development permitted as development without consent and complying development for schools for the following reasons:

- The Draft SEPP will override the refined and context based planning provisions for educational facilities and child care centres contained in the WLEP and the *Woollahra Development Control Plan 2015* (WDCP) with a "one size fits all" approach.
- The Draft SEPP and Draft "Better Schools: A design guide for schools in NSW" (the Draft Design Guide) will not address the existing or desired future character of areas within the Woollahra LGA, creating a generic built form that does not respond to local character or conditions.

2. The Draft SEPP

2.1 Development without consent on schools, non-government schools as public authorities

The Draft SEPP will permit certain development without consent from a consent authority on existing school sites. However, the person carrying out the development will need to undertake an environmental assessment of the likely impacts of the proposed activity in accordance with Part 5 of the *Environmental Planning and Assessment Act 1979*.

Registered non-government schools (RNS) will be prescribed as public authorities to enable them to carry out these developments without consent using the same process currently carried out by the Department of Education (DoE) for public schools. The *Draft Environmental Planning and Assessment Amendment (Schools) Regulation 2017* (the Draft Regulation) is proposed to prescribe RNSs as public authorities for this purpose.

We do not support this proposal. Despite the guidance of the Draft "NSW Code of Practice for Part 5 Activities: For registered non-government schools" (the Draft Code of Practice), RNSs will act in conflicting roles. They are the developer, they appoint the person to assess the development proposal and they determine the proposal. There is a lack of independence in this process. Additionally, there is no proposed mechanism to ensure that the RNSs are held accountable for the accuracy of the assessment. The auditing process of RNS compliance described in section 6.3 of the Draft Code of Practice is not mandatory and is also permitted by "a suitably qualified person", whose credentials and experience are not defined. A more detailed description of our concerns with the associated Draft Code of Practice is included point 6 of this submission, below.

2.2 Consultation and notification

Clauses 8-12 of the Draft SEPP require consultation with councils and other public authorities for development without consent carried out by or on behalf of public

authorities. In the case of consultation with councils, this only relates to development which may impact on council-related infrastructure or services (namely stormwater, traffic, pedestrian, sewerage, water supply and excavation management) or local heritage items and heritage conservation areas.

We support consultation between public authorities and councils, and note that the consultation possible under these clauses is not mandatory. The public authority is only required to consult with council if, in their opinion, the development will have an impact on a narrow range of infrastructure or heritage items and heritage conservation areas.

Additionally, the wording of these clauses is confusing and ambiguous. The term "public authorities" is used to describe both the proposed developer of education facilities and child care facilities, such as an RNS or the DoE, as well as the governing bodies or agencies for particular types of development, such as the Office of Environment and Heritage or Roads and Maritimes Services. For example sub-clause 12 (1) (c) states:

> (1) Clauses 8–11 do not apply with respect to development to the extent that: …
>
> (c) they would require notice to be given to a council or public authority that is carrying out the development or on whose behalf it is being carried out …

In this subclause it is unclear under what circumstances notice is required to be given and to whom and which public authority is carrying out development and for whom.

We recommend a mandatory requirement for public authorities (DoE or RNS) to consult with councils regarding the potential impact of development without consent in regard to issues such as building height, bulk, scale and privacy, and particularly issues which can only be determined by merit assessment, such as the impacts on view sharing and desired future character. This level of consultation would foster communication and co-operation between public authorities and councils, provide the public authority with valuable local experience about environmental conditions and community expectations, and assist in providing well planned development on existing school sites.

We also recommend that the Department clarify the term "public authorities" to avoid confusion and ambiguity in interpretation of the document.

2.3 Increase student and staff numbers by up to 10% as development without consent

Clause 30 of the Draft SEPP will permit certain development without consent on existing school sites. This development is described in the "State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017: Explanation of Intended Effects" (Explanation of Intended Effects) as "small scale" and "minor". However, it will permit development that will allow an increase in students and staff numbers at existing schools by up to 10% "compared with the average of each of those numbers for the 12-month period immediately before the commencement of the development".

We note that subclause 30(3) specifies that an approval under this clause cannot contravene an existing condition of a development consent that applies to any part of the school, relating to student or staff numbers. We support this provision.

However, we do not support subclause 30(2)(b). In the case where an existing school does not have a student cap as a condition of development consent, the school would potentially be permitted to increase its student and staff numbers by 10% each year. Our experience is that schools can have substantial impacts on surrounding areas. Where they are located in residential precincts, with narrow streets, a lack of on-street car parking and poor public transport services, there can be significant impacts on residential amenity and road infrastructure. These impacts need to be assessed thoroughly by an independent authority with community input. The development without consent process under clause 30 does not allow this rigorous process.

We recommend that reference to an increase in student and staff numbers in subclause 30(2)(b) be removed.

With regard to setting student and staff caps through development consents, we note the Draft "Regulating expansion of schools" Planning Circular on student caps (the Draft Planning Circular) exhibited with the Draft SEPP. We provide comments on the circular in section 7 of our submission.

2.4 Notification of development without consent

Clause 31 of the Draft SEPP requires a public authority, or its representative, to notify the relevant council and occupiers of adjoining land of its intention to carry out development, before development is carried out. Consideration must be given to the responses to the notice that is received within 21 days.

While we support consultation between public authorities, councils and the community, we are concerned about the wording of clause 31. The clause states that notification is required "before development to which this clause applies is carried out", rather than before development is assessed under the Part 5 process and the Draft Code of Practice. Therefore, the wording could be interpreted to mean that notice is given after the assessment is complete, but prior to the commencement of works. In this case, any allowance for interested parties to make a submission, as contemplated in subclause 31(2)(b) is of no value because the assessment has already been undertaken, and an approval has been issued.

We recommend that subclause 31(2) be reworded to confirm that the notification process for this type of development occurs prior to the completion of the assessment process.

The current wording of the Draft subclause is:

> (2) Before development to which this clause applies is carried out, the proponent of the development must:

We recommend it be amended to read:

> (2) Before the assessment and determination of an application for the development to which this clause applies is carried out, the proponent of the development must:

2.5 Building height definition

The definition of building height for schools as complying development relies on ground level (mean) and ground level (finished), rather than the more commonly used ground level (existing).

The Standard Instrument definitions of ground level are:

> ***ground level (existing)*** means the existing level of a site at any point.
>
> ***ground level (finished)*** means, for any point on a site, the ground surface after completion of any earthworks (excluding any excavation for a basement, footings or the like) for which consent has been granted or that is exempt development.
>
> ***ground level (mean)*** means, for any site on which a building is situated or proposed, one half of the sum of the highest and lowest levels at ground level (finished) of the outer surface of the external walls of the building.

We do not support the use of ground level (mean) and ground level (finished), rather than the more commonly used ground level (existing) as the basis for building height for complying development on schools. These ground level definitions are ambiguous, confusing and complex.

For example, ground level (finished) relates to the "ground surface after completion of any earthworks" or "that is exempt development". However, if no earthworks or exempt development have been completed on a site, the definition does not apply and consequently building height cannot be determined.

Therefore, we recommend the use of ground level (existing) as the basis for building height calculations for complying development on schools. However, if the ground level (mean) and ground level (finished) definitions are retained, we recommend that a diagram or diagrams be included to assist with determining ground levels and building height.

2.6 Maximum building height

Schedule 2, clause 2 of the Draft SEPP will permit building height for schools as complying development to maximum of 4 storeys and 22m. This is a significant increase from the maximum of 12m permitted in the *State Environmental Planning Policy (Infrastructure) 2007* (the Infrastructure SEPP).

We do not support a maximum building height of 4 storeys and 22m as complying development, particularly in low density residential areas. The maximum height control in R2 Low Density Residential zone in the WLEP 2014 is generally 9.5m. This height control is aimed at restricting development to 2 storeys with a pitched or angled roof. A 22m control for development such as residential or mixed use, is approximately equivalent to a 5-6 storey building.

The Draft SEPP would permit development more than double the height of any development in the R2 zone, and as complying development, it would not require a full assessment process for amenity issues such as view loss / sharing, visual impact, bulk and scale and desired future character. These issues are more sensitive in areas with steeply sloping terrain such as the Woollahra LGA.

We therefore recommend that a maximum building height of 12m be maintained for complying development on schools, as is currently permitted by the Infrastructure SEPP.

2.7 View sharing

Neither the Draft SEPP nor the Draft Code of Practice include a consideration of the impact of new educational development on views and view sharing. Therefore, there is no mechanism available for a merit assessment based on view sharing principles which have been established by the Land and Environment Court in Tenacity Consulting v Warringah Council [2004] NSWLEC 140.

The issue of views and view sharing is particularly relevant in the Woollahra LGA which is located on Sydney Harbour and characterised by sloping land which provides iconic and significant public and private views to residents. In light of this context, we are extremely concerned that educational development will be permitted as complying development or development without consent, without a full assessment of view impacts. An increased potential for view impacts is likely due to the maximum building heights of 22m applicable to complying development. View impacts require merit assessment and cannot be codified. Therefore, we object to the permissibility of complying development to a maximum building height of 22m.

We recommend that a maximum building height of 12m be maintained for complying development on schools, as is currently permitted by the Infrastructure SEPP.

2.8 Development adjoining heritage items and within heritage conservation areas

Schedule 2, clause 3 of the Draft SEPP will permit complying development for schools up to 1m from a side or rear boundary which adjoins land which may contain a heritage item or land which is within a heritage conservation area. This type of development may not be appropriate in terms of impacts on the heritage item or a heritage conservation area. Although the Draft Better Schools Design Guide and Draft Environmental Code of Practice makes a minor reference to a consideration of heritage impact in Principle 1 – context, built form and landscape, it is not specific as to how to assess this impact.

We recommend that development adjoining heritage items or within heritage conservation areas not be permitted as complying development.

2.9 Flood control lots

Schedule 2 clause 12 of the Draft SEPP includes the following definition of flood control lot:

> ***flood control lot*** means a lot to which flood related development controls apply in respect of development for the purposes of industrial buildings, commercial premises, dwelling houses, dual occupancies, multi dwelling housing or residential flat buildings (other than development for the purposes of group homes or seniors housing).

This definition does not apply to land zoned SP2 Infrastructure in the WLEP, as none of the development types listed in the definition are permissible within the zone. Consequently, no consideration of the controls of clause 12 will apply for complying development for schools and school-based child care on existing school sites zoned SP2 Infrastructure (Clauses 33 (3) and 34 (2) (e)).

We recommend the inclusion of a new subclause in Schedule 2 clause 12 (1), with wording to specify that the clause applies "to all development that is carried out on a lot within a Flood Planning Area of a relevant local environmental plan". This will enable the consideration of the controls of clause 12 to school sites in the SP2 Infrastructure zone.

2.10 Site compatibility certificates and additional uses of State land

Clauses 13 and 14 of the Draft SEPP will permit the issuing of site compatibility certificates and the development of additional uses on prescribed State land (such as schools) for the purposes permitted with or without consent on adjacent land with a different zone. This will permit the development of a wide range of additional land uses on State land without the need to undertake the rigorous assessment and justification currently required by the planning proposal process.

The provisions have the potential to permit uses on existing educational establishment sites (such as schools) which are not desirable or acceptable to the local community. While site compatibility certificates may be expedient for the purpose of allowing additional uses, the process does not allow for the rigour of a planning proposal, which would normally include community consultation.

We do not support clauses 13 and 14 of the Draft SEPP. The provisions will weaken the local land use zoning provisions of the LEPs, by permitting a proliferation of additional land uses on existing educational establishment sites undermining community confidence in, and transparency of, the existing zoning system. Clause 5.3 of the Standard Instrument provides a development standard with a similar objective. However, this clause is optional for adoption by individual councils. Woollahra Council chose not to adopt this standard when endorsing the WLEP. We maintain our opposition to this planning concept.

We recommend that clauses 13 and 14 be removed from the Draft SEPP.

3. The Draft Regulation.

3.1 Non-government schools as public authorities

Subclause 277 (6) of the Draft Regulation will prescribe RNSs as public authorities to enable them to carry out development without consent using the same process as currently used by the DoE for public schools. We do not support this clause. The clause will permit RNSs to propose, approve and carry out certain works without development consent on existing school sites. As mentioned previously, the assessment process for development without consent will not be independent. The auditing mechanism for ensuring that RNSs are held accountable for the accuracy will only be independent if it is undertaken by the DoE, or another independent authority.

Therefore, we recommend that this clause not be approved. Should the Department retain the proposed clause, we maintain our recommendations which seek a rigorous and independent assessment and approval process for development without consent and an independent monitoring process of assessors and approvals.

3.2 Design verification statements

Clause 129AA of the Draft Regulation states a certifying authority must not issue a complying development certificate for school developments 12m in height or greater, unless they have been provided with a written statement a qualified designer (a person registered as an architect in accordance with the *Architects Act 2003*), verifying that the design quality principles in the Draft SEPP have been achieved.

We are concerned that these written statements (design verification statements) will not provide a rigorous assessment of the design quality principles for the following reasons:

- The designer of the development is able to assess the merits of their own design. In these cases, the design verification statements will not provide an independent assessment of the design quality principles.
- There is no proposed mechanism to ensure that designers are held accountable for the accuracy of their statements. The certifier will only be required to check that the statement has been provided, and not test its accuracy and quality.

We recommend the establishment of an independent third party certification or registration system for practitioners who would be permitted to either prepare independently assessed design verification statements, or confirm the accuracy of design verification statements prepared by designers. At the very least we recommend that qualified designers be prohibited from providing design verification statements for their own designs.

4. The Draft Design Guide.

   4.1 We generally support the principles, guidance and evaluation process described in the Draft Design Guide. However, the document provides only a generalised conceptual overview for school design, rather than the detailed design specifications outlined in a guideline document, such as the Draft Child Care Planning Guideline.

   We recommend that the Draft Design Guide be enhanced with detailed design guidance provided by a range of professional school designers from both the public and private sectors. This would allow the guide to serve as a tool for school designers and public authorities in the design and assessment phases for both development with consent and development without consent.

5. Draft "Child Care Planning Guideline".

   5.1 We generally support the early childhood education and care facilities development controls of the Draft SEPP and the Draft Child Care Planning Guideline. The controls and guideline are generally consistent with the controls in the WLEP and *Woollahra Development Control Plan 2015* (WDCP), Part F1 – Child Care Centres.

6. The Draft Code of Practice

   6.1 As stated previously, we do support prescribing RNSs as public authorities to enable them to carry out development without consent on existing schools. We also do not support the current provisions of the Infrastructure SEPP which permit the DoE to carry out development without consent on existing for public schools.

   Despite these objections, we generally support the provisions described in the Draft Code of Practice as a starting point for a codified method of assessing and carrying out development without consent. However, we have the following concerns with the Draft Code of Practice:

   - Permitting RNSs and the DoE to assess the merits of their development and grant approvals raises questions about the independence of the process.
   - There is no proposed mechanism to ensure that an RNS and the DoE are held accountable for assessment and approval of their works.
   - Section 3.2.1 refers to Class 1 works requiring a Review of Environmental Factors. These works are placed into two categories:
     - Minor School Development Works, and
     - Other School Development Works.

     "Minor School Development Works" include minor alterations and additions to school buildings and structures, internal works, fitouts, accessibility works, restoration and maintenance and repair works. These works are described requiring a less detailed assessment. There is no definition or guidance provided for the term "minor" or "less detailed". This needs to be clarified.

"Other School Development Works" include construction, operation or maintenance of school buildings that are close to residential boundaries, within bushfire zones, and demolition works. These works are described as requiring "a more detailed assessment".

- Section 3.3.2 requires the assessment of any "proposed activity" to be prepared by "a person suitably qualified in environmental impact assessment". However, no definition of a "suitably qualified" person is provided.
- Section 3.3.3 outlines a mandatory consultation requirement for Class 1 Other School Development. RNSs must consult with those Government agencies (including councils) and neighbours that the RNS "considers relevant" thereby making it a discretionary requirement. No guidance is provided in this regard.
- Section 6.3 states that the auditing of RNS compliance with the Draft Code of Practice may be conducted by "a suitably qualified person". However, no definition of a "suitably qualified person" is provided. The circumstances in which an audit may be required should also be spelt out. This could include situations where there is sustained council and community concern about processes and outcomes.

6.2 We recommend that:

- RNSs and the DoE be required to engage an qualified independent person to assess the merits of their development and grant approvals. This recommendation should be accompanied by a registration or certification system for suitably qualified individuals.
- The auditing process of the accuracy of RNS and DoE compliance with the Draft Code be undertaken by an independent person. This recommendation should be accompanied by a registration or certification system for suitably qualified individuals.
- Section 3.2.1 be amended to classify alterations and additions to school buildings and structures as "Other School Development Works", to allow a more detailed assessment of the impact of this development.
- Section 3.3.2 be amended to include a definition of "a person suitably qualified in environmental impact assessment". This recommendation should be accompanied by a registration or certification system for suitably qualified individuals.
- Section 3.3.3 be amended to require mandatory consultation for Class 1 "Other School Development" irrespective of whether the RNS considers notification to be relevant. This amendment should be accompanied by guidance as to extent of consultation with neighbours, such as a proximity radius or the like.
- Section 6.3 be amended to either require all auditing of RNS compliance with the Draft Code of Practice to be conducted by the DoE, or include a definition of "a suitably qualified person". This recommendation should be accompanied by a registration or certification system for suitably qualified individuals.

7. The Draft Planning Circular

7.1 Under the Draft SEPP, development undertaken as complying development and development without consent cannot contravene any existing conditions on development consents relating to student or staff numbers that apply to the land within the boundaries of an existing school. The Draft Planning Circular advises consent authorities that development consent conditions which cap student and staff numbers (cap conditions) should recognise the need for flexibility in enrolment numbers at both public and non-government schools. Further, it advises that if cap conditions are required, they should only be applied in circumstances justified by a comprehensive and evidence-based assessment of relevant planning issues such as traffic and parking.

7.2 We have the following comments and concerns with the principles of the Draft Planning Circular:

- Principle 1: Apply outcome based consent conditions
  - The principle will be difficult to administer and enforce as councils may not be aware when enrolment fluctuations occur.
  - A prescriptive cap is a mechanism which enables councils to assess and measure the impacts associated with student and staff numbers, whereas an outcome based condition is open to interpretation and influenced by other external factors.
  - An outcome based condition, unlike a prescriptive student cap, does not provide certainty to surrounding residents in terms of safeguarding their amenity from the impacts of noise, minimising traffic and parking impacts, and addressing issues with operational management.

- Principle 2: Caps should be evidence based
  - We generally support this principle.
  - We note that the evidence must be based on both existing and maximum student capacity.

- Principle 3: Mitigate impacts directly
  - Caps are an appropriate mechanism to regulate the impacts associated with school development.
  - We do not support the use of conditions requiring other measures to mitigate the impacts of school development, as they may not provide the certainty of outcomes which can be achieved by a cap condition.

- Principle 4: Flexibility required for school developments
  - We support the concept of flexibility, but consider that it needs to be applied on a case-by-case basis. Based on our experience we consider cap conditions

are reasonable measures to control the impacts arising from school activities. In applying cap conditions we agreed that they need to be evidence based in accordance with principle 2.

In summary, we acknowledge that cap conditions should be evidence based. However, we are also aware that prescriptive conditions are easier to enforce and understand, and potentially easier to comply compared with outcome based conditions.

Conclusion

We acknowledge the need for the development of additional educational and child care facilities. However, we have concerns as to the scope of new planning and assessment framework which are being considered by the Department. These concerns relate to the potential scale of development which will be permitted without council consent and the related environmental and amenity impacts, the lack of independence in assessment and accountability of this development.