

Submission on the *Design and Place State Environmental Planning Policy* Explanation of Intended Effect

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The NSW Young Lawyers Environment and Planning Committee (**Committee**) makes the following submission on the *Design and Place State Environmental Planning Policy (SEPP) Explanation of Intended Effect (EIE)*.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO₂ (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The NSW Young Lawyers Environment and Planning Committee comprises of a group of approximately 250 members interested in our natural and built environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Introduction

The Committees welcome the opportunity to comment on Part 3 and Appendix A of the Explanation of Intended Effect (EIE) for the proposed D&P SEPP.

Summary of recommendations

1. That an additional mandatory consideration be drafted to explicitly require consideration of First Nations Peoples heritage, and Country more generally.
2. That mandatory consideration 8 be drafted to require consideration of public-health vulnerabilities relevant to design.
3. The proposed updates to the existing SEPP 65 clauses should ensure there are clear non-discretionary standards present in the design guidance to create certainty for the community and meet expectations.
4. That under the merit assessment to award flexibility, the applicant should prove that the alternative provides a better design outcome, improves amenity, fosters innovation and responds to financial feasibility. Further development of the guidance and processes involved in encouraged.
5. Any future proposed revisions to the Apartment Design Guide (**ADG**) for the purpose of creating a single design guide for the Housing Diversity SEPP and the proposed Design and Place State Environmental Planning Policy (**D&P SEPP**), should be undertaken with direct consultation with relevant industry and community groups, particularly to ensure the language used provides certainty and there are no conflicting requirements.
6. The requirement for targeted engagement with local First Nations community members be mandatory for any state significant infrastructure to which the proposed D&P SEPP applies.

Part 3 – Key components of the D&P SEPP

Mandatory matters for consideration

1. The Committee welcomes and supports the introduction of the 19 proposed design and place considerations which would be mandatory relevant considerations under section 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).
2. Consideration 1 (cultural and built heritage) requires that "...areas of cultural and built importance are celebrated, conserved and protected..." The EIE notes that the benefit of this consideration is that it requires a "...wider consideration of heritage to include First Nations and non-First Nations heritage..."
3. The Committee supports this position in principle, but notes that a stronger position would be to include a stand-alone consideration, requiring regard to be had to both Indigenous heritage and broader considerations of Country (as contemplated at section 2.2.1 of the EIE). This would ensure regard was had to both Indigenous heritage, but also to continuing and emerging understandings of Country when planning for development (as is one of the new aims of the D&P SEPP, see EIE section 2.2).

RECOMMENDATION 1 - That an additional mandatory consideration be drafted to explicitly require consideration of First Nations Peoples heritage, and Country more generally.

4. In relation to consideration 8 (resilience), the Committee supports the consideration of site specific vulnerabilities, particularly those relating to bushfires, flooding and coastal erosion. The Committee would also recommend the inclusion of consideration of public health-based vulnerabilities in light of the COVID-19 pandemic. This might include prioritising open spaces in development, ensuring adequate space for social distancing and providing for contactless interactions where possible.

RECOMMENDATION 2 - That mandatory consideration 8 be drafted to require consideration of public-health vulnerabilities relevant to design.

Appendix A – Proposed Amendments to the Apartment Design Guide and SEPP 65

Proposed amendments to *State Environmental Planning Policy No. 65 - Design Quality of Residential Apartment Development (SEPP 65)*

5. The Committee generally agrees with the objectives and opportunities that the revision to the Apartment Design Guide can provide. It acknowledges the need to facilitate flexibility in response to the changing conditions of the COVID-19 pandemic, industry feedback, best practice and NSW government initiatives.
6. The Committee generally supports the proposed changes to separate the ADG with a focus on site-level design advice and the Urban Design Guide with precinct scale design and a new Design Review Guide.
7. The Committee agrees with the integration of SEPP 65 into the proposed D&P SEPP on the basis of creating consistent design guidance and streamlining the number of policy documents applicable to the development process.
8. Clear drafting of the updated clauses of SEPP 65 transposed to the proposed D&P SEPP will be required in order to establish certainty and clarity of design principles and to avoid unnecessary duplication or overlap. The EIE provides sparse detail as to what form any updates to the SEPP 65 clauses may take. However, the Committee notes that any drafting updates should not weaken the intent of the principles or other development obligations.
9. Although the proposed D&P SEPP aims to champion "good design", this should not come at the expense of clear minimum standards of design principles. Accordingly, the Committee supports the proposed transfer of non-discretionary standards for residential flat buildings as set out under cl 30 of SEPP 65 to the proposed D&P SEPP and the expansion of these non-discretionary standards to align with those proposed in the revised ADG, provided such standards remain non-discretionary and are not changed to discretionary considerations or guidance. Additionally, the Committee welcomes the proposed revision of the ADG to ensure any conflicts with LEPs are removed.

RECOMMENDATION 3 - The proposed updates to the existing SEPP 65 clauses should ensure there are clear non-discretionary standards present in the design guidance to create certainty for the community and meet expectations.

Greater focus on sustainability and resilient design

10. The Committee strongly supports the greater focus on sustainability and resilient design that will be introduced under the proposed D&P SEPP as part of the principles replacing the design quality principles set out under Schedule 1 of SEPP 65. This is particularly encouraging given the increasing need to design buildings and places that are responsive to the ongoing impacts of climate change.

Better housing, better places

11. The Committee sees this form of high density housing as vital to supporting NSW's housing supply. It supports the view that revisions should balance amenity, affordability and financial feasibility.
12. The Committee encourages the development of design guidelines for taller residential building that support good design which can positively impact the character of neighbourhoods, provide better amenity and a desirable alternative to detached housing.

Recent lessons learnt

13. The Committee supports the finding that the ADG plays a vital role in promoting better apartment design standards and supports the economy by providing clarity to the industry on when discretion or flexibility is applicable in assessing compliance with certain design criteria. Especially where it can deliver better design outcomes whilst still aligning with the certain key themes.
14. The Committee encourages the development of clear guidelines which promote flexibility in the key themes of solar access, natural ventilation and noise, apartment size and layout, deep soil and landscape design and parking.

RECOMMENDATION 4 - That under the merit assessment to award flexibility, the applicant should prove that the alternative provides a better design outcome, improves amenity, fosters innovation and responds to financial feasibility. Further development of the guidance and processes involved in encouraged.

15. In relation to the other themes, the Committee strongly encourages further development of the 'communication and interpretation' theme to confirm the statutory role of the ADG; the 'primary controls' theme to give more clarification of the order of precedence where there are inconsistencies between the ADG and other local environmental instruments and development control plans; the 'building performance' theme to promote long term building sustainability and waste management and the 'design review panels' theme to promote greater consistency in design excellence.

New Design Review Guide to be used in conjunction with proposed D&P SEPP

16. The Committee notes a detailed interrogation of the proposed new Design Review Guide will need to be undertaken when the document is released with a particular focus on the role of design review panels.

Urban design and site planning

17. Proposed bicycle parking rates (Table A4) - The Committee supports the revisions to the key objectives, design criteria and guidance. The rates might be revised in non-urban locations.
18. Unbundling (Table A4) - The proposal to have unbundling of car spaces may raise issues of compromised safety, security and access to residential blocks where the unbundling of car spaces is not limited to residents in the same building.
19. Options for Revising Guidance on Car Parking Rates (Table A4) - The Committee endorses the unbundling of car spaces and dwelling ownership in apartment builds. This is an economically efficient and cost-effective method of encouraging more environmentally sustainable modes of transport. This option would remove an implicit subsidy to private car ownership, the cost of which is imposed on those households who already elect not to use private cars.
20. The Committee also endorses reducing the minimum parking space requirements which vary across LGAs by common criteria such as the availability of nearby public transport and local car share services. Indeed, unbundling will not function properly to reduce reliance on private cars unless reductions to minimum car parking space requirements for new builds are also implemented.

21. Landscaping and greening (Table A5) - The Committee generally supports the objectives to increase green cover. However, it notes that smaller sites may make this objective counter intuitive if a basement configuration becomes less efficient and requires another level of basement. This can have a unintended effect of increasing excavation costs and the amount of concrete used.
22. Building Form & Building Separation (Table A5) - The Committee agrees with the desirable built form that slender towers provide. However, the maximum gross floor area control may limit the opportunity to achieve the permissible density where building separation is constrained by site context.
23. The Committee endorses the proposal to increase tower separation distance and provide numerical guidance reducing maximum gross floor area/floor space ratio, and number of units per core per floor on 9+ storey builds to encourage taller/slimmer apartment builds. This would increase the amenity of higher density apartment living, making it a more viable option for whole-of-life occupation as an alternative to free-standing dwellings in greenfield developments.
24. Mixed use development and street activation (Table A5) - The Committee notes that as a rule of thumb this is desirable, however, certain site configurations and small site areas can limit the 40% criteria being achievable, especially where car parking access and residential lobby and services occupy the frontage. Market considerations and assessment on a case by case basis may be more appropriate.

Residential amenity

25. Direct sunlight access requirements (Table A6) - It is noted that while flexibility is required to respond to site constraints and industry feedback, the need for flexibility to be applied should be proven where based on merits assessment. The Committee supports the need to develop guidance for how this is assessed.
26. The Committee generally supports the need to provide flexibility to allow hours outside the normal range to be counted. It suggests that the expanded range could be from 8am-4pm for more difficult siting scenarios.
27. To promote a mix of units obtaining solar access, the design criteria could be developed to require a certain proportion of each typology obtain solar access, in order that access be more evenly distributed.
28. Natural ventilation requirements (Table A6) - The Committee supports the revisions to the design criteria as it promotes design flexibility.
29. Diversity of apartment types, sizes, and layouts (Table A6) - The Committee encourages the desire for a more diverse mix of unit sizes and typologies which are supported by market analysis, as the market will drive the need for larger or smaller units. To address the trend towards providing just minimum unit sizes, perhaps the design criteria could require that no more than 50% of unit sizes provide just the minimum unit size.
30. It is noted that while flexibility is required to respond to site constraints and industry feedback, the need for flexibility to be applied should be proven where based on merits assessment. The Committee supports the need to develop guidance for how this is assessed.
31. The Committee endorses proposed design guidance encouraging the use of non-structural walls between dry areas of apartments in order to allow the potential reconfiguration of apartments as the needs of occupants change over time (e.g. addition or removal of studies and bedrooms).
32. Options to enable adaptable apartment layouts (Table A6) - The Committee generally supports the provision of larger family units. However, requiring all bedrooms to be a minimum 12m², may make the affordability of the unit unreachable due to its increased size. Although the approach is desirable, it may be at the expense of affordability. Another consideration is that larger units can impact the environment, increasing the heating and cooling load and having a larger carbon footprint. The Committee suggests

that to temper the approach, perhaps not all bedrooms will be required to meet this requirement and should be flexible.

33. Storage (Table A6) - The Committee supports the increased requirements and revision to storage which improves amenity. However, it is recommended that the definitions and guidance for which storage can be counted be improved. The definition could be revised to perhaps include that it must be a dedicated storage compartment, off the corridor, must be a built-in place cupboard or room, and is not loose furniture or storage or includes the laundry.

Relationship with the proposed Housing Diversity SEPP

34. The Committee supports the proposed relationship with the Housing Diversity SEPP for the sake of maintaining uniformity and consistency across design guidance relating to residential apartment development.

ADG to apply to residential apartment development under the Housing Diversity SEPP

35. The Committee generally supports the proposal to extend the revised ADG under the D&P SEPP to applicable residential apartment development carried out under the Housing Diversity SEPP. The proposal states specific provisions for the new housing types may be added where appropriate but does not provide any further detail as to what those specific provisions may include. The Committee notes that it is crucial the ADG design guidance is reviewed to ensure it does not conflict with the guidance for the specialised housing types included under the Housing Diversity SEPP.

Intended future revisions to the ADG to create a single design guide

36. The Committee supports this intention on the basis of further streamlining the planning system and creating accessible housing design guidance for the community. However, any future revisions to the ADG with the aim of establishing it as a single design guide must be cautiously undertaken. Simply combining all existing housing design guidance into one document risks creating confusion and conflicts between prescribed design requirements, particularly in areas where overlap between universal and more specialised requirements exist.
37. Additionally, the language of any revisions must be carefully scrutinised to ensure the document provides certainty and clarity for design guidance. Accordingly, the Committee recommends that any future revisions to the ADG be undertaken with direct consultation with relevant industry and community groups, including those with interests in specialised housing types such as student accommodation, co-living, social housing, boarding houses and housing for seniors.

RECOMMENDATION 5 - Any future proposed revisions to the ADG for the purpose of creating a single design guide for the Housing Diversity SEPP and D&P SEPP should be undertaken with direct consultation with relevant industry and community groups, particularly to ensure the language used provides certainty and there are no conflicting requirements.

Relationship to Part 5 State Significant Infrastructure development

38. The Committee notes with some concern the absence of detail as to the role of the proposed D&P SEPP in relation to state significant infrastructure under Part 5 of the EP&A Act. The EIE states at section 6.2.1 that "*Development applications that are deemed SSI (and critical SSI) to which the D&P SEPP applies, will be required to demonstrate how principles have been met through considerations relevant to the scale of the proposal.*" The EIE notes that the template Secretary's Environmental Assessment Requirements will be updated to align with the application requirements of the proposed D&P SEPP but no indication is given as to what form "*considerations relevant to the scale of the proposal*" may take or

whether such "*considerations*" will be stricter or more relaxed in comparison to the standard design requirements.

39. This is particularly concerning given the enormous impact state significant infrastructure can have on the design of a place and its interactions with existing and influence on future developments. A detailed interrogation of the proposed "*considerations*" will need to be undertaken when the draft D&P SEPP is released for public comment.

Engagement with local First Nations community members

40. The Committee is disappointed to note that, in relation to state significant infrastructure development to which the proposed D&P SEPP applies, targeted engagement with local First Nations community members, including Traditional Custodians, as part of the public exhibition process is framed as "*may be required*" rather than a mandatory requirement. That targeted engagement is not presented as a mandatory requirement for state significant infrastructure is particularly disappointing given part of the overarching intention of the proposed D&P SEPP is to prioritise the "*wellbeing of... Country*".
41. Accordingly, the Committee recommends that targeted engagement with local First Nations community members, including Traditional Custodians, be framed as a mandatory requirement of any state significant infrastructure development to which the proposed D&P SEPP applies.

RECOMMENDATION 6 - The requirement for targeted engagement with local First Nations community members be mandatory for any state significant infrastructure to which the proposed D&P SEPP applies.

Championing universal design

42. Last year, the Committee provided feedback on the proposed Housing Diversity SEPP. In particular, the Committee recommended that:
- the new development design for the build to rent typology, should by default accommodate for the needs of people living with a disability, by identifying particular needs, provide inclusive modes of communication and foster effective collaboration with disability services providers;¹ and
 - a broader review of the *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004* should be undertaken to provide meaningful guidance for good design of housing for seniors and people with disability.²
43. The Committee supports the Department's intention that "Apartment Design Guide will be revised over time to combine all housing design guidance into a single design guide to be used with the Housing Diversity SEPP and D&P SEPP. This would include additional design guidance for student accommodation, co-living, boarding houses, and housing for seniors".³ We consider that consolidation of design guidance, if implemented effectively, could encourage "universal design" to be considered in all planning and development projects rather than as an afterthought, only for developments specific to a particular interest group.
44. The Committee also supports the proposed ADG residential amenity design criteria 3 in relation to "livable housing targets through universal design", noting that the Department intends to increase the

¹ NSW Young Lawyers, Submission on the Housing Diversity State Environmental Planning Policy <https://go.lawsociety.com.au/NSWYL/Submissions>, p 6.

² NSW Young Lawyers, Submission on the Housing Diversity State Environmental Planning Policy <https://go.lawsociety.com.au/NSWYL/Submissions>, p 11.

³ *Explanation of Intended Effect*, Appendix A, p. A30

requirement for a specified Livable Housing Australia level and percentage if NSW government research supports higher standards.⁴

45. In addition, we consider that the D&P SEPP provides the opportunity to place universal design at the forefront of the design process in line with the EP&A Act object to promote good design and amenity of the built environment.⁵ Universal design requires that our built environments and public spaces are designed to “be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.”⁶ Given that only 10% of people aged over 65 and 5% of people with disability live in retirement villages or groups homes⁷ and there is a strong preference for ageing in place, universal design is increasingly imperative to ensure that our built environment and housing options remain future-proofed for demographic changes.
46. The objective of universal design is to be seamless, such that accessibility is “so effortless and invisible that users don't perceive the design's intent”.⁸ Rather than a focus on discrete standards such as access ramps or door widths, guidance should encourage universal design considerations to be integrated throughout the project.⁹ As an example, the Department could consider introducing a section in the Urban Design Guide to set out considerations and methods of application for the seven principles of universal design:
- Equitable use
 - Flexibility in use
 - Simple and intuitive use
 - Perceptible Information
 - Tolerance for error
 - Low physical effort
 - Size and shape for approach and use.¹⁰
47. The Department could also consider framing appropriate mandatory considerations for the “precinct” and “significant development” development scales, and/or requiring that applications for these types of developments are required to demonstrate the consideration of universal design principles.

⁴ *Explanation of Intended Effect*, Appendix A, p. A19.

⁵ *Environmental Planning and Assessment Act 1979* (NSW), s 1.3(g).

⁶ *Convention on the Rights of Persons with Disabilities*, Art 2.

⁷ NSW Department of Planning, Industry and Environment, “A Housing Strategy for NSW” (Discussion Paper May 2020) 45, 47.

⁸ Steve Wright and Heidi Johnson-Wright, “Design for Everybody” *American Planning Association: Planning Magazine* (March 2016) <https://www.planning.org/planning/2016/mar/designforeverybody/>.

⁹ *Ibid.*

¹⁰ See Wolfgang F.E Preiser “Integrating the Seven Principles of Universal Design into Planning Practice” pp 11-30 in Jack Nasar and Jennifer Evans-Cowley (eds) *Universal Design and Visitability: From Accessibility to Zoning* (Ohio State University), for an example of how the principles can be incorporated into urban planning and design.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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