



New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

NEW SOUTH WALES LEGISLATIVE COUNCIL REGULATION COMMITTEE

INQUIRY INTO ENVIRONMENTAL PLANNING INSTRUMENTS (SEPPs)

May 2021

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

<http://www.nswccl.org.au>

office@nswccl.org.au

Correspondence to: PO Box A1386, Sydney South, NSW 1235

Phone: 02 8090 2952

SUBMISSION TO THE NSW LEGISLATIVE COUNCIL REGULATION COMMITTEE INQUIRY INTO ENVIRONMENTAL PLANNING INSTRUMENTS (SEPPs)

Introduction

The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the NSW Legislative Council Regulation Committee Inquiry into Environmental Planning Instruments (SEPPs).

The NSWCCL was founded in 1963 with the aim of protecting the civil liberties and human rights of those in NSW and across Australia.

NSWCCL makes this submission for a number of key reasons:

- a. To ensure that adequate safeguards are in place for the creation of SEPPs in recognition that parliament is the supreme law making body in the state;
- b. In recognition that the climate change poses a significant and increasing threat to the ability for citizens' and others residents' civil liberties and human rights, and that any decisions made which concern the environment should be appreciative of the adverse effects of climate change; and,
- c. In recognition that First Nations communities voices should be recognised and afforded significant weight in the development of environmental and planning policy.

Accordingly, NSWCCL can see no reason why SEPPs should be exempted from the statutory regime for the parliamentary disallowance of delegated legislation set out under s. 41 of the *Interpretation Act 1987* (NSW). Exempting SEPPs from this regime allows for the Minister to exercise an almost unfettered discretion in preparing SEPPs which remove part of the planning powers from local government and can make decisions without due regard to the threat multiplier of climate change or the voice of First Nations communities. To remedy this, NSWCCL recommends that SEPPs be subject to the statutory regime for disallowance.

Moreover, NSWCCCL also sees no reason as to why the Minister has discretion to not consult with the community in the process of making a SEPP, particularly in circumstances where the subject matter regulated by the SEPP would usually be subject to the jurisdiction of democratically elected local governments. NSWCCCL, therefore, recommends that the requirements for public consultation by the Minister in making a SEPP be strengthened.

SEPPs

A SEPP is formally made by the Governor under the *Environment Planning and Assessment Act 1979* (NSW) and can concern any matter which ‘is of State or regional environmental planning significance or of environmental planning significance to a district within the meaning of Division 3.1’.¹ A plan is usually made on the advice of the relevant Minister, however, such advice is not formally required as a precondition to the Governor exercising her statutory power.

The SEPP must further the objects of its parent Act² and can make provisions regarding matters set out in s. 3.14 which are broad in ambit and include subjects as wide ranging as ‘protecting, improving or utilising, to the best advantage, the environment’ and ‘controlling ... development’.

When making a SEPP, the Minister may seek and consider submissions from the public if ‘appropriate or necessary’, but is not required to do so.³ The Courts have repeatedly found that there is no obligation on the Minister to consult.⁴

In the event of an inconsistency between a SEPP and another environmental planning instrument, the general presumption is that the SEPP will prevail over all others.⁵ Accordingly SEPPs take precedence over other environmental planning instruments which have been enacted by local government.

¹ *Environment Planning and Assessment Act 1979* (NSW) s 3.29(2); see also *Huntlee Pty Ltd v Sweetwater Action Group Inc; Minister for Planning and Infrastructure v Sweetwater Action Group Inc* [2011] NSWCA 378.

² *Ibid*, s. 3.13.

³ *Ibid*, s. 3.30.

⁴ See for e.g. *Reysson Pty Ltd v Minister Administering the Environment Planning and Assessment Act 1979* [2020] NSWCA 281 at [77] per Payne JA (Bell P and Gleeson JA agreeing).

⁵ *Ibid*, s. 3.28(1)(a).

Disallowance regime

Section 41 of the *Interpretation Act 1987* (NSW) provides the following:

- (1) Either House of Parliament may pass a resolution disallowing a statutory rule—
 - (a) at any time before the relevant written notice is laid before the House, or
 - (b) at any time after the relevant written notice is laid before the House, but only if notice of the resolution was given within 15 sitting days of the House after the relevant written notice was so laid.
- (2) On the passing of a resolution disallowing a statutory rule, the rule shall cease to have effect.

Section 5(6) expressly omits s. 41 from a list of provisions that apply to environmental planning instruments. A SEPP is an environment planning instrument per s. 1.4 of the *Environment Planning and Assessment Act 1979* (NSW) and s. 21 of the *Interpretation Act 1987* (NSW).

Section 8 of the *Subordinate Legislation Act 1989* (NSW) does not permit the remaking of statutory rules which have been disallowed in the same or substantially the same way within four months of the disallowance. This prohibition on remaking the delegated legislation in the same or similar terms, is an important check on executive power, and often in effect, forces the Minister to consult with members of parliament and their department in remaking the delegated legislation.

The disallowance procedures provide an important democratic check on otherwise unfettered executive discretion in relation to SEPPs. The subject matter which can fall within the purview of a SEPP is very broad, and has the capacity to oust other subordinate legislation that has been made by democratically elected local governments. Additionally, a SEPP can be created in the absence of any consultation with relevant stakeholders, which further increase the democratic deficit present in the processes for their creation.

It is vitally important that parliament retain its power to oversee and control delegated legislation in a healthy democracy. Anne Twomey has written ‘a law which purports to confer a power exclusively on the Executive while denying that power to the Legislature is an

abdication of power, rather than a delegation of power.’⁶ NSWCCCL strongly endorses this sentiment and emphasises the importance and necessity of the parliament retaining control over environmental and planning decisions made through SEPPs. Such oversight is crucial to ensure that these decisions are properly made in the public interest, and to ensure that the Minister and their department remain accountable to parliament. The parliament, at present, has limited recourse to hold the Minister to account for decisions made in respect of SEPPs and has no power to prevent policies being put in place that are not in the public interest. Thus, NSWCCCL can see no reason for SEPPs to be exempt from parliamentary oversight.

On the contrary, the nature of SEPPs and their fundamental role in the regulation of planning and environmental matters in the state militates in favour of them being subject to the type of scrutiny allowed for by s. 41. Environmental and planning matters comprise a significant portion of the State’s jurisdiction, and are of increasing importance in the context of a changing climate. SEPPs form an important planning tool for the government and should therefore be subject to scrutiny backed up with the consequence of disallowance in parliament to protect the public interest. The necessity for parliamentary scrutiny is further exacerbated by the threat posed by climate change and the need to ensure that First Nations voices are heard in the development of policies which will have significant impacts on their communities (as outlined below).

Therefore NSWCCCL recommends that strong consideration be given to making SEPPs subject to the disallowance procedures established by s. 41 of the *Interpretation Act 1987* (NSW).

Requirement for public consultation

The Minister is afforded discretion to not consult with the community and relevant stakeholders in the preparation of a SEPP. This is in stark contrast to the provisions set out in Division 3.4 of the *Environment Planning and Assessment Act 1979* (NSW) which set out clear requirements regarding public consultation during the creation of local environment plans (LEPs). When challenges have been raised against the SEPP provisions, the Courts

⁶ Twomey, A., *The Constitution of New South Wales* (Federation Press, 2004) pp. 211-212.

have consistently found that s. 3.30 (and its predecessor s. 39) expressly denies stakeholders from rights to procedural fairness.⁷

Plainly, the public has the right to have input into the way that their environment and communities develop and are managed. This is a fundamental principle of representative democracy. NSWCCCL can see no reason why the same, or similar consultation processes do not apply as between LEPs and SEPPs.

Even putting to one side the people's right to participate in decision making in a representative democracy, affected parties should be afforded the right to be heard by the Minister and their department through the process of preparing a SEPP. Affected parties, in particular should be entitled to have a say in environmental and planning processes that may affect them.

One of the objects of the *Environment Planning and Assessment Act 1979* (NSW) is 'to provide increased opportunity for community participation in environmental planning and assessment'. The SEPP provisions manifestly fail in achieving this objective and instead allow for community participation to be completely removed.

NSWCCCL recommends that, as a minimum, the *Environment Planning and Assessment Act 1979* (NSW) be amended to compel the Minister to consult with the community and relevant stakeholders in the preparation of a SEPP.

NSWCCCL further recommends that the *Environment Planning and Assessment Act 1979* (NSW) be amended to establish a clear statutory framework for:

- 1) The nature of the information about the proposed SEPP that must be made available to the community and stakeholders prior to consultation;
- 2) The timeframe for public consultation;
- 3) A list of stakeholders who must be consulted with. While this falls outside of the scope of NSWCCCL's expertise it would likely include agencies like the Environment Protection Authority and Natural Resources Access Regulator.

⁷ See e.g. *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33 at 54 per Beazley JA (as her Honour then was).

- 4) The requirement for the Minister to consider the submissions put to them and their department in the preparation of the SEPP.

Climate change and human rights

Climate change is a critically important human rights and civil liberties issue. A healthy and functional climate is a prerequisite to the enjoyment of all human rights and civil liberties. Climate change is already having profound effects on human life – from increased incidence of extreme weather events to sea level rises - which endanger human rights today. A Joint Declaration of UN Human Rights Treaty bodies recently stated that ‘climate change poses significant risks to the enjoyment’ of human rights.⁸ Failure to act on climate change violates key human rights treaties to which Australia is a signatory.

The primary international human rights treaty concerning civil liberties is the International Covenant on Civil and Political Rights 1966. This treaty guarantees, *inter alia*, the right to life (Article 6), the right to privacy, family and a home life (Article 17(1)) and the right to minority cultural identity and practice (Article 27). By failing to take real action on emissions reduction, Australia may breach all three provisions (and others). In 2018, the Human Rights Committee, which can hear complaints about breaches of the ICCPR, commented that Article 6 requires States to take action against conditions that may prevent individuals from living in dignity which includes allowing environmental degradation, the deprivation of land, resources and territories of First Nations peoples, and increases the frequency natural disasters.⁹ The Committee also stated that ‘implementation of the obligation ...depends, *inter alia*, on measures taken by State parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.’¹⁰ The Committee has reiterated that States’ obligations create an *active* duty to protect rights from abuse by others.¹¹

In relation to the right to culture, there may be several minority groups in Australia whose rights are being violated, especially Torres Strait Islanders, who are seeing their cultural

⁸ <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>

⁹ Human Rights Committee, ‘General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (CCPR/C/GC/36, 30th October 2018), at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf, 6.

¹⁰ *Ibid* 15.

¹¹ *Ibid* 5.

practices threatened by rising sea levels and increased extreme weather events.¹² Australia is violating the rights of citizens to not be subjected to arbitrary or unlawful interference, with their rights to privacy, family and the home, by acts and omissions perpetrated by the State.¹³ A case arguing such breaches of the ICCPR on behalf of a group of Torres Strait Islanders is currently before the UNHRC.¹⁴

Moreover, given the UNHRC has commented previously that the right to freedom of movement (Article 12) engenders an obligation on states to prevent internal displacement,¹⁵ the ICCPR may be breached by Australia when groups are internally displaced by climate change.¹⁶ NSW is home to a plethora of diverse climates from low lying coastal areas to some of the most arid deserts; inevitably, people will be displaced within NSW if government continue in their failure to act appropriately in relation to climate change.

Furthermore, the human rights of children will also be at risk from climate change. On September 24th 2019, a group of 18 child plaintiffs from around the world filed a complaint under the Convention on the Rights of the Child (the most widely ratified human rights treaty) to the UN Committee tasked with overseeing compliance with that treaty. This complaint alleges, specifically, that their rights to life, health and culture have been violated.¹⁷ As children will bear the burden of successive governments' failures to act in respect of climate change, it is their rights, over the long term, that will be most affected by unchecked climate change.

Whilst the recommendations made by NSWCCCL in this submission are primarily grounded in principles of accountability of executive action, we are fortified in our recommendations by the crucial need for all levels of government to act on the threat multiplier of climate change. SEPPs are a crucial public policy tool in NSW for the regulation of environment and planning. It is accordingly important that SEPPs are made in a way which is consistent with

¹² Owen Cordes Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR' (2008) 9 *Melbourne Journal of International Law* 405, 424-5.

¹³ ICCPR Article 17(1).

¹⁴ Client Earth, *Torres Strait Islander group submits response in historic climate case* (2020) <<https://www.clientearth.org/latest/latest-updates/news/torres-strait-islander-group-submits-response-in-historic-climate-case/>>

¹⁵ HRC, Addendum: General Comment No 27 (67): Freedom of Movement (Art 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) [7].

¹⁶ Owen Cordes Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR' (2008) 9 *Melbourne Journal of International Law* 405 427.

¹⁷ <https://theconversation.com/with-15-other-children-greta-thunberg-has-filed-a-un-complaint-against-5-countries-heres-what-itll-achieve-124090>

the necessary action that needs to be taken on climate change. Failure to consider climate change in the SEPP process would be inconsistent with the objects of the *Environment Planning and Assessment Act 1979* (NSW), especially the following:

- 1) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources;
- 2) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment; and,
- 3) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

Ensuring that there is proper public consultation during the creation of a SEPP will ensure that public and stakeholder voices are heard. This will allow those concerned about the human rights and civil liberties risks of climate change to proffer their views to the Minister for their consideration during the making of a SEPP.

Moreover, bringing SEPPs within the statutory procedure for disallowance will ensure that the parliament retains the ability to effectively veto a very powerful regulatory instrument if it falls short of being in the public interest or fails to properly consider the adverse effects of climate change.

The current structure for the creation of SEPPs does not compel the Minister to consider how the proposed SEPP intersects with the threat multiplier of climate change. NSWCCCL submits that if our recommendations are adopted it will allow for greater community input and parliamentary oversight over the process which should lead to more favourable outcomes for the environment and climate action.

First Nations communities' voices

The *Environment Planning and Assessment Act 1979* (NSW) has an object 'to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)'. A central component of ecological sustainable development is to appropriately give weight to social and cultural considerations, including the voices of First Nations

communities in recognition of their continued custodianship of lands to which their cultures spiritual belief systems are inextricably connected.

The planning and environment system must do better at listening to the voices of First Nations communities. In the recent independent statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the Final Report stated that the consideration of First Nations communities' voices under that Act 'reflects an overall culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians.'¹⁸ NSWCCCL understands that First Nations communities have coinciding views in relation to the NSW environment and planning system too. First Nation communities have repeatedly raised with our members that they feel their contributions reflecting 60,000 years of custodianship for this country, are ignored or minimised. That risk is magnified when such discretionary power is reposed in an individual Minister without appropriate parliamentary accountability or checks on power.

The recommendations made by NSWCCCL would ensure that First Nations voices could contribute to the process of developing SEPPs. Moreover, through allowing for parliamentary disallowances of SEPPs, the parliament can ensure that due weight is being given to First Nations voices in the preparation of SEPPs.

NSWCCCL considers that further work needs to be done in the environment and planning jurisdiction to ensure that First Nations voices are heard and considered in all decision making processes, including the development of SEPPs.

Statutory list of considerations in making SEPPs

NSWCCCL supports, in principle, any recommendations for the development of a statutory list of considerations that must be adverted to by a Minister when preparing a SEPP. However, given that NSWCCCL's expertise does not lie in environment and planning law or the processes around it in practice, it will leave detailed comment on what such considerations should be to more appropriate stakeholders.

¹⁸ <https://epbcactreview.environment.gov.au/resources/final-report/chapter-2-indigenous-culture-and-heritage/22-indigenous-knowledge-and-views-are-not-fully-valued-decision-making>.

NSWCCL supports any measure which seeks to place clear guidance around the exercise of the broad discretionary power to create SEPPs in order to constrain executive power. Such a measure would also more clearly signal parliamentary intention around the creation of SEPPs to the executive.

Naturally NSWCCL would strongly support consideration of the views of all stakeholders including First Nations community voices in the inclusion of any statutory list of considerations in making SEPPs. It would also strongly support the inclusion of a consideration concerning the effects of climate change.¹⁹

This submission was prepared by Josh Pallas on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Committee.

Yours sincerely,



Michelle Falstein

Secretary

NSW Council for Civil Liberties

Contact in relation to this submission:

Josh Pallas

Email: joshpallas2@gmail.com mobile: 0458 605 281

¹⁹ See generally on this point, Nari Sahukar, 'The Role of Planning Laws and Development Control Systems in Reducing Greenhouse Gas Emissions: Analysis from New South Wales, Australia', in M Hossain et al (eds.) *Pathways to a Sustainable Economy* (Springer International, 2018) 61.