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REGULATION COMMITTEE

Environmental planning instruments (SEPPs)

Report 8

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Regulation Committee

Environmental planning instruments (SEPPs)

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Terms of reference

1. That the Regulation Committee inquire into and report on:
 - (a) the making of environmental planning instruments (SEPPs) under section 3.29 of the *Environmental Planning and Assessment Act 1979*,
 - (b) whether SEPPs should be disallowable under the *Interpretation Act 1987*, and
 - (c) any other related matters.
2. That the committee report by the first sitting day in August 2021.

The terms of reference were self-referred by the committee on 24 March 2021.¹

¹ *Minutes*, NSW Legislative Council, 24 March 2021, p 2093.

Committee details

Committee members

The Hon Mick Veitch MLC	Australian Labor Party	<i>Chair</i>
Ms Abigail Boyd MLC	The Greens	<i>Deputy Chair</i>
The Hon Robert Borsak MLC	Shooters, Fishers and Farmers Party	
The Hon Catherine Cusack MLC	Liberal Party	
The Hon Greg Donnelly MLC	Australian Labor Party	
The Hon Scott Farlow MLC	Liberal Party	
The Hon Ben Franklin MLC	The Nationals	
The Hon Peter Poulos MLC *	Liberal Party	

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- * The Hon Peter Poulos MLC replaced the Hon Matthew Mason-Cox as a member of the committee on 13 May 2021.

Chair's foreword

This inquiry builds upon the work the Regulation Committee conducted in the Delegated Legislation inquiry of 2020. The Regulation Committee has embarked upon an exercise of inquiring into and reporting on policy matters beyond that of gazetted regulation and instruments. The terms of reference for this inquiry were self-referred in March 2021 and specifically set the committee the task of inquiring into the making of environmental planning instruments (SEPPs) under section 3.29 of *the Environmental Planning and Assessment Act 1979*, and whether SEPPs should be disallowable under the *Interpretation Act 1987*.

I wish to extend my appreciation to those who engaged with the committee, either through written submission or personally at the public hearing. The submissions were thoughtful and raised several matters for the committee to consider. The success or otherwise of any parliamentary inquiry is heavily dependent upon the submissions from stakeholders and this inquiry was no different.

The report provides comment on several of the matters raised but I would like to mention just three. Firstly, consultation and communication were raised by most stakeholders. It is clear consultation mechanisms must be enhanced and many stakeholders raised the current consultation process for the Design and Place SEPP as a good model. Recommendations 2 and 4 of this report provide some suggestions for government on ways to improve current consultation mechanisms.

Secondly, the parliamentary scrutiny of environmental planning instruments was raised and explored during the inquiry. The *EP&A Act* contains a number of provisions relating to scrutiny and transparency of environmental planning instruments by government, such as publication on the NSW Government legislation website and 'regular and periodic review' by the Planning Minister. However, there are no statutory requirements that make SEPPs subject to scrutiny by Parliament. SEPPs are not required to be tabled in Parliament or reviewed by a parliamentary committee, and are not subject to disallowance. Recommendations 6 and 7 provide some suggestions on a way forward on this matter for government.

Finally, the committee considered the issue of disallowance mechanisms for SEPPs. Disallowance was described during the inquiry as a 'blunt instrument', with evidence received from stakeholders who both supported and opposed such a mechanism. I note there is a dissenting statement on this issue and while the committee did not recommend such a measure arising from this inquiry I would suggest that there should be further discussion on this matter going forward.

I wish to extend my appreciation to the committee members for their considered input into this inquiry, and to the committee secretariat for their considerable guidance and support to myself as the Chair and the committee as a whole. I would also like to thank the Parliamentary Library and Hansard for assistance.



Hon Mick Veitch MLC
Committee Chair

Recommendations

Recommendation 1

21

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to make clear that third-party review rights are not extinguished when a State environmental planning policy deems a development to be 'State significant'.

Recommendation 2

22

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that the Minister must undertake consultation for all State environmental planning policies, with consultation to include the following elements:

- publication of a comprehensive, plain English explanation of intended effect
- publication of the draft text of the State environmental planning policy
- a minimum consultation period of 28 days from the publication of the draft State environmental planning policy text
- explanation of how feedback gathered during the consultation process has been considered
- details of how and when the State environmental planning policy will be reviewed by the department.

Recommendation 3

22

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that:

- the Minister may declare any State environmental planning policy to be an 'emergency State environmental planning policy'
- an 'emergency State environmental planning policy' is exempt from consultation requirements but must be reviewed within 12 months.

Recommendation 4

23

That the Department of Planning, Industry and Environment publish online the following information, as relevant, relating to all current and future State environmental planning policies:

- a link to the current and all previous versions of the State environmental planning policy text on the NSW Legislation website
- any explanatory material detailing the rationale for the State environmental planning policy and its intended effect
- details of any consultation undertaken and how this consultation was incorporated into the State environmental planning policy
- information about upcoming and past departmental review.

Recommendation 5

23

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that all future State environmental planning policies are subject to a sunset period of five years.

Recommendation 6

24

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that the Minister must table a report in both Houses of Parliament on the first sitting day after the summer and winter recesses each year, indicating:

- all State environmental planning policies made since the previous report was tabled (or in the case of the first report, the preceding 6 months), and for each instrument providing a summary of the rationale for and intended impact of the instrument, what consultation was undertaken, and how feedback gathered during the consultation process was considered
- any State environmental planning policies that are due to lapse in the next 12 months, and whether there is an intention to remake those instruments or allow them to lapse on expiry of the sunset period.

Recommendation 7

24

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that, 12 months prior to the expiry of the relevant sunset period, the Minister is to refer any State environmental planning policy that is intended to be remade to the Legislative Council Regulation Committee for inquiry and report.

Conduct of inquiry

The terms of reference for the inquiry were self-referred by the committee on 24 March 2021.

The committee received 10 submissions.

The committee held one public hearing at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.

Chapter 1 Background

By way of background, this chapter outlines what SEPPs are and how they are made, including existing statutory requirements for consultation, publication and review. The chapter then outlines mechanisms for parliamentary scrutiny of delegated legislation, including disallowance under the *Interpretation Act 1987* or enabling legislation, and concludes that SEPPs are not disallowable under either of these mechanisms.

Background to the inquiry

- 1.1 In 2020, this committee held an inquiry into the making of delegated legislation in New South Wales. The committee found that the current statutory mechanisms for the control and scrutiny of delegated legislation are in need of reform to better protect constitutional principles of democratic oversight and parliamentary sovereignty and to minimise the potential for executive overreach. To this end, the committee recommended further investigation to improve the transparency and scrutiny of delegated legislation, including considering:
- the adequacy of current requirements for consultation in the development of delegated legislation
 - the current provisions for disallowance of statutory instruments and the merits of extending disallowance to all instruments of a legislative character.²
- 1.2 The committee also recommended that parliamentary committee scrutiny of delegated legislation be improved and this committee's remit and powers were subsequently expanded, allowing the committee to inquire into a broader range of legislative instruments and to self-refer inquiries.³
- 1.3 In this context, the committee has turned its mind to one particular type of delegated legislation, environmental planning instruments, and specifically, State environmental planning policies, or 'SEPPs'. In this self-referred inquiry, the committee examined how SEPPs are made and whether they are subject to sufficient safeguards and scrutiny mechanisms, including whether SEPPs should be subject to disallowance by Parliament.

Environmental planning instruments

- 1.4 An 'environmental planning instrument' is a planning document made under the *Environmental Planning and Assessment Act 1979* (the *EP&A Act*). An environmental planning instrument may be a State environmental planning policy (SEPP) or a local environmental plan (LEP). The focus of this inquiry has been on SEPPs.

² Regulation Committee, NSW Legislative Council, *Making of delegated legislation in New South Wales*, (2020).

³ *Minutes*, NSW Legislative Council, 20 November 2020, p 1748.

The making of environmental planning instruments

- 1.5** An environmental planning instrument may be made for the purposes of achieving any of the objects of the *EP&A Act*.⁴ The objects of the Act are set out in section 1.3 and include, among others: ecologically sustainable development, proper management of the State's resources, protection of the environment, and increased opportunity for community participation.
- 1.6** SEPPs are made by the Governor and apply to either the whole of the State or special areas of the State. Under section 3.30, before recommending the Governor make a SEPP, the Minister is to take such steps, if any, as the Minister considers appropriate or necessary to:
- publicise an explanation of the intended effect of the proposed instrument
 - seek and consider submissions from the public.⁵
- 1.7** In addition, the *EP&A Act* contains a number of conditions precedent for specific types of SEPPs such as:
- consultation with the Greater Sydney Commission if the proposed instrument relates to land within the Greater Sydney Region⁶
 - consultation with the Chief Executive of the Office of Environment and Heritage if the Planning Secretary is of the opinion that the proposed instrument will or may adversely affect critical habitat of threatened species, populations or ecological communities, or their habitats⁷
 - provisions relating to development application consent for SEPPs relating to a Sydney drinking water catchment.⁸
- 1.8** Under section 3.22, a SEPP that amends an existing instrument does not have to comply with these requirements if it is minor or if the Minister considers that it will not have any significant adverse impact on the environment.⁹
- 1.9** Section 3.14 sets out what SEPPs may contain. SEPPs may make provision for a wide range of environmental actions, such as protecting the environment, controlling development, and protecting vegetation, native animals and habitats. As well as environmental issues, instruments may also make provision with respect to affordable housing, public spaces or buildings such as hospitals, schools and railways, and controlling advertising.¹⁰

⁴ *Environmental Planning and Assessment Act 1979* s 3.13.

⁵ *Environmental Planning and Assessment Act 1979* s 3.30.

⁶ *Environmental Planning and Assessment Act 1979* s 3.30(2).

⁷ *Environmental Planning and Assessment Act 1979* s 3.25.

⁸ *Environmental Planning and Assessment Act 1979* s 3.26.

⁹ *Environmental Planning and Assessment Act 1979* s 3.22.

¹⁰ *Environmental Planning and Assessment Act 1979* s 3.14.

- 1.10 A SEPP may also declare any development or class of development to be State significant development,¹¹ or specify that a development may be carried out with or without development consent.¹²
- 1.11 If there is inconsistency between environmental planning instruments, there is a general presumption that a SEPP will prevail over a LEP or other instrument.¹³

Scrutiny of environmental planning instruments

- 1.12 The *EP&A Act* contains a number of provisions relating to scrutiny and transparency of environmental planning instruments by government. Under section 3.24, all environmental planning instruments must be published on the NSW Government legislation website.¹⁴ Section 3.21 provides that the Planning Secretary must keep all SEPPs 'under regular and periodic review' for the purpose of ensuring that the objects of the Act are achieved as much as possible, and must determine whether each SEPP needs to be updated every five years.¹⁵
- 1.13 However, there are no statutory requirements that make SEPPs subject to scrutiny by Parliament. SEPPs are not required to be tabled in Parliament or reviewed by a parliamentary committee, and are not subject to disallowance.

Disallowance

- 1.14 Disallowance refers to the power of a House of Parliament to revoke or nullify a piece of delegated legislation. A number of regulations and other instruments are subject to disallowance but in practice the power is rarely used.
- 1.15 A statutory instrument may be disallowable under either:
- section 41 of the *Interpretation Act 1987*, or
 - the Act under which the instrument was made.
- 1.16 Under section 41 of the *Interpretation Act*, either House of Parliament may pass a resolution disallowing a statutory rule either before written notice of the rule is tabled in the House or at any time after the rule has been tabled if notice of the motion has been given within 15 sitting days after tabling.¹⁶ A statutory rule ceases to have effect once the resolution is passed.¹⁷
- 1.17 However, environmental planning instruments are not disallowable under section 41 as they do not fall within the statutory definition of a 'statutory rule'. A 'statutory rule' is defined in section 21 as:
- (a) a regulation, by-law, rule or ordinance—

¹¹ *Environmental Planning and Assessment Act 1979* s 4.36.

¹² *Environmental Planning and Assessment Act 1979* ss 4.1-4.2.

¹³ *Environmental Planning and Assessment Act 1979* s 3.28.

¹⁴ *Environmental Planning and Assessment Act 1979* s 3.24.

¹⁵ *Environmental Planning and Assessment Act 1979* s 3.21.

¹⁶ *Interpretation Act 1987* s 41(1).

¹⁷ *Interpretation Act 1987* s 41(2).

- (i) that is made by the Governor, or
 - (ii) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, or
- (b) a rule of court.¹⁸

1.18 While SEPPs are made by the Governor, they are not categorised as a 'regulation', 'by-law', 'rule' or 'ordinance' under the empowering Act, the *EP&A Act*.

1.19 An instrument can also be disallowable if its enabling legislation specifies that it is. Enabling legislation may do this in a number of different ways. For example, the *National Parks and Wildlife Act 1974* contains a provision specifying that particular documents are subject to disallowance and setting out the process by which a document can be disallowed.¹⁹ Other enabling legislation imports the relevant section of the *Interpretation Act* so that the disallowance provisions under the *Interpretation Act* become applicable to particular instruments or documents.²⁰

1.20 The *EP&A Act* does not provide for the disallowance of environmental planning instruments, including SEPPs. While the Act does provide for disallowance of certain documents,²¹ this does not apply to an environmental planning instrument.

¹⁸ *Interpretation Act 1987* s 21.

¹⁹ See *National Parks and Wildlife Act 1974* s 35 in relation to a notice of reservation.

²⁰ See, for example, *Gaming Machine Tax Act 2001* s 16 in relation to ClubGRANTS guidelines.

²¹ See *Environmental Planning and Assessment Act 1979* s 7.41 in relation to a notice constituting, altering or abolishing a development area.

Chapter 2 The making and scrutiny of SEPPs

This chapter first outlines the scope and powers of SEPPs and their role in the planning system. It then examines the process for making a SEPP, including consultation, and stakeholder concerns with current consultation requirements. Finally, the chapter looks at current mechanisms for scrutiny of SEPPs and outlines recommendations for improved scrutiny by the executive and by Parliament.

The scope and powers of SEPPs

- 2.1** Stakeholders agreed that SEPPs are an important instrument that play a significant role in the planning system. Stakeholders said that SEPPs provide certainty and consistency to planning so that land owners and potential purchasers have clear information on the development capacity of their land.²² As well as providing 'investment certainty' and a 'consistent planning approach', stakeholders noted the importance of flexibility in the system for the Minister to act quickly to make changes if necessary.²³
- 2.2** The committee heard that SEPPs are used to regulate a wide variety of issues. Dr Lorne Neudorf, Associate Professor at the Adelaide Law School, highlighted that SEPPs have been used to regulate 'everything from child care to trading hours, koala habitats to dog fences and recycling to railways'.²⁴ The Property Council of Australia listed existing SEPPs which they categorised across the following themes:
- economic development
 - environmental protection
 - housing supply and design.²⁵
- 2.3** Given their broad scope, stakeholders noted that SEPPs can have a big impact. The committee heard that SEPPs can 'significantly and directly' impact on rights and interests of individuals,²⁶ as well as on the value of land.²⁷ Mr Chris Gambian, Chief Executive Officer, Nature Conservation Council of NSW, commented on the importance of SEPPs being made properly,

²² Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 7 June 2021, p 35; Submission 4, NSW Minerals Council, p 4; Evidence, Ms Rachel Chick, Solicitor, Environmental Defenders Office, 7 June 2021, p 8.

²³ Submission 6, Property Council of Australia, p 4; Submission 5, Urban Taskforce, p 1; Evidence, Ms Lauren Conceicao, NSW Deputy Executive Director, Property Council of Australia, 7 June 2021, p 24; Evidence, Mr Ray, 7 June 2021, pp 35; 37; Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 7 June 2021, p 30; Evidence, Mr Nick Savage, Policy Director - Environment, NSW Farmers Association, 7 June 2021, p 22; Submission 4, NSW Minerals Council, pp 1-2.

²⁴ Evidence, Dr Lorne Neudorf, Associate Professor, Adelaide Law School, University of Adelaide, 7 June 2021, p 2.

²⁵ Submission 6, Property Council of Australia, pp 5-6.

²⁶ Submission 2, Dr Neudorf and Mr Leadbeter, p 3.

²⁷ Evidence, Ms Pauline Wright, President, NSW Council for Civil Liberties, 7 June 2021, p 48.

as the long-term ramifications of planning decisions are 'enormous and, in many cases, permanent'.²⁸

- 2.4** The committee also heard that SEPPs are being used more frequently. For example, Ms Pauline Wright, President of the NSW Council for Civil Liberties, noted that 50 SEPPs were made in 2020.²⁹ Similarly, Dr Neudorf told the committee that, in the last three years in New South Wales, more SEPPs have been made by the executive than Acts passed by Parliament, which he considered part of a trend of delegated legislation becoming 'the principal form of lawmaking in New South Wales'.³⁰ Others argued the vast majority of SEPPs made are amendments to existing SEPPs that have minor consequences to the intent of the policy.³¹
- 2.5** Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, at the Department of Planning, Industry and Environment, agreed that the number of SEPPs has grown over time as SEPPs were usually introduced to respond to a specific issue, but stated that the government has recently tried to consolidate different SEPPs.³²
- 2.6** In terms of the powers of SEPPs, the Environmental Defenders Office highlighted that currently, a number of SEPPs operate in a way that extinguishes third party merit review rights by classifying development as 'State significant'.³³ The EDO argued that while such rights are rarely used by community groups, their existence improves decision-making and that any limits on these rights should be done by legislation, rather than SEPPs.³⁴

Henry VIII powers

- 2.7** A number of stakeholders noted that SEPPs have the power to potentially override other instruments and questioned whether it was appropriate that an instrument with few restrictions and little scrutiny should be able to do so.
- 2.8** In their submission, Dr Neudorf and Mr Paul Leadbeter said that under section 3.16 of the *EP&A Act*, a SEPP may exempt the subject matter of the SEPP from any other law in New South Wales, which includes primary legislation enacted by Parliament. They described this as a 'breathtaking provision' as it 'allows a SEPP to take legal priority over any other law in the state except for the [EP&A] Act, flipping the ordinary legal hierarchy on its head'. They argued this effectively transforms a SEPP into a 'super law' with 'quasi-constitutional status'.³⁵

²⁸ Evidence, Mr Chris Gambian, Chief Executive Officer, Nature Conservation Council of NSW, 7 June 2021, p 13.

²⁹ Evidence, Ms Wright, 7 June 2021, p 46.

³⁰ Evidence, Dr Neudorf, 7 June 2021, p 2. Submission 2, Dr Neudorf and Mr Leadbeter, p 1.

³¹ Submission 6, Property Council of Australia, p 6; Evidence, Mr Abbey, 7 June 2021, p 33.

³² Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 7 June 2021, p 36.

³³ Submission 7, Environmental Defenders Office, pp 4-5; Evidence, Ms Walmsley, 7 June 2021, pp 8-9.

³⁴ Evidence, Ms Walmsley, 7 June 2021, pp 8-9.

³⁵ Submission 2, Dr Neudorf and Mr Leadbeter, p 3.

- 2.9 Dr Neudorf and Mr Leadbeter were concerned that such a power could be exercised with very little accountability. The sole accountability mechanisms in the *EP&A Act* are that the Governor must approve a SEPP's use and the Minister responsible for a law the SEPP is overriding must give consent.³⁶ Dr Neudorf noted that he had not seen in other jurisdictions 'such a sweeping or breathtaking ability to essentially override existing rules with really no parliamentary oversight of the use of that power'.³⁷ In New South Wales, SEPPs have used Henry VIII powers 20 times in the last 10 years.³⁸
- 2.10 Ms Wright added that where a SEPP overrides a LEP, it may disempower those who have been involved in the prescribed community consultation process for the LEP.³⁹
- 2.11 However, others argued it is important that SEPPs retain Henry VIII powers. The Property Council of Australia argued that the power to override local planning controls ensures a consistent approach and is important where local planning controls do not achieve state or regional objectives.⁴⁰ Mr Ray, from the Department of Planning, Industry and Environment, said that the nature of the planning system means SEPPs need to be able to override ancient covenants. He noted further that the Henry VIII provisions are very specific and only override the existing covenant or provision to the extent necessary to undertake the development.⁴¹

The making of SEPPs

- 2.12 During this inquiry, the committee heard evidence about the process by which SEPPs are currently made, focusing primarily on consultation. Stakeholders expressed concern about the minimal legislative requirements in relation to consultation, and recommended a number of ways consultation and engagement could be improved. However, stakeholders disagreed about whether elements of and timeframes for consultation should be mandatory. Stakeholders also raised concerns regarding the notification and accessibility of SEPPs once they are made.

Current practice regarding consultation on SEPPs

- 2.13 As noted in chapter 1, the *EP&A Act* provides that the Minister is to take such steps, if any, as the Minister considers appropriate or necessary to publicise an explanation of the intended effect of a proposed SEPP and to seek and consider submissions from the public.⁴² While the Minister can decide not to consult on SEPPs, Mr Ray said that in practice, most SEPPs are put out for public consultation.
- 2.14 Mr Ray emphasised that what consultation involves depends on the nature of each SEPP, and argued it is important this discretion is retained. He said 'there is no one size fits all approach to

³⁶ Submission 2, Dr Neudorf and Mr Leadbeter, pp 3-4.

³⁷ Evidence, Dr Neudorf, 7 June 2021, p 3.

³⁸ Answers to questions on notice, Dr Lorne Neudorf, Associate Professor, Adelaide Law School, University of Adelaide, 24 June 2021, pp 1-3.

³⁹ Evidence, Ms Wright, 7 June 2021, p 46.

⁴⁰ Submission 6, Property Council of Australia, p 7.

⁴¹ Evidence, Mr Ray, 7 June 2021, pp 42-43.

⁴² *Environmental Planning and Assessment Act 1979* s 3.30.

consultation and for each proposed SEPP an approach is generally tailored for the proposal and then undertaken'. Mr Ray further advised that the only time consultation will generally not take place is where a proposed SEPP is needed urgently or where it is administrative or machinery in nature and will have no substantial impact on current planning controls.⁴³

2.15 In addition to the exhibition of an explanation of the intended effect of the proposed instrument, as provided for under the *EP&A Act*, consultation may include the following:

- public information sessions
- targeted stakeholder sessions
- information workshops, and
- online seminars.⁴⁴

2.16 Mr Ray explained that the department provides advice to the Minister on the consultation recommended for each SEPP and is itself guided by internal policies such as its community participation plan.⁴⁵ Mr Ray emphasised that SEPPs must be considered as part of the planning system which has 'checks and balances' from 'greater community involvement, increased transparency and strong laws', and noted the legal framework in place:

For SEPPs and LEPs, this means allowing the community and stakeholders to have their say on changes that impact them. It also means a clear legal framework has been provided. All LEPs and SEPPs are signed off before they are made by the NSW Parliamentary Counsel. The clear, legal framework of the Act has been moderated by a significant body of public law driven out of the NSW Land and Environment Court and the NSW Court of Appeal.⁴⁶

2.17 By way of example, stakeholders discussed the current consultation process for the proposed new Design and Place SEPP, which has included an explanation of intended effect put out for public comment, as well as more direct engagement with different stakeholder groups. The department will also publish the draft instrument and a cost-benefit analysis for public comment. The consultation process is predicted to take up to two years.⁴⁷

2.18 Stakeholders agreed that in general, the process followed for the Design and Place SEPP is a good model.⁴⁸ Stakeholders described the department as 'very responsive' to feedback and said that, while they may not agree with certain elements of the SEPP itself, they nevertheless felt they had been heard.⁴⁹ However, Mr Gambian, representing the Nature Conservation Council of NSW, noted that even in a consultation process as comprehensive as this, there has been

⁴³ Answers to questions on notice, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 1 July 2021, pp 1-2; Evidence, Mr Ray, 7 June 2021, pp 37; 39-40.

⁴⁴ Answers to questions on notice, Mr Ray, 1 July 2021, pp 1-2.

⁴⁵ Evidence, Mr Ray, 7 June 2021, pp 35-36.

⁴⁶ Evidence, Mr Ray, 7 June 2021, p 35.

⁴⁷ Evidence, Mr Ray, 7 June 2021, pp 39-40.

⁴⁸ Evidence, Mr Gambian, 7 June 2021, pp 15-16; Evidence, Ms Conceicao, 7 June 2021, pp 25; 28.

⁴⁹ Evidence, Ms Conceicao, 7 June 2021, pp 25; 28; Evidence, Mr Gambian, 7 June 2021, pp 15-16.

little engagement with the general public. He argued this is inadequate given the long-term impacts the SEPP will have.⁵⁰

2.19 For his part, Mr Ray emphasised that the consultation process for the Design and Place SEPP is particularly comprehensive as the SEPP represents a significant policy shift and aims to achieve a number of different things, stating:

... It is a many-faceted SEPP. It is design, it is place, it is looking at subdivisions for the first time – principles about subdivisions. It is also a principles-based SEPP, which is a bit of a new model, rather than a strict development control. As I said, it is looking at sustainability as well. There is a lot in it and the consultation process is a fit-for-purpose process.⁵¹

2.20 In contrast, inquiry participants also pointed to a number of SEPPs which they argued involved inadequate consultation leading to poor outcomes, including in some cases, SEPPs that are inconsistent with existing SEPPs, other legislation, or the objects of the *EP&A Act*.⁵² Specific SEPPs raised in this regard included Koala SEPP 19 and its replacement,⁵³ the Non-Rural Vegetation SEPP,⁵⁴ the Coastal SEPP,⁵⁵ and amendments to the Mining SEPP.⁵⁶

Stakeholder concerns and suggestions for improving consultation

2.21 Stakeholders raised a number of concerns around the adequacy of the current legislative framework regarding consultation and put forward a number of areas for improvement, particularly around the explanation of intended effect, the publication of draft SEPP text, and public comment. Stakeholders also made the case both for and against introducing mandatory minimum consultation requirements.

2.22 These issues are explored in detail below, but generally speaking, there was consensus among stakeholders that good consultation:

- results in better SEPPs⁵⁷
- provides an opportunity to consider and balance competing interests,⁵⁸ and that even where stakeholders with competing interests disagree on the outcome of a SEPP, good policy can be achieved where the process is transparent, robust and defensible⁵⁹

⁵⁰ Evidence, Mr Gambian, 7 June 2021, p 13.

⁵¹ Evidence, Mr Ray, 7 June 2021, pp 39-40.

⁵² Submission 10, Timber NSW, pp 15-16; Evidence, Mr Savage, 7 June 2021, p 18; Submission 7, Environmental Defenders Office, pp 8-9.

⁵³ Evidence, Mr Gambian, 7 June 2021, pp 13; 16-17; Submission 7, Environmental Defenders Office, pp 7-8; Evidence, Ms Walmsley, 7 June 2021, p 9; Evidence, Mrs Petrie, 7 June 2021, p 19.

⁵⁴ Submission 7, Environmental Defenders Office, pp 7-8.

⁵⁵ Evidence, Mrs Petrie, 7 June 2021, p 19.

⁵⁶ Submission 7, Environmental Defenders Office, pp 8-9; Evidence, Ms Walmsley, 7 June 2021, p 12.

⁵⁷ Evidence, Mr Gambian, 7 June 2021, pp 15-16; Evidence, Ms Conceicao, Property Council of Australia, 7 June 2021, p 27.

⁵⁸ Evidence, Ms Wright, 7 June 2021, p 48.

⁵⁹ Evidence, Mr Abbey, 7 June 2021, p 31.

- allows those who understand the existing regulatory environment and how a SEPP will operate in practice to address unforeseen issues before they arise⁶⁰
- is important so that all those who will be impacted are aware of what the changes will mean ahead of time⁶¹
- is also important for public confidence in the law and will lead to less controversy later.⁶²

Inadequacy of current legislative requirements

2.23 Numerous inquiry participants put forward the view that the current legislative requirements for consultation are inadequate, as consultation is discretionary and there is minimal guidance about what consultation should involve.

2.24 For example, Dr Neudorf and Mr Leadbeter commented that the *EP&A Act* 'does not impose any concrete minimum standards of consultation' for SEPPs, other than for SEPPs which affect the Greater Sydney Region.⁶³ This means that what consultation will look like and indeed whether any consultation is required at all is left 'entirely within the Minister's discretion'.⁶⁴ The NSW Council for Civil Liberties noted that the courts had on numerous occasions confirmed that the Minister has no obligation to consult under the *EP&A Act*.⁶⁵

2.25 According to the NSW Council for Civil Liberties, the fact that consultation is at the Minister's discretion is at odds with:

- the principle that affected parties should be afforded the right to be heard
- the principle that the public has a right to have input into the way their environment and community is managed
- the object of the *EP&A Act* related to increased opportunity for community participation.⁶⁶

2.26 In this regard, stakeholders compared the legislative provisions for making SEPPs to those in place for similar regulatory instruments. LEPs, for example, require the preparation of explanatory material and community consultation, as well as more robust review than SEPPs.⁶⁷ Regulations made under the *Subordinate Legislation Act 1989* require the preparation of a regulatory impact statement, public notice, comments and submissions, and consideration of alternatives.⁶⁸

⁶⁰ Evidence, Mrs Petrie, 7 June 2021, pp 20; 22.

⁶¹ Evidence, Dr Neudorf, 7 June 2021, p 5; Evidence, Ms Conceicao, 7 June 2021, pp 26-27.

⁶² Evidence, Ms Walmsley, 7 June 2021, pp 11-12; Evidence, Mr Gambian, 7 June 2021, p 14.

⁶³ Submission 2, Dr Neudorf and Mr Leadbeter, pp 2-3.

⁶⁴ Submission 2, Dr Neudorf and Mr Leadbeter, pp 2-3; Submission 7, Environmental Defenders Office, p 7.

⁶⁵ Submission 3, NSW Council for Civil Liberties, p 4.

⁶⁶ Submission 3, NSW Council for Civil Liberties, pp 6-7; Evidence, Ms Wright, 7 June 2021, p 46.

⁶⁷ Submission 2, Dr Neudorf and Mr Leadbeter, p 4; Submission 3, NSW Council for Civil Liberties, pp 6-7; Submission 10, Timber NSW, p 3.

⁶⁸ Submission 7, Environmental Defenders Office, pp 6-7.

2.27 Stakeholders suggested requirements that apply to regulations could be informative in the context of SEPPs. For example, the NSW Minerals Council pointed to the principles contained in the NSW Government's 'Guide to Better Regulation', and in particular the publication of a cost-benefit analysis and requirement that alternatives be considered.⁶⁹ The Environmental Defenders Office noted that regulatory impact statements are also a useful tool and could be tailored to SEPPs so that they include an assessment of environmental, as well as socio-economic, costs.⁷⁰

2.28 The committee also heard that SEPPs have fewer requirements than equivalent instruments in other jurisdictions. In South Australia, for example, public consultation for equivalent instruments is required by law and includes at least two months of general public consultation and review of public submissions.⁷¹ In Victoria, the Environment Protection Authority, which recommends that a SEPP be made, must provide the following documents to the relevant parliamentary committee:

- the final policy impact assessment
- a summary of submissions made
- a statement evaluating the submissions and detailing any changes made to the SEPP as a result
- the review panel's advice and EPA's response.⁷²

Explanation of intended effect

2.29 As noted above, the *EPA Act* requires that the Minister publish an explanation of the intended effect of a proposed SEPP if they consider it necessary. However, several stakeholders suggested this provision is inadequate, both in terms of failing to specify the content of such documents and in terms of publication being discretionary.

2.30 Stakeholders said a statement of intended effect should clearly explain what the SEPP will do and why it is needed.⁷³ Mr Gambian argued that for each SEPP, the Minister should 'make the argument for it, describe its scope and describe some purpose'.⁷⁴ Dr Neudorf commented that, as SEPPs are not debated in Parliament as bills are, it is particularly important that explanatory material clearly identify the current state of the law, the need for change, and the SEPP's likely impacts. Dr Neudorf called for the *EPA Act* to be amended to require the Minister to publish a detailed explanation for every SEPP.⁷⁵

⁶⁹ Evidence, Mr Abbey, 7 June 2021, p 30. The guide and principles are available online: <https://www.treasury.nsw.gov.au/sites/default/files/2019-01/TPP19-01%20-%20Guide%20to%20Better%20Regulation.pdf>.

⁷⁰ Evidence, Ms Walmsley, 7 June 2021, p 12.

⁷¹ Answers to questions on notice, Dr Neudorf, 24 June 2021, pp 4-8.

⁷² Submission 1, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, pp 1-2.

⁷³ Evidence, Dr Neudorf, 7 June 2021, p 5; Evidence, Mr Abbey, 7 June 2021, p 30.

⁷⁴ Evidence, Mr Gambian, 7 June 2021, pp 13-14.

⁷⁵ Evidence, Dr Neudorf, 7 June 2021, p 5; Submission 2, Dr Neudorf and Mr Leadbeter, p 9.

Publication of draft SEPP text

- 2.31** As well as information about a SEPP's intended effect, stakeholders called for the draft text of a proposed SEPP to be published as part of the consultation process. The EDO said that while statements or explanations of intended effect may be useful, they do not provide enough detail on how a SEPP will actually operate, noting that 'much of the effect of any legal instrument comes down to the specifics of its drafting'.⁷⁶ Ms Walmsley also noted that making the draft text available would 'improve the rigour' of public consultation and make it easier to see how public consultation has been incorporated.⁷⁷

Public comment

- 2.32** Some stakeholders argued that consultation on SEPPs should include the opportunity for general public comment, rather than just consultation with industry or particular stakeholder groups. For example, it was suggested that details of how the public can be involved with consultation should be published widely in the media.⁷⁸ According to the EDO, public consultation should include the opportunity for the public to comment on both the explanation of intended effect and the proposed draft text.⁷⁹
- 2.33** The EDO and the NSW Minerals Council agreed that public comment on issues raised during the consultation process should be 'demonstrably taken into account', with an explanation of how issues raised during consultation were considered.⁸⁰ The Planning Institute of Australia recommended that a Community Engagement Report be prepared for each major SEPP so that it is clear how feedback was incorporated into the final instrument.⁸¹

Mandatory minimum consultation

- 2.34** The committee heard competing viewpoints about whether elements of consultation should be mandatory or whether the government should retain the flexibility to determine how to consult for each SEPP. Stakeholders also diverged on the issue of whether a minimum timeframe for consultation should be mandated.
- 2.35** Most stakeholders agreed that consultation for the majority of SEPPs should be mandatory.⁸² Mr Gambian argued that, while the department has some rigorous processes in place, these should be in place for all SEPPs, not just when the department elects to.⁸³ Similarly, Mr Andrew Abbey of the NSW Minerals Council argued that there should be some minimum consultation and engagement requirements, noting that, while there has been more emphasis on consultation generally, 'there is always room for improvement'.⁸⁴

⁷⁶ Submission 7, Environmental Defenders Office, p 7.

⁷⁷ Evidence, Ms Walmsley, 7 June 2021, p 11.

⁷⁸ Submission 10, Timber NSW, p 8.

⁷⁹ Submission 7, Environmental Defenders Office, p 7.

⁸⁰ Evidence, Mr Abbey, 7 June 2021, p 30.

⁸¹ Submission 9, Planning Institute of Australia, pp 2-3.

⁸² Submission 2, Dr Neudorf and Mr Leadbeter, p 9; Evidence, Ms Wright, 7 June 2021, p 46; Submission 3, NSW Council for Civil Liberties, pp 7-8; Submission 10, Timber NSW, p 9.

⁸³ Evidence, Mr Gambian, 7 June 2021, pp 14-16.

⁸⁴ Evidence, Mr Abbey, 7 June 2021, p 30.

2.36 Those who called for mandatory consultation generally recommended that the *EP&A Act* should be amended to require the publication of an explanation of intended effect in all cases, as well as the draft text, and set out a process for public engagement. For example, the NSW Council for Civil Liberties proposed that the *EP&A Act* be amended to establish a clear statutory framework setting out:

- the nature of the information about the proposed SEPP that must be made available to the community and stakeholders prior to consultation
- the timeframe for public consultation
- the stakeholders who must be consulted with
- a requirement for the Minister to consider the submissions put to them and their department in the preparation of a SEPP.⁸⁵

2.37 Those in favour of mandatory minimum requirements also argued that there should be a mandated consultation period. Dr Neudorf described a 28 day consultation period as a 'good starting point' as it is standard and generally represents a good balance between adequate consultation and flexibility.⁸⁶ Others argued that a 28 day period should be the minimum for straightforward SEPPs but SEPPs that are more comprehensive or involve matters of state importance would require more time.⁸⁷ In addition, Ms Walmsley commented that 28 days would not be sufficient for engagement with certain groups, such as when a SEPP will impact on First Nations communities.⁸⁸

2.38 On the other hand, some stakeholders argued against mandatory consultation. Ms Conceicao of the Property Council of Australia, cautioned against 'consulting for the sake of consulting' and argued that flexibility in how consultation takes place would avoid unnecessary delays. She said that the current consultation processes undertaken by the department in both the implementation and review of SEPPs is sufficient, and that the Property Council would not support further requirements that may slow the process down.⁸⁹

2.39 When asked about the potential impact of making consultation requirements mandatory, Mr Ray advised that at a minimum, a process of public comment takes at least a month and if this were mandatory, the government would not be able to act quickly to respond to certain situations.⁹⁰

Accessibility and notification

2.40 In addition to the issue of consultation, a number of stakeholders raised concerns about the inaccessibility of SEPPs once they are made, particularly around the language used in SEPPs and the fact that affected stakeholders are not automatically notified that a new SEPP applies to their land.

⁸⁵ Submission 3, NSW Council for Civil Liberties, pp 7-8.

⁸⁶ Evidence, Dr Neudorf, 7 June 2021, pp 4; 6.

⁸⁷ Evidence, Ms Chick, 7 June 2021, p 8; Evidence, Ms Wright, 7 June 2021, p 49.

⁸⁸ Evidence, Ms Walmsley, 7 June 2021, p 12.

⁸⁹ Evidence, Ms Conceicao, 7 June 2021, pp 25; 27.

⁹⁰ Evidence, Mr Ray, 7 June 2021, p 43.

- 2.41** In particular, stakeholders argued that SEPPs are often expressed in technical language, making them difficult for non-experts to understand.⁹¹ The EDO noted that under the Statutory Rule Guidelines, 'a statutory rule must be expressed plainly and unambiguously, and consistently with the language of the enabling Act' and called for the same requirement to apply to SEPPs.⁹² In this context stakeholders emphasised that SEPPs should, as far as possible, be written in plain English.⁹³ Mr Gambian added that, rather than enforcing a plain English requirement, the test should be that the SEPP can be understood.⁹⁴
- 2.42** In addition, SEPPs can be inaccessible in the sense that affected stakeholders are not required to be notified that a SEPP has been introduced that affects them. The only notification requirement for SEPPs is that they must be published on the NSW Legislation website. There is no requirement to notify stakeholders in advance and SEPPs come into legal force on the day they are published.⁹⁵ While SEPPs are required to be published online, the Property Council of Australia noted that generally, explanatory material detailing the SEPP's meaning or how the SEPP relates to the objects of the *EP&A Act* or existing policies is not published alongside the SEPP on the NSW Legislation website.⁹⁶
- 2.43** Stakeholders were concerned that this means it is very difficult to find out if a SEPP applies to you or your land. Ms Walmsley observed there is no fail-safe notification system so that currently, it 'can be quite opaque'.⁹⁷ Dr Neudorf agreed that the only real way to find out if a SEPP applies to you is to read each SEPP.⁹⁸
- 2.44** From the government's perspective, Mr Ray accepted that it can be difficult to find information on relevant SEPPs and noted landowners currently need to obtain a planning certificate from their local council to find out what SEPPs apply to their land. However, Mr Ray said the department does try to publish explanatory material and notify stakeholders who have been involved in consultation. The department is also developing searchable maps that will make it easier to see which SEPPs apply to particular plots of land in future.⁹⁹

Scrutiny of SEPPs

- 2.45** As noted in chapter 1, the standard scrutiny mechanisms applicable to statutory rules such as regulations, including disallowance, do not apply to SEPPs. The committee heard that in practice, SEPPs are reviewed by the executive. However, stakeholders expressed concern about the lack of guidance around what such review should involve, and the lack of transparency about what review certain SEPPs have undergone.

⁹¹ Evidence, Dr Neudorf, 7 June 2021, p 5; Submission 6, Property Council of Australia, p 8.

⁹² Submission 7, Environmental Defenders Office, p 9.

⁹³ Evidence, Dr Neudorf, 7 June 2021, p 5; Evidence, Mr Gambian, 7 June 2021, p 16.

⁹⁴ Evidence, Mr Gambian, 7 June 2021, p 16.

⁹⁵ Submission 2, Dr Neudorf and Mr Leadbeter, p 4.

⁹⁶ Submission 6, Property Council of Australia, pp 4; 8.

⁹⁷ Evidence, Ms Walmsley, 7 June 2021, p 10.

⁹⁸ Evidence, Dr Neudorf, 7 June 2021, p 6.

⁹⁹ Evidence, Mr Ray, 7 June 2021, p 37; Answers to questions on notice, 1 July 2021, p 2.

- 2.46 Stakeholders also raised concerns about the lack of parliamentary scrutiny of SEPPs, especially in the context of the broad powers and impact SEPPs can have.

Review by the executive

- 2.47 Under section 3.21 of the *EP&A Act*, the Planning Secretary must keep all SEPPs 'under regular and periodic review' to ensure the SEPP achieves the objects of the Act. The section also provides that the Planning Secretary is to determine whether a SEPP should be updated 'every five years following such a review'.¹⁰⁰
- 2.48 Mr Ray advised that the Department of Planning, Industry and Environment does keep all instruments under regular review according to the Act. He noted that new or significant SEPPs are often reviewed after two years to allow the government to track how the SEPP works and make timely changes if required.¹⁰¹ Mr Ray further advised that small or single-issue SEPPs are not reviewed as often and may only be reviewed every ten years.¹⁰²
- 2.49 As well as the timeframe for review, Mr Ray advised that what review of each SEPP involves depends on the instrument itself, describing current practice as 'fit-for-purpose':

[I]t depends on the circumstances. In smaller scale situations it might be an internal review. In other situations we might ask for public comment. In some cases we might get an expert to do a report for us, and if necessary in some cases that may be put out for public comment, or in some cases we might just rely on the report and publish the report. Again, it is a fit-for-purpose review.¹⁰³

- 2.50 Numerous stakeholders raised concerns about the adequacy of the current legislative requirements for periodic review. However, the committee heard differing views expressed as to whether such elements should be mandated, and whether SEPPs should be subject to a timeframe or sunset clause prompting review at a certain time.
- 2.51 Dr Neudorf and Mr Leadbeter argued that the current legislative accountability mechanisms are inadequate. In their view, the only real accountability mechanism in the *EP&A Act* is the requirement that the Governor approve a SEPP before it is made. However, they expressed the view that this is insufficient in the context of the broad scope and power of SEPPs because it means the executive is checking itself.¹⁰⁴ They noted further that, as SEPPs are not defined as 'statutory rules', they are not subject to the default sunset period of five years for delegated legislation under the *Subordinate Legislation Act 1989*.¹⁰⁵
- 2.52 A number of stakeholders recommended that new SEPPs be subject to a similar sunset clause so that review is mandated. For example, Ms Wright argued that SEPPs should be subject to a sunset provision as such provisions prompt review, effectively mandating review.¹⁰⁶ According

¹⁰⁰ *Environmental Planning and Assessment Act 1979* s 3.21.

¹⁰¹ Evidence, Mr Ray, 7 June 2021, p 38.

¹⁰² Evidence, Mr Ray, 7 June 2021, p 38.

¹⁰³ Evidence, Mr Ray, 7 June 2021, p 43.

¹⁰⁴ Submission 2, Dr Neudorf and Mr Leadbeter, pp 3-4.

¹⁰⁵ Submission 2, Dr Neudorf and Mr Leadbeter, p 5.

¹⁰⁶ Evidence, Ms Wright, 7 June 2021, p 47.

to Ms Wright, a mandated review would ensure a SEPP is still justified and should continue.¹⁰⁷ Similarly, Dr Neudorf noted that a 5 year sunset clause would give everyone the chance to see how a SEPP is working and if it is achieving its intended purpose.¹⁰⁸ In this regard, both Dr Neudorf and the EDO suggested that review of a SEPP should include a consultation process.¹⁰⁹

- 2.53** However, Mr Ray argued against the application of a sunset clause for SEPPs, posing the question: 'what happens when the sun sets?' Mr Ray argued that if a SEPP were to lapse automatically after a sunset period, it may result in a complicated regulatory void.¹¹⁰ Mr Ray noted further that mandated automatic review every five years would strain departmental resources and may have little benefit, particularly for smaller SEPPs or SEPP amendments.¹¹¹ Mr Ray said that any mandated review would need to be 'a proportionate one and not overly-regulated so it could be fit-for-purpose in each case'.¹¹²
- 2.54** The Property Council of Australia and NSW Minerals Council argued that flexibility about whether to review particular SEPPs and how frequently to do so, is preferable to mandatory review.¹¹³ Mr Abbey called for review to be 'as required' when issues come up but not necessary if the SEPP is working well, and noted that a five year review may not be appropriate for industries such as mining where development assessments can take five years and investment decisions are more long-term.¹¹⁴ In addition, Mr Abbey and Mrs Petrie of NSW Farmers, argued the focus should be on improvements to consultation to scrutinise and improve SEPPs up-front, rather than on later review.¹¹⁵

Scrutiny by Parliament

- 2.55** There is currently no provision for Parliament to systematically scrutinise or to disallow SEPPs. As noted in chapter 1, as SEPPs are not 'statutory rules', the provisions of the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and *Legislation Review Act 1987* providing for tabling in Parliament, scrutiny by a parliamentary committee and disallowance, do not apply.
- 2.56** A number of stakeholders expressed the view that the lack of parliamentary scrutiny of SEPPs, coupled with their potentially strong powers and broad remit, represents a threat to parliamentary sovereignty. Ms Wright argued that the exclusion of SEPPs from parliamentary scrutiny processes was as 'an effective scrutiny gap which should be remedied', and described parliamentary scrutiny mechanisms, including the disallowance power, as 'important democratic checks' on executive power.¹¹⁶ Ms Wright argued that making SEPPs subject to parliamentary

¹⁰⁷ Evidence, Ms Wright, 7 June 2021, p 47.

¹⁰⁸ Evidence, Dr Neudorf, 7 June 2021, pp 5-6.

¹⁰⁹ Evidence, Ms Chick, 7 June 2021, p 8; Answers to questions on notice, Ms Rachel Walmsley, Head of Policy and Law Reform and Ms Rachel Chick, Solicitor, Environmental Defenders Office, 1 July 2021, p 1.

¹¹⁰ Evidence, Mr Ray, 7 June 2021, p 38.

¹¹¹ Evidence, Mr Ray, 7 June 2021, pp 38-39.

¹¹² Evidence, Mr Ray, 7 June 2021, p 39.

¹¹³ Evidence, Ms Conceicao, 7 June 2021, pp 24; 27-28.

¹¹⁴ Evidence, Mr Abbey, 7 June 2021, pp 33-34.

¹¹⁵ Evidence, Mr Abbey, 7 June 2021, p 31; Evidence, Mrs Petrie, 7 June 2021, p 21.

¹¹⁶ Evidence, Ms Wright, 7 June 2021, p 46.

scrutiny and disallowance would maintain key rule of law principles such as parliamentary sovereignty as well as restoring public confidence in lawmaking processes.¹¹⁷ According to Ms Wright, even SEPPs that are not controversial and appear to be working well should be reviewed as problems may not arise for some time.¹¹⁸

2.57 Along similar lines, according to Dr Neudorf, the strong powers of SEPPs, coupled with the limited legislative guidance, effectively 'sidelines' Parliament:

[T]he *Environmental Planning and Assessment Act 1979* confers exceptional legislative powers on the government while sidelining Parliament by eliminating meaningful parliamentary oversight. This approach is incompatible with Parliament's constitutional role as lawmaker-in-chief.¹¹⁹

2.58 Dr Neudorf argued that this lack of oversight is particularly concerning given:

- the impact SEPPs may have on individual rights
- the lack of legislative requirements for how they are made
- the power they have to override existing rules.¹²⁰

2.59 The Environmental Defenders Office argued that, while there is some opportunity to challenge individual SEPPs through the courts, these review rights are extremely limited and do not replace other scrutiny mechanisms such as disallowance.¹²¹

Suggestions for improvement

2.60 Stakeholders put forward a number of different mechanisms for improving parliamentary scrutiny.

2.61 One suggestion put forward was a ministerial statement to Parliament when a SEPP is made. Mr Gambian commented that such a statement would be 'incredibly helpful', not just for SEPPs but for other regulatory instruments as well, stating: 'one of the ways we can disinfect some of these processes is with a bit of daylight'.¹²² Mr Gambian suggested that such a process could include questioning the relevant Minister.¹²³

2.62 Ms Walmsley agreed that a ministerial statement would improve SEPPs and recommended that, in addition, there should be debate in Parliament and the capacity to amend a SEPP.¹²⁴ Ms Conceicao, representing the Property Council of Australia, agreed a ministerial statement would be a good idea, noting that, while the Property Council is opposed to anything that might slow planning down, they 'strongly support anything that makes SEPPs more communicable'.¹²⁵

¹¹⁷ Evidence, Ms Wright, 7 June 2021, pp 46-47.

¹¹⁸ Evidence, Ms Wright, 7 June 2021, p 48.

¹¹⁹ Evidence, Dr Neudorf, 7 June 2021, p 2.

¹²⁰ Evidence, Dr Neudorf, 7 June 2021, p 3.

¹²¹ Answers to questions on notice, Ms Walmsley and Ms Chick, 1 July 2021, p 1.

¹²² Evidence, Mr Gambian, 7 June 2021, p 15.

¹²³ Evidence, Mr Gambian, 7 June 2021, p 17.

¹²⁴ Evidence, Ms Walmsley, 7 June 2021, p 12.

¹²⁵ Evidence, Ms Conceicao, 7 June 2021, p 25.

2.63 Stakeholders also referred to tools used in other jurisdictions. In Victoria, information about certain equivalent instruments must be provided to the relevant parliamentary committee, which may report to each House, including recommending disallowance.¹²⁶ In Victoria, either House may disallow equivalent instruments in whole or in part and in New Zealand, the Parliament can amend the equivalent instrument without disallowing the entire instrument.¹²⁷

2.64 In South Australia, equivalent instruments under different Acts are subject to parliamentary scrutiny and disallowance, though the disallowance power has never been formally exercised.¹²⁸ The Minister must refer equivalent instruments to a parliamentary committee which can recommend to the Minister that changes be made or recommend disallowance to Parliament, depending on the instrument.¹²⁹

Disallowance of SEPPs

2.65 In relation to whether SEPPs should be made disallowable in New South Wales, the committee heard diverging views from inquiry participants. Some stakeholders argued that Parliament should have the discretion to disallow a SEPP, noting that disallowance is a rarely used power but a useful deterrent against the potential overreach of executive power. Others, however, argued that disallowance would lead to uncertainty and is not necessary if consultation is improved.

2.66 Stakeholders who argued for SEPPs to be disallowable highlighted the role of Parliament in overseeing delegated legislation and argued parliamentary scrutiny should be extended to SEPPs, given their scope and impact. The Environmental Defenders Office argued that, without parliamentary scrutiny, SEPPs are 'only in the sphere of the executive', which is inappropriate given they can be such powerful instruments.¹³⁰ Similarly, the NSW Council for Civil Liberties emphasised the role of Parliament in a democracy, arguing that the power of Parliament to oversee and control delegated legislation is 'vitaly important' for a healthy democracy. They argued that, without this power, Parliament currently has little recourse to hold the Minister to account for SEPPs and ensure they operate in the public interest.¹³¹

2.67 Stakeholders accepted that disallowance may be a blunt instrument but argued it is nevertheless a necessary deterrent. Dr Neudorf described the power as 'an important stick to hold', noting that the possibility of disallowance is often enough to ensure instruments are drafted properly.¹³²

2.68 Along similar lines, the Environmental Defenders Office argued the disallowance power is not used often but its existence 'makes for better policymaking', commenting:

¹²⁶ Submission 1, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, p 2.

¹²⁷ Submission 1, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, p 2; Evidence, Dr Lorne Neudorf, Associate Professor, Adelaide Law School, University of Adelaide, 7 June 2021, p 2.

¹²⁸ Submission 2, Dr Neudorf and Mr Leadbeter, pp 6-8; Answers to questions on notice, Dr Neudorf, 24 June 2021, pp 3-4.

¹²⁹ Submission 2, Dr Neudorf and Mr Leadbeter, pp 6-8.

¹³⁰ Submission 7, Environmental Defenders Office, pp 5-6.

¹³¹ Submission 3, NSW Council for Civil Liberties, pp 5-6; Evidence, Mr Gambian, 7 June 2021, p 13.

¹³² Evidence, Dr Neudorf, 7 June 2021, p 2.

Although it is an imperfect oversight mechanism, given it is the primary tool of scrutiny available for delegated legislation, the disallowance provisions of the *Interpretation Act 1987* should apply to environmental planning instruments, especially SEPPs. The very fact that an instrument has the potential to be disallowed may function to improve the process in terms of ensuring a more rigorous, evidence-based and transparent process for developing robust SEPPs.¹³³

- 2.69** Dr Neudorf described how the disallowance power in other jurisdictions is exercised. He noted that disallowance is rarely used in South Australia but its existence creates a 'strong incentive' for the relevant department to carry out effective consultation.¹³⁴ Similarly, Dr Neudorf noted that the Senate has a range of tools available, including the ability for the committee to raise issues directly with the Minister, but said disallowance can be an important 'backstop' that ensures concerns with an instrument are addressed.¹³⁵
- 2.70** Finally, the NSW Council for Civil Liberties noted that under the *Subordinate Legislation Act 1989*, a disallowed statutory rule cannot be remade in substantially the same way within four months following disallowance, and argued this 'important check on executive power' should apply to SEPPs.¹³⁶
- 2.71** Others, however, argued that SEPPs should not be made disallowable. The Property Council of Australia claimed that disallowance would cause delays and uncertainty and is unnecessary given the opportunity for planning decisions to be challenged through the courts.¹³⁷ These stakeholders argued that an improved consultation process should provide sufficient scrutiny and questioned the need for parliamentary disallowance of a SEPP that has undergone a comprehensive consultation process.¹³⁸
- 2.72** The NSW Minerals Council, for example, argued that, given the current checks and balances in place, and the increasing practice of community consultation, disallowance would not be ideal. They stated:

Given the processes often adhered to and the checks and balances in place, it would be concerning if disallowance powers could be easily used to veto a SEPP amendment in its final stages (potentially after significant time) for the purposes of political expediency, despite a comprehensive, transparent, and robust process, including adherence to the better regulation principles, and reasonable consultation with the community and business.¹³⁹

Emergency SEPPs

- 2.73** All stakeholders agreed that some SEPPs may need to be made quickly in order to respond to particular situations. In particular, a number of stakeholders pointed to recent examples of

¹³³ Submission 7, Environmental Defenders Office, pp 5-6; Evidence, Ms Walmsley, 7 June 2021, p 9.

¹³⁴ Answers to questions on notice, Dr Neudorf, 24 June 2021, p 4.

¹³⁵ Evidence, Dr Neudorf, 7 June 2021, p 4.

¹³⁶ Submission 3, NSW Council for Civil Liberties, p 5.

¹³⁷ Submission 6, Property Council of Australia, pp 7-9.

¹³⁸ Evidence, Mr Abbey, 7 June 2021, p 30.

¹³⁹ Submission 4, NSW Minerals Council, p 4.

SEPPs made in response to the COVID-19 pandemic as evidence of situations in which SEPPs need to be made quickly in response to an unprecedented situation. One example included the COVID-19 Response SEPP, known colloquially as the 'toilet paper SEPP', which allowed retailers to restock quickly in response to panic buying.¹⁴⁰ A number of rapid SEPP amendments were also made in 2019 and 2020 to allow clearing from bushfires and to allow businesses to operate during the pandemic.¹⁴¹

2.74 There was general acceptance that, in such exceptional or emergency circumstances, SEPPs may need to circumvent normal consultation processes or other requirements in order to be made quickly. Dr Neudorf described it as a question of balance, noting that in an emergency the need for decisive action may override other concerns.¹⁴² For some stakeholders, the need to act quickly to create emergency SEPPs was an argument against any mandatory requirements for SEPPs.¹⁴³ Others advocated for an exception to be carved out for emergency or exceptional circumstances so that some SEPPs could be made more quickly.¹⁴⁴

2.75 In this regard, the Environmental Defenders Office cautioned against creating too many different categories of SEPPs, arguing that 'creating tiers of SEPPs' would not only be confusing to the community but would open the door for arguments that certain SEPPs should avoid scrutiny.¹⁴⁵ They recommended that, given the potentially significant power of SEPPs, it would only be appropriate to bypass normal consultation requirements in exceptional circumstances.¹⁴⁶

2.76 The Environmental Defenders Office and the NSW Council for Civil Liberties both argued that if a SEPP is made in exceptional or emergency circumstances, the SEPP should be subject to mandatory review.¹⁴⁷ According to Ms Walmsley, this is particularly important as the normal requirements for consultation and scrutiny would not apply:

[I]mportantly, because you are bypassing disallowance and you are bypassing the public consultation, you would need to put in place a 12-month sunset clause or review clause whereby that is in place for a short time and then gets reviewed at that point to enable a bit of scrutiny so you can see how it has been functioning.¹⁴⁸

2.77 The Environmental Defenders Office recommended that review of such SEPPs after 12 months should consider the SEPP itself as well as whether exceptional circumstances existed to justify making the SEPP without the usual requirements. If the review recommends the SEPP should continue or be remade, this new SEPP should be disallowable.¹⁴⁹

¹⁴⁰ Submission 5, Urban Taskforce, p 1.

¹⁴¹ Evidence, Mr Ray, 7 June 2021, p 40.

¹⁴² Evidence, Dr Neudorf, 7 June 2021, p 7.

¹⁴³ Evidence, Mr Allan Hansell, NSW Policy and Communications Consultant, Property Council of Australia, 7 June 2021, pp 25-26; Evidence, Mr Abbey, 7 June 2021, p 30.

¹⁴⁴ Evidence, Ms Walmsley, 7 June 2021, p 11; Evidence, Ms Wright, pp 48-49.

¹⁴⁵ Evidence, Ms Walmsley, 7 June 2021, p 11.

¹⁴⁶ Answers to questions on notice, Ms Walmsley and Ms Chick, 1 July 2021, pp 3-4.

¹⁴⁷ Evidence, Ms Chick, 7 June 2021, p 8; Evidence, Ms Wright, 7 June 2021, p 48.

¹⁴⁸ Evidence, Ms Walmsley, 7 June 2021, p 10.

¹⁴⁹ Answers to questions on notice, Ms Walmsley and Ms Chick, 1 July 2021, pp 3-4.

Committee comment

- 2.78** Through this inquiry, the committee has sought to better understand the role that SEPPs play in the planning system, and importantly, the processes by which SEPPs are made, consulted on and overseen.
- 2.79** The committee accepts that SEPPs are important planning instruments, as they provide flexibility for government to impose rules relating to a particular area or issue and to act quickly if necessary. At the same time, SEPPs represent a significant exercise of executive power. Planning policies can have wide-ranging and long-term impacts on property and individual rights, communities and the environment. In addition, under the *EP&A Act*, SEPPs currently have the power to potentially override existing legislation and rules and may designate development to be State significant, thereby effectively extinguishing third party review rights.
- 2.80** While the committee accepts the important role SEPPs play and the need, on occasion, to override ancient covenants or conflicting local plans, it is critical that the process by which they are made is robust and transparent, and that they are overseen and scrutinised appropriately. The committee also accepts that SEPPs may legitimately designate development to be State significant but this should never result in the extinguishment of third party review rights. Such rights are an important check on the planning system and on instruments of this sort. We therefore recommend that the NSW Government consider amending the *EP&A Act* to make it clear that a SEPP cannot extinguish third party review rights.

Recommendation 1

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to make clear that third-party review rights are not extinguished when a State environmental planning policy deems a development to be 'State significant'.

- 2.81** Stakeholders raised a number of concerns about the current legislative provisions for the making and oversight of SEPPs. Particular attention was drawn to the fact that consultation on SEPPs is currently at the Minister's discretion, that there is minimal guidance around how consultation and review should take place, and that there is no provision for a SEPP to be scrutinised by Parliament. Stakeholders also noted that SEPPs can be inaccessible, written in technical language and with minimal explanatory material available alongside the published SEPP.
- 2.82** Clearly, better consultation will produce better policy outcomes. Good consultation will address issues before they arise, allow consideration of competing interests and put all affected stakeholders on notice of upcoming changes. The SEPP itself should be clear and understandable and explanatory material detailing the rationale for and impact of the SEPP should be readily available. We also agree with stakeholders that consultation can be strengthened if the general public is given the opportunity to comment and if the draft text of a proposed SEPP is published as part of the consultation process.
- 2.83** In our view the *EP&A Act* should be amended to guarantee that adequate consultation on SEPPs takes place across the board. We are ultimately persuaded by arguments that stronger consultation, including a minimum consultation period, should be mandated. This is particularly important given the broad powers and significant and long-term impacts of SEPPs.

- 2.84** This mandatory consultation process should include not only the publication of a comprehensive and plain English explanation of intended effect, but also the publication of the draft text of the SEPP. The process should include the opportunity for the public to comment and should take a minimum of 28 days. The Minister should also be required to demonstrate how the feedback gathered during the consultation was considered, and when review will take place.
- 2.85** At the same time, the committee accepts that there is a need for some SEPPs to be made in exceptional, or emergency, circumstances. Changes to the *EP&A Act* should create an exception to allow the Minister to declare a SEPP to be an 'emergency SEPP'. Such a SEPP would not be subject to the standard consultation requirements but should instead be reviewed after twelve months.

Recommendation 2

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that the Minister must undertake consultation for all State environmental planning policies, with consultation to include the following elements:

- publication of a comprehensive, plain English explanation of intended effect
- publication of the draft text of the State environmental planning policy
- a minimum consultation period of 28 days from the publication of the draft State environmental planning policy text
- explanation of how feedback gathered during the consultation process has been considered
- details of how and when the State environmental planning policy will be reviewed by the department.

Recommendation 3

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that:

- the Minister may declare any State environmental planning policy to be an 'emergency State environmental planning policy'
- an 'emergency State environmental planning policy' is exempt from consultation requirements but must be reviewed within 12 months.

-
- 2.86** In addition to better consultation for future SEPPs, in the interests of transparency and accessibility, the committee recommends that the NSW Government make information about current SEPPs more accessible online. The NSW Government should, for all current and future SEPPs, publish the current and previous versions of the SEPP, explanatory material, and details of consultation and review.

Recommendation 4

That the Department of Planning, Industry and Environment publish online the following information, as relevant, relating to all current and future State environmental planning policies:

- a link to the current and all previous versions of the State environmental planning policy text on the NSW Legislation website
 - any explanatory material detailing the rationale for the State environmental planning policy and its intended effect
 - details of any consultation undertaken and how this consultation was incorporated into the State environmental planning policy
 - information about upcoming and past departmental review.
-

2.87 Turning to the question of scrutiny, the committee is concerned that Parliament currently plays no role at all in overseeing SEPPs, leaving a significant scrutiny gap that should be addressed. As this committee observed in its report on the making of delegated legislation in New South Wales, where Parliament delegates law-making powers to the executive, it is critically important, consistent with Parliament's constitutional role, that such laws be subject to parliamentary oversight.

2.88 In this regard, the committee considered a range of possible parliamentary accountability measures. First, we are of the view that all future SEPPs should be made subject to a sunset period of five years. Second, the Minister should be required to table a report in Parliament twice each year listing all SEPPs made in the preceding 6-month period, including information about the rationale for and intended impact of these SEPPs and the consultation process. The report should also note any SEPPs for which the sunset period is due to expire within the next 12 months, and whether there is an intention to remake those instruments or allow them to lapse. Third, we recommend that this committee review all SEPPs that are intended to be remade on the expiry of the sunset period 12 months prior to that time.

2.89 These mechanisms will improve scrutiny and accountability in a number of ways. Reporting to Parliament will allow for parliamentary debate on these instruments, both to encourage better consultation and drafting, and to ensure that members are able to raise issues and bring them to attention of the government. Committee scrutiny of SEPPs will allow stakeholders to comment on the operation of a SEPP and ensure that any concerns with its operation in practice can be drawn to the government's attention prior to the SEPP being re-made.

Recommendation 5

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that all future State environmental planning policies are subject to a sunset period of five years.

Recommendation 6

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that the Minister must table a report in both Houses of Parliament on the first sitting day after the summer and winter recesses each year, indicating:

- all State environmental planning policies made since the previous report was tabled (or in the case of the first report, the preceding 6 months), and for each instrument providing a summary of the rationale for and intended impact of the instrument, what consultation was undertaken, and how feedback gathered during the consultation process was considered
- any State environmental planning policies that are due to lapse in the next 12 months, and whether there is an intention to remake those instruments or allow them to lapse on expiry of the sunset period.

Recommendation 7

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that, 12 months prior to the expiry of the relevant sunset period, the Minister is to refer any State environmental planning policy that is intended to be remade to the Legislative Council Regulation Committee for inquiry and report.

2.90 At the other end of the spectrum of potential parliamentary scrutiny measures, the committee examined the power of disallowance. Acknowledging that the committee heard strong but diverging views on the issue, at this stage we believe the case has not been made for SEPPs to be subject to disallowance by Parliament. Disallowance is a blunt instrument and in the context of SEPPs, has the potential to create uncertainty and inconsistency in the planning system. While Parliament can play a greater role in scrutinising SEPPs, parliamentary debate and committee scrutiny will lead to better policy outcomes without the potential for a regulatory void.

Appendix 1 Submissions

No.	Author
1	Scrutiny of Acts and Regulations Committee - Parliament of Victoria
2	Associate Professor Lorne Neudorf and Adjunct Senior Lecturer Paul Leadbeter
3	NSW Council for Civil Liberties
4	NSW Minerals Council
5	Urban Taskforce
6	Property Council of Australia
7	Environmental Defenders Office (EDO)
8	Nature Conservation Council of NSW
9	Planning Institute of Australia (PIA)
10	Timber NSW

Appendix 2 Witnesses at hearing

Date	Name	Position and Organisation
Monday 7 June 2021 Macquarie Room Parliament House	Dr Lorne Neudorf <i>(via teleconference)</i>	Associate Professor, Adelaide Law School, University of Adelaide
	Ms Rachel Walmsley	Head of Policy and Law Reform, Environmental Defenders Office
	Ms Rachel Chick	Solicitor, Environmental Defenders Office
	Mr Chris Gambian	Chief Executive Officer, NSW Nature Conservation Council
	Ms Jacquelyn Johnson	Strategy and Operations Director, NSW Nature Conservation Council.
	Mr Nick Savage	Policy Director - Environment, NSW Farmers Association
	Mrs Bronwyn Petrie	Member, NSW Farmers Association
	Ms Lauren Conceicao	NSW Deputy Executive Director, Property Council of Australia
	Mr Allan Hansell	NSW Policy and Communications Consultant, Property Council of Australia
	Mr Andrew Abbey	Policy Director, NSW Minerals Council
	Mr Marcus Ray	Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment
Ms Pauline Wright	President, NSW Council for Civil Liberties	

Appendix 3 Minutes

Minutes no. 13

Wednesday 24 March 2021

Regulation Committee

Members' Lounge, 1.31 pm.

1. Members present

Mr Veitch, *Chair*

Ms Boyd, *Deputy Chair*

Mr Borsak

Ms Cusack

Mr Donnelly

Mr Farlow

Mr Mason-Cox

2. Apologies

Mr Franklin

3. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 12 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 18 March 2021 – Letter from Mr Veitch, Ms Boyd and Mr Donnelly requesting a meeting of the Regulation Committee to consider a proposed self-reference into environmental planning instruments.

5. Consideration of terms of reference

The Chair tabled a letter proposing the following self-reference:

Inquiry into environmental planning instruments

1. That the Regulation Committee inquire into and report on:
 - (a) the making of environmental planning instruments (SEPPS) under section 3.29 of the *Environmental Planning and Assessment Act 1979*,
 - (b) whether SEPPS should be disallowable under the *Interpretation Act 1987*, and
 - (c) any other related matter.
2. That the committee report by the first sitting day in August 2021.

Resolved, on the motion of Mr Donnelly: That the committee adopt the terms of reference.

6. Conduct of the inquiry into environmental planning instruments

6.1 Proposed timeline

Resolved, on the motion of Ms Boyd: That the committee adopt the following timeline for the administration of the inquiry:

- Submissions closing date: Wednesday 19 May 2021.
- Hearings: one hearing date in June 2021, the date of which is to be determined by the Chair after consultation with members regarding their availability.

- Report deliberative: to be held in the week commencing Monday 2 August 2021, the date of which is to be determined by the Chair after consultation with members regarding their availability.

6.2 Stakeholder list

Resolved, on the motion of Mr Mason-Cox: That the secretariat circulate to members the Chairs' proposed list of stakeholders to provide them with the opportunity to amend the list or nominate additional stakeholders, and that the committee agree to the stakeholder list by email, unless a meeting of the committee is required to resolve any disagreement.

7. Adjournment

The committee adjourned at 1.34 pm, *sine die*.

Sharon Ohnesorge

Committee Clerk

Minutes no. 14

Monday 7 June 2021

Regulation Committee

Macquarie Room, Parliament House, 9.47 am

1. Members present

Mr Veitch, *Chair*

Ms Boyd, *Deputy Chair* (until 3.52 pm)

Mr Banasiak (substituting for Mr Borsak)

Ms Cusack

Mr Donnelly (until 4.10 pm)

Mr Farlow

Mr Franklin

Mr Poulos

2. Previous minutes

Resolved, on the motion of Ms Cusack: That draft minutes no. 13 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 18 May 2021 – Email from Vicky Kuek, Principal Policy Lawyer, Policy and Practice, Law Society of New South Wales, to the secretariat, indicating the Law Society will not be providing a submission to the SEPPs inquiry.
- 19 May 2021 – Email from Janet Sparrow, Manager Strategic Land-Use Planning, NSW Environment Protection Authority, to the secretariat, indicating the EPA will not be providing a submission to the SEPPs inquiry.
- 20 May 2021 – Email from Audrey Marsh, Senior Policy and Campaigns Officer, Planning Institute of Australia, to the secretariat, declining the invitation for the Planning Institute to appear as a witness at the hearing for the SEPPs inquiry on 7 June 2021.
- 21 May 2021 – Email from Annette O'Callaghan, Parliamentary Counsel, to the secretariat, declining the invitation for Parliamentary Counsel's Office to appear as a witness for the SEPPs inquiry on 7 June 2021.
- 25 May 2021 – Email from Nick Savage, Policy Director – Environment, NSW Farmers, indicating NSW Farmers has not had time to prepare a submission for the SEPPs inquiry but would like to appear a witness on 7 June 2021.

- 26 May 2021 – Email from Tara Elmes, Committee Clerk, Regulations Review Committee, Parliament of New Zealand, to the secretariat, indicating the committee will not be providing a submission to the SEPPs inquiry.
- 1 June 2021 – Email from Senada Bjelic, Office of the Hon Mark Banasiak MLC, advising that the Hon Mark Banasiak MLC will substitute for the Hon Robert Borsak MLC for the SEPPs inquiry hearing on 7 June 2021.
- 7 June 2021 – Email from Ms Ishbel Cullen, Policy and Outreach Coordinator, NSW Nature Conservation Council, to the secretariat, advising she is unable to appear as a witness on 7 June but Ms Jacquelyn Johnson, Strategy and Operation Director, will attend instead.
- 7 June 2021 – Email from Ms Jane Fitzgerald, NSW Executive Director, Property Council of Australia, to the secretariat, advising she will not appear as witness on 7 June but Ms Lauren Conceicao will attend instead.

Sent:

- 26 March 2021 – Email from the secretariat to stakeholders inviting them to make a submission to the SEPPs inquiry.

4. Inquiry into environmental planning instruments (SEPPs)**Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submissions nos 1-9.

Allocation of questioning

Resolved, on the motion of Ms Boyd: That the allocation of questions for today's hearing be left in the hands of the Chair.

Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witness was sworn and examined:

- Dr Lorne Neudorf, Associate Professor, Adelaide Law School, University of Adelaide (via Webex).

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Rachel Walmsley, Head of Policy and Law Reform, Environmental Defenders Office
- Ms Rachel Chick, Solicitor, Environmental Defenders Office.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Chris Gambian, Chief Executive Officer, NSW Nature Conservation Council
- Ms Jacquelyn Johnson, Strategy and Operations Director, NSW Nature Conservation Council.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Nick Savage, Policy Director – Environment, NSW Farmers Association
- Mrs Bronwyn Petrie, Member, NSW Farmers Association.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Lauren Conceicao, NSW Deputy Executive Director, Property Council of Australia
- Mr Allan Hansell, NSW Policy and Communications Consultant, Property Council of Australia.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Andrew Abbey, Policy Director, NSW Minerals Council.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Pauline Wright, President, NSW Council for Civil Liberties.

The evidence concluded and the witness withdrew.

The public hearing concluded at 4.44 pm.

The public and media withdrew.

5. Adjournment

The committee adjourned at 4.45 pm, *sine die*.

Monica Loftus

Committee Clerk

Draft minutes no. 15

Thursday 5 August 2021

Regulation Committee

Via Webex, 10.04 am

1. Members present

Mr Veitch, *Chair*

Ms Boyd, *Deputy Chair*

Ms Cusack

Mr Donnelly

Mr Farlow

Mr Franklin

Mr Poulos

2. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 14 be confirmed.

3. Inquiry into environmental planning instruments (SEPPs)

Public submissions

The committee noted that the following submission was published by the committee clerk under the authorisation of the resolution appointing the committee: submission no. 10.

Answers to questions on notice

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Dr Lorne Neudorf, Associate Professor, Adelaide Law School, University of Adelaide, received on 24 June 2021
- Ms Lauren Conceicao, NSW Acting Executive Director, Property Council of Australia, received on 1 July 2021
- Mr Rachel Chick, Solicitor, Environmental Defenders Office, received on 1 July 2021
- Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, received on 1 July 2021.

Consideration of Chair's draft report

The Chair submitted his draft report entitled *Environmental planning instruments (SEPPs)* which, having been previously circulated, was taken as being read.

Ms Boyd moved: That:

- a) Paragraphs 2.83, 2.84 and 2.85 be omitted and the following new paragraphs be inserted instead:

'Acknowledging that the committee heard diverging views on the issue, the Committee believes that a strong case has been made for SEPPs to be subject to disallowance by Parliament. As a general rule, the committee is of the opinion that in order to better protect the constitutional principles of democratic oversight and parliamentary sovereignty, all instruments of a legislative nature should be disallowable. The committee does not believe that any compelling reason has been put forward during this inquiry for why that general rule should be abandoned in the case of SEPPs. On the contrary, given that SEPPs cover a wide variety of issues, can override primary legislation and can have a direct and significant impact on the rights and interests of individuals, the committee considers that the case for SEPPs to be disallowable instruments is particularly strong.

Given the broad range of topics covered by SEPPs, and the range of circumstances in which they can be used (including in emergency circumstances), the committee accepts that there is a need for some flexibility in relation to the length and structure of the consultation process (if any) undertaken in relation to each SEPP. However, the committee is of the opinion that the current level of flexibility and discretion provided to the Minister in relation to the consultation process is inappropriate whilst SEPPs are not disallowable instruments. By including SEPPs as disallowable instruments, the Minister can take into account the risk of disallowance when determining how robust the consultation process should be in relation to a particular SEPP.

Similarly, whether or not a sunset provision or review will be appropriate in relation to a particular SEPP may depend on the circumstances. Again, however, by including SEPPs as disallowable instruments, the Minister's determination of what is appropriate in relation to a particular SEPP can be made in light of the risk of disallowance if community expectations are not met.'

- b) Recommendation 2 be omitted and the following new recommendation be inserted instead:

'That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that the disallowance provisions of the *Interpretation Act 1987* apply to all State environment planning policies.'

c) Recommendation 3 be omitted and the following new recommendation be inserted instead:

"That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* to provide that, in relation to all State environmental planning policies, the Minister must:

- publish a comprehensive, plain English explanation of intended effect
- where possible, publish a draft text of the State environmental planning policy at least 28 days prior to publishing the final text
- publish an explanation of how feedback gathered during the consultation process (if any) has been considered
- provide details of how and when the State environmental planning policy will be reviewed by the department."

d) Paragraph 2.86 be amended by omitting the words 'In addition to better consultation for future SEPPs,' before 'in the interests of transparency and accessibility'.

e) Paragraph 2.90 be omitted.

Question put.

The committee divided.

Ayes: Ms Boyd.

Noes: Ms Cusack, Mr Donnelly, Mr Farlow, Mr Franklin, Mr Poulos, Mr Veitch.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That:

- The draft report as amended be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, answers to questions on notice and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- Upon tabling, all transcripts of evidence, submissions, answers to questions on notice and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- That the report be tabled on Tuesday 10 August 2021.

4. Adjournment

The committee adjourned at 10.20 am, *sine die*.

Monica Loftus
Committee Clerk

Appendix 4 Dissenting statement

Ms Abigail Boyd MLC, The Greens

Given the evidence provided in submissions and at the hearings, and this committee's previous approach to delegated legislation (see Report No 7 - Making of Delegated Legislation in NSW, dated 22 October 2020), it is disappointing that the committee was not able to agree to much stronger recommendations in this report.

As a general rule, all delegated instruments of a legislative nature should be disallowable in order to better protect the constitutional principles of democratic oversight and parliamentary sovereignty. It is the Greens' view that no compelling reason was put forward during this inquiry for why that general rule should be abandoned in the case of SEPPs. On the contrary, given that SEPPs cover a wide variety of issues, can override primary legislation and can have a direct and significant impact on the rights and interests of individuals, the case for SEPPs to be disallowable instruments is particularly strong.

It was noted in the inquiry that New South Wales is an outlier in relation to the narrow disallowance powers given to our parliament. Further, despite other jurisdictions within Australia allowing disallowance powers over instruments similar to SEPPs, the committee heard that those powers were rarely exercised. No evidence was put forward to back up the assertion that a disallowance power would lead in practice to any significant delay or uncertainty, and certainly not to an extent which would justify a departure from the usual democratic principles which should govern law-making in New South Wales.

By including SEPPs as disallowable instruments, many of the other concerns regarding SEPPs would be alleviated. For example, concerns regarding whether or not the consultation process in relation to SEPPs is always robust, and whether or not particular SEPPs should have some expiry or mandatory review date.

Given the broad range of topics covered by SEPPs, and the range of circumstances in which they can be used (including in emergency circumstances), the Greens accept that there may be a need for some flexibility in relation to the length and structure of the consultation process (if any) undertaken in relation to each SEPP. For example, a SEPP which has a low potential impact on individual rights and responsibilities may require far less consultation than a SEPP that has a significant potential impact and/or addresses a relatively controversial issue.

However, the current level of flexibility and discretion provided to the Minister in relation to the consultation process is clearly inappropriate whilst SEPPs are not disallowable instruments. By including SEPPs as disallowable instruments, the Minister's decisions can take into account the risk of disallowance when determining how robust the consultation process should be in relation to a particular SEPP. If the Minister fails to consult appropriately for that particular SEPP, the risk of greater scrutiny from Parliament and the consequential risk of disallowance will be greater. Giving Parliament the power to disallow SEPPs will incentivise best practice regulation-making on the part of the executive.

There may be valid reasons for why a SEPP is considered urgent, and for which a minimum consultation period may be inappropriate. The committee's report seeks to address this issue by recommending that a distinction be made between 'emergency' and less urgent SEPPs, exempting the former from consultation requirements. However, without Parliament having the power to disallow the SEPP, there is nothing (other than perhaps through an expensive and onerous court action) preventing the Minister from inappropriately declaring a SEPP to be an 'emergency' one. In other words, the committee's

recommendation, if adopted, would provide an even greater opportunity for a Minister to avoid adequate consultation on a particular SEPP. It was surely not the point of this inquiry (which was sparked by concerns over the broad discretion given to the executive over the making of SEPPs) to make a recommendation that would actually increase the executive's discretion, particularly without also recommending an increase in parliament's ability to hold the Minister to account through a disallowance power.

Similarly, whether or not a sunset provision or review will be appropriate in relation to a particular SEPP may depend on the circumstances. The committee has suggested in this report that all 'emergency' SEPPs would be reviewed after 12 months. Such review will not be conducted by parliament, however, but rather by the department. Again, without including SEPPs as disallowable instruments, there can be no assurance that such a review would adequately address any concerns that may have arisen since the SEPP was made.

The inclusions of the following recommendations in place of Recommendations 2 and 3 would have strengthened the committee's report considerably:

Recommendation 2 (replacement)

That the NSW Government consider amending the Environmental Planning and Assessment Act 1979 to provide that the disallowance provisions of the Interpretation Act 1987 apply to all State environment planning policies.

Recommendation 3 (new)

That the NSW Government consider amending the Environmental Planning and Assessment Act 1979 to provide that, in relation to all State environmental planning policies, the Minister must:

- *publish a comprehensive, plain English explanation of intended effect*
- *where possible, publish a draft text of the State environmental planning policy at least 28 days prior to publishing the final text*
- *publish an explanation of how feedback gathered during the consultation process (if any) has been considered*
- *provide details of how and when the State environmental planning policy will be reviewed by the department.*

Regardless of the outcome of this inquiry, the Greens will continue to argue for greater parliamentary scrutiny over the decisions of the executive. Giving ever-greater unfettered power to the executive, and allowing the making of significant pieces of delegated legislation such as SEPPs without parliamentary scrutiny, is a trend that harms our democracy. The committee has missed an important opportunity in this report by failing to support Parliament's power to oversee and control delegated legislation, a fundamental feature of a healthy democracy.

Despite these areas of disagreement, I would like to thank the other members of the committee and the secretariat for their work and collaboration throughout the inquiry.

