

4 April 2014

Local Government Report Consultation
Division of Local Government
Locked Bag 3015
NOWRA, NSW 2541

by email: lgconsultation@dlg.nsw.gov.au

Dear Sir/Madam,

Submission on *A New Local Government Act for NSW* Final Report

EDO NSW welcomes the opportunity to comment on *A New Local Government Act for NSW (Final Report)* of the Local Government Acts Taskforce (**Taskforce**).¹ EDO NSW is a community legal centre specialising in public interest environmental and planning law. As such, our focus is on protection of the environment and community participation.

EDO NSW made a previous submission to the Taskforce's Discussion Paper of July 2013. This submission builds on EDO NSW's comments at that time, the Taskforce's response to submissions, and other matters that have come to light from the Taskforce's recommendations. The submission follows the recommendation headings of the Final Report.

Approach and Principles for the development of the New Act

EDO NSW is generally supportive of the use of integrated planning and reporting, noting its emphasis on community engagement and inclusion of environmental objectives and strategies.

EDO NSW also agrees that the Local Government Act should be written in plain language and presented in a logical format. We note that this was the intention behind the current *Local Government Act 1993* when it commenced. With respect to the flexibility proposed and the 'avoidance of excessive prescription and unnecessary red tape', EDO NSW notes that there needs to be a balance between the flexibility given to councils to carry out their role, and accountability to the community. The reduction of red tape and flexible, principles-based legislation should not result in a situation where council responsibilities are effectively unknown or unenforceable by the community.

¹ See http://www.dlg.nsw.gov.au/dlg/dlghome/dlg_GenerallIndex.asp?areaindex=REPORTS&mi=50&ml=1.

Purposes of the Local Government Act

EDO NSW remains concerned that the Taskforce's recommendations downplay the importance of local government in stewardship and management of the local environment. In particular, the Taskforce's recommendations on the purposes of the new Act remove all reference to the environment.

By comparison, the current *Local Government Act* includes as purposes of the Act:

*(a) to provide the legal framework for an effective, efficient, **environmentally responsible** and open system of local government in New South Wales*

...

*(e) to require councils, councillors and council employees to have regard to the principles of **ecologically sustainable development** in carrying out their responsibilities. [emphasis added]*

EDO NSW submits that the purposes of a new Act should continue to refer to an environmentally responsible system of local government. This is also consistent with the integrated planning and reporting process that the Taskforce recommends as the central framework for the new Act.

EDO NSW also reiterates comments on the move away from the principles of ecologically sustainable development (**ESD**) in this context:

"... the 'Purposes' provision intended to be an addition to the Act mentions 'sustainability' rather than the term 'ESD Principles'. This focus on generalised 'sustainability' risks a watered down environmental protection method becoming mainstream practice for local governments. The rationale behind this watering down of environmental protection remains unclear.

Despite this departure from ESD Principles, both 'sustainability' and 'environmental wellbeing' were identified to be among the most commonly raised principles to be reflected in the new legislation by the previous workshops and written submissions. The new Act should reflect this ..."

Environmental challenges and the opportunities to address them, have become no less urgent or important since the 1993 Act came into force, as consecutive NSW State of the Environment Reports demonstrate.² New South Wales communities continue to look to local government for environmental leadership and information, often from a limited base of public understanding. Many local councils embrace this role, guided by the current Local Government Act, but this must be reinforced in local government laws of the future.

Role and Guiding Principles of Local Government

Given that the environmental challenges in Australia are increasing, there is no justification for lowering the significance of environmental factors in local government decision making.

² See <http://www.epa.nsw.gov.au/soe/>.

EDO NSW is pleased that the Taskforce has, as a result of submissions, included the principles of ESD in its guiding principles. However, we submit that the concept of ESD should be given greater prominence than the Final Report proposes.

The framing of the recommendation about the role of local government is unclear. There is a reference to achieving 'environmental,' (sic). However, it is unclear whether this is meant to refer to 'environmental health and wellbeing' or whether other words are inadvertently omitted.

In any event, EDO NSW submits that the numbered list of ways for local government to achieve its role should include "promoting and implementing the principles of ecologically sustainable development." This would align more closely with important purposes of the current Act and the Council's charter (sections 7-8); and is consistent with Section 3 of the *Intergovernmental Agreement on the Environment*, to which the Australian Local Government Association is a party.³

With respect to the proposed guiding principles, EDO NSW also recommends that the principle of stewardship in point 94 would benefit from the specific inclusion of the concept of 'environmentally responsible' management of resources, infrastructure and development, in accordance with the principles of ESD. Again, this is consistent with the current, recognised purpose of local government.

Similarly, we suggest that point (5) should be clarified by stating the ESD principle of intergenerational equity to make it clear that the protection, restoration and enhancement of the quality of the environment should be seen as an appropriate function of local government for current, as well as future, generations.

Finally, it is unclear whether the principle of ensuring sustainable management, including considerations of risk management and long term sustainability adequately incorporate the risks arising from climate change impacts. EDO NSW recommends that any new Act acknowledges the need for local government to address climate change risks and impacts in its decision making, as a guiding principle. We acknowledge that this can only be done within the resources available to local government, but climate change is an important reference that should be included.

Integrated Planning and Reporting

As noted previously, EDO NSW is generally supportive of the integrated planning and reporting (IPR) process. However, proposals for moving processes to regulations, codes and guidelines, and increasing flexibility for councils, should not result in situations where councils become unaccountable to the community through vague and unenforceable non-legal documents.

EDO NSW is aware of situations under the current IPR process where Councils have failed to give due consideration to community submissions, or to include relevant subject matter from the State Plan. Currently, the Act provides that Councils "must" comply with the relevant aspects of IPR, including guidelines. EDO NSW

³ See <http://www.environment.gov.au/node/13008>, Section 3 – Principles of Environmental Policy.

recommends that this level of obligation continues. Significant content and procedural requirements, whether in the Act, regulations or guidelines should continue to be expressed in clear and enforceable terms. In addition, the Act needs to give legal status to any 'guidelines' or 'codes' by requiring that councils must comply with them.

Community engagement

EDO NSW supports the community engagement principles proposed by the Taskforce. However, EDO NSW strongly disagrees with any proposal to make a failure to comply with consultation and engagement principles a matter that does not invalidate council decisions.⁴ Such an approach would undermine the proposed purpose of the Act, and result in the Act condoning breaches of procedural fairness. In order to maintain community trust in local government, it is necessary that the community is able to enforce its rights to participate in council decision making processes. This same proposal was a fundamental concern with the proposed Planning Act, regarding the application of the proposed Public Participation Charter.

While EDO NSW supports the ability of councils to have flexible and locally appropriate community engagement strategies, there need to be minimum standards of community participation rights for decisions that affect the community. We refer to our recommendations on Community Participation in relation to the Planning Bill 2013 and White Paper. For example, EDO NSW recommended:

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Recommendation 5: The Community Participation Charter must be enforceable, with all planning authorities required to comply with the Charter's broad principles including in the making of Community Participation Plans.

For further information, please see EDO NSW previous submissions on the proposed Planning reforms.⁵

Meetings

EDO NSW supports a clear Code of Meeting Practice, so that both councils and communities understand what is expected in open meetings. Any Code should be clear about the standards for timely public provision of information before and after meetings. In addition, we recommend that, for consistency and clarity, access time arrangements put in place by most councils should be standardised by inclusion in the Code.

Pecuniary interest

EDO NSW notes the recommendation to review these provisions and ensure they are written in plain language and easily understood. EDO NSW supports this proposal. It is important for the community to understand when a pecuniary interest (or conflict of interest) will or will not arise.

⁴ See recommendation 3.3.18(4), p.17.

⁵ Available at: http://www.edonsw.org.au/planning_reforms.

However, there is some concern about the proposed removal of “unnecessary red tape”. It is not clear that any such ‘red tape’ exists. In our experience, there is a loss of trust in local government where the community believes that pecuniary interests are not being properly acknowledged. This has been exacerbated by corruption findings in recent years. It is therefore important to ensure that registers of pecuniary interest remain comprehensive and publicly available. From the perspective of community accountability and assurance, such safeguards are more than ‘red tape’.

EDO NSW would support an amendment to the effect that a failure to comply with pecuniary interest requirements could invalidate a council decision, particularly where the person involved had a deciding vote. Such a vote often creates a perception of bias and a loss of community trust in Council’s decision making processes. However, the current terms of the Act seek to validate such failures in governance.

Public land

EDO NSW strongly supports the Taskforce’s final recommendation to continue the classification of public land into community and operational land, and to require council resolutions to specify classification, category and proposed use(s) at the time of acquisition.

EDO NSW also supports the recommendation to include an independent public hearing process before community land has its dominant use changed, or is otherwise considered for disposal. Public land is often of great importance to the community and local environment. It is therefore important to ensure that there are safeguards surrounding inappropriate use and disposal. This should include clear local notification in relation hearings, and more generally, improved education for community engagement on public land holdings and their current and future uses.

We also question the appropriateness of moving the management of community land solely to the Asset Management and Delivery Program. While this may increase efficiency for councils, it may also remove community engagement in relation to how important community land is managed. The current requirement for Plans of Management allows for upfront community engagement and also holds councils accountable for the manner in which those lands are managed. It is also unclear how well the environmental values of land will be recognised under a council’s Asset Management and Delivery Program. Community land is a valuable ‘green infrastructure’ asset, and its environmental, social and economic benefits deserve greater recognition.

Any change to community land management needs to ensure that natural, ecological or other community values of the land are properly recognised; that there is transparency in the way in which decisions are made; and there is an appropriate level of detail for the management of individual areas of land. In this respect, EDO NSW supports the retention of subcategories of community land, as they more clearly identify the appropriate level of protection that needs to be in place for specific types of community land.

With respect to the recommendations about leases and licences, we reiterate that:

The move to allow councils greater freedom to lease or licence public land should also be approached with caution. The EDO suggests that any such freedom needs to be bounded by constraints to prevent the inappropriate excision of what is now community land from public use, or impacts on areas of local environmental significance.⁶

Approvals, Orders and Enforcement

With respect to orders, EDO NSW generally supports the Taskforce's recommendations. It is recognised that any procedures for orders, whether in the Act or regulations, need to balance proper protection and management of the local environment with procedural fairness to recipients of the orders.

EDO NSW supports the adoption of enforcement policies, so that the community can understand, in a more transparent manner, when councils are likely to take enforcement action. EDO NSW receives many calls from community members who are frustrated at the lack of action by councils, in situations where they have powers to take enforcement action but refuse to do so.

In addition to transparent enforcement policies, councils and/or the Local Government Association should be required to publish enforcement statistics in a regular and consistent form. This would allow cross-government comparison and the identification of trends, both of enforcement success and areas for improvement.

Should you require any further information, please contact rachel.walmsley@edonsw.org.au.

Yours sincerely,
EDO NSW



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⁶ EDO NSW, [Submission on a new Local Government Act](http://www.edonsw.org.au/planning_development_heritage_policy) (July 2013), available at http://www.edonsw.org.au/planning_development_heritage_policy.