

5th July 2013

Local Government Acts Taskforce
C/- Division of Local Government
Department of Premier and Cabinet
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By email: LGATSubmissions@dlg.nsw.gov.au

Dear Local Government Acts Taskforce,

Submission on *A New Local Government Act for NSW* Discussion Paper

EDO NSW welcomes the opportunity to comment on the Local Government Acts Taskforce's *A New Local Government Act for NSW (Discussion Paper)*.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.

After examining the Discussion Paper, EDO NSW comments on the following five issues:

1. *The move away from Ecologically Sustainable Development (ESD) Principles*
2. *The removal of the division between Operational and Community land*
3. *Approval process flexibility*
4. *Protection from liability*
5. *The consolidation of public participation*

¹ <http://www.dlg.nsw.gov.au/dlg/dlghome/documents/information/A%20New%20Local%20Government%20Act%20For%20NSW%20-%20Discussion%20Paper%20-%20April%202013.pdf> Accessed June 2013.

1. The move away from ESD Principles

In NSW ESD has been embedded in a significant number of separate pieces of legislation, including the *Protection of Environment Administration Act 1991*,² the *Environmental Planning and Assessment Act 1979*³ and the *Local Government Act 1993*.⁴ In particular the *Local Government Act 1993* contains a Charter for councils to follow, which includes the promotion of ESD principles as a guideline.⁵ This Charter was identified by the Discussion Paper as one aspect of legislation which ‘works well’ and will be retained.⁶ However the review proposes a ‘guiding principle’ which includes to: ‘facilitate sustainable, responsible management, development, protection and conservation of the natural and built environment’ and to ‘diligently address risk and long-term sustainability.’⁷ ‘Sustainability’ is not further defined.

The Discussion Paper does not refer to the long-established ESD principles, nor does it provide a clear rationale as to why the principles need to be replaced.⁸ In the absence of clear recognised principles, there is a real risk of less stringent application of sustainability considerations in local government decision making in the future. Development and conservation are conflated into the same principle, and the word ‘ecological’ has been removed from sustainability references.

Similarly, the ‘Purposes’ provision intended to be an addition to the Act mentions ‘sustainability’ rather than the term ‘ESD Principles’⁹. 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.¹⁰ The new Act should reflect this and ESD should also inform the integrated planning and reporting framework favoured by the Taskforce.

EDO NSW recommends:

- ***The new Local Government Act should retain a reference in the proposed Role and Principles of Local Government to promoting and implementing the principles of ecologically sustainable development as currently defined.***

² *Protection of Environment Administration Act 1991* (NSW) s6(1)

³ *Environmental Planning and Assessment Act 1979* (NSW) s5(a)(vii)

⁴ *Local Government Act 1993* (NSW) s8(1)

⁵ *Local Government Act 1993* (NSW) s8(1). This is consistent with the role of local government under the Intergovernmental Agreement on the Environment – see <http://www.environment.gov.au/about/esd/publications/igae/>

⁶ A New Local Government Act for NSW, p.19

⁷ A New Local Government Act for NSW, p.6

⁸ A New Local Government Act for NSW, p.25

⁹ A New Local Government Act for NSW, p.6

¹⁰ A New Local Government Act for NSW, p.18

2. The proposed removal of the division between operational and community land

Under the current *Local Government Act 1993* all public land must either be classified as 'community' or 'operational'.¹¹ Community land has significantly more protection than operational land. In particular, community land cannot be disposed of¹² and Ministerial approval may be required for leases and other proprietary rights.¹³

The Discussion Paper proposes that this current land classification system is 'unnecessarily prescriptive, costly [and] onerous'.¹⁴ Suggestions to address this issue propose a removal of the division between operational and community land. Instead of having two classifications, land use will be determined at the time of acquisition.¹⁵ The removal of this distinction will ease the requirements for the sale or lease of community land and only require plans of management for particularly valuable or sensitive areas.¹⁶ 'Valuable' or 'sensitive' are not defined.

It is unclear from the Discussion Paper how current protections on community land will continue under the proposed changes, if for example, 'conditions, restrictions and covenants' can be removed.¹⁷ It is not clear how a more general focus on managing 'council-owned public lands as assets'¹⁸ will appropriately value the land for its ecological qualities.¹⁹ Any policy must also give transparency to the community and the opportunity for input regarding the use of public land.

While local councils may have a view that the current public land management system is 'unnecessarily prescriptive' and 'onerous', from the EDO's experience, local communities often rely on the rules around community land management to protect important environmental sites within their local government area. Any consideration of removing constraints therefore needs to be considered from both sides.

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.

Also significant is the removal of obligations to prepare and maintain Plans of Management. Previously these have been the primary tool for ensuring councils protect the natural environment under their control. However the Discussion Paper

¹¹ *Local Government Act 1993* (NSW) s 26

¹² *Local Government Act 1993* (NSW) s 45

¹³ *Local Government Act 1993* (NSW) s 47

¹⁴ A New Local Government Act for NSW, p.75

¹⁵ A New Local Government Act for NSW, p.52

¹⁶ A New Local Government Act for NSW, p.52

¹⁷ A New Local Government Act for NSW, p.51

¹⁸ A New Local Government Act for NSW, p.52

¹⁹ See, for example, The Economics of Ecosystems and Biodiversity, 'TEEB For Local and Regional Decision makers', at <http://www.teebweb.org/publications/teeb-study-reports/local-and-regional/>.

proposes to only continue the use of Plans of Management for the 'most valuable or sensitive areas of community land.'²⁰ As noted, there is no discussion about how these 'valuable or sensitive' lands would be defined or identified.

EDO NSW recommends:

- ***The Taskforce needs to provide further detail on how current environmental protections on community land will be continued under the new Act.***
- ***Ensure the new Act provides the community with opportunities for ongoing input on the management of public land.***
- ***Develop objective criteria to identify sensitive and/or ecologically valuable land.***
- ***Retain the requirement for Plans of Management for land identified as sensitive and/or ecologically valuable land.***

3. The move to make approval procedures more flexible

The *Local Government Act 1993* lists a number of activities for which approvals are generally required.²¹ These activities may have significant environmental impacts and so need appropriate regulation. The Discussion Paper highlights that different activities often have disproportionate regulation and gaps in regulatory requirements can result in unjust decisions. Additionally some duplication of approval responsibilities is noted.²²

To deal with these issues the Discussion Paper has suggested a review of the approvals process with the focus on 'flexibility', 'less prescription' and 'councils discretionary on-the-grounds functions.'²³ Because local government approvals often address environmental issues, making the system more flexible and less regulated without appropriate environmental consideration or regulatory checkpoints could lead to detrimental environmental impacts. This concern is particularly relevant because the Discussion Paper provides no direction for this review, such as how regulatory checkpoints might be enforced other than suggesting that there will be 'statutory minimum standards.'²⁴

EDO NSW recommends:

- ***The review of approvals should provide further detail, including on proposed 'statutory minimum standards, before acting on recommendations to change or remove approvals (such as that for filming on public land).'***
- ***Any change to the approvals process should ensure that environmental protections are maintained or increased.***

²⁰ A New Local Government Act for NSW, p.52

²¹ *Local Government Act 1993* (NSW) s 68

²² A New Local Government Act for NSW, p.55

²³ A New Local Government Act for NSW, p. 56

²⁴ A New Local Government Act for NSW, p. 56

4. Protection from liability

We note that the Discussion Paper acknowledges a current review of coastal issues being undertaken by the NSW Coastal Ministerial Taskforce.²⁵ EDO NSW has undertaken analysis of the issue of liability for actions taken in relation to sea level rise, and has provided feedback to various aspects under review.²⁶ We would be happy to be involved in further review of this issue.

5. Consolidation of community participation

The Discussion Paper identifies 'community engagement... as the key mechanism by which councils identify community priorities.'²⁷ Yet it goes on to support the deregulation of community participation, stating: 'this highly regulatory approach is unnecessary in many instances'²⁸. This statement is counterbalanced by suggesting community engagement be synchronised with the integrated planning framework. It is acknowledged this report will be redrafted, but until a more concrete assurance of the comprehensive inclusion of community participation is made, there is concern that consultation may become tokenistic and limited.

The Discussion Paper suggests that the new Local Government Act should become less prescriptive, while maintaining a strong governance framework. Provisions that set out specific obligations for Council in relation to community consultation and involvement in decision making are of real importance in maintaining a strong governance framework. The EDO therefore submits that this aspect of 'prescription', while it may appear onerous for councils, is of high importance in ensuring an accountable local government system.

EDO NSW considers community participation in detail in our submission on the Government's Planning White Paper reform process and draft Planning Bill 2013. The central aspect of the White Paper reforms to community participation include a Community Participation Charter under a new Planning Act. Comments made in relation to community participation under new planning laws are directly relevant to this local government review process. This review must closely consider the role of the proposed Community Participation Charter and associated Community Participation Plans, in relation to local government functions under the new planning system.

For further reference, we **attach** our recommendations on Community Participation in relation to the White Paper and Planning Bill 2013 to this submission. For further information, please see Part 2 of the EDO NSW submission on the planning reforms.²⁹

²⁵ A New Local Government Act for NSW, p. 40

²⁶ EDO NSW reports and law reform submissions on coastal issues are available at:
http://www.edo.org.au/edonsw/site/policy_submissions.php

²⁷ A New Local Government Act for NSW, p.30

²⁸ A New Local Government Act for NSW, p.30

²⁹ Available at:

http://www.edo.org.au/edonsw/site/pdf/subs/130628NSWPlanningWhitePaper_EDONSWsubmission.pdf

A new Local Government Act could also strengthen community participation processes, for example by formalising a right for members of the community to speak at council meetings. This is currently at the discretion of councils, although most do provide a public access option. We note that the Taskforce is not suggesting any changes to the meetings provisions as such, but the new Act could formalise the right of community members to speak.

EDO NSW recommends:

- ***See the attached summary of recommendations made in relation to the NSW Planning White Paper and draft legislation.***
- ***The new Act should formalise the right of the community to speak at Council meetings.***

Please contact EDO NSW if you require further information.

Yours sincerely,
EDO NSW



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**Attachment – Community Participation – Recommendations for Reform
EDO NSW Submission on the Planning White Paper & Draft Legislation**

Community Participation – Planning Bill, Part 2	
Community Participation Charter	<i>Recommendation 5:</i> 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.
Mandatory processes and accountability	<i>Recommendation 6:</i> The clause which states Part 2 of the Act is ‘not mandatory’, and restricts legal challenges, should be removed (clause 10.12).
Mandatory notification and consultation requirements	<p><i>Recommendation 7:</i> Mandatory notification and consultation requirements for strategic planning and development assessment should reflect best practice. The Act should include:</p> <ul style="list-style-type: none"> • minimum requirements at the <i>strategic planning</i> stage, including: <ul style="list-style-type: none"> ○ notification of the preparation of strategic plans and local plans; ○ publicly available information (including environmental studies and sectoral strategies); ○ decision makers must take into account submissions made on draft plans; ○ decision makers must provide reasons for decisions about strategic plans (per Part 3; and Schedule 2 Part 1); • minimum requirements at the <i>development application and assessment</i> stage, including: <ul style="list-style-type: none"> ○ notification of development applications (DAs); ○ publicly available supporting information, including all information supporting a DA; ○ decision makers must take into account submissions made on DAs; ○ decision makers must provide reasons for decisions when determining DAs (per Part 4; and Schedule 2 Part 1). <p><i>Recommendation 7a:</i> The provisions pertaining to copyright of documents should clearly indemnify all persons <i>including councils and community members</i> where documents are published or accessed for planning purposes, such as commenting on DAs (per Schedule 2, clause 2.24).</p>
Minimum exhibition periods	<p><i>Recommendation 8:</i> Minimum mandatory exhibition periods should be as follows:</p> <p>Strategic Planning level</p> <ul style="list-style-type: none"> • 60 business days (12 weeks) for draft strategic plans (including Local Plans and their planning control provisions). • 60 business days (12 weeks) for draft strategic (environmental) impact assessments.

	<p>Development Assessment level</p> <ul style="list-style-type: none"> • 45 business days (9 weeks) for State Significant Development (SSD), State Infrastructure Development (SID) and Public Priority Infrastructure (PPI). • 35 business days (7 weeks) for impact assessable development proposals (other than SSD, SID or PPI). <p>General procedure</p> <ul style="list-style-type: none"> • All notification and exhibition periods should be expressed in business days. <p><i>Recommendation 9:</i> Where a minimum exhibition period is provided, the legislation should explicitly state that members of the public (and public authorities) may make comment during these periods, and may inspect and copy any documents for that purpose.</p>
Review of Community Participation Plans	<p><i>Recommendation 10:</i> There should be express provision for the proposed independent review of Community Participation Plans, with this process to be mandatory and regular.</p>