



The NSW Aboriginal Land Council's submission to Planning Review Panel: Issues Paper

March 2012

TABLE OF CONTENTS

1. Introduction	1
2. Summary of Recommendations	2
3. Objectives of a new planning system	4
<i>Recognising Aboriginal land rights</i>	4
<i>Promotion of ongoing community participation in planning processes</i>	5
<i>Protecting Aboriginal culture and heritage</i>	5
<i>Focus on practical implementation, robust review and monitoring mechanisms</i>	6
4. Consultation and engagement with Aboriginal peoples	8
<i>Mechanisms to effectively engage with Aboriginal peoples and Aboriginal Land Councils</i>	9
<i>The need to establish mandatory consultation requirements in legislation for all levels of decision-making</i>	10
<i>Appeals and reviews</i>	11
5. Protection of Aboriginal culture and heritage	13
<i>Strategic planning</i>	13
<i>Identification and mapping of Aboriginal heritage</i>	14
<i>Processes for listing heritage items in Local Planning Instruments</i>	14
<i>Protection of Aboriginal heritage information</i>	15
<i>The need for mandatory consideration of cumulative impacts</i>	15
<i>Development assessment</i>	17
<i>Guidance material</i>	17
<i>Definitions</i>	18
<i>A new model for the protection and management of Aboriginal culture and heritage in NSW</i>	18
6. Economic development of Aboriginal lands	19
7. Former Aboriginal missions and reserves	21

1. Introduction

The New South Wales Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples NSW and is the largest Aboriginal member based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983* (NSW), NSWALC is an independent, self-funded non-government organisation that has an elected governing council and the objective to “*improve, protect and foster the best interests of all Aboriginal persons within New South Wales*”.¹

In addition, NSWALC provides support to the network of 119 elected and autonomous Local Aboriginal Land Councils (**LALCs**) across NSW also established under the *Aboriginal Land Rights Act*.

Aboriginal Land Councils are significant land holders across the state and have functions under the *Aboriginal Land Rights Act* in respect to the management and development of land assets as well as the protection and promotion of Aboriginal culture and heritage².

The planning system in NSW provides an important mechanism for facilitating the objectives of the *Aboriginal Land Rights Act* which include:

- (a) to provide land rights for Aboriginal persons in New South Wales,
- (b) to provide for representative Aboriginal Land Councils in New South Wales,
- (c) to vest land in those Councils,
- (d) to provide for the acquisition of land, and the management of land and other assets and investments, by or for those Councils and the allocation of funds to and by those Councils,
- (e) to provide for the provision of community benefit schemes by or on behalf of those Councils.³

In practice, however, the NSW planning system has created a number of barriers for Aboriginal Peoples and Aboriginal Land Councils to achieving the objectives of the *Aboriginal Land Rights Act*. NSWALC’s previous submission to the Planning Review Panel demonstrated a number of areas where the planning system is actively impeding on the goals and aspirations of Aboriginal communities by:

- failing to create an inclusive planning system that meaningfully engages with Aboriginal peoples,
- failing to recognise that Aboriginal peoples have the right to determine and develop priorities and strategies for the development of use of Aboriginal lands, territories and other resources, as per Article 32 of the United Nations *Declaration on the Rights of Indigenous Peoples*,
- inadequate recognition and protection of Aboriginal culture and heritage, and
- failing to make provisions for the specific circumstances of former Aboriginal reserves and missions and failing to allow for the reintegration of former Aboriginal reserves and missions into the NSW planning system without undue expense.

The Planning Review Panel’s *Issues Paper* entitled ‘The Way Ahead for Planning in NSW?’ has posed a number of questions that relate to some of the issues identified in NSWALC’s previous submission. These questions are addressed below.

¹ *Aboriginal Land Rights Act 1983* (ALRA), Section 105(a), available at: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+42+1983+cd+0+N>

² ALRA, Section 52(4) and 106(7)

³ *Aboriginal Land Rights Act 1983* (ALRA), Section 3

2. Summary of Recommendations

Recommendation 1:

NSWALC recommends that new planning laws and related instruments include the following objectives:

To facilitate the objectives of the *Aboriginal Land Rights Act*,

- To promote ongoing community participation in planning processes, and
- To protect Aboriginal culture and heritage.

In addition, international human rights instruments, including the United Nations *Declaration on the Rights of Indigenous Peoples*⁴, must underpin new planning laws.

Recommendation 2:

The new planning system must provide for:

- specific enforceable mechanisms in planning processes that operationalise and implement these objectives, and
- robust and transparent review, appeal and monitoring mechanisms.

Recommendation 3:

Clear requirements for best practice consultation with Aboriginal peoples must be developed in consultation with peak Aboriginal organisations in NSW and Aboriginal communities and enshrined in NSW Planning laws.

Recommendation 4:

Best practice consultation requirements with Aboriginal Land Councils and Aboriginal peoples must be legislated to take place for all plan making, development assessment and other decision-making processes.

Recommendation 5:

The principle of 'Free, Prior and Informed consent' must be incorporated into the new planning system.

Recommendation 6:

Appeal and review rights must be incorporated into the new planning system that provides mechanisms for Aboriginal peoples to seek redress where Aboriginal culture and heritage has been damaged or destroyed.

Recommendation 7:

Strategic planning must include mechanisms for the identification of Aboriginal culture and heritage values across the state, which then trigger development prohibitions and/or further consultation and assessment as appropriate.

Recommendation 8:

Mechanisms to identify and record Aboriginal heritage must be based on mandatory and uniformly applied best practice standards for: the identification of Aboriginal culture and heritage values through consultation and engagement with Aboriginal peoples and communities, and the protection of culturally sensitive information.

Recommendation 9:

Development consent processes must include mandatory consultation with Aboriginal communities in relation to potential impacts upon Aboriginal culture and heritage.

Recommendation 10:

Aboriginal heritage must be listed as a specific assessment criteria in new planning laws.

⁴ The United Nations *Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly in 2007 and endorsed by the Australian Government in 2009, identifies international principles that Australian laws and planning should consider in order to close the gap between the lives of Aboriginal peoples.

Recommendation 11:

New planning laws for NSW must include a broad all encompassing definition of Aboriginal culture and heritage that captures the tangible and intangible, as well as whole of landscape values.

Recommendation 12:

Cumulative impact assessments for Aboriginal heritage must be undertaken for all developments, and mechanisms to refuse developments on this basis must be incorporated.

Recommendation 13:

Objectives that promote economic independence for Aboriginal peoples and self-determination in respect to Aboriginal lands in accordance with the principles underpinning the *Aboriginal Land Rights Act* and the United Nations *Declaration of the Rights of Indigenous Peoples* must be recognised in any new planning system.

Recommendation 14:

Aboriginal Land Councils should have the right to seek review or appeal of decisions made by planning authorities.

Recommendation 15:

Aboriginal Land Councils should have the right to seek compensation for adverse land zoning decisions and planning proposals, in recognition that the intent of the *Aboriginal Land Rights Act* was to act a compensatory mechanism.

Recommendation 16:

A new planning system must recognise and acknowledge the historical existence and cultural significance of Aboriginal settlements on former reserves and missions as a standalone type of development.

Recommendation 17:

A planning approvals process should be established that acknowledges the state significance of these sites in order to overcome the current barriers that are hindering these sites from becoming recognised as part of the NSW planning system, and re-integrate these sites into the NSW Planning System without undue expense.

Recommendation 18:

A specific state-level approval process and consent authority for development proposals should be established relating to former reserves and missions to ensure a coordinated approach.

Recommendation 19:

Any proposed programs or legislative mechanisms to address former Aboriginal reserves and missions should be developed in partnership and close consultation with NSWALC and affected Local Aboriginal Land Councils.

Recommendation 20:

Timelines must be negotiated with NSWALC and relevant LALCs to allow enough time for genuine consultation to occur, and ensure that any potential adverse impacts are minimised. (eg. other operational requirements of LALCs; timeframes related to social housing schemes imposed by the Aboriginal Housing Office; funding from external sources).

3. Objectives of a new planning system

Related questions from the Planning Review Panel's *Issues Paper* :

- A1 What should the objectives of new planning legislation be?
- A2 Should any overarching objectives be given weight above all other considerations?
- B1 What should be included in the objectives of new planning legislation?
- B2 Should ecologically sustainable development be the overarching objective of new planning legislation?
- B3 Should some objectives have greater weight than others?
- B4 Should there also be separate objectives for plan making and development assessment and determination?
- B5 Should the objectives address the operation of the new planning legislation?

NSWALC is of the view that three key objectives must be incorporated into the objectives of new planning legislation:

- Recognition of Aboriginal land rights,
- Promotion of ongoing community participation in planning processes, and
- Protection of Aboriginal culture and heritage.

Recognising Aboriginal land rights

Planning systems are increasingly being recognised as important mechanisms in promoting and facilitating improved outcomes for Aboriginal peoples, including in delivering land justice and a range of community goals.⁵

In response to the ongoing socio-economic disadvantage experienced by Aboriginal peoples, the NSW Parliament established land rights “for the regeneration of Aboriginal culture and dignity” and for “laying the basis for a self-reliant and more secure economic future” for Aboriginal peoples in NSW. Self-determination and compensation are key principles underpinning the ALRA.

The preamble of the *Aboriginal Land Rights Act 1983* recognises that ‘Land is of spiritual, social, cultural, and economic importance’ to Aboriginal peoples.⁶ The *Aboriginal Land Rights Act* was established to facilitate the return of land in NSW to Aboriginal peoples through a process of lodging claims over unused or unoccupied Crown lands.⁷ The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for Aboriginal communities, as compensation for historic dispossession and in recognition of the ongoing disadvantage suffered by Aboriginal communities.

However, in order to achieve many of the goals envisioned by the NSW Parliament in passing the *Aboriginal Land Rights Act*, the planning system, as a key mechanism for regulating and controlling the use of land in NSW, must incorporate and facilitate the objectives of the *Aboriginal Land Rights Act*.

⁵ For example, see Lane MB. 2006. *The Role of Planning in Achieving Indigenous Land Justice and Community Goals*. Land Use Policy, 23(4): 385-394; Berke, Phillip. R. Ericksen, Neil. Crawford, Jan. and Dixon, Jenny. 2002, “Planning and Indigenous People: Human Rights and Environmental Protection in New Zealand”, *Journal of Planning Education and Research*, Vol.22 No.2, pp.115-134, Accessed 20th February 2012, <http://jpe.sagepub.com/content/22/2/115>; Australian Institute of Health and Welfare (2011) ‘What works to overcome Indigenous Disadvantage’, available at: http://www.aihw.gov.au/closingthegap/documents/annual_papers/what_works_to_overcome_disadvantage.pdf; and Janet Hunt (2010) ‘Looking after Country in New South Wales: Two case studies of socio-economic benefits for Aboriginal people’ available at: <http://caepn.anu.edu.au/publications/working.php>.

⁶ *Aboriginal Land Rights Act 1983* (NSW), available at:

<http://www.legislation.nsw.gov.au/maintop/view/inforce/act+42+1983+cd+0+N>

⁷ Section 36 of the *Aboriginal Land Rights Act 1983* (NSW) outlines the definition of claimable Crown lands.

The 2008 Council of Australian Governments (COAG) National Indigenous Reform Agreement, in recognition of the disadvantage still experienced by Aboriginal peoples in Australia, committed all governments in Australia to 'Close the Gap' to improve the lives of Aboriginal peoples.⁸

NSWALC is of the view that, in order to achieve the equity envisioned by this policy commitment, all aspects of NSW Government laws and policies must seek to protect and support the rights and aspirations of Aboriginal peoples.

Recognition of the *Aboriginal Land Rights Act* in the objectives, plan making and development assessment provisions of a new planning system will ensure that planning authorities establish and formalise processes to deliver better planning outcomes for Aboriginal peoples and help close the gap on standards of living.

Promotion of ongoing community participation in planning processes

The capacity of planning systems to engage effectively with Aboriginal peoples in planning and decision-making processes is crucial to achieving improved outcomes for Aboriginal communities. Furthermore, there is a clear need for planning authorities to recognise that planning inherently involves social and political elements, and for these elements to be openly addressed through genuine community processes.

Under the current planning system, there are limited opportunities for Aboriginal peoples and Aboriginal Land Councils, to genuinely engage with planning processes. While there are some general public notice and exhibition requirements in the current planning laws, they tend to be insufficient for the purpose of engaging with Aboriginal peoples and communities, and have been significantly eroded in recent years.

Aboriginal peoples must be provided with early and meaningful opportunities to influence planning decisions which may affect rights and interests as a standard component of both plan-making and development assessment processes. This engagement must occur well before decisions are made regarding adoption of a plan or determination of development applications. Access to information about the implications of planning decisions which may affect Aboriginal people's interests must be mandated to promote free and informed responses.

There is a clear need to reinstate genuine public participation in the NSW Planning System with specific recognition of Aboriginal peoples, communities and Aboriginal Land Councils as key stakeholders with particular needs in respect to consultation. Further recommendations in relation to consultation are provided in section 4 below.

Protecting Aboriginal culture and heritage

Despite the widely recognised significance of Aboriginal culture and heritage, the NSW Government on numerous occasions has acknowledged that the current system for protecting Aboriginal culture and heritage is inadequate.⁹

The current system, governed principally by the *National Parks and Wildlife Act 1974*, is failing to prevent the wide-spread destruction of Aboriginal heritage, and is viewed as a system for the regulated destruction of Aboriginal culture and heritage, rather than for its protection.¹⁰

⁸ Department of Families, Housing, Community Services and Indigenous Affairs, 'Closing the Gaps', available at: <http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/default.aspx>

⁹ For further details about previous proposals to reform Aboriginal culture and heritage laws in NSW refer to NSWALC publication 'Our Sites, Our Rights', December 2010, available at: <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>

¹⁰ For further critiques of the current system please refer to previous NSWALC submissions to the NSW Government on this issues, including a joint submission by the NSW Aboriginal Land Council and NTSCORP Limited in response to the reform of Aboriginal Culture and Heritage laws in NSW, 'Our Culture in Our Hands', December 2011, available at: http://www.alc.org.au/media/78829/120112%20nswalc_ntscorp%20broad%20reform%20submission%20final.pdf

The planning system, as a framework for regulating development and land use activities on all land in NSW, is ideally positioned to ensure the long-term protection and management of Aboriginal culture and heritage, and to facilitate positive outcomes for Aboriginal communities. Further recommendations in relation to Aboriginal culture and heritage are provided in section 5 below.

Focus on practical implementation, robust review and monitoring mechanisms

Key objectives must be supported by specific mechanisms in planning processes to give effect to their full intent and scope.

It is important for the vision for the new planning system to be translated into law without over-simplification or unintended consequences. The process of drafting new planning laws is of key importance in this regard.

Furthermore, it is important to address how the legal definitions of words such as ‘facilitate’ and ‘promote’ will be interpreted and translate into the day-to-day activities of planning authorities, proponents, and communities. The use of the words such as ‘consider’ and ‘may’ are open-ended, and do not require decisive action on the part of decision-makers. In reality, these words allow decision-makers or proponents to bypass or superficially address major issues.¹¹ The use of ambiguous processes and language must be avoided. Clear and coherent mechanisms must be built into the new planning system to ensure that full impacts and consequences of planning activities are evaluated in a comprehensive manner.

Strategic planning must be linked to day-to-day decision making, particularly given that substantial resources are often put into developing strategic plans. Importantly, early engagement at the planning stage cannot be seen as a substitute for local-level engagement and information on specific developments; nor should it remove important safeguards of accountability such as open standing and third party appeal rights.

There is a clear need for additional resources for engaging with Aboriginal communities to support the implementation of a new planning system, both in terms of familiarising communities with the new laws and processes, in addition to mandated mechanisms in plan making and development assessment processes.

Building in rigorous review and monitoring mechanisms promotes transparency and accountability. The incorporation of review and appeal bodies and processes that provide independent, accessible and transparent forums for issues to be debated and resolved through both plan-making and development assessment processes are supported.

Recommendations in relation to appeals processes are provided in Section 4 below.

Recommendation 1:

NSWALC recommends that new planning laws and related instruments include the following objectives:

- To facilitate the objectives of the *Aboriginal Land Rights Act*,
- To promote ongoing community participation in planning processes, and
- To protect Aboriginal culture and heritage.

¹¹ The Environmental Defender’s Office report ‘The State of Planning in NSW’ provides a number of cases in point. Available at: <http://www.nccnsw.org.au/sites/default/files/archive/stateparliament/State%20of%20Planning%20in%20NSW%20FINAL%20101214.pdf>

In addition, international human rights instruments, including the United Nations *Declaration on the Rights of Indigenous Peoples*¹², must underpin new planning laws.

Recommendation 2:

The new planning system must provide for:

- specific enforceable mechanisms in planning processes that operationalise and implement these objectives, and
- robust and transparent review, appeal and monitoring mechanisms.

¹² The United Nations *Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly in 2007 and endorsed by the Australian Government in 2009, identifies international principles that Australian laws and planning should consider in order to close the gap between the lives of Aboriginal peoples.

4. Consultation and engagement with Aboriginal peoples

Related questions from the Planning Review Panel's *Issues Paper* :

- A9 In a new planning system, how can we improve community participation opportunities? How can we improve consultation processes for plan making and development assessment?
- C3 Should new legislation prescribe a process of community participation prior to the drafting of a plan?
- C19 Should there be statutory public participation requirements when drafting SEPPs?
- C22 Should there be a legislative provision to establish this?
- D25 What public notification requirements should there be for development applications?
- D26 How can the community consultation process be improved?
- D36 How can the integrity of an environmental impact statement be guaranteed?
- D83 What should be the requirement for a decision making body to give reasons for decisions – in particular as to why objections to a proposal have not been accepted?
- D131: 'Should there be specific statutory obligations to require the establishment of (and procedures for) community consultation forums to be associated with major project development?
- E1 What appeals should be available and for whom?
- E3 In what circumstances should third party merit appeals be available?
- E8 What sort of reviews should be available?
- E9 Who should conduct a review?
- E10 What rights should third parties have about reviews? And what provisions should apply regarding the costs of the review?
- F3 What can be done to ensure community ownership of a new planning system?
- F4 What action can be undertaken by bodies preparing strategic plans to increase community engagement with the planning system?
- F5 What changes can be put in place to ensure more effective cooperation between councils, government agencies, the community and developers within the planning system?
- F6 What checks and balances can be put in place to ensure probity in the planning system?
- F7 How can information technology support the establishment of a new planning system?
- F9 How should information about the planning system be made more accessible in a multicultural society?

The role of planning authorities in promoting and facilitating community engagement throughout planning processes is well recognised as a crucial for achieving positive outcomes for both government and communities. Mechanisms in support of this have been canvassed in detail other submissions to the Planning Review Panel.¹³

Much research and literature has been published about what constitutes 'best practice' community consultation processes and the benefits of utilising such processes in planning.¹⁴ The requirement of placing a single advertisement in a local newspaper during a short exhibition timeframe containing only minimal details about the proposal is outdated and illegitimate.

A more robust planning system would, for example, require planning authorities to actively promote consultation processes early on in the planning process. Providing details in advance about anticipated consultation processes allows communities to plan ahead and therefore better engage. Consultation processes can be enhanced by providing communities with opportunities for seeking feedback and

¹³ See for example submissions made by the NSW Environmental Defender's Office.

¹⁴ See for example: Carson, Lyn. and Gelber, Katharine. 2001, "Ideas for Community Consultation", *NSW Department of Urban Affairs and Planning*, February, pp.1-59, Accessed 19th December 2011, available at: http://activedemocracy.net/articles/principles_procedures_final.pdf; Department of Sustainability and Environment. 2005, "Book 1: An Introduction to Engagement", *Effective Engagement: Building Relationships with Community and Other Stakeholders*, The Community Engagement Network Resource and Regional Services Division, Victorian Government, Version 3, pp.1-48, Accessed 30th January 2012, http://www.dse.vic.gov.au/data/assets/pdf_file/0019/105823/Book_1_-_An_Introduction_to_Engagement.pdf; and International Association for Public Participation (IAP2). 2007, "IAP2 Core Values of Public Participation", International Association for Public Participation, p.1, Accessed 30th January 2012, <http://www.iap2.org/associations/4748/files/CoreValues.pdf>.

providing input in decision making throughout the planning process, rather than a one-off submission process. Furthermore, planning authorities should be required to provide communities with a full range of data and information throughout the planning process to support their engagement.¹⁵

Mechanisms to effectively engage with Aboriginal peoples and Aboriginal Land Councils

Historically, approaches to planning have tended to “disempower and marginalise”¹⁶ Aboriginal communities. NSWALC wishes to address this issue and draw the Planning Review Panel’s particular attention to mechanisms specifically designed to better engage and improve consultation with Aboriginal peoples.

Best practice in engaging Aboriginal peoples in consultation processes must fundamentally recognise and promote the inherent rights of Aboriginal peoples as outlined in the United Nations *Declaration on the Rights of Indigenous Peoples* which highlights Aboriginal peoples rights to maintain and strengthen distinct political, legal, economic, social and cultural institutions.¹⁷

The United Nations *Declaration on the Rights of Indigenous Peoples* also states:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.*¹⁸
(emphasis added)

The Aboriginal and Torres Strait Islander Social Justice Commissioner has outlined some of the key elements of ‘meaningful and effective engagement’ with Aboriginal peoples.¹⁹ These are as summarised as follows:

- a) Consultation processes should be products of consensus

¹⁵ Brody, Samuel, D. Godschalk, David. R. and Burby, Raymond. J. 2003, “Mandating Citizen Participation in Plan Making: Six Strategic Planning Choices”, *Journal of the American Planning Association*, Summer, Vol.69 Iss.3, pp.245-265, Accessed 27th February 2012, <http://web.ebscohost.com.ezproxy.lib.uts.edu.au/ehost/pdfviewer/pdfviewer?sid=b253550c-3b97-4435-ae7f-99162283780f%40sessionmgr113&vid=5&hid=107>.

¹⁶ Hibbard, Michael. Lane, Marcus. B. and Rasmussen, Kathleen. 2008, “The Split Personality of Planning: Indigenous peoples and Planning for Land and Resource Management”, *Journal of Planning Literature*, Vol.23 Iss.2, pp.136-151,ref page 142, Accessed 20th February 2012, <http://jpl.sagepub.com.ezproxy.lib.uts.edu.au/content/23/2/136.full.pdf+html>

¹⁷ Guidelines and principles on best practice engagement with Aboriginal peoples have been developed by a number of organisations including: United Nations Permanent Forum on Indigenous Issues (UNPFII) and Human Rights Equal Opportunity Commission (HREOC). 2005, “Engaging the marginalized: Partnerships between indigenous peoples, governments and civil society”, *United Nations Workshop – 2005 International Conference on Engaging Communities – Brisbane, Australia*, 15th August, pp.1-8, Accessed 19th December 2011, http://www.hreoc.gov.au/social_justice/conference/engaging_communities/sjr-unws-bw.pdf and Human Rights and Equal Opportunity Commission (HREOC). 2006, “Engaging Australian Indigenous Peoples: New arrangements for the administration of Indigenous affairs, economic and social development, and native title in Australia”, *UN Workshop on Engaging the Marginalised: Partnerships between Indigenous Peoples, government and civil society*, Background Paper prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights & Equal Opportunity Commission, Australia, Brisbane 15th August, Updated 24th January 2006, Accessed 19th December 2011, http://www.hreoc.gov.au/social_justice/conference/engaging_communities/background_paper.html

¹⁸ United Nations Declaration on the Rights of Indigenous Peoples, available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

¹⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, 2010, Native Title Report 2010, Chapter 3 and Appendix 4, available at: http://www.hreoc.gov.au/social_justice/nt_report/ntreport10/index.html

- b) Consultations should be in the nature of negotiations
- c) Consultations need to begin early and should, where necessary, be ongoing
- d) Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance
- e) Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision
- f) Adequate timeframes should be built into the consultation process
- g) Consultation processes should be coordinated across government departments
- h) Consultation processes need to reach the affected communities
- i) Consultation processes need to respect representative and decision-making structures
- j) Governments must provide all relevant information and do so in an accessible way

One example of how information can be made available to Aboriginal peoples in NSW includes publishing notices in accessible media and providing direct notification to relevant community organisations. NSWALC recommends that notification is provided to Aboriginal communities members through at least the following channels:

- Advertisements published in Aboriginal media including Tracker, Koori Mail and National Indigenous Times, and other local and state Indigenous media,
- Advertisements published in local community newspapers,
- Notification letters sent to all relevant Local Aboriginal Land Councils,
- Notification letters sent to Aboriginal organisations operating in the locations where consultations are being held including the Aboriginal Medical Service, Aboriginal Legal Service, Elders Councils and Aboriginal Corporations registered with the Office of Indigenous Corporations,
- Details of the consultation meetings and processes to be featured on centralised systems, such as local council and Department of Planning websites.

NSWALC reiterates to Government that the standard minimum period that should be provided by Government and proponents for notifying community members of consultations is **one month's notice**.

Meetings and face to face consultations specifically with local Aboriginal community members should also be encouraged at places and times that are appropriate for the local community. Furthermore, NSWALC encourages relevant planning authorities, and proponents, to keep communities informed throughout the life of any project, and opposes 'one-off' consultation.

NSWALC recommends that the production of up-to-date and specific guides for the Aboriginal communities of NSW should be a legislated mechanism to enhance engagement in the planning system. Such guides must be developed in partnership with peak Aboriginal organisations and Aboriginal communities. Guides must be made readily available and easily accessible in terms of language and content.

Aboriginal people should be provided with information about the implications of planning decisions that may affect their interests in an accessible way, enabling them to make an informed response.

Making use of new information technologies is encouraged; however, this should not replace more conventional forms of notification, engagement and consultation. It is important for relevant planning authorities and proponents to be aware of barriers to participation by Aboriginal peoples, such as living in remote locations, and ensuring that these are overcome.

The need to establish mandatory consultation requirements in legislation for all levels of decision-making

NSWALC is aware of a number of concerns raised by Local Aboriginal Land Councils in relation to the lack of fair and transparent consultation provisions in current planning laws. Consultation provisions for preparing

strategic planning instruments and development consent mechanisms have been significantly eroded in recent years.²⁰

Concerns have been raised with NSWALC by Local Aboriginal Land Councils not only in relation to the poor (and lack of) consultation in relation to the development of Local Environmental Plans (LEPs), planning proposals, and major projects, but also other decisions made by planning authorities, such as the reclassification of public land that is vested in, or under the control of Local Councils, particularly when such reclassification is from 'community land' to 'operational land'.

This lack of consultation is having significant negative impacts for Aboriginal peoples, particularly in relation to Aboriginal heritage sites not being protected and detrimental zoning decisions resulting in economic development opportunities being prevented.

The Independent Commission Against Corruption has recommended that consultation requirements for draft LEPs²¹ be given statutory backing and that community consultation processes are undertaken before the release of strategic planning documents²².

Furthermore, the Independent Commission Against Corruption has recommended:

'That the NSW Department of Planning and Infrastructure produces and maintains a community guide dealing with development processes.'

*'That the NSW Government ensure that planning authorities are required to provide regular information and updates to the public about development applications under assessment, including any significant changes made to the application.'*²³

Appeals and reviews

Under the current laws it has been extremely difficult for Aboriginal peoples to appeal decisions that allow for the destruction of Aboriginal culture and heritage, or to seek redress where Aboriginal heritage has been illegally destroyed. Such disregard for Aboriginal people's cultural rights significantly undermines statements made by government about the rights for Aboriginal peoples to make decisions about culture and heritage.

Providing merits appeal rights for Aboriginal peoples has the capacity to deliver better outcomes for protecting Aboriginal culture and heritage, as well as increasing the transparency and accountability of decision-making.

Furthermore, merits appeal rights for objectors should be reinstated for all major projects, and should be broadened in line with ICAC recommendations.

Recommendation 3:

Clear requirements for best practice consultation with Aboriginal peoples must be developed in consultation with peak Aboriginal organisations in NSW and Aboriginal communities and enshrined in NSW Planning laws.

Recommendation 4:

Best practice consultation requirements with Aboriginal Land Councils and Aboriginal peoples must be

²⁰ Refer to NSWALC submission to the Planning Review Panel 'Stage 1', November 2011, available at:

²¹ Independent Commission Against Corruption, 2012, 'Anti-corruption safeguards in the NSW Planning System' page 20

²² Independent Commission Against Corruption, 2012, 'Anti-corruption safeguards in the NSW Planning System' page 19

²³ Independent Commission Against Corruption, 2012, 'Anti-corruption safeguards in the NSW Planning System' pages 16 and 21, available at: <http://www.icac.nsw.gov.au/media-centre/media-releases/article/4023>

legislated to take place for all plan making, development assessment and other decision-making processes.

Recommendation 5:

The principle of 'Free, Prior and Informed consent' must be incorporated into the new planning system.

Recommendation 6:

Appeal and review rights must be incorporated into the new planning system that provides mechanisms for Aboriginal peoples to seek redress where Aboriginal culture and heritage has been damaged or destroyed.

5. Protection of Aboriginal culture and heritage

Related questions from the Planning Review Panel's *Issues Paper* :

- B6 Are the current definitions in the Act still relevant or do they need updating?
- B8 Should there be a definition of 'minor'? If so, what should it say?
- B14 Should the information available about land on a central portal be able to be legally relied upon, if there is the ability for it to be certified for accuracy?
- B16 What provisions should there be for independent decision making?
- B17 What should be the role of the Minister in a new planning system?
- C6 Should plans and associated maps have prescribed periodic reviews?
- C7 At what suggested intervals should such reviews occur?
- C9 What information and data should be used when preparing plans?
- C10 Should there be a requirement to make it publicly available?
- C12 Should biodiversity and environmental studies be mandatory in the preparation of plans?
- C13 How should landscapes of Aboriginal cultural heritage significance be identified and considered in plan making?
- C29 What should be the processes prior to listing an item of local heritage in an LEP?
- D4 What development should be exempt from approval and what development should be able to be certified as complying?
- D5 How should councils be allowed local expansions to any list of exempt and complying development?
- D6 Should there be a public process for evaluating complying development applications?
- D8 Should there be an automatic approval of a proposal if all development standards and controls are satisfied?
- D38 What changes, expansions or additions should be made to the present assessment criteria in the Planning Act?
- D44 Should a consent authority be required to consider any cumulative impact of multiple developments of the same general type in a locality or region? Should this be a specific requirement in assessment criteria?

Both strategic planning and development consent processes afford opportunities to intercede at different stages of development and land use activities for the purpose of improving protections for Aboriginal culture and heritage. However, the current planning system does not adequately incorporate Aboriginal culture and heritage considerations or protections, and where Aboriginal culture and heritage is recognised, implementation by relevant planning authorities has been *ad hoc* and inconsistent.

Strategic planning

There are currently provisions in the Standard Instrument LEP at clause 5.10 to provide for the identification and protection of Aboriginal culture and heritage. However, the provision of guidance or minimum standards on how these provisions are intended to operate has been minimal, and it appears that the implementation by local government authorities has been *ad hoc* and inconsistent to date.

In many cases, it appears that Aboriginal culture and heritage values and considerations are only captured if a local government authority has undertaken an Aboriginal heritage study or where planning authorities or proponents have taken the initiative to check the Aboriginal Heritage Information Management System²⁴ maintained by the NSW Office of Environment and Heritage. These studies, where undertaken by local government authorities, appear to have been approached with differing methodologies, and accordingly results have been of varying quality. However, there is little advice or minimum standards for local councils about how to effectively undertake this with the support of local Aboriginal communities.

²⁴ NSWALC has commented extensively on problems with AHIMS. See for example 'More than Flora and Fauna' available at <http://www.alc.org.au/publications/other-publications.aspx> and NSWALC Fact Sheet on AHIMS available at: <http://www.alc.org.au/publications/fact-sheets.aspx>

While the Standard Instrument LEP requires local government authorities to consider Aboriginal heritage and notify the Aboriginal community prior to granting consent for a development involving an Aboriginal object or Aboriginal place of heritage, this often only occurs if the item has been included on a public 'heritage schedule' or map in the LEP.²⁵ As outlined above, many local councils have not undertaken comprehensive Aboriginal heritage studies in order to identify Aboriginal culture and heritage items appropriate for inclusion in this schedule. This has resulted in Aboriginal heritage being largely excluded from this protection mechanism, which mainly incorporates 'European' or non-Aboriginal heritage items.

There is a clear need for Aboriginal culture and heritage to be incorporated as a key assessment criterion in strategic planning and mapping processes.

Identification and mapping of Aboriginal heritage

Best practice in cultural mapping exercises must inherently involve the supported participation and decision-making of Aboriginal communities. Procedures and protocols defined in *The Burra Charta* and related guidelines adopted by the Australian ICOMOS²⁶ support the rights of Aboriginal peoples to directly participate in projects that assess or manage cultural heritage:

Article 4.

Each cultural group has a primary right to identify places of cultural significance to it and this right may include the withholding of certain information.

Article 5.

Each cultural group has the right of access to pertinent information and to any decision-making process affecting places it has identified as significant.

Article 11.

*enable each cultural group to gain access to, and inclusion and participation in, the decision-making processes which may affect the place.*²⁷

Similarly, procedures published in *Ask first: a guide to respecting Indigenous heritage places and values*²⁸ are considered best-practice guidelines for addressing Aboriginal heritage issues. These guidelines provide practical advice and assert that sensitive consultation and negotiation with Aboriginal peoples is the best means of addressing Indigenous heritage issues. Failure to engage in this process can deny traditional owners their right to informed consent.

Mandatory best practice engagement and consultation mechanisms must be incorporated into any projects that seek to identify or manage Aboriginal heritage.

Processes for listing heritage items in Local Planning Instruments

In line with statements made above in relation to community consultation, Aboriginal communities and Local Aboriginal Land Councils must be meaningfully engaged in all projects that seek to record and identify Aboriginal heritage. It is best practice for Aboriginal peoples to direct such projects and have key decision making powers.

²⁵ Clause 5.10(8) of the *Standard Instrument – Principal Local Environmental Plan* available at www.legislation.nsw.gov.au. The Standard Instrument also outlines that 'Aboriginal places of heritage significance' and 'Aboriginal objects' may, but need not, be recorded on a public map attached to a LEP.

²⁶ Australian ICOMOS, 1999, *The Burra Charter for Places of Cultural Significance and associated Guidelines and Code of the Ethics of Co-Existence*, available at: http://australia.icomos.org/wp-content/uploads/BURRA_CHARTER.pdf

²⁷ Australian ICOMOS, *Code of the Ethics of Co-Existence*, page 21

²⁸ Australian Heritage Commission. 'Ask first: a guide to respecting Indigenous heritage places and values'. Canberra: AHC, 2002, www.environment.gov.au/heritage/ahc/publications/commission/books/ask-first.html.

Protection of Aboriginal heritage information

Some Aboriginal sites, areas, or landscapes may be inherently sensitive, while in other cases, custodian communities may wish to keep information about sites from the public for risk of vandalism or harm.

As a minimum, guidance must be developed in consultation with peak Aboriginal organisations and Aboriginal communities regarding how Aboriginal heritage information is to be sought, recorded and stored by planning authorities and proponents. It is recommended that guidance materials include advice about the need for planning authorities to be aware of restrictions required for sensitive information, and mechanisms that promote free, prior and informed consent.

The use of formal agreements and protocols between planning authorities and Aboriginal communities that address how cultural information is to be recorded and stored must be underpinned by the principles espoused in international human rights instruments, including the Nagoya Protocol,²⁹ including fair and equitable benefit-sharing, are encouraged.

The need for mandatory consideration of cumulative impacts

The NSW Government has issued approximately **3,000³⁰ permits to destroy Aboriginal culture and heritage** since the commencement of Aboriginal culture and heritage provisions in the *National Parks and Wildlife Act* in 1969. One permit, known as an Aboriginal Heritage Impact Permit, may allow for the destruction of several Aboriginal sites. This means that the actual number of Aboriginal culture and heritage sites destroyed with the approval of the NSW Government is estimated to be far greater than 3,000.

The destruction of Aboriginal heritage in NSW cannot continue at this rate.

The State of the Environment Report 2011 has highlighted these issues stating that:

“One of the main threats to Indigenous heritage places is conscious destruction through government-approved development—that is, development for which decision-makers are aware of (or obliged to be informed about) Indigenous heritage impacts, yet choose to authorise the destruction of Indigenous heritage. This widespread process, combined with a general lack of understanding of physical Indigenous heritage, means that individual decisions on assessment and development result in progressive, cumulative destruction of the Indigenous cultural resource.”³¹

The State of the Environment Report 2011 listed the following reasons for the destruction of Aboriginal sites in Australia:

- “lack of listing or recognition,
- conscious, informed decisions by development consent authorities,
- prioritisation of economic considerations over heritage protection,
- **little to no assessment or public reporting of the cumulative impact of development—that is, how much of the Indigenous heritage estate has already been destroyed through past activities in the region,**

²⁹ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, available at: <http://www.cbd.int/abs/text>

³⁰ Answers to questions on notice in the NSW Parliament (refer to previous NSWALC submissions to the OEH available at: <http://www.alc.org.au/publications/other-publications.aspx>) and the Aboriginal Heritage Impact Permit register available on the NSW Office of Environment and Heritage website at <http://www.environment.nsw.gov.au/licences/ahipregister.htm> reveal that over 1000 permits to destroy Aboriginal heritage have been issued since 2004 alone. NSWALC has repeatedly requested data about AHIPs from the OEH to no avail. As such, this figure is a conservative estimate based on the average rate of permits issued since 2004.

³¹ Australian State of the Environment Committee, State of the Environment Report 2011, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Chapter 9: Heritage, Page 721, available at: <http://www.environment.gov.au/soe/2011/report/heritage/download.html>

- insufficient consultation with Indigenous communities.”³² (emphasis added)

The NSW Government has committed to the principle of Ecologically Sustainable Development (**ESD**) for managing the environment, which includes heritage. The World Commission on Environment and Development in its report ‘*Our Common Future*’ published in 1987 defined sustainable development as ‘*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*’³³

Several laws in NSW currently incorporate ESD in their objectives and functions, including the current *Environmental Planning and Assessment Act 1979* (NSW), the *National Parks and Wildlife Act 1974* (NSW), and the *Protection of the Environment Administration Act 1991* (NSW).

The *Protection of the Environment Administration Act 1991* (NSW) provides an extensive definition of ESD which states:

“...ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequences of various options,

(b) **inter-generational equity**—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations...”(emphasis added)³⁴

The State of Indigenous Cultural Heritage Report 2011 has recommended that:

“There is a need for research into and measurement of the cumulative impact of past and continued approved destruction of Indigenous heritage.”³⁵

Clear mechanisms must be established in strategic planning and decision making structures that implement the duty to protect Aboriginal culture and heritage. One such mechanism could implement a process of assessing cumulative impacts of the destruction of Aboriginal heritage. Such a process would provide that the duty to protect Aboriginal heritage outweighs all other considerations, and that developments must be refused on this basis.

A new planning system needs to move beyond merely ‘considering’ Aboriginal heritage.³⁶

³² Australian State of the Environment Committee, State of the Environment Report 2011, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Chapter 9: Heritage, Page 735, available at: <http://www.environment.gov.au/soe/2011/report/heritage/download.html>

³³ Report of the World Commission on Environment and Development: *Our Common Future*, 1987, Chapter 2, available at: <http://www.un-documents.net/wced-ocf.htm>

³⁴ *Protection of the Environment Administration Act 1991* (NSW), Section 6(2)

³⁵ Schnierer, E, Ellsmore, S and Schnierer S, *State of Indigenous Cultural Heritage Report 2011*, Report prepared for the Australian Government Department of Sustainability, Environment, Water, Population and Communities on behalf of the State of the Environment 2011 Committee, page 12, available at <http://www.environment.gov.au/soe/2011/report/heritage/pubs/soe2011-supplementary-heritage-state-of-indigenous-cultural-heritage.pdf>

³⁶ The Environmental Defender’s Office has provided useful comments on incorporating the mandatory consideration of cumulative impacts into planning laws. See: EDO Submission to the Review of the NSW Planning System (Stage 1), available at: http://www.edo.org.au/edonsw/site/pdf/subs/111104review_nsw_planning_stage_1.pdf

Development assessment

NSWALC has raised a number of issues around various kinds of 'low impact' developments³⁷, and other streams of developments, being defined in legislation, that allow a broad scope of developments and activities to be exempted from the routine development assessment process. Thus, it has long been NSWALC's position that these should be kept to a minimum to avoid unmitigated impacts on Aboriginal culture and heritage.

NSWALC is also aware of concerns about the implementation of 'exempt' and 'complying' development clauses (Clauses 3.1 and 3.2 of the Standard Instrument LEP). As developments listed as 'exempt' or 'complying' may bypass the usual development consent processes, and associated notification and consultation procedures, this can result in an increased risk of damage or destruction of Aboriginal heritage.

There is a clear need for processes that may allow consultation or Aboriginal heritage protections to be circumvented, to be kept to a minimum.

Legislative mechanisms that mandate the following could provide a starting point in ensuring that Aboriginal communities are notified and involved in activities that may impact on Aboriginal heritage:

1. Proponents to notify and consult Aboriginal communities in the early planning stages of plans and development proposals via the consultation mechanisms outlined in Section 4 above. New protocols and guidance materials need to be developed that provide for Aboriginal peoples to have key decision-making roles.
2. Planning authorities and proponents to access information about Aboriginal heritage through culturally appropriate channels. Currently there are several 'registers' that contain information about Aboriginal heritage, and these are not necessarily consistent, these include the Aboriginal Heritage Information Management System, LEP Heritage Maps, local council sensitivity mapping, and registers that are maintained by Local Aboriginal Land Councils (NOTE: Aboriginal heritage is broader than physical sites and includes intangible values as well as water, flora and fauna.)
3. If these two mechanisms identify that there may be Aboriginal culture and heritage in the area, then this will act as a trigger for further consultation with Aboriginal communities and investigation and assessment.

Guidance material

In addition to the recommendations made above in relation to the development of community guides, NSWALC notes that the NSW Department of Planning and Infrastructure Annual Report 2010-11 states that that Department has:

*'Developed a series of environment and assessment guidelines to ensure the department undertakes robust, rigorous and timely environmental assessments, including a draft community guide, draft guidelines for proponents, draft guidelines on threatened species and biodiversity assessment, and **Aboriginal heritage assessment**.*³⁸

While the production of guides may be a useful tool to communicate complex legislation in a plain English format, it is essential that community have opportunity to have input into such guides and policies, particularly as such guides often have a significant impact on the day-to-day operation of a policy.

³⁷ See for example, submission made NSWALC and NTSCORP in June 2010 relation to the draft National Parks and Wildlife Regulation 2010, available at: <http://www.alc.org.au/media/52844/100907%20submission%20to%20deccw%20re%20regs%20-%20limited%20images%20updated.pdf>

³⁸ NSW Department of Planning and Infrastructure, 2011, Annual Report 2010-11, page 159, available at: <http://www.planning.nsw.gov.au/SettingtheDirection/Corporatepublications/tabid/95/language/en-US/Default.aspx>

Definitions

Recognising and recording significant Aboriginal heritage requires an understanding of how Aboriginal communities value certain places and areas of land within an area. Aboriginal peoples' definition of culture is not limited to particular places or physical evidence of Aboriginal existence on the land; it includes whole of landscape values and both tangible and intangibles that tell a story about the land, environment, people, family, history, law, community and spirituality.

A new model for the protection and management of Aboriginal culture and heritage in NSW

NSWALC has been advocating for the establishment of an Independent Aboriginal Heritage Commission, or similar structure, to protect and manage Aboriginal culture and heritage in NSW. The NSW Office of Environment and Heritage are currently leading a review of these laws.

NSWALC is of the view that decision-making roles in relation to Aboriginal heritage issues should be transferred to local Aboriginal communities. There will a need for a new planning system to recognise new structures developed in this regard.

As such, it is envisaged that the decision-making role of the Minister where Aboriginal heritage matters are involved would be referred to the new Commission.

Recommendation 7:

Strategic planning must include mechanisms for the identification of Aboriginal culture and heritage values across the state, which then trigger development prohibitions and/or further consultation and assessment as appropriate.

Recommendation 8:

Mechanisms to identify and record Aboriginal heritage must be based on mandatory and uniformly applied best practice standards for: the identification of Aboriginal culture and heritage values through consultation and engagement with Aboriginal peoples and communities, and the protection of culturally sensitive information.

Recommendation 9:

Development consent processes must include mandatory consultation with Aboriginal communities in relation to potential impacts upon Aboriginal culture and heritage.

Recommendation 10:

Aboriginal heritage must be listed as a specific assessment criteria in new planning laws.

Recommendation 11:

New planning laws for NSW must include a broad all encompassing definition of Aboriginal culture and heritage that captures the tangible and intangible, as well as whole of landscape values.

Recommendation 12:

Cumulative impact assessments for Aboriginal heritage must be undertaken for all developments, and mechanisms to refuse developments on this basis must be incorporated.

6. Economic development of Aboriginal lands

Related questions from the Planning Review Panel's *Issues Paper* :

- C23 How should rezonings (planning proposals) be initiated?
- C25 Should there be a right of appeal or review for decisions about planning proposals?
- C26 Should there be a right for a landholder to seek compensation for the consequences of a rezoning of their land?
- C27 When local environmental plans are being made or amended, how can transparency and opportunities for negotiation be improved during consultation with government agencies?

As per the *Aboriginal Land Rights Act*, LALCs hold land for the economic, social and cultural benefit of Aboriginal people living within their boundaries. With the consent of their members, LALCs may seek to develop or sell land that they hold. LALCs may also seek to maintain key parcels of land for their cultural or environmental values. As a result of claims made over claimable crown land, the NSW network of Aboriginal Land Councils owns significant landholdings across the state.

It must be acknowledged that Aboriginal people's interests in land and particularly Aboriginal Land Council land are broader than simply environmental conservation. In respect to Aboriginal Land Council land these interests extend to the economic potential.

The Overcoming Indigenous Disadvantage Report 2011 specifically highlights that Aboriginal peoples obtain a range of economic, social and cultural benefits from land³⁹, stating that:

"Land ownership may lead to greater autonomy and economic independence, increased commercial leverage and political influence. It can also deliver commercial benefits like increased income, employment and profits."

However, in NSW, these benefits have been undermined by adverse planning mechanisms and decisions. There has been a tendency by some local government authorities to view land owned by Aboriginal Land Councils as public environmental conservation assets; effectively parklands. As such, land owned by Aboriginal Land Council has tended to be 'downzoned' for environmental conservation purposes. This has the effect of reducing the development potential of those lands, which undermines the social policy mechanism of the *Aboriginal Land Rights Act*.

As such, Aboriginal Land Councils should have the right to seek reviews or appeals for decisions made by planning authorities.

As noted above, one of the intentions of the *Aboriginal Land Rights Act* was to provide compensation for the historic dispossession of lands. The application of restrictive zoning provisions to Aboriginal Land Council owned land severely curtails the economic and socially beneficial potentials to which such lands could be used and undermines the beneficial intentions of the Aboriginal land rights legislation.

Aboriginal Land Council land tends to be 'greenfield' by virtue of the nature of claimable land (unused crown land) and is becoming of increasing strategic importance, in terms of future developments and the projection of conservation values. This is particularly so in the more developed coastal plains east of the dividing range.

³⁹ Steering Committee for the Review of Government Service Delivery, *Overcoming Indigenous Disadvantage Key Indicators 2011 Report*, Chapter 8.2 'Indigenous Owned or Controlled land and business', available at: http://www.pc.gov.au/data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf

Many Aboriginal Land Councils struggle in planning processes to maintain the land use zonings that applied to their land when it was claimed, let alone seek to have it zoned to allow the land to be put to any higher economic use. The costs associated with addressing detrimental planning decisions are often prohibitive for Aboriginal Land Councils, particularly in respect to small parcels of land. As a result the potential for Aboriginal Land Council land to provide social benefits to Aboriginal peoples and to assist with planning pressures remains unrealised.

Furthermore, as holders of freehold title to their lands, Aboriginal Land Councils encounter public liability concerns in respect to the public's misuse of lands that are effectively retained as quasi parklands through local planning decisions.

Effective consideration of Aboriginal Land Council land in planning processes is also hindered by the accuracy of the cadastral data upon which planning authorities are making decisions; particularly relating to land under claim or land granted with title yet to be transferred or land with title only partially transferred.

The ongoing imposition of restrictive environmental conservation land use zonings on Aboriginal Land Council lands:

- Elevates the social benefit of environmental protection above the social benefit envisaged by the NSW Parliament in the passing of the *Aboriginal Land Rights Act*; and
- Erodes self determination, which underpins the *Aboriginal Land Rights Act* in respect to Aboriginal Land Council lands.

Recommendation 13:

Objectives that promote economic independence for Aboriginal peoples and self-determination in respect to Aboriginal lands in accordance with the principles underpinning the *Aboriginal Land Rights Act* and the United Nations *Declaration of the Rights of Indigenous Peoples* must be recognised in any new planning system.

Recommendation 14:

Aboriginal Land Councils should have the right to seek review or appeal of decisions made by planning authorities.

Recommendation 15:

Aboriginal Land Councils should have the right to seek compensation for adverse land zoning decisions and planning proposals, in recognition that the intent of the *Aboriginal Land Rights Act* was to act a compensatory mechanism.

7. Former Aboriginal missions and reserves

Related question from the Planning Review Panel's *Issues Paper* :

- C35 Should a program be developed to integrate Aboriginal reserves properly into a new planning system and, if so, how should that program be developed and what timeframe could be targeted for its implementation?
- D2 What development should be designated as State significant and how should it be identified? Should either specific projects or types of development generally be identified as State significant?
- D11 Should existing nonconforming uses be permitted to intensify on the site where they are being conducted (subject to a merit assessment)?
- D12 Should existing nonconforming uses be permitted to expand the boundaries of their present site (subject to a merit assessment)?

Former Reserves and Missions in NSW

As NSWALC's previous submission identified, there are 59 former Aboriginal reserves and missions in NSW that are owned and managed by 49 LALCs. Historically, the development of these Aboriginal settlements, which was largely government driven, occurred outside of state and local government planning processes.

As a result, despite the housing and other infrastructure that exist on these sites, former reserves are typically on a single title, with responsibility for the provision of services and the maintenance of infrastructure within the reserve boundary (including water, sewage and waste services, maintenance of roads, street lightning and drainage systems, and common area management) falling to the LALC owner.

Whilst planning change is not the only input required to improve the living conditions on these communities, overcoming planning impediments to the subdivision of these sites would assist LALC's to divest themselves of burdensome infrastructure and services, and would improve the asset management of these sites.

Current Zoning and Planning Issues

More than half of the former Aboriginal reserves and missions used for Aboriginal settlements are not currently recognised as residential areas in plan making process. In scoping the subdivision partnership program it has been found that 34 of the total 59 former reserves are currently inappropriately zoned.

Zoning of some sites is being addressed as part of the current standardisation of LEP's across NSW, however some LEPs have already been approved. As these sites are being considered at a local level, on a site-by-site basis during the plan making process there is a risk of sites being overlooked or gaining an undesirable zone. The key issues are ensuring former Aboriginal reserves and mission sites in NSW have an appropriate zone and asset management strategy which is supported by the LALC, as the land owner.

Many former reserves and missions do not have a zone that reflects nor is consistent with their current land use. Current land uses include a combination of housing and community facilities (child care centres, medical centres, shops, schools, halls, sheds, playgrounds and sports facilities). A former reserve in northern NSW, for example, is currently zoned 'Non Urban A', however there are 30 houses on this former reserve. Another former reserve in central NSW, is currently zoned '1(a) Rural Agricultural' despite its 16 houses.

All levels (state, regional and local government) of the new planning system should recognise and acknowledge the historical existence and cultural significance of Aboriginal settlements on former reserves and missions as a standalone type of development. This is to reflect the unique planning aspects of these Aboriginal settlements compared to other forms of development and to formally recognise these

Aboriginal sites as part of the planning system.

Subdivision Pilot Program

In June 2008, NSWALC entered into a partnership project with the Australian Government for the surveying and subdivision of former Aboriginal Reserves in NSW. A total of \$6M was allocated to the project.

Whilst the Commonwealth sought “to increase home ownership options for Indigenous Australians in NSW through the subdivision of discrete Aboriginal reserves”, NSWALC’s objectives in facilitating and funding the program included improvements in asset management and options for future management.

Much of the information in this submission regarding the reserves has been drawn from the work undertaken during the pilot phase of this subdivision project. A report prepared by consultants to this project, Arup Ltd, which identifies the barriers to subdivision of former reserve sites and details attempts at subdividing 4 pilot sites through existing planning processes entitled: *NSW Aboriginal Land Council; Subdivision of former Aboriginal Reserves, Scoping Document February 2012*, can be provided to the Planning Review Panel upon request.

In undertaking preliminary scoping for the project it became apparent that the subdivision of the subject lands was likely to face considerable planning barriers.

The project established that conventional subdivision processes do not work with the former reserve sites as such processes:

- Assume a ‘greenfield’ site (or undeveloped site), where the former reserve sites are partially or substantially developed, and
- Require compliance with current statutory planning requirements, where many elements of existing development on the former reserve sites are not compliant with current statutory requirements.

Pilot Sites

A shire council in the north-west of NSW had indicated that they support, in-principle, the subdivision of two former reserves situated within its boundary. To this aim, the shire council sought rezoning of the former reserve sites to residential use in their new LEP. However, the regional office of the then Department of Planning rejected the proposed rezoning based on flood risk issues, despite the department’s previous assurances that such rezoning would be “caught” and “prioritised” through the gateway process. The shire has continued to advocate on the LALCs behalf to achieve a residential zoning outcome that reflects its current use.

Alternatively another council, on the mid-north coast, has concerns that the subdivision of a former reserve within its boundary may impact on future development to higher residential density on these lands. The former reserve once existed on the edges of town but as a result of large urban sprawl in the area the site is now centrally located in what the council views as a medium density zone. As a result the council has advised that it is not in a position to offer in-principle support for the subdivision. In effect, the council has rejected the recognition of the former reserves existing settlement pattern, based on their view it is an under-development of the site, despite the historic nature of the settlement, or the interests of the LALC landowner.

Zoning that reflects use

Former reserves and missions that are currently not appropriately zoned will need to be rezoned before a LALC will be able to obtain subdivision, unless the provisions of a state-wide planning response can

facilitate subdivision without a rezoning.

Traditional “spot” rezoning will require the preparation and submission of a rezoning application to Council. This application will then go through an approval process of at least six months. It is possible that the timeframe for approval of rezoning may be protracted during 2012 due to the demands on the Department of Planning and Infrastructure associated with the preparation of comprehensive LEPs.

In addition to the barriers of cost and time, there is also a risk that an application to rezone lands will not be successful.

The new planning system may be able to overcome the current planning barriers by providing an appropriate zone that recognises the historic, current and future land uses and the cultural significance of these sites.

In determining the most appropriate zone for each former reserve, consideration would need to be given to existing uses of the lands. As a general principle, the appropriate zones are likely to be (in current planning terms) Zone R1 General Residential and Zone R2 Low Density Residential.

An alternative may be a state planning response that allows the current non-conforming use to be permitted based on the relative merit of the proposal, and where such development was limited to a subdivision plan being registered that recognises the existing settlement pattern.

Development Application Process

Where lands have a current zoning that reflects its current use the current Development Application (DA) process also presents a number of challenges in facilitating the improvement of former Aboriginal reserve and mission sites. Following a standard Development Application (DA) process presents the following challenges:

- The sites fall under many local governments and each local government would have its own controls to be complied with and DA process to follow;
- Each site is different and producing a DA submission for each site would take time and cost a lot of money;
- DA requirements can be onerous and dependant on local planning controls. Requirements may include studies for flooding, bushfire, heritage, energy usage, traffic and water usage;
- The DA may require existing road reserves to be upgraded to meet Council standards. This may not be possible without significant financial investment;
- A standard DA process assumes an undeveloped site. This is not the case for former reserves and missions and planning approvals processes may need to be more flexible to accommodate this. This is unlikely to be achieved state-wide without the intervention of state planning regulation or policy to drive such flexibility; and
- Some sites may never be able to comply with requirements of the DA and will never be able to obtain subdivision approval due to site constraints.

Current local planning controls for dwelling houses and residential subdivision are designed to facilitate the future development of standard types of residential development. These controls fail to recognise the unique issues that are specific to former Aboriginal reserves and missions, including the extensive existing built fabric, cultural connections and historical legacy in which these sites were formed.

State wide planning system for former reserves and missions

Former reserves and missions are of significant cultural and social value to Aboriginal people and as such

the development of policies, which may impact their future use, management, and/or development must be underpinned by recognition of this social and cultural value.

As identified above, the standard DA process is not an appropriate method for subdivision of all 59 former reserve sites and rezoning of individual sites on a site-by-site basis is also a time consuming and labour intensive approach. An alternative approach is the creation of a new State Planning response for the subdivision of former reserves and missions.

Previous discussions with the then Department of Planning identified the development of a specific State Environmental Planning Policy as a possible alternative approach to facilitating the subdivision of the former reserve sites.

The planning system needs to identify a planning approvals process that acknowledges the state significance of these sites in order to overcome the current planning and institutional barriers that are hindering these sites from becoming recognised as part of the NSW planning system.

A state-wide approach would create a framework that allows key issues to be identified and managed in a streamlined process. Establishing a specific state-level approval process and consent authority for development proposals relating to former reserves and missions would enable the creation of a body that is appropriately informed about issues relating to former Aboriginal settlements on reserves and missions. This body would also be able to apply a consistent, effective approach to development assessment.

Performance criteria would need to be created under which a site could be assessed, such criteria might include:

- A subdivision concept plan signed off by the LALC and community under the ALRA for land dealings,
- Conditions on the site in terms of flood, bushfire and heritage management, and
- Requirements for the site in terms of Development Control Plans (e.g. minimum road reserve widths)

A state-level response is not without its challenges as each site is very different and it may be difficult to create a regulatory system that would suit every site.

However, a state-level process would ensure that assessment is not influenced by the potential financial liability these sites may impose on local government bodies if subdivided. A negotiated state-level consistent approach would also minimise the need for appeal by LALCs who have limited resources.

Factors impacting on Timing

The timing of the introduction of any new planning regime for former reserves and missions would need to ensure adequate provision is made for meaningful and continuous consultation with the LALC network and NSWALC.

In addition to ensuring timeframes have regard for the need for consultation with LALCs and NSWALC; work on the subdivision program indicates there are a number of other stakeholders that would support the timely introduction of a new planning system for former reserves and missions, most notably NSW Department of Human Services - Housing NSW, and the Commonwealth Department of Families, Community Services, Housing and Indigenous Affairs.

A new planning system for former reserves and missions

The new planning system for NSW should aim to facilitate equality in the standards of living between Aboriginal and non-Aboriginal people and guarantee effective participatory rights to all.

Future legislation should facilitate a planning system that recognises and acknowledges the existence of Aboriginal settlement in former reserves and missions. This will reflect the unique planning aspects of Aboriginal settlements compared to other forms of development and provide due recognition of Aboriginal peoples as the original owners of the land in NSW. Aboriginal people should be provided with information about the implications of planning decisions that may affect their interests in an accessible way, enabling informed responses.

The planning system needs to assess development with a risk management as opposed to risk avoidance approach. In applying this approach, consideration must be given to the limited human and financial resources available to the LALCs as owners of former reserve and missions. In order to promote an effective, consistent approach and minimise the need for appeals, future legislation needs to enable the establishment of a state-level approval process and a state-level body to deal with subdivision and development of Aboriginal reserves and mission sites.

Recommendation 16:

A new planning system must recognise and acknowledge the historical existence and cultural significance of Aboriginal settlements on former reserves and missions as a standalone type of development.

Recommendation 17:

A planning approvals process should be established that acknowledges the state significance of these sites in order to overcome the current barriers that are hindering these sites from becoming recognised as part of the NSW planning system, and re-integrate these sites into the NSW Planning System without undue expense.

Recommendation 18:

A specific state-level approval process and consent authority for development proposals should be established relating to former reserves and missions to ensure a coordinated approach.

Recommendation 19:

Any proposed programs or legislative mechanisms to address former Aboriginal reserves and missions should be developed in partnership and close consultation with NSWALC and affected Local Aboriginal Land Councils.

Recommendation 20:

Timelines must be negotiated with NSWALC and relevant LALCs to allow enough time for genuine consultation to occur, and ensure that any potential adverse impacts are minimised. (eg. other operational requirements of LALCs; timeframes related to social housing schemes imposed by the Aboriginal Housing Office; funding from external sources).

This submission has been prepared by the New South Wales Aboriginal Land Council. For more information about this submission please contact the NSW Aboriginal Land Council Policy and Research Unit by phone on 02 9689 4444 or by email policy@alc.org.au.