



Submission to NSW Government Green Paper: *A new planning system for NSW*

September 2012

Overview

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

NSWALC provides support to the network of 120 elected and autonomous Local Aboriginal Land Councils (**LALCs**) across NSW also established under the *Aboriginal Land Rights Act 1983*. Aboriginal Land Councils are significant land holders across the state and have functions under the *Aboriginal Land Rights Act 1983* in respect to the management and development of lands as well as the protection and promotion of Aboriginal culture and heritage.² The key goals of LALCs are outlined in their Community Land and Business Plans (**CLBPs**).³

NSWALC has been actively engaged in the NSW Planning System review process and contends that significant changes are needed to the planning laws in NSW in order to achieve equity, transparency and accountability in the NSW Planning System and facilitate the goals and aspirations of Aboriginal peoples.

NSWALC’s first submission to the Independent Planning Review Panel (**Review Panel**) in November 2011 advocated for reforms to the NSW Planning System in recognition that the current planning system is hindering the objectives of the *Aboriginal Land Rights Act 1983* and failing to address the needs of Aboriginal peoples in NSW, particularly in respect to the following issues:

1. Consultation and engagement with Aboriginal Peoples,
2. Protection and management of Aboriginal Culture and Heritage,
3. Economic development of Aboriginal lands, and
4. Integration of former Aboriginal missions and reserves into the NSW planning system.

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, Sections 52(4) and 106(7)

³ ALRA, Sections 82-83

NSWALC's second submission to the Review Panel in March 2012 proposed a number of practical and achievable mechanisms to address these issues and provided a number of recommendations in response to the *NSW Planning Review Panel Issues Paper*.

The NSW Government Green Paper titled '*A new planning system for NSW*' (**the Green Paper**) proposes a number of broad policy directions for new planning laws, policies and systems. Policy directions outlined in the Green Paper such as reforms to "*engage communities as an integral part of making key planning decisions*"⁴ and aims to "*improve people's quality of life*"⁵ are broadly supported by NSWALC. However, NSWALC is concerned and disappointed that overall the Green Paper fails to address a number key concerns with the current planning system, including poor community engagement and participation and the lack of community trust in planning processes.⁶ Where these issues are addressed, the proposals appear to provide only cursory or insufficient changes and are not supported with sufficient evidence for how their successful implementation will be achieved. Overall, the proposals fail to meet commitments by the NSW Government to return "*transparency, integrity and respect for local government and communities*"⁷ into planning laws.

It is also of significant concern that while the Green Paper outlines some very general proposals aimed to engage with communities, the NSW Government has largely failed to address key issues of importance to Aboriginal peoples and the Aboriginal Land Rights network as outlined in our previous submissions. We are alarmed that the Green Paper does not include Aboriginal people and Aboriginal Land Councils in the list of "*the community and key stakeholders*" who will have key roles in the new planning system.⁸ Furthermore, we are concerned that the Green Paper is largely silent on heritage issues generally, and fails to specifically address the protection and management of Aboriginal heritage in new planning laws. Additionally, the Green Paper has failed to recognise the strategic importance of Aboriginal lands and the economic aspirations of Aboriginal peoples.

The Independent Planning Review Panel, chaired by Tim Moore and Ron Dyer produced an extensive two volume report which made recommendations to the NSW Government for new planning laws. Many of NSWALC's recommendations were reflected in the Planning Review Panel's recommendations including recommendations supporting **genuine consultation**, specific consideration and **protection of Aboriginal heritage through planning laws**, and proposals to address **former missions and reserves**.

NSWALC notes that a number of important recommendations developed by the Independent Planning Panel have not been addressed. The Green Paper however, states that it has taken "*a somewhat different broad path in its proposed framework*" and that "*[w]hilst neither endorsing nor rejecting their matters of detail, the two volumes of the Panel's Review Report provide an indication of the range of detailed implementation topics that will need to be considered [in the development of the White Paper and Exposure Bill]*".

While it is noted that the purpose of the Green Paper is to outline the governments future policy direction, the intended effects of the proposed changes appear to promote limited goals at the

⁴ NSW Government, July 2012, Green Paper: A new Planning System for NSW, page 3

⁵ NSW Government, July 2012, Green Paper: A new Planning System for NSW, page 17

⁶ The Environmental Defenders Office have criticised the current NSW planning system as being "*complex, highly politicised, disconnected from local communities, and resulting in poor environmental outcomes*". Source: Environmental Defender's Office, December 2010, 'The state of planning in NSW', available at: http://www.edo.org.au/edonsw/site/pdf/subs/101214state_of_planning_in_nsw.pdf

⁷ Media Release, The Hon. Brad Hazzard, Thursday June 16 2011 'Labor's Destructive Part 3A ends' available at: <http://www.planning.nsw.gov.au/media>

⁸ Figure 6 on page 21 of the Green Paper includes a list of "The community and key stakeholders" who will have key roles in the new planning system. The Aboriginal Land Rights network and the Aboriginal community are not included in this list.

expense of broader social, environmental, cultural and heritage outcomes. It is considered that a robust, accountable and effective planning system requires developing an understanding of a broad range of issues and community priorities through sustained community engagement and participation in all levels of planning.

Summary of Recommendations

Recommendation 1: NSWALC re-iterates that the objectives of a new planning system should:

- Facilitate the objectives of the *Aboriginal Land Rights Act*,
- Promote ongoing community participation in planning processes, and
- Protect Aboriginal culture and heritage.

Recommendation 2: That clear mechanisms be developed and enacted to achieve the above objectives in a new planning Act. All decisions, powers and functions of a new Act should implement the above objectives in addition to providing mechanisms for guaranteeing genuine community participation and accountability.

Recommendation 3: The NSW government should give further consideration to the proposed Objects and preamble recommended by the Independent Planning Review Panel.

Recommendation 4: The new planning system must specifically acknowledge and provide for Aboriginal peoples in engagement and participation mechanisms.

Recommendation 5: The NSW Government must identify and provide resources, expertise, and training to ensure that consultation is conducted effectively.

Recommendation 6: The new planning system must be supported by funding and resources for building capacity in Aboriginal communities and specifically LALCs to understand new planning laws and engage in planning systems and decisions.

Recommendation 7: NSWALC, Local Aboriginal Land Councils and Aboriginal peoples must be included in the list of “*community and key stakeholders*” in the new planning system as identified on page 21 of the Green Paper.

Recommendation 8: Aboriginal Land Councils should be represented on all Regional Planning Boards.

Recommendation 9: Aboriginal Land Councils and Aboriginal communities should be specifically identified as key stakeholders to be consulted in the making of state planning policies, Regional Growth Plans, Subregional Delivery plans and Local Land Use Plans.

Recommendation 10: Aboriginal Land Councils and Aboriginal communities should be specifically represented on Independent panels.

Recommendation 11: That the Public Participation Charter:

1. Be enshrined in legislation,
2. Incorporate clear and enforceable elements and best practice minimum standards to allow governments, proponents and communities to implement the Charter,
3. Specifically recognise and provide for Aboriginal peoples in line with principles outlined in the United Nations *Declaration on the Rights of Indigenous Peoples*.

Recommendation 12: Planning policies and instruments, including regional growth plans, sub-regional delivery plans and Local Land Use Plans should include objectives and mechanisms to provide opportunities for Local Aboriginal Land Councils to unlock the economic development potential of their

lands through a coordinated approach between local government authorities and in partnership with Local Aboriginal Land Councils.

Recommendation 13: Strategic planning initiatives must not undermine the compensatory mechanisms of the ALRA. The ALRA is the only form of compensation given to Aboriginal peoples in NSW as a result of dispossession. Local Aboriginal Land Councils must be engaged in strategic planning initiatives.

Recommendation 14: That a clear response is provided from the NSW Government in respect to how the NSW Planning System will protect and manage Aboriginal culture and heritage.

Recommendation 15: That legislation is enacted to enable Aboriginal peoples and relevant planning authorities to consider, maintain and protect Aboriginal heritage in planning processes.

Recommendation 16: That the new planning laws require planning authorities and local councils to publicly report regularly on the actions they have taken to protect and promote Aboriginal heritage.

Recommendation 17: In consultation with local Aboriginal communities, including Aboriginal Land Councils, planning instruments include Aboriginal heritage where appropriate.

Recommendation 18: That further consideration is given to NSWALC's previous submissions to the Planning Review and that actions are undertaken in relation to NSWALC's previous recommendations in respect to Aboriginal heritage.

Recommendation 19: That the NSW Government further consider the recommendations made by the Independent Planning Review in reference to former Aboriginal missions and reserves in consultation with NSWALC.

Recommendation 20: That an amended process in respect to bringing former Aboriginal missions and reserves into the NSW Planning System is developed by NSWALC and the Department of Planning and Infrastructure and other relevant stakeholders.

Recommendation 21: The new planning system's aim of 'improving people's quality of life' should include the quality of life of the Aboriginal people living on former Reserves and Missions across NSW.

Recommendation 22: Land use zones for former Reserves and Mission sites should acknowledge the existing development (which in the majority of cases includes residential dwellings and some minor ancillary development to support existing residential uses).

Recommendation 23: Land use zones for former Reserves and Mission sites should facilitate the formalisation of the existing development via subdivision should the membership of the owner-LALC wish to subdivide.

Recommendation 24: Contributions, infrastructure levies, development application charges and other fees should not apply to these settlements because they are existing and often predate the communities that now adjoin them. Subdivision of existing settlements should not attract contributions.

Recommendation 25: That NSWALC's previous submissions to the Independent Planning Review Panel are further considered in detail in the development of the White Paper and Draft Exposure Bill.

Recommendation 26: The White Paper outline clear timeframes for the development and implementation of new planning laws and associated instruments, regulations and policies, including any prioritisation of growth or other areas.

Recommendation 27: Clarification should be provided about what resources will be available to develop new plans, to what extent existing plans will inform any new plans, and opportunities for communities to have a say in these processes. Clarification should also be provided about the status of Strategic Regional Land Use Plans in a new planning system, and the program for Local Plans.

Recommendation 28: Consideration should be given to extending the timeframes for the consultation period for the White Paper and Draft Exposure Bill.

Objectives and purpose of planning laws

NSWALC is concerned that important goals and objectives for a new planning system have not been proposed for a new planning system. Throughout the Green Paper there appears to be a greater focus on facilitating development and encouraging economic growth, while other important elements such as sustainable development, and social and cultural considerations, are not adequately addressed. Furthermore, Aboriginal Land Councils and Aboriginal peoples are not recognised in the Green Paper.

The Green Paper states that *“The objectives of the [new planning] Act will emphasise in particular the role of planning in facilitating and managing growth and economic development”*.⁹ The apparent emphasis on economic considerations in favour of other considerations is reflected in the stated principles driving the reform of the NSW system which include:

- *“where a proposal meets agreed requirements there is presumption in favour of a right to develop”*, and
- *“individuals and markets are best placed to deliver diverse choices, vibrant communities and strong and sustainable economies”*.¹⁰

Although the Green Paper recognises the Independent Planning Review Panel’s recommendation that the new planning system should facilitate ‘triple bottom line’ outcomes, specifically, that the objects of the new Act be to *“provide an ecologically, economically and socially sustainable framework for land use planning and for development proposals assessment and determination,”*¹¹ the NSW Government proposals do not support this aim. The new planning system must provide for inclusive and representative participatory processes in order to develop community priorities and goals, which include the equal recognition of economic, cultural, environmental and social considerations.

Furthermore, the Independent Planning Review Panel proposed the following preamble to a new Sustainable Planning Act:

“The land and waters that comprise the State of New South Wales have had Aboriginal peoples and, more recently, people from diverse cultural backgrounds as the custodians. The land and waters incorporate a rich diversity of landforms and plant and animal life. The landscapes are diverse and beautiful and include landscapes of cultural significance to Aboriginal peoples. The land and waters have provided food, shelter and other material

⁹ See Green Paper at page 3. The Green Paper also states at page 17 that the purpose of the new planning system is to:

- promote economic development and competitiveness
- connect people and places
- protect the environment
- improve people’s quality of life
- resolve land use trade-offs based on social, economic and environmental factors
- effectively manage growth and change.

¹⁰ Green Paper, page 18.

¹¹ Independent Planning Review Panel Report: *Recommendations for the NSW Planning System*, Volume 1, page 37, available at: <http://www.planning.nsw.gov.au/a-new-planning-system-for-nsw>

support to their custodians throughout human occupation. That occupation and use has modified and had an impact on a wide range of those natural values.”¹²

This preamble recognises the unique status of Aboriginal peoples, and the importance of incorporating specific provisions for Aboriginal culture and heritage to facilitate positive outcomes for Aboriginal communities in a new planning system. The Objects for strategic planning proposed by the Independent Planning Review Panel also specifically recommend that sensitive areas, including Aboriginal cultural landscapes or sites and localities of heritage significance are to be identified as factors that may limit or prevent development from taking place.

NSWALC reminds the NSW Government of commitments made to Aboriginal peoples in NSW, including statements made by the NSW Premier to “*build real and effective linkages between State Government and Aboriginal communities, [and] put locally-driven solutions for economic and cultural empowerment front and centre.*”¹³ As such, NSWALC reiterates that the NSW Planning system must facilitate and promote the objectives of the *Aboriginal Land Rights Act 1983*.

Recommendation 1: NSWALC re-iterates that the objectives of a new planning system should:

- Facilitate the objectives of the *Aboriginal Land Rights Act*,
- Promote ongoing community participation in planning processes, and
- Protect Aboriginal culture and heritage.

Recommendation 2: That clear mechanisms be developed and enacted to achieve the above objectives in a new planning Act. All decisions, powers and functions of a new Act should implement the above objectives in addition to providing mechanisms for guaranteeing genuine community participation and accountability.

Recommendation 3: The NSW government should give further consideration to the proposed Objects and preamble recommended by the Independent Planning Review Panel.

Engagement, participation and consultation

The Green Paper proposes to “*engage*” communities early at the “strategic” planning stages in the setting of the overall planning outcomes for an area through the following:

1. A Public Participation Charter “*to require appropriate community participation to occur in plan making and development assessment*”,
2. More ‘e-planning’ tools, which essentially amounts to making planning information more accessible online,
3. Some very general statements are outlined that purport to engage communities early at the strategic planning stages in the setting of the overall planning outcomes for an area,
4. Making planning proposals in “plain English”,
5. Improving transparency in decision making by public tracking of decision making processes, and
6. Increased use of independent expert panels to make planning decisions.

Engagement and participation of communities in planning processes must not replicate the current outdated and illegitimate system of providing insufficient notification and information to

¹² Independent Planning Review Panel Report, Volume 2, page 98

¹³ Media Release, The Hon. Barry O’Farrell, Premier ‘Audit report shows labor failed Aboriginal communities’, Wednesday 18 May 2011, available at:

<http://www.daa.nsw.gov.au/news/files/AG%20Report%20Two%20Ways%20Together%2018.5.11ps.pdf>

communities and denying communities genuine opportunities to influence the outcomes of planning decisions. The proposals outlined in the Green Paper under the banner of 'Community and stakeholder engagement' appear to focus on providing information, rather than improving community engagement and participation in all levels of planning. Engagement and participation must allow communities to have their views heard and considered by decision-makers, and provide communities with evidence of how their input affected the decision.

Proposals to remove a number of community rights in relation to developments, including proposals that seek to substitute community engagement at the 'strategic' or sub-regional levels at the expense of community involvement at the development assessment stages are not supported. Such proposals fail to recognise the need for sustained community consultation throughout the life of a project, particularly where the impacts of that project are large.

Furthermore, a number of proposals are outlined in the Green Paper appear to undermine the ability of communities be genuinely engaged in planning decisions. This includes proposals to "deliver major projects sooner", "streamline approvals", and allow "speedy assessment" of development proposals.¹⁴ The Green Paper also states that development proposals which comply with certain standards cannot be refused, and proposes to limit appeals from citizens in this regard. Such proposals appear to hinder opportunities for communities to have a say about what happens in their area.

The Green Paper also includes proposals to replace a number of existing planning instruments with new tiers of 'strategic plans'. For example, Local Environmental Plans (LEPs) are proposed to be replaced with 'Local Land Use Plans' that will apparently focus more on a "strategic framework", and allow more "flexibility" in development controls and standards. NSWALC is concerned that this will limit people's ability to have a say on specific development proposals. Furthermore, as currently proposed, there is insufficient detail around such proposals to guarantee that communities will have any opportunities to influence how areas will be preserved or developed particularly if there are goals that appear to provide for a wide-range of activities to take place without assessment under the justification of 'flexibility'.

Such proposals do not address concerns about the lack of and poor community consultation, lack of transparency and accountability in decision making, and lack of proper protections for Aboriginal culture and heritage. While there are some brief proposals included that mention community participation and engagement, the details of these are largely unspecified and fall far short of meeting robust and best practice criteria.

At community consultations hosted by the Department of Planning and Infrastructure (**DoPI**) during August and September 2012 representatives from the Department agreed with community members present that not providing for community consultation after the strategic planning stage would be of major concern. NSWALC submits that a range of effective mechanisms to improve engagement and participation of communities has been canvassed in NSWALC's previous submissions and in the work of the Environmental Defender's Office, and provides the below additional comments.

The need for sustained community engagement and participation in a new planning system

While the Green Paper supports early community engagement no proposals are included to outline how this will be achieved in practice. Proposals to replace consultation on individual developments with consultation on 'strategic' initiatives are not supported.

¹⁴ Green Paper, page 48

There are currently low levels of community engagement and participation in planning issues, and community issues more broadly. In 2010, 44% of Australians aged over 18 identified that they had difficulty having a say in community issues that are important to them, similar to the rate reported in 2006 (46%).¹⁵ This is a significant statistic for the NSW Government to consider when looking at proposals that will further restrict the community's ability to have a say. It is clear that in order for community engagement and participation strategies to be successful a range of resources and mechanisms are required, and that specific efforts are needed to engage with Aboriginal communities.

NSWALC notes that the EDO, TEC and NCC have published a useful report focusing on best practice in public participation and community engagement strategies and makes a number of pragmatic and achievable recommendations to achieve this in a new planning system.¹⁶

Engagement with Aboriginal peoples

NSWALC is very concerned that the Green Paper fails to recognise Aboriginal peoples, and that engagement and participation of Aboriginal organisations and communities is not incorporated as an essential element of the new planning system.

The Green Paper highlights the need for '*new community driven approaches*' to community participation and the need to fund such participation. While this approach is broadly supported, as outlined in NSWALC's previous submissions, some LALCs and Aboriginal communities may need additional support to participate fully and effectively in planning processes. Furthermore, specific education and awareness strategies are needed to promote planning systems to LALCs and their members who may not be aware of the long term implications of decisions being made relating to their lands, in addition to lands that may be under claim or of cultural significance.

The new planning system must recognise that NSWALC and the LALCs are key stakeholders to be consulted as peak bodies representing the interests of Aboriginal peoples in NSW.

Furthermore, as outlined in previous submissions to the NSW Government,¹⁷ NSWALC's position is that consultation on culture and heritage matters must include as a minimum those organisations with statutory responsibilities for culture and heritage. These are:

- NSWALC and LALCs,
- Registered Native title claimants and holders, and NTSCORP,
- Aboriginal Owners and the Registrar of the *Aboriginal Land Rights Act*.

It is recommended that the NSW Government take into account that a number of jurisdictions overseas have recognised Indigenous Peoples in their planning laws and process. The New Zealand *Local Government Act* which forms part of New Zealand's planning legislation recognises and includes a number of provisions and minimum standards for government authorities to follow in respect to Maori. Specifically, New Zealand laws provide for specific consultation requirements for Maori to contribute to decision making processes, and for government authorities to facilitate participation

¹⁵ Australian Social Inclusion Board, Department of Prime Minister and Cabinet 2012, Social Inclusion in Australia '*How Australia is faring*', page 49

http://www.socialinclusion.gov.au/sites/www.socialinclusion.gov.au/files/publications/pdf/HAIF_report_final.pdf

¹⁶ 'Our Environment, Our Communities: Integrating environmental outcomes and community engagement in the NSW Planning System, 2012, Appendix 2, available at:

http://nccnsw.org.au/sites/default/files/Our_Environment_Our_Communities_0.pdf

¹⁷ See NSWALC and NTSCORP joint submission in response to the Reform of Aboriginal Culture and Heritage in NSW '*Our Culture in Our Hands*', December 2011

by Maori in decision making. The below provisions are replicated to demonstrate that other jurisdictions have recognised Indigenous peoples in planning laws.

Under s 81(1) New Zealand *Local Government Act*, every local authority must:

- (a) establish and maintain processes to provide opportunities for Maori to contribute to the decision-making processes of the local authority; and*
- (b) consider ways in which it may foster the development of Maori capacity to contribute to the decision-making processes of the local authority; and*
- (c) provide relevant information to Maori.*

Furthermore where a local authority is assessing options, if the decision is significant that involves land or a body of water, the authority is to “take into account the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu [sacred sites], valued flora and fauna, and other taonga” (s 77).

The New Zealand *Local Government Act* recognises that it is the Crown’s duty to address substantive issues of importance to Maori, with the role of local government to facilitate participation generally, and to involve Maori in decisions of local concern.

Public Participation Charter

The Green Paper proposes the establishment of a Public Participation Charter ‘to require appropriate community participation to occur in plan making and development assessment’.¹⁸ It would be expected that this Charter would accommodate recommendations previously made by NSWALC in respect to participation of LALCs and Aboriginal peoples in the planning process, and as such the NSW Government is referred to these submissions. The Public Participation Charter must consider that each LALC has varying levels of resources available to be involved in the plan making process.

It is recommended that “best practice principles of consultation or public participation” must be embedded in legislation with provisions that operationalise and require reporting to promote compliance with the principles or Charter. If there are concerns about need for flexibility then the Charter could provide for a best practice minimum standard to be followed, and any divergence from those provisions would need to demonstrate that at least those best practice principles have been complied with.

The Public Participation Charter:

1. Must be enshrined in legislation,
2. Must incorporate clear and enforceable elements and best practice minimum standards to allow governments, proponents and communities to implement the Charter,
3. Must specifically recognise and provide for Aboriginal peoples.

The NSW Government is referred to the United Nations *Declaration on the Rights of Indigenous Peoples* for guidance on principles that should be reflected in any participation and engagement mechanisms with Aboriginal peoples.

Access to information, development of plain English guides and e-planning

The Independent Planning Review Panel made a number of recommendations in respect to increased utilisation of online resources to assist community engagement in planning, including the establishment of an online planning portal, more spatial information to be publicly available, electronic registers, a proposed Spatial Information Act, and accelerating the upgrade of the

¹⁸ Green Paper, page 19

cadastre database.¹⁹ We also note the Review Panel has stated that “*the planning system should not regard informing the community as a passive process – it needs to be an active and dynamic one reaching out rather than on relying on those who are interested to hunt for and find information on topics they wish to be engaged in*”.²⁰

The increased focus of utilising technology to engage with communities is supported, however, this should not be at the expense of other forms of communication and engagement which must include:

- Face-to-face meetings and workshops,
- Letters to households, neighbours, interested groups, key stakeholders including Aboriginal Land Councils and affected parties, and
- Advertisements in newspapers.

The Independent Planning Review Panel has also made recommendations in respect to the development of plain English guides.²¹ This recommendation has been reflected in the Green Paper. 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. Funds should be provided to deliver workshops Aboriginal communities on the content of the guides.

Regional Planning Boards

The Green Paper proposes the establishment of Regional Planning Boards to advise on regional and subregional strategic plan-making, infrastructure and planning issues.²² It is proposed that the Regional Planning Boards will be comprised of an independent local chair, key stakeholders with relevant experience, representatives of local government and ex-officio NSW government representatives.

It is noted that the majority of decisions regarding land use and zoning are currently proposed to be made in the strategic stages of the planning system.

NSWALC recommends that Aboriginal Land Councils be represented on Regional Planning Boards in recognition of the range of experience, functions and responsibilities in respect to land, community, economic development and culture and heritage issues. This will provide for the views and inputs of Aboriginal peoples at this critical stage of the plan making process. However, involvement of Aboriginal peoples on government boards must not be a substitute for genuine engagement and participation of Aboriginal Land Councils and Aboriginal peoples in planning.

Resourcing community participation and engagement

The Independent Planning Review Panel recommended that a fundamental change in attitude is required by government planning staff at all levels.²³ The Review Panel has recommended that professional development for planning practitioners in engaging with the community is required, particularly in assisting communities with the right to know.

NSWALC submits that there is a need for funding and government agencies to facilitate participation, and that this must be done in close consultation with Aboriginal organizations to

¹⁹ Independent Planning Review Panel, recommendations include 132-140 (Volume 1) and 210 (Volume 2)

²⁰ Independent Planning Review Panel, Volume 2, page 122

²¹ Independent Planning Review Panel, Volume 1, Recommendations 141 and 142

²² Green Paper, page 86

²³ Independent Planning Review Panel, Volume 1, Volume 2, recommendation 207

ensure that engagement and participation mechanisms are culturally appropriate and meet the needs of Aboriginal communities.

Recommendation 4: The new planning system must specifically acknowledge and provide for Aboriginal peoples in engagement and participation mechanisms.

Recommendation 5: The NSW Government must identify and provide resources, expertise, and training to ensure that consultation is conducted effectively.

Recommendation 6: The new planning system must be supported by funding and resources for building capacity in Aboriginal communities and specifically LALCs to understand new planning laws and engage in planning systems and decisions.

Recommendation 7: NSWALC, Local Aboriginal Land Councils and Aboriginal peoples must be included in the list of “*community and key stakeholders*” in the new planning system as identified on page 21 of the Green Paper.

Recommendation 8: Aboriginal Land Councils should be represented on all Regional Planning Boards.

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Recommendation 10: Aboriginal Land Councils and Aboriginal communities should be specifically represented on Independent panels.

Recommendation 11: That the Public Participation Charter:

4. Be enshrined in legislation,
5. Incorporate clear and enforceable elements and best practice minimum standards to allow governments, proponents and communities to implement the Charter,
6. Specifically recognise and provide for Aboriginal peoples in line with principles outlined in the United Nations *Declaration on the Rights of Indigenous Peoples*.

Economic development of Aboriginal lands

The focus on the Green Paper on more strategic and regional initiatives may offer some positive options for better coordinating initiatives across local government boundaries. As highlighted in NSWALC’s previous submissions, Aboriginal Land Councils in NSW are often large land owners within an area, and often Aboriginal Land Council boundaries cross several Local Government boundaries. While NSWALC’s previous submissions have highlighted issues regarding Local Governments and planning authorities tending to view Aboriginal Land Council lands as quasi conservation lands, NSWALC reminds the NSW Government that Aboriginal people’s interests in land are broader than environmental issues alone, and include goal to attain, manage and develop lands for cultural, economic and social purposes as determined by local Aboriginal communities.

The Overcoming Indigenous Disadvantage Report 2011 specifically highlights that Aboriginal peoples obtain a range of economic, social and cultural benefits from land,²⁴ 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.”

As recommended above, NSWALC sees LALCs as a key stakeholder for both local and state government authorities when planning for future land uses.

NSWALC contends that new planning policies and instruments, including regional growth plans, sub-regional delivery plans and Local Land Use Plans should include objectives and mechanisms to provide opportunities for LALCs to unlock the economic development potential of their lands through a coordinated approach between local government authorities and in partnership with LALCs. The NSW Government must promote local governments and regional planning authorities to partner with Aboriginal Land Councils and Aboriginal communities when planning for future land uses.

It is important to highlight for the NSW Government the important issue of Aboriginal Land Claims. Aboriginal Land Councils can make a claim to Crown land in NSW under section 36 of the *Aboriginal Land Rights Act*. Aboriginal land claims are the sole form of compensation available to compensate Aboriginal people for the past dispossession of their lands. At present, there are over 26,000 undetermined Aboriginal land claims to Crown land, many of which are several years old. NSWALC is working with Government to address this backlog, however, pending resolution of the backlog NSWALC wishes to ensure the rights under those undetermined land claims are protected. Where strategic initiatives are proposed it is recommended that LALCs are engaged and consulted early on to ensure that LALCs future interests in lands are not undermined.

Recommendation 12: Planning policies and instruments, including regional growth plans, sub-regional delivery plans and Local Land Use Plans should include objectives and mechanisms to provide opportunities for Local Aboriginal Land Councils to unlock the economic development potential of their lands through a coordinated approach between local government authorities and in partnership with Local Aboriginal Land Councils.

Recommendation 13: Strategic planning initiatives must not undermine the compensatory mechanisms of the ALRA. The ALRA is the only form of compensation given to Aboriginal peoples in NSW as a result of dispossession. Local Aboriginal Land Councils must be engaged in strategic planning initiatives.

Aboriginal Culture and Heritage

NSWALC is concerned that the Green Paper does not specifically mention Aboriginal Culture and Heritage, and makes only brief mention of heritage issues generally. Furthermore, it is of significant concern that the NSW Government has failed to provide clarity on its direction for heritage management in NSW, and that key recommendations made in our previous submissions appear to have been overlooked. It is hoped that this issue will be rectified in the White Paper and Draft Exposure Bill.

²⁴ 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

In addition, the NSW Government has been silent on how the current reform of Aboriginal culture and heritage laws will interact with planning processes. As outlined in previous submissions the planning system offers both significant opportunities to protect Aboriginal heritage in addition to destroying Aboriginal heritage. NSWALC seeks a response from the NSW Government specifically in regards the interaction of the Planning System Review with the review of Aboriginal Culture and Heritage laws being undertaken by the NSW Office of Environment and Heritage (OEH) and the Aboriginal Culture and Heritage Working Party.

Also of concern are proposals to remove concurrences as it is often only at the local level that the details of specific projects become apparent and can be addressed, including in relation to Aboriginal heritage.

A fundamental re-think is needed into how the proposed new planning system will work in practice to deliver outcomes for the Aboriginal community and Aboriginal heritage. Furthermore, proposals to allow certain developments to proceed where they comply with pre-approved building envelopes and standards, and switching off the need to obtain approvals from other government departments are not supported.

One of the stated goals for the Aboriginal culture and heritage reform relates to linking Aboriginal culture and heritage protection with planning processes. However, at this stage the Planning Green Paper does not specifically refer to protecting Aboriginal culture and heritage and does not provide detailed information or proposals about how heritage issues generally will be managed or addressed in new planning laws. The only proposal that specifically refers to heritage protections generally relates to the establishment of an online planning portal that will provide users with access to spatial datasets, which will include heritage items and areas.

It is of concern that some Department of Planning and Infrastructure representatives present at the most recent round of community consultations did not appear to understand the purpose of the *Heritage Act*. NSWALC wishes to highlight that the *Heritage Act 1977* (NSW) only provides very narrow protections to limited items/areas of heritage significance that must meet strict criteria. Currently there are only approximately 1623 items listed and protected under the State Heritage Register. As such, the *Heritage Act* in its current form and implementation does effectively protect the majority of Aboriginal heritage in NSW. There are only 20 items listed for their Aboriginal heritage values on state heritage register, while there are more than 60,000 Aboriginal heritage items listed on the NSW Government's Aboriginal Heritage Information Management System (AHIMS).

A number of the Independent Planning Review Panel's recommendations in respect to Aboriginal heritage broadly supported recommendations made by NSWALC. NSWALC recommends that the NSW Government give further consideration to the below recommendations:

*Recommendation 8 – **Objects of the proposed Sustainable Planning Act** to identify sensitive areas containing factors (or likely to) that will limit or prevent development taking place – significant landscapes or features, including Aboriginal cultural landscapes or sites, and item of likely or known heritage significance, among others.*

*Recommendation 19 – **Objects for the preparation of Local Land Use Plans** are to identify specific sensitive areas where there are known limitations on development including Aboriginal cultural landscapes or sites, among others.*

Recommendation 72 – Matters to be taken into account in determining a development application are to include Aboriginal heritage, among others.

Recommendation 130 (Volume 2) – Independent Hearing and Assessment Panels to include Aboriginal cultural heritage as an area of expertise.

As canvassed within NSWALC's previous submissions, there is a great need for cumulative impact assessments for Aboriginal heritage to be undertaken for all developments, and mechanisms to refuse developments on this basis must be incorporated. NSWALC notes that the Independent Planning Review Panel made the following recommendations:

Recommendation 12: *Strategic planning processes are to investigate the cumulative impacts of presently operating and approved development, both within and outside the footprint of the strategic planning area, which are contributing directly to impacts within the strategic planning area.*

Recommendation 13: *In the designation of areas for future development, the processes are to take into account the potential to add to the existing and likely future cumulative impacts within that strategic planning footprint.*

Recommendation 73: *The assessment process for merit assessable development proposals and all types of impact assessable development proposals is to consider whether there will be any unacceptable cumulative impact, if the proposed development were to be approved, having regard to impacts that arise from existing or approved developments.²⁵*

Recommendation 14: That a clear response is provided from the NSW Government in respect to how the NSW Planning System will protect and manage Aboriginal culture and heritage.

Recommendation 15: That legislation is enacted to enable Aboriginal peoples and relevant planning authorities to consider, maintain and protect Aboriginal heritage in planning processes.

Recommendation 16: That the new planning laws require planning authorities and local councils to publicly report regularly on the actions they have taken to protect and promote Aboriginal heritage.

Recommendation 17: In consultation with local Aboriginal communities, including Aboriginal Land Councils, planning instruments include Aboriginal heritage where appropriate.

Recommendation 18: That further consideration is given to NSWALC's previous submissions to the Planning Review and that actions are undertaken in relation to NSWALC's previous recommendations in respect to Aboriginal heritage.

Former Aboriginal Missions and Reserves

There are 59 former Aboriginal Reserves and Missions in NSW. NSWALC's previous submissions have outlined the history of these areas and the current difficulties in incorporating these sites into the planning system. The Planning Review Panel has acknowledged that "*dealing with these former reserves and missions is a fundamental **issue of social justice** for the Aboriginal people generally and for the Aboriginal communities living on or associated with these sites in particular*".²⁶

²⁵ Independent Planning Review Panel Report, Volume 1

²⁶ Independent Planning Review Panel, Volume 2, page 119

It is noted that while issues relating to former Reserves and Missions were raised in Independent planning Review Panel reports, they are not specifically mentioned in the Green Paper. NSWALC expects that these will be further considered by the NSW Government during the next stages of the review process and in the interim.

NSWALC acknowledges the finalisation and successful implementation of the new planning system in NSW may take several years. Gaps in the quality of life of Aboriginal people are evident on former Reserves and Missions and therefore they cannot afford such a timeframe. As such, given the likely timeframes of the implementation of the new planning system are years, it may be possible to implement an alternate approach before the new planning Act is finalised.

The issue of recognising existing settlements relates to a specific and quantifiable number of sites and each has been clearly identified and documented by NSWALC. All former reserves and missions contain existing residential settlements with some complimentary uses such as community facilities, and have been in existence for a significant period of time. The process of formalising these settlements should consider these sites as a legacy issue.

Formal acknowledgement of these settlements within the new (and existing) planning system must occur. NSWALC believes this acknowledgement must include:

- Acknowledgement of existing development (which in the majority of cases includes residential dwellings and some minor ancillary development to support existing residential uses) via formal Land use zones;
- Land use zones for former Reserves and Mission sites should enable the formalisation of the existing development via subdivision should the owner, the LALC, wish to subdivide;
- Contributions, infrastructure levies, development application charges and other fees should not apply to these settlements because they are existing and often predate the communities that now adjoin them. Subdivision of existing settlements should not attract contributions as it will not in any way intensify use.

The recommendations made by the Independent Planning Review Panel in respect to former Aboriginal missions and reserves²⁷ are broadly supported particularly that a specific approach is needed that must be undertaken in partnership with NSWALC and LALCs, and that no fees should be charged.

NSWALC seeks further discussion with the Department of Planning and Infrastructure regarding the recommendations made by the Independent Planning Review Panel and wishes to propose some amendments to the process proposed by the Planning Review Panel to ensure that the process is equitable, efficient and is capable of achieving the best possible outcomes for Aboriginal peoples.

The amended process should be prepared by NSWALC and DoPI and in consultation with the Subdivision Steering Committee (of which DoPI is a member). The alternate process should:

- Be simple, bearing in mind its aim to formalise development that is already there,
- Be uniform across the state, as the aim is common to all former Reserves and Missions sites,
- Be able to identify and apply a land use zone that recognises what currently exists, and
- Identify ways to overcome barriers imposed by the existing system such as the cost of upgrading infrastructure to local standards and contributions imposed on LALCs.

²⁷ Independent Planning Review Panel Report, Volume 2, Part 11, pages 119-121

NSWALC notes that the Queensland Government has addressed similar issues via a temporary State Planning Policy implemented for reconfiguration of a Lot Code for Land in Indigenous Local Government Areas.²⁸ The policy was only valid for a short period of time, creating the incentives for all those involved to work together to address the issues efficiently and effectively. While there are significant differences in the nature and circumstances of the Queensland Indigenous Local Government Areas and the NSW former Reserves and Missions, the implementation of a state wide approach with a fixed timeframe recognised the importance of these lands to Aboriginal people and recognised that the matter needed to be addressed outside of local planning.

NSWALC also notes that Change 18 of the Green Paper outlines new principles for infrastructure levies. Some of these principles should not apply to former Reserves and Missions:

- ‘Beneficiary pays’ principle assumes that the beneficiary, the LALC and residents of former Reserves and Missions, contribute to the cost of the provision of infrastructure to these sites. NSWALC believes this is inherently unfair given the history of these sites which has been detailed in previous NSWALC submission.
- ‘Cost reflectivity’ principle assumes that levies should reflect ‘*at least some of*’ the cost of the higher provision of infrastructure in some areas. NSWALC believes this principle should not apply for the reasons above as well as the fact that many sites are located in marginal land.

Recommendation 19: That the NSW Government further consider the recommendations made by the Independent Planning Review in reference to former Aboriginal missions and reserves in consultation with NSWALC.

Recommendation 20: That an amended process in respect to bringing former Aboriginal missions and reserves into the NSW Planning System is developed by NSWALC and the Department of Planning and Infrastructure and other relevant stakeholders.

Recommendation 21: The new planning system’s aim of ‘improving people’s quality of life’ should include the quality of life of the Aboriginal people living on former Reserves and Missions across NSW.

Recommendation 22: Land use zones for former Reserves and Mission sites should acknowledge the existing development (which in the majority of cases includes residential dwellings and some minor ancillary development to support existing residential uses).

Recommendation 23: Land use zones for former Reserves and Mission sites should facilitate the formalisation of the existing development via subdivision should the membership of the owner-LALC wish to subdivide.

Recommendation 24: Contributions, infrastructure levies, development application charges and other fees should not apply to these settlements because they are existing and often predate the communities that now adjoin them. Subdivision of existing settlements should not attract contributions.

Timeframes

The Green Paper sets out a timeframe for the release of the White Paper and the Exposure Bill for later in 2012, however, no clear timeframes are proposed for bringing the new planning Act into

²⁸ QLD State Planning Policy 1/09 Reconfiguration of a Lot Code for Land in Indigenous Local Government Areas to which a Local Planning Scheme does not Apply.

force, or for the preparation of planning policies, Regional Growth Plans, Subregional Delivery Plans and Local Land Use Plans.

The White Paper should include clear timeframes for both bringing the new planning Act into force and for the preparation of planning policies and plans.

Furthermore, the NSW Government should consider that the timeframe for introducing new legislation into NSW Parliament by early 2013 is very short, particularly given that the release of the White Paper and Draft Exposure Bill are due during the time of year when many businesses and organisations close down.

Recommendation 25: That NSWALC's previous submissions to the Independent Planning Review Panel are further considered in detail in the development of the White Paper and Draft Exposure Bill.

Recommendation 26: The White Paper outline clear timeframes for the development and implementation of new planning laws and associated instruments, regulations and policies, including any prioritisation of growth or other areas.

Recommendation 27: Clarification should be provided about what resources will be available to develop new plans, to what extent existing plans will inform any new plans, and opportunities for communities to have a say in these processes. Clarification should also be provided about the status of Strategic Regional Land Use Plans in a new planning system, and the program for Local Plans.

Recommendation 28: Consideration should be given to extending the timeframes for the consultation period for the White Paper and Draft Exposure Bill.

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.