18 July 2016

Alison Frame  
Deputy Secretary, Policy and Strategy  
Department of Planning & Environment  
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Dear Alison,

PIA SUBMISSION TO ENVIRONMENTAL PLANNING AND ASSESSMENT ACT UPDATES - 2016

As you will be aware, PIA has championed the cause of fundamental reform of the NSW planning system in recent years. We congratulate the Minister and the Department for the initiatives already implemented to improve the planning system, whilst also recognising that the reform process is still far from complete. We therefore welcome the opportunity to provide further input to the current round of reform initiatives.

PIA understands that a draft exposure Bill encompassing proposed reforms is to be released in the near future and PIA looks forward to reviewing and responding to that. However, in advance of that more formal process, we wish to outline the following principles that may influence the form and content of the Bill and other reform elements that go beyond the immediately proposed legislative changes.

SUMMARY OF PIA’S KEY REFORM PRIORITIES

PIA supports the Government’s incremental approach to reform, commencing with non-controversial measures from the earlier reform process. The ‘immediate’, short term reform priorities we consider to be as follows:

Strategic and Statutory Plans and Development Guidelines

- Comprehensive review of SEPPs to consolidate and to function as high level planning policy documents, not containing development control provisions;
- Standard LEPs, - incorporate, with consequent legal status, higher order strategic policies and principles, ALL development standards and some enhanced flexibility to local adaptability;
- Simplify statutory provisions and definitions;
- Reduce the need for lawyers in development categorisation and merit based decision making.

Development pathways and appeals
• Reduce development pathways and consolidate ALL pathways into one Part of the Act;
• LEPs to prescribe all development pathways, processes and consent authorities for each
development category.

Harness capability of e-planning
• For greater use in strategic planning – visualisation tools to enhance community
consultation;
• For monitoring and reporting on strategic plan implementation;
• For DA lodgement, assessment, tracking and performance assessment, including transparent
tracking of State agency referrals.

PIA urges the government to continue with progressive reform within an agreed framework for the
amended Act over the next (say) 2 – 4 years.

Strategic and Statutory Plans and Development Guidelines
• Introduce a template “Toolbox”, DCP that can be locally customised;
• Rename development “policies” or “guidelines” (not “control plans”)

Development pathways and appeals
• Introduce a toolbox of non-mandatory standard consent conditions, for State and local
agencies
• For Class 1 appeals not involving points of law, introduce within the Land and Environment
Court a system of inquisitorial proceedings before professional planners and allied
professionals to replace contested hearings involving lawyers

Infrastructure funding policy
• Introduce a holistic funding policy, (based on clear transparency and accountability
principles) addressing all current and potential mechanisms for a comprehensive system of
funding, including, SIC, Sec 94, VPAs, Value Capture, land tax, stamp duty etc
• Funding policy to have a direct link to Infrastructure Strategies and Plans at State, Regional,
District and local levels

A role for Registered Planners
• Mandate that PIA Registered Planners are to prepare complex SEEs (say >$10mil).
Precedents include biodiversity assessors and SEPP 65 architects and current South
Australian initiative
• Enable certification of “compliance with development standards”

Governance review
• Undertake a comprehensive, whole-of-government review of all agencies with a role in
planning and delivery

INTRODUCTION
PIA agrees that the current planning reforms, which were broadly supported in the Planning Bill 2013 should as far as practicable be implemented in the current reform round, although there may be some that could be better fashioned than they were in that Bill.

We accept the Government’s approach of a progressive and politically pragmatic reform agenda that builds on the agreements reached in the previous reform process and to clearly identify those elements that will not be revisited, such as the ESD definition and code assessment.

However, PIA also believes that the Government should not shy away from necessary reforms simply because they may generate some controversy. Our concern is that in order not to ‘ruffle any feathers’, changes may be too timid and ineffectual in realising the full degree of reform needed to give the State the efficient and effective planning system it desperately requires.

In our opinion, nothing should be ‘off the table’ in terms of the review and reform of the planning system. In saying this however, we do not wish to see a ‘baby and the bath water’ situation, where any meaningful reform is abandoned in the face of objections to some individual issues.

As such, PIA agrees that the Government takes an incremental approach to reform, and we therefore suggested the following approach to a progressive ‘reform rollout’ described an earlier PIA submission:

“PIA believes that reforms should be initially targeted to a few high priority issues to avoid resources being ineffectually dissipated across too many fronts. Whilst all areas need to be ultimately addressed, it may be beneficial to take an incremental approach to the ‘reform rollout’. This should not be read as leaving comprehensive reform to the ‘never, never’ but rather working to say a 5 year reform program where the most important issues are prioritised and implemented in a carefully considered and consultative manner before moving to lower priority areas.

As a means of determining what are the priority reform areas, consideration should be focused on outcomes rather than processes. PIA considers the foremost of these priorities for planning in NSW are improving housing supply and affordability and effective use of existing infrastructure and timely delivery of new infrastructure.”

In undertaking a ‘staged’ approach to reform, it is important that we do not see a repeat of attempts at ‘reform’ in earlier decades, which involved making a series of ad hoc amendments to the Act, often involving adding new sections over the top of old ones. This simply led to the current ‘bastardisation’ of what was initially a simple, streamlined and effective enabling Act in its original 1980 form.

We believe therefore that from the outset it is important to establish a simple and logical structure to the Act, which is adhered to and populated as the reforms are progressively rolled out. In this regard, we consider the current Act (more in its 1980 form) provides a generally sound structural basis and requires only relatively minor adjustment, as recommended in the following table:

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In the process of reviewing each element of the Act, PIA recommends that the Government applies a ‘purposive test’ on each and every provision; identify which provisions are necessary and which are not; repealing those that are not and refining those with a purpose to ensure their form and content are as simple and understandable as possible.

**RESPONSE TO SPECIFIC REFORM INITIATIVES**

The recently released “EPAA Updates 2016” paper contains a list under the heading “Progressing some of the remaining elements of the 2013 Bill”. We will use these elements as the basis for this submission, with reference to our submissions to the previous planning reform stages, since we believe the principles for reform have changed little since we first started calling for it in 2011.

**Community engagement: establish a new part of the Act that consolidates community consultation provisions and requires decision makers to give reasons for their decisions**
PIA response:

PIA strongly supports the need for improved statutory and non-statutory mechanisms to enhance public engagement across all aspects of planning and implementation under the Act. However PIA is not supportive of a new dedicated section of the Act dealing with community participation, since we are concerned that this appears to approach community participation as an end in itself, rather than as an essential element of the substantive parts of the Act. That is, community participation is an essential element of the strategic planning and the formulation of planning instruments (current Part 3 & 3A), but also remains important for development and environmental assessment (Current Part 4 & 5). We do not see benefit in disengaging the public participation processes and procedures of these activities from the other processes and procedures relating to the same activities. Creating a new, separate section appears aimed more at increasing the ‘perception’ of the importance of public participation under the Act, rather than achieving any specific procedural improvements that would not be gained by having the same provisions in the various relevant parts of the Act.

Strategic Planning

Further on this point, we note that the Updates Paper has “strategic planning” under the heading “achievements to date”, and refers to the Greater Sydney Commission Act and the hierarchy of State, Regional and District Plans. PIA supports these initiatives, but recommends that Part 3B is incorporated into Part 3, so that the hierarchy of strategic plans is made much clearer, enabling a clear ‘line of sight’ in the statutory frameworks (as well as hopefully the policy content of the instruments) from State Policies, Regional Plans, District Plans, Local Plans and Development Guidelines.

There is still a major gap in terms of local strategic planning driving local outcomes. Most standard LEPs were “conversions”. Local strategic plans need to be given legal status – through implementing LEPs.

In previous submissions PIA provided details on how this hierarchy of plans should operate. Following is an excerpt from a previous PIA submission (with minor amendment relating to more recent terminology such as “District” in place of “sub-regional”) which still remains largely relevant.

State Policies

PIA believes that the current array of SEPPs should be reduced to a single or small number covering key issues of genuine State planning significance as outlined in the White Paper, where they are described as “Planning Policies”.

Amalgamating and rationalising the key policy content of SEPPs into the NSW Planning Policies is seen as a critical reform. This document should ideally receive (‘whole of government’) endorsement so that the plans and policies of all public infrastructure agencies are consistent with NSW Planning Policies.

NSW Planning Policies were proposed under the White Paper to form a suite of policies dealing with a range of issues (e.g. employment, housing etc.). These State Planning Policies were to be given effect in all relevant plans (regional, district and local).
There is no reason why these NSW Planning Policies cannot be prepared now as plain English documents and then be given effect through ‘lower order EPIs and relevant section 117 directions.

This proposal would be given effect through repealing all current SEPPs, transferring the high level policy principles to State Policies and transferring all development control parts of the SEPPs into the LEP standard instrument. This includes the development control provisions of Growth Centres SEPP, Major Projects SEPP, Infrastructure SEPP, Seniors Housing SEPP, Codes SEPP and the like. There will need to be different standard instruments tailored for the specific needs of the particular LGA (e.g. the standard instrument for Liverpool would contain applicable parts of the Growth Centres SEPP that would not be applied in other area’s LEPs).

2016 Update: PIA notes the statement in the Updates Paper that the Government is not proposing to remove SEPPs. Whilst our submission above refers to replacing SEPPs with State Policies, we are not committed to any form of nomenclature and consider the principles described in that submission can equally be realised under the current or a slightly refined version of SEPPs under the revised Act.

Regional and District Planning

It remains vitally important for State, regional, district and local infrastructure planning and delivery to be informed by and linked to State, regional and district planning policies. Regional Infrastructure Plans and Local Infrastructure Plans do not need to be statutory instruments but can and should be mandated guidelines to be considered in plan making under Section 117 Directions or some other statutory mechanism.

2016 Update: We acknowledge and welcome the fact that such a link has been incorporated in Part 3B of the current Act.

The Regional Plans and draft Regional Plans exhibited and adopted in the last year are major improvements compared to their predecessors. However, they are generally still in need of improvements in terms of governance, the “tangibility” of actions, real connection with local planning and integration of infrastructure planning and funding.

Local Planning

The White Paper envisaged a consistent form of Local Plan which gave effect to the relevant plans sitting above it (district, regional and State Planning Policies). The Local Plan was required to set out how the Local Plan responded to and addressed these issues.

The use of Standard Template LEP and Order provide for a consistent means of preparing LEPs. This could include the requirement for LEPs to clearly set the strategic planning context and how an LEP responds to higher order plans.

A key element of the White Paper was the recognition that plans should be evidenced based and should be regularly reviewed. Both these laudable and necessary requirements could be achieved through the use of the Standard Template Order and section 117 directions. Councils are already bound to review their LEPs on a regular basis (section 73 of the EP&A Act). This obligation should be more readily enforced through the making of a section 117
direction which requires Councils to regularly review and report the LEPs performance to the Secretary of the Department.

The LEP could include detailed, precinct or street block level planning to identify parameters for complying development on identified parcels of land. This could apply to green-fields sites or existing urban areas. There would be no need for the detailed exclusions currently in the Codes SEPP for this type of complying development because all constraints would be sifted out of the process at the strategic assessment stage.

The review of metro LEPs and DCPs to identify and remove unnecessary impediments to infill housing supply as proposed by the affordable housing taskforce (established by the former Planning Minister) is an urgent priority that should be commenced immediately.

2016 Update: Whilst Part 3B of the Act requires LEPs to give effect to higher order strategic plans, more strategic planning – with statutory status conferred on strategic planning by the implementing LEP is a critical need. Most current LEPs were conversions and lacking in the foundation of evidence-based planning.

Strategic planning summary

Under our suggested approach there would be a strategic planning hierarchy similar to that outlined in the White Paper, comprising:

SEPPs - State Policies: Topic or sector based policies on major issues such as housing, employment etc., containing no ‘development controls’ but specifying matters to be incorporated into lower order policies;

Regional and District Plans: Spatially based land use plans giving effect to State Policies within specified regions or districts of the State, containing no ‘development controls’ but specifying matters to be incorporated into LEPs.

LEPs: Standard instruments incorporating State and District policy prescriptions and containing all ‘development controls’ affecting development in the local area.

DCPs: Standard instrument DCPs should be considered to provide consistency of form and structure of such guidelines across the State, however should be able to be customised by local authorities within these structures to suit local circumstances.

Regular review of all strategic and statutory plans is supported as essential. All strategic and statutory plans, State, regional, district and local, should be aligned so that there is a ‘cascading’ review cycle, where lower order plans are constantly informed by higher order plans and vice versa.

Alignment with each Council’s Community Strategic Plan prepared via the Integrated Planning and Reporting Framework (IP&RF) under the Local Government Act is also considered appropriate. This would also enable associated planning policies such as the council Voluntary Planning Agreements (VPA) Policy to be aligned with the Community Strategic Plan prepared via the IP&RF. Currently VPAs are not aligned as VPA legislation predated the introduction of the IP&RF.

PIA considers that the local strategic plan, as an integral part of the Community Strategic Plan, should be a stand-alone document, but with its elements relevant to land use planning, referenced in the
LEP. This inclusion in the LEP will inform the assessment of development applications, particularly those that seek to significantly vary development standards and in the assessment of development applications against the objectives of the zone and the instrument.

In relation to DCPs, the formulation by the Government (in close consultation with local government) of a non-mandatory template DCP is supported by PIA. This would provide something of a “toolbox” of standard provisions that could be adopted by local governments, particularly those with limited resources, which could be customised to suit local conditions.

With the recent Council amalgamations and the accompanying road map for transition, local planning controls will be likely left alone until sometime post September 2017 elections and then the review would start with LEPs. In reality it might be the plethora of DCPs across amalgamating councils that may prove problematic for some time. The availability of a template DCP over this period should be of significant assistance, particularly to newly formed Councils, in this context. This would assist in the gradual standardisation of the form and content of DCPs across the State without affecting the ability of each Council to respond its own unique conditions.

PIA considers that the significant focus in Department of Planning and Environment on e-planning should enable the incorporation of template DCP provisions into the Planning Portal.

PIA considers that the term “development control plan” should be replaced with “development guidelines” to better reflect their statutory status (per Section 74BA of the Act). This terminology is also more encouraging of a mindset within consent authorities of facilitating good development through guidelines rather than “controlling” development through mandatory restrictions.

PIA considers that a rethink is also required of the tendency in DCPs and even the Government’s Apartment Design Guide, to seek to impose guidelines on virtually every conceivable element of development, particularly where they may relate to issues that could be discretionary and with little identifiable “planning purpose”. For example, the effective ‘obligation’ to have balconies of a minimum size is something that may be desirable, but may not be a high priority for some consumers who may not use them and would prefer the reduction in cost that may be gain from instead having a Juliette balcony, that afford equal light and ventilation. This, combined with a tendency for some consent authorities to treat “guidelines” as mandatory requirements, often leads to overly and unnecessarily complex and prolonged development assessments that add little planning benefit to the ultimate outcomes. A preferred approach would be to identify a lesser number of key quantitative guidelines that facilitate desired planning outcomes whilst leaving other matters that may be better left to consumer choice, to be expressed as qualitative principles.

Development pathways: clearly stating the different development pathways and consent authorities under the Act.

PIA Response

PIA strongly agrees with this principle.

Our position remains as outlined below in our submission to the White Paper dated June 2013, PIA expressed our concern that the exposure Bill still contained too many approval pathways, and suggested the following improvements:
We consider a much clearer and simpler structure than outlined in Section 1.13 of the Planning Bill (and which should be moved to Part 4 of the Bill), is as follows:

For the purposes of this Act, there are the following categories of development:

(a) exempt development (being development so declared by a local plan that is exempt from the assessment and approval requirements of this Act),

(b) complying development (being development so declared by a local plan that requires development consent under this Part by a consent authority or certifier),

(c) assessable development (being development requiring development consent under this Part) being the following:

(i) local development (being development so declared by a local plan that requires development consent from a local council),

(ii) regionally significant development (being development so declared by a local plan that requires development consent from a regional planning panel),

(iii) State significant development (being development so declared by a local plan or the Minister that requires development consent from the Minister),

(iv) State infrastructure development (being development so declared by a local plan or the Minister that requires development consent of the Minister),

(v) EIS assessed development (being development so declared by a local plan that requires development consent and an environmental impact statement before consent can be granted, and which gives objectors appeal rights in some cases),

Note. Some EIS assessed development may also be regionally or State significant development or infrastructure. Under the former Act, a similar category of development was called designated development.

This approach consolidated all assessment and approval ‘streams’, including Part 5, into a single part of the Act and through the Standard Instrument, identifies all development falling within the category and its associated consent authority within the Local Plan (whilst still allowing Ministerial declarations for development of regional or state importance).

Environmental assessment: clarifying and streamlining the environmental assessment provisions, including the incorporation of state significant infrastructure into Part 5 of the Act

PIA response

PIA agrees with this principle, however, as indicated above, we suggest the streamlining of environmental assessment provisions under the Act should be incorporated into one Part of the Act, rather than two or more.

Review and appeals: consolidating provisions into a single new part of the Act
PIA response:

PIA agrees with this proposal as a means of simplifying and streamlining the structure of Act.

PIA also suggests that serious consideration is given to enabling Class 1 appeals under the Land and Environment Court Act, not involving points of law, to be undertaken in a Tribunal setting before a non-legal professional on an inquisitorial basis, rather than the current adversarial ‘lawyer led’ system. This could still be undertaken under the auspices of the Land and Environment Court, with most past and current Commissioners having the requisite skills to preside over such proceedings.

PIA’s previous submission to the 2012/13 reforms outlined the following general principles in relation to appeals and reviews, which we consider remain relevant:

- current appeal and review rights in the EP&A Act to remain
- existing constraints on review applications under s82A to be expanded (see below)
- Appeals should be determined against the same policies and objective rules and tests as the original decision
- A right of appeal on the merits by a third party may be appropriate for development:
  - Where the risk of corruption is high;
  - That departs, significantly, from policy.
- Third party merit appeals should not be permitted where:
  - Discretion is limited (ie for development assessed against objective criteria);
  - Development has undergone a rigorous consultation process, such as a public enquiry, and the 3rd party did not make an objection at the public consultation stage;
  - The 3rd party is a trade competitor or has no interest affected by the decision.

Administration: standardising provisions relating to the administration of the Act, including those relating to the Minister, the Secretary, the PAC and other planning bodies.

PIA response:

PIA agrees with this proposal as a means of simplifying and streamlining the implementation of Act.

PIA considers the rationalisation of governance generally in the planning sphere is an essential element of planning reform in NSW. Whilst we believe a useful and important first step is the suggested rationalization and clarification of roles under the Act, we recommend that the subsequent tranche of review and reform should encompass a much more comprehensive and broader reaching governance review as described in previous PIA submissions.
The relationship of the Department of Planning and Environment and the Greater Sydney Commission is one requiring particular consideration, particularly in how areas of the State outside Sydney are administered relative to Sydney.

Language and accessibility: improving the structure and language of the Act so that it is easier to understand, follow and apply.

PIA response:

PIA strongly supports this principle. Indeed from PIA’s very first submissions in 2011 to the government’s planning reform agenda, PIA placed plain English and simplification of the Act and all subordinate instruments under that Act, as an “overarching principle” by which successful planning reform should be measured.

This was just one of several such “overarching principles” in our 2011 submissions and we consider that all of these principles remain very much relevant and bear repeating in the context of this latest round of proposed reforms.

- A logical structure and easily understood provisions;
- Meaningful objectives that the rest of the Act is geared towards achieving, not just a series of ‘motherhood’ statements;
- The ability to proactively and quickly respond to changing circumstances without endlessly changing the Act;
- Processes (for plan making, consultation, appeals, development assessment) the complexity of which is proportionate to the complexity of the issue;
- Roles and responsibilities of decision makers logically and clearly defined;
- Procedures that promote co-operative rather than adversarial decision making;
- Requirements for strategic plans that balance and properly integrate State and local, public and private interests and are accompanied by administrative and funding strategies that facilitate their achievement over time;
- Development decisions guided by those strategic plans rather than vice versa; and
- Development decisions based on merits rather than legalities, and outcomes rather than processes.

We are pleased to observe that several of the current round of Government proposals for reform align with our principles. The challenge will be to ensure that the provisions ultimately arising from this latest round of reforms genuinely give effect to the principles. We suggest that any initiatives that do arise are measured against these principles.

The Paper lists a number of “Further areas for consultation”. PIA makes the following submissions in relation to some of these:

Community engagement

PIA’s various submissions to the previous planning reforms address in detail the principles and methodology for community engagement and we refer the Department to those submissions.
As indicated above, PIA considers it is not necessary or desirable to dedicate a chapter to community participation in order to emphasise its importance. It is sufficient to identify community participation as an object of the Act to identify its importance. The current Act contains an object referring to community participation. That has been sufficient for the Courts to describe the right to participate in planning decisions as an “inviolable right”, meaning that the right to be consulted is paramount and cannot be taken away without express words to the contrary. This has been particularly relevant in cases challenging the validity of development consents in circumstances where public notification is not been properly carried out.

The community participation principles outlined by the Department are a combination of substantive and procedural principles. PIA considers that the substantive principles should be listed as objects of the Act. The procedural principles should be used as an in-house guide or touchstone in the formulation of the particular enabling provisions relating to community participation in the Act.

The right to be consulted as currently expressed in the objects of the Act is limited “to provide increased opportunity for public involvement and participation in environmental planning and assessment”. Of the principles listed in the PP slide PIA considers the following should be objects:

- The community has a right to be informed about planning matters that affect the community.
- The community should be given opportunities to participate in strategic planning as early as possible to enable community views to be genuinely considered.
- Community participation should be inclusive and planning authorities should actively seek views that are representative of the community.

**Local development**

Improved consultation around local development issues has merit but should not be a mandatory requirement. Even as non-mandatory it will be extremely difficult to administer, particularly if it were to be relied on or replace a more structured approach.

The on-going issue around consultation is how to better engage at the strategic level in a manner that gives a community confidence that the strategic framework in which they have become involved is solid. The Charter would provide a level of consistency across all consent authorities.

Concurrences and referrals remain problematic at both the strategic and local planning level. There is reluctance on the part of local council to determine an application or proceed with a Planning Proposal without the concurrence or comment from relevant agency stakeholders. Timeframes around referrals can be treated as a “guideline” with no recourse. Consistency in response from different state government departments is also problematic and often there can be confusion between a PP response and a response to a DA.

There is no overall system tracking of concurrences and referrals which enable consent authorities to track timeliness of response. To date, anecdotal evidence has indicated that delays are impacting consent authority decision-making. PIA considers that the e-planning portal should be utilised to record and track referrals to government agencies to improve transparency and performance.
In relation to Assessment Panels, whilst they may have some shortcomings, overwhelmingly, PIA supports the role of expert panels for applications, particularly those that involve a significant financial investment, are controversial or seek to vary development standards.

However, PIA believes that Panels should not determine small-scale local development applications, which should continue to be dealt with under staff delegated authority. Introducing a panel into that process will unnecessarily extend the assessment time frame for the 90+% of DAs that are minor or conforming.

Improving governance and review processes

PIA suggests an extension of the Section 82A review process to the following determinations:

- Integrated development.
- Those made by the Minister or a delegate of the Minister such as the department (reviewed by the Planning Assessment Commission (PAC)).
- Those by the PAC (reviewed by a differently constituted PAC).

PIA suggests that the Section 82A review process at Local Council level is undertaken only by Independent Hearing and Assessment Panels – which would operate under regulations for standard process. This would enable full transparency and accountability in the review process. For example, Lane Cove Council IHAP also acts as Council’s s.82A Review panel. Where the decision at review was made by the IHAP, then it would be reviewed by a differently constituted IHAP.

Harness capability of e-planning

PIA has been a strong advocate for and supporter of the Department’s e-planning initiatives and the planning portal. As indicated in some of our earlier comments, PIA considers there is great potential to further harness the capabilities of e-planning, particularly in the following areas:

- For greater use in strategic planning – visualisation tools to enhance community consultation
- For monitoring and reporting on strategic plan implementation
- For DA , assessment, tracking and performance assessment, including transparent tracking of State agency referrals

PIA appreciates the opportunity to make this submission. We understand that the Government’s timeframe to introduce an Exposure Bill is limited and there is much detail that will need to be addressed that we have not been able to address in this submission. As such, PIA and its individual members we are willing and very keen to work cooperatively with the Department to work up the more detailed provisions to give effect to the principles outlined in this submission.

Yours sincerely
Marjorie Ferguson MPIA CPP
PIA NSW President