



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D/RIC:JvdPIb

21 June 2022

Professor Mary O’Kane AC and Mr Michael Fuller APM
NSW Independent Flood Inquiry
GPO BOX 5341
Sydney NSW 2001

By email: inquiry@floodinquiry.nsw.gov.au

Dear Professor O’Kane and Mr Fuller,

The NSW Independent Flood Inquiry

The Law Society appreciates the opportunity to comment in response to the terms of reference for the Independent Flood Inquiry to examine and report on the causes of, preparedness for, response to, and recovery from, the 2022 catastrophic flood event. The Law Society’s Environmental Planning and Development and Rural Issues Committees contributed to this submission.

Terms of reference

Our comments focus on inquiry terms of reference 2 (e) and (f):

2e. land use planning and management and building standards, including:

- i. the instruments, policies and programs applying to existing development in flood prone locations across NSW; and
- ii. the instruments, policies and programs applying to proposed future developments in flood prone locations across NSW;

2f. appropriate action to adapt to future flood risks to communities and ecosystems;

Climate change adaptation planning

In our view, a key issue with the planning system is that it does not effectively factor the projected future physical impacts of climate change into strategic planning and project-level decision making. Consideration of these issues is currently piecemeal and often reactive. We suggest that, for the sake of affected communities, local authorities and decision makers, there needs to be a State-wide overarching framework in place that ensures that consideration of climate impacts, including extreme weather projections, is appropriately factored into planning decisions.

As a first step, we suggest that a definition of ‘climate change’ be included in the *Environmental Planning and Assessment Act 1979*. There is currently no explicit reference

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to climate change in the Act and it does not expressly address the need to plan effectively for climate change adaptation.

A detailed analysis and consideration of how to factor climate change adaptation into the NSW planning system in a holistic way is required. The consideration of climate change mitigation and adaptation should be incorporated into the NSW planning system, encompassing all key stages of the planning process, from strategic land use planning to environmental impact assessment and development assessment. One example of how this might be addressed is by the introduction of a Climate Change State Environmental Planning Policy.

Improved planning measures to avoid and minimise flood hazard risks

There are a range of existing policies that regulate development of flood prone land. However, we submit that consolidation and rationalisation of key considerations across the planning system would significantly clarify these processes, which would improve outcomes for all stakeholders.

Law Society submission on the Flood Prone Land Package in 2020

The following points were included in our submission in response to the exhibition of the Flood Prone Land Package in 2020, and we reiterate these points below.

The Law Society notes that there is significant variation in the way that councils approach flood mapping, what material is relied on to prepare the mapping and what the map itself shows. We support the proposition that all areas where flood-related development controls apply should be mapped, and maps made publicly available.

The Guideline¹ provides that this can be done in development control plans (DCPs), local environmental plans (LEPs), other relevant environmental planning instruments (“EPI”) or by publishing the map on the council website. If the mapped areas are included in a DCP, then this means the EPI can be amended by amending the DCP. As this may cause confusion, we query whether the mapping should be restricted to the EPI. Although we appreciate that some landowners would prefer their land not to be identified in a LEP as flood prone, that is the practical effect if it is mapped via a DCP. When doing a property search on the planning portal, this overlay is likely to be missed if it is mapped in a DCP.

We suggest that the Guideline should require the draft maps to be placed on public exhibition, including the reports and data used to determine the areas that are included. This will provide transparency and an ability to test the data. All draft maps, amendments and supporting documents should be provided to facilitate public consultation.

The Guideline refers to the determination of the flood planning level (FPL) as provided in the NSW Government Floodplain Development Manual. We note that many people associate flooding with rivers bursting banks, and many of the examples in the Manual focus on this. However, the Manual was amended in 2001 to include overland flooding. This covers flows from a variety of sources, including from pipes overflowing because urban development has been approved, but local catchments and drainage pipes don’t have sufficient capacity. This is then segregated into local drainage and major drainage. Only the latter is considered appropriate to include in a planning certificate. However, the Manual now treats them in the same way, and divides overland flooding into local and major, and gives the council the

¹ NSW Government, Guideline, “Considering flooding in land use planning” July 2021 < https://shared-drupal-s3fs.s3.ap-southeast-2.amazonaws.com/master-test/fapub_pdf/Considering+flooding+in+land+use+planning+guideline+-+July+2021.pdf >.

discretion to choose which to include in the Flood Planning Area (FPA), which is defined as land at or below the FPL.

Presumably, once a council updates its FPA, the FPA may well cover much broader areas than it did previously. This obviously has implications for the ability to undertake exempt and complying development. Given the level of discretion applied, we confirm the need for the transparency mentioned above on data and the decisions made to include or not include overland flooding in the FPA.

Planning certificates

We note the requirement to include information in planning certificates issued under section 10.7(2) of the *Environmental Planning and Assessment Act 1979* if the land or part of the land is "within the flood planning area and subject to flood related development controls".

The definition of FPA is therefore of interest to conveyancers, lawyers and the property industry. This definition is wider in catchment to the concept of flood prone land. There is potential for community consternation arising from any increase in notations on section 10.7(2) certificates. The community may perceive that a notation on a planning certificate, required to be attached to a contract for sale of their property, may result in a diminution in the value of that property.

A notation that a property is located within a flood planning area may also have insurance implications. We note that the Inquiry focuses on "floods" and "flood prone locations". While "flood prone land" is defined in the Floodplain Development Manual, "flood prone locations", as a term, is not defined as far as we are aware. The definition of flood as used by insurers is narrower than the definition of flood in the Floodplain Development Manual. As we understand it, in line with the changes brought about by the National Disaster Insurance Review, insurers utilise the universal definition of flooding:

Flood means the covering of normally dry land by water that has escaped or been released from the normal confines of any of the following:

- (a) a lake (whether or not it has been altered or modified);*
- (b) a river (whether or not it has been altered or modified);*
- (c) a creek (whether or not it has been altered or modified);*
- (d) another natural watercourse (whether or not it has been altered or modified);*
- (e) a reservoir;*
- (f) a canal;*
- (g) a dam.*

This illustrates the potential for confusion with the application of differing definitions.

The issue of definition clarification, together with the issues of insurance and valuation implications for land identified as being within a flood planning area, should be considered in the context of any proposed legislative reform.

Council resourcing

The importance of having properly resourced and informed local councils which can appropriately respond to emergencies cannot be overstated. In some of our members' experience, councils did not have the equipment to adequately measure the risk of flooding, increasing the risk of misinformation.

We agree with the statement in the submission by the Planning Institute of Australia (PIA) that further assistance is required by the NSW State Government in the ongoing research and analysis of flood mitigation in response to a changing climate across the state.²

PIA Recommendations

We encourage the Inquiry to carefully consider the following recommendations made in the PIA submission:

- Support local government in standardising and updating mapping of flood prone land to ensure it is readily available in a digitised format.
- Support a program of State funding of updating catchment flood modelling and mapping to assist Local government to keep information up to date and responsive to climate change scenarios. Catchments and local government areas should be prioritised based on a risk framework.
- Consolidate the wide-ranging set of flooding considerations across local environment plans, the floodplain development manual, flood prone land package and strategic planning guidelines for natural hazards.³

Land use planning and management

Media reports have shown the devastation and destruction of many homes and businesses caused by the floods. The damage to some of these homes and businesses will not be able to be repaired, either because the landowner is uninsured, or because the landowner does not wish to risk a future recurrence of the destruction by rebuilding on the same site.

Planning should promote resilience and not encourage redevelopment in an area that is likely to continue to be exposed to flood risk without consideration of the alternatives. The relocation of Grantham in the Lockyer Valley, Queensland is an example of a planned retreat from a historic settlement area. We note that Lismore Council has set out options for future settlement in their discussion paper on the growth and rebuilding of Lismore.⁴ We suggest that the situation in Lismore could provide an important case study to explore the opportunities and costs of all options including reconstruction or relocation and a 'planned retreat', as the basis for a future planning and funding approach for existing developments at high risk of future destruction by natural hazards in a changing climate. Regular and constructive consultation with the local community will be an important and immediate priority, as residents and business owners are faced with difficult decisions immediately about investments to make in the city in the context of the current recovery.

Emergency responses

The criticism of the response to the Lismore flooding demonstrates that there is a need for greater co-ordination between government agencies and services in emergency responses. We understand that there have been several inquiries and investigations by the relevant authorities arising from the recent flooding and other natural hazards. We consider that any finding by this Inquiry and other relevant investigations and inquiries should form the basis for developing a risk-based planning framework which involves all tiers of Government, covering the full spectrum of disaster responses, from planning to avoid, or minimise exposure to, future hazards, to 'planned retreat', where the hazard and its impact on human life and the environment cannot be mitigated.

² Planning Institute of Australia, 'PIA submission to the NSW Independent Flood Inquiry', 9 < <https://www.planning.org.au/documents/item/11843> >.

³ Ibid.

⁴ Lismore City Council, 'Building Back Better', < <https://yoursay.lismore.nsw.gov.au/growth-management-strategy> >.

We appreciate the opportunity to participate in the Inquiry. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joanne van der Plaats', written in a cursive style.

Joanne van der Plaats
President