



Environmental Defenders Office

20 May 2022

Professor Mary O’Kane AC and Mr Michael Fuller APM
NSW Independent Flood Inquiry
inquiry@floodinquiry.nsw.gov.au

Dear Prof O’Kane and Mr Fuller,

NSW Independent Flood Inquiry

Environmental Defenders Office (**EDO**) welcomes the opportunity to make a submission to the NSW Independent Flood Inquiry (**Inquiry**).

As a community legal centre specialising in public interest environmental and planning law, EDO’s submission addresses the Inquiry’s terms of reference (**ToR**) that relate to environmental and planning law, and in particular:

1. The Inquiry is to consider and report to the Premier on the following matters:
 - a. the causes of, and factors contributing to, the frequency, intensity, timing and location of floods in NSW in the 2022 catastrophic flood event, including consideration of any role of weather, climate change, and human activity;
 - b. the preparation and planning by agencies, government, other entities and the community for floods in NSW, including the accuracy and timing of weather forecasts, current laws, emergency management plans, practices and mitigation strategies, their application and effect;
 - ...
2. And to make recommendations arising from the Inquiry as considered appropriate, including on:
 - ...
 - b. preparation and planning for future flood threats and risks;
 - ...
 - e. 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;
 - f. appropriate action to adapt to future flood risks to communities and ecosystems;
 - g. coordination and collaboration between the NSW Government and the Australian Government;
 - h. coordination and collaboration by the NSW Government with other state and territory governments and local governments;
 - ...

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It is uncontroversial to observe that the unprecedented scale of the 2022 catastrophic flooding event(s) in NSW were driven by climate change.¹ It is similarly uncontroversial to note that with increasing climate change comes more severe and often more frequent natural disasters including flooding.² Parts of NSW that are not currently considered flood prone will in the future be so.

Climate change will also bring more frequent compound extreme events.³ The 2022 extreme rainfall events and associated catastrophic flooding and landslides are examples of these compound events. The 2019-2020 Black Summer bushfires and preceding drought were also compound extreme events, which themselves may have had a compounding effect on the scale of the 2022 flooding and landslides.⁴

The impacts of climate change are systemic, interconnected, and wide-reaching and it is imperative that the consideration of climate change risks (such as increasingly extreme rainfall and floods) is embedded in all aspects of the land use planning and management in NSW. As it stands, current laws, instruments, policies and programs around land use planning and natural resource management across NSW are not fit for purpose in the face of the rapidly changing climate and for projected future climate change impacts.

It is imperative also that preparation and planning by government and agencies for disasters such as flooding include mitigation of climate change, as well as adaptation measures. Beyond a certain point, adaptation is not possible - communities and ecosystems will be unable to be protected or recover from successive floods and other climate change driven disasters.

To this end, EDO has produced a comprehensive analysis of current and proposal for future NSW planning laws to respond to the current and evolving threat of climate change, including increasing unprecedented flooding and attendant impacts.

Our ***Climate-ready planning laws for NSW*** report examines how to integrate climate change into the NSW planning system, finds that NSW needs a whole-of-government approach to climate change and recommends that an overarching Climate Change Act and Climate Change SEPP be made. Of particular relevance to the Inquiry's ToR, the Act should put in place processes (such as climate adaption plans) for building resilience to the impacts of climate change.

¹ See, for example: Sydney Morning Herald, 5 March 2022, 'Let's face it, it's climate change': Floods renew debate over where we should live, <https://www.smh.com.au/national/nsw/let-s-face-it-it-s-climate-change-floods-renew-debate-over-where-we-should-live-20220302-p5a129.html>; Climate Council, March 2022, *A Supercharged Climate: Rain Bombs, Flash Flooding and Destruction*, <https://www.climatecouncil.org.au/resources/supercharged-climate-rain-bombs-flash-flooding-destruction/>

² AdaptNSW, *Climate change impacts on storms and floods*, <https://www.climatechange.environment.nsw.gov.au/storms-and-floods>

³ Bureau of Meteorology, 2021, *State of the Climate 2020*, <http://www.bom.gov.au/state-of-the-climate/australias-changing-climate.shtml> ; ARC Centre of Excellence for Climate Extremes, March 2022, *Why research on compounding weather and climate hazards is important*, <https://climateextremesnews.files.wordpress.com/2022/03/why-research-on-compounding-weather-and-climate-hazards-is-important.pdf>

⁴ Climate Council, 2021, *Hitting Home: The Compounding Costs of Climate Inaction*, <https://www.climatecouncil.org.au/wp-content/uploads/2021/01/hitting-home-report-V7-210122.pdf>, p 21

The report makes specific recommendations for planning law reform including to: better integrate climate change considerations into planning decisions; strengthen strategic land-use planning; require Climate Impact Statements for major projects; and provide guidance for decision makers on how to assess whether a project will have unacceptable climate impacts.

What is missing at the strategic level is a clear and compelling link between the best available science on likely climate change impacts (for example, projections from AdaptNSW, advice of OEH or the Climate Advisory Council) and the planning system – such as an upfront requirement to identify regional or local risks and address climate impacts. Local plan-makers and authorities should not be left to identify best available science on an ad hoc basis themselves. Rather they should be supported by clear institutional and policy linkages, such as a statutory Climate Change Advisory Council and adaptation planning guidelines at the relevant scale (whether national, state, regional or local).⁵

The report is attached to this letter and available online at:

<https://www.edo.org.au/publication/climate-ready-planning-laws/>. We refer the Inquiry to the recommendations in that report, and in particular:

Recommendation 1: Establish a Climate Change Act

Implement a whole-of-government approach to climate change by enacting new climate change laws in NSW that deal with both climate change mitigation and adaptation in a clear and coordinated way.

Recommendation 3: State Environmental Planning Policy – Climate Change

Develop an overarching Climate Change SEPP to improve integration of climate mitigation, transition and adaptation targets and measures within the planning system.

Recommendation 4: Mandatory consideration for plan making

Require all planning authorities to address climate change considerations when preparing and making strategic plans (SEPPs, regional plans, district plans, local strategic planning statements and LEPs). Strategic plans must also adopt appropriate climate adaptation responses, including for example, planned retreat in relation to natural disaster risk, green infrastructure planning to combat urban heat island effects, and biodiversity corridors for species migration.

Recommendation 5 Guidance for plan making

Provide additional guidance, funding and support to planning authorities preparing strategic plans, including by:

- establishing principles of best practice adaptation to guide planning authorities and decision makers;
- providing the NSW Climate Change Advisory Council with specific statutory functions and adequate funding to advise NSW planning authorities on (among other things):
 - up-to-date climate change projections,

⁵ Environmental Defenders Office, March 2021, *Climate-ready Planning Laws for NSW: Rocky Hill and beyond*, <https://www.edo.org.au/publication/climate-ready-planning-laws/>, p 27.

- state and regional-level climate risks,
- best practice adaptation measures, and
- the adequacy of draft adaptation plans;
- developing specific Ministerial Directions on climate risk assessment and adaptation to assist councils with planning functions;
- including climate change in Local Strategic Planning Statement guidance;
- increasing guidance on, and scrutiny of, planning proposals in relation to climate change responses, including providing access to and advice on the best available science and assessing comparative performance to ensure continuous improvement;
- increasing guidance on transitioning away from fossil fuel production and use consistent with the latest IPCC recommendations; and
- requiring the pursuit of other regional development goals to be achieved consistently with emissions reduction and climate adaptation responses.

Recommendation 10: Impose a duty to refuse projects with unacceptable climate impacts and risks

Impose a duty for decision makers to refuse proposals with unacceptable climate change impacts. This includes provisions to require decision makers to assess and respond to climate change impacts, including new duties to:

- impose conditions to ameliorate the identified impacts of climate change;
- refuse applications with unacceptable climate risks - this could include where climate change poses a realistic threat to the lives or safety of present or future residents, or would impose prohibitive public costs by way of emergency management, infrastructure repair or future adaptation costs, or would increase threats to biodiversity; and
- apply best practice guidelines for climate change adaptation.

Recommendation 17: Ensure all relevant legislation is climate ready

Review all relevant legislation with a view to incorporating clear requirements for climate change mitigation and adaptation that integrate with requirements under the NSW planning system and any stand-alone climate legislation. This could be undertaken by the new Climate Change Division of Premier & Cabinet on advice from the new Climate Change Advisory Council.

Recommendation 19: Continuous improvement

Increase funding for climate adaptation planning, monitoring and reporting, auditing of compliance with conditions of consent, and commit to a regulatory culture of continuous learning and improvement.

We would be happy to discuss these recommendations in more detail. For further information, please contact rachael.chick@edo.org.au or (02) 9262 6989.

Yours sincerely,

Environmental Defenders Office



Rachael Chick
Solicitor



Rachel Walmsley
Head of Policy & Law Reform

Attachment

Climate-ready planning laws for NSW: Rocky Hill and beyond, Environmental Defenders Office,
March 2021.