



Draft Urban Drainage Bill 2013 Submission

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Introduction

The Local Government Association of Tasmania (LGAT) is the representative body of Local Government in Tasmania. Established in 1911, the LGAT is incorporated under the *Local Government Act 1993* with membership comprising the 29 Tasmanian councils.

The objectives of the Association are:-

- To promote the efficient administration and operation of Local Government in the State of Tasmania;
- To watch over and protect the interests, rights and privileges of municipal Councils in the State of Tasmania;
- To foster and promote relationships between Local Government in the State of Tasmania with both the Government of Tasmania and the Government of the Commonwealth of Australia;
- To represent the interests of the members of the Association generally, and in such particular matters as may be referred to the Association by its members; and
- To provide such support services to the members of the Association as the Association may by resolution in meeting determine.

General Comments

This submission has been developed following collaboration with member councils and focuses on a number of shared comments and concerns in relation to the Draft Urban Drainage Bill 2013 ('the Bill'). A number of councils have made direct submissions in relation to the Bill, containing considerable detail and technical knowledge. Any omission of in this submission of comments that councils have made directly should not be viewed as lack of support by the Association for that specific issue.

The Association appreciates the level of consultation provided by the Department of Primary Industry, Parks, Water and the Environment on this issue through the provision of regional briefings and the extended time period provided in regards to this and individual council submissions.

Review of the *Draft Urban Drainage Bill*

Part 1 – PRELIMINARY

Section 3 – Interpretation

Councils have raised a number of key terms that require definition, further detail or revision, as well as suggestions for additional terms that should be defined within the Bill.

Terms which required definition include:

- **'drain'** - i.e. culvert, open or shaped surface, sub-surface etc.

Definitions with suggested amendments are as follows:

- **'connection point'** - It appears unclear who is responsible for any section of pipe between the private stormwater system contained within the private property and the point at which this 'single user' pipeline connects to the stormwater system when the main pipeline is outside the boundary line. This point requires clarification.
- **'council'** – the Bill provides for this term to be defined as per the Local Government Act 1993. However confusion arises as to the usage of the term within various sections of the Bill and whether such is appropriate in all circumstances. In the cases of the definitions of councils and general managers concerns have been raised in relation to the contracting out of stormwater system services and the implications this may have, as the Bill does not appear to contemplate adequately this outsourcing and agency responsibilities. Provision needs to be made for those circumstances where the work of a council is contracted out to an agent stormwater service provider subject to section 6(4); the Bill must ensure that the use of terms is accurate and appropriate.
- **'general manager'** – as noted above in relation to the use of the term 'council', the Bill provides for this term to be defined as per the Local Government Act 1993. However confusion arises as to the usage of the term within various sections of the Bill and whether such is appropriate in all circumstances. The Bill does not appear to adequately differentiate between the activities of the general manager and the activities of the contractual provider of stormwater services.
- **'private stormwater system'** – subsection (c) is considered unnecessary; the definition of this term is covered adequately in subsections (a) and (b) collectively. As such it is suggested that subsection (c) be deleted.
- **'stormwater'** – the definition of this term should also include reference to 'stormwater which is intensified by development'. Also see comments in the context of section 24.
- **'stormwater system'** – this term should be articulated as 'public stormwater system' in order to distinguish between private and public systems. It is acknowledged that 'private stormwater systems' are defined within the Bill as distinct from other types of systems; however, to avoid confusion at those points at which a seemingly generic 'stormwater system' is referred to without reference to whether it is private or public, the distinction should be clarified at all references throughout the Bill.
 - Subsection (a) – it is suggested for clarification that the words '*as marked on a map pursuant to section 12*' should be inserted following on from the words 'a waterway'; the current wording appears to include the destination river or

body of water within the defined stormwater system, which it should not. Reference to the maps to be developed pursuant to section 12 will assist in accurate demarcation of storm water systems.

- **‘urban area’** – the adoption of the Local Government Act 1993 definition of urban area for the purposes of this Bill is problematic. Some ‘towns’ within the state are not declared as towns, whilst the municipal areas of Launceston, Hobart, Glenorchy, Clarence, Burnie and Devonport are declared as cities in their entirety and as such will have potentially onerous obligations in relation to assessments of their respective catchment areas, whether or not these relate to urban areas or otherwise. The Association notes the comments made by Clarence City Council in relation to the definition of this term and supports the proposition that a preferred approach would be to place councils under the obligation to publish and maintain a map of relevant urban areas within its municipal area served by public stormwater systems, similar to the way ‘roads maintained’ are articulated pursuant to section 208 of the *Local Government Act 1993*.
- **‘waterway’** – the term ‘river’ should be included within this definition along with those waterways already indicated.

Section 4 – Objects of Act

- *Subsection (a)* – it is suggested that latter part of this paragraph be amended to read ‘minimise the level of risk of urban flooding due to storm water flows’. Such wording provides a more appropriate and achievable objective, as it is considered that a risk itself cannot be minimised, though the level of risk can.
- *Subsection (b)* – it is understood from briefings in relation to the Bill that it does not, nor is there an intention that it should, deal with ‘environmental issues’ in any section. As such the reference to the environment within section 4 is irrelevant and unachievable and should be removed.

Part 2 – OBLIGATIONS OF STORMWATER SERVICE PROVIDERS

Section 5 – Council to provide adequate stormwater systems

- *Subsection (1)* – the reference to the term ‘effectively drain’ requires further clarification. There is an element of subjectivity inherent in this term and it is presumed therefore that the test of reasonableness will be applied to councils’ obligations to drain an urban area effectively. Standards of drainage may vary between municipal areas as a result of resources and capacity and councils may reach slightly different conclusions regarding what each considers ‘effective’.
- *Additional Subsection* – In furtherance of the objects of the Act, it is requested that an additional subsection be inserted in section 5 to the effect that ‘council may impose any condition on a planning permit to ensure that a development is effectively drained in accordance with the Act’. It is desirable to provide councils with an appropriate head of power to ensure for the adequate provision of infrastructure.

Section 8 - Provision where commercial arrangements cannot be agreed

- *Subsection (3)(c)* – It is noted that the word ‘overtime’ should read either ‘over *time*’ or alternatively ‘over *the* time’.

Section 10 – Stormwater system management systems

- *Subsection (1)* – The requirement that all councils develop stormwater system management plans (SWMPs) within three years is problematic. Whilst it is

acknowledged that best practice dictates that councils should have Stormwater Management Plans, currently there is little guidance provided in regards to the development, content or coverage of SWMPs. Consequently, councils without the in-house expertise to draft plans, nor guidelines to follow on which a consultancy brief to develop a plan could be based, may not have SWMPs in place or the ability to develop these within the designated time frame.

It is requested that provision be made within Regulations accompanying the proposed new legislation for articulating a more appropriate time frame within which councils must develop SWMPs. Such an approach could make provision for individual council deadlines, taking into account the resources and capacity that councils have to dedicate towards a potentially onerous and complex technical project. As such, it is suggested that the wording of subsection (1) be amended to read that 'A council must develop a stormwater system management plan for the urban area of its municipality *in accordance with the timeframe as specified in the Regulations.*'

In furtherance of the above suggestion, and as a general comment in relation to section 10, it is suggested that it would be appropriate to establish a technical reference group, comprising representatives from Local Government and the relevant state government agencies, to develop guidelines and templates to be used by Local Government to ensure consistency and effectiveness in the development of Stormwater Management Plans.

- *Subsection (2)(b)* – In relation to this subsection, and pertaining again to the three year time frame stipulated in subsection (1), concern has been voiced regarding the capacity of councils to be able to indicate the level of flood risk for each urban stormwater catchment in every stormwater system. An alternative wording for this subsection has been provided by Glenorchy City Council as follows: '*risk factors from flooding for each urban stormwater catchment in the stormwater system and council's response to those factors*'. Such a provision will allow for the varying capacities across councils whilst still requiring councils to consider and identify the risk factors they must address for their stormwater catchments.

Section 11 – Power of council to adopt stormwater systems

- *Subsection (4)* - It was agreed that any drain specified by a Planning Condition under the LUPAA should not be subject to this condition. The size of a 'non contributable' drain must be of sufficient size to cope with any existing upstream flow.

Section 12 – Council to maintain maps

Regarding the requirement that councils make publicly available maps showing all (public) stormwater systems within their urban areas; it is not practical to show every property connection service existing in the road reservation or across a boundary in the neighbouring property. There are also issues in relation to the format within which this data is presently maintained, and its capacity for translation or production for public purposes.

Part 3 – POWERS IF STORMWATER SERVICE PROVIDERS

Section 13 – Protection of stormwater assets

- *Subsection (1) (b)* -

- Regarding the term 'prescribed structure'; will this be defined in the Regulations or elsewhere?
- Regarding the reference to 'general manager'; the reference to 'council' should be replaced with 'general manager' as general managers will be the individual responsible for making decisions in this regard.
- Subsection (2) – there may be circumstances in which a council may wish to determine a period of less than 28 days where the health and/or safety of the community is at risk, e.g. where a pollutant or contaminant is being discharged into the stormwater system. There should be provision for councils to be able to vary i.e. shorten the time frame within which restoration or reinstatement works are to be carried out. Such provision should be incorporated into the end of the subsection to the effect '*...or a time-frame as determined by Council where the health and/or safety of the community are at risk.*'
- Subsection 10 – it should be articulated within this subsection that the subject agreed terms and conditions must form a Part 5 (s.71) agreement under LUPAA and therefore appear on the relevant Certificate of Title, in order to be transparent to future property owners.

Section 14 – Interference with stormwater systems

- Subsection (2) – As submitted in relation to section 13(2), the words '*...or a time-frame as determined by Council where the health and/or safety of the community are at risk.*' should be added to the end of the paragraph in order to provide for those circumstances in which a shorter time period for restorative or reinstatement works is appropriate.

Section 15 - Power of council-appointed officers to carry out work on or adjacent to public land

- Subsection (2)(a) – There will be times where it will be appropriate to carry out night works and subsection (2) should provide for this. It is suggested therefore that the following words be added (either to the end of clause (a) or alternatively as a new clause (b)) to the effect '*between the hours of 7 a.m. and 7 p.m. on any day; and allow at anytime, with the permission of the owner, to facilitate night-work – so as to minimize inconvenience to the public...*'
- Subsection (5) – The words '*and without notice*' should be added after the words '*at any time*' at the end of this paragraph to ensure that council officers may gain immediate access and carry out requisite works in an emergency.

Section 16 – Power of council-appointed officers to enter private land

- Subsection (2) – It would seem appropriate within this subsection to make provision for the *owner* of the subject property to be advised in addition to the occupier, and on the same terms as stipulated.
- Subsection (4) – As noted in relation to section 15(2)(a), there will be times when it will be appropriate to carry out night works; it is requested that this subsection allow for entry by an officer appointed by a council at anytime (*with the permission of the owner*) to facilitate night-work where appropriate and so as to minimize inconvenience to the public.

Section 17 – Identity Card

The proposed requirements for identity cards within the Bill are not consistent with the provisions contained within section 20B of the *Local Government Act 1993*. It is suggested that the Bill should be amended to refer to the requirements of the

aforementioned section of the LGA 1993 in order to attain consistency of entry provisions and procedures. As suggested by Huon Valley Council, the section could be simplified to read 'The General Manager is to ensure that an officer referred to in section 16 is issued with an identity card in accordance with section 20B of the *Local Government Act 1993*.'

If the above suggestion is declined, the question of *why* individual identity cards should be signed by the general manager of a council becomes relevant. Given that councils have the capacity to engage an agent to operate and maintain stormwater systems within a municipal area, there will be circumstances where the most appropriate person to be signing identity cards will be the CEO or similar of the stormwater service provider rather than the general manager of the council. There needs to be provision made for such a circumstance if subsection (d) is to remain.

Section 18 - Power to undertake construction of stormwater systems

Concern has been raised regarding the lack of provision within the Bill for developer charges such as capital contribution and headworks charges associated with development. Currently these issues are dealt with as conditions on planning permits under section 51 of the LUPAA, however such conditions are subject to challenge before the Tribunal and thus do not always hold certainty. There is strong support among councils for the provision of a specific head of power within the Bill that allows councils to impose headworks developer charges. The suggested Developer Charges provision put forward by Huon Valley Council is a good example of a desirable clause.

In addition to the comment above, it is noted that there is no provision for compensation of land owners within this section; such provision should be considered.

Part 4 – CONNECTION

Section 20 – Connection to stormwater service

Section 20 should make provision for councils to be able to set conditions in relation to the discharge of stormwater to the connection point. This may be in relation to peak flow rates, detention storage, water quality etc.

- Subsection (1) – It is noted that 'reasonable' is not defined. Some councils have indicated that their interpretation of this subsection is likely to pertain to whether they have a *legal ability* to lay the connection, whether a gravity connection is possible, as well as the receiving capacity of the infrastructure.

Section 21 – Limits on connection point

- Subsection (1) – The question has been put forward as to whether it is the intention to mark the map (devised pursuant to section 12) with every property connection that exists in the road reservation or extends over the fence into the neighbour's property?
- Subsection (2) – where a private stormwater system serves two or more properties and such infrastructure has been approved by the general manager, this should be identified as a Part 5 (s.71) agreement under the LUPAA and therefore appear on the relevant Certificate of Title, in order to be transparent to future property owners.

Section 22 – Requirement to connect

- *Subsection (3)(b)* – In relation to the recovery of costs under this subsection, it is requested that provision be made for the recovery of costs in the same manner as pursuant to s.201(4) & (5) of the *Local Government Act 1993* i.e. allow for a charge to be made against the subject, recoverable in the same manner as rates and other charges against the land.

Section 23 – Requirement to disconnect

- *Subsection (2)* – As indicated in previous comments regarding other sections of the Bill, there may be circumstances in which a council may wish to determine a period of less than 28 days for the removal of a connection, where the health and/or safety of the community is at risk, e.g. where a pollutant or contaminant is being discharged into the stormwater system. There should be provision for councils to be able to vary i.e. shorten the time frame within which a disconnection is to be carried out.

Section 24 – Property owners not to direct stormwater onto neighbouring properties

- *Subsection (1)* – it is acknowledged that the term ‘nuisance’ has a well accepted common law definition; however, the definition of ‘stormwater’ needs to be tightened within section 3 of this Bill in order to allow for the application of this section in the assessment of a nuisance.
- *Subsection (3)* – as indicated above in relation to s.22(3)(b), rather than providing for a council to recover costs under subsection (2)(b) in a court of competent jurisdiction, it would be more appropriate that provision be made for the recovery of costs in the same manner as pursuant to s.201(4) & (5) of the *Local Government Act 1993* i.e. allow for a charge to be made against the subject, recoverable in the same manner as rates and other charges against the land.

Section 25 – Regulations

There is a clear requirement for the development of regulations to accompany the proposed new legislation. Considerable benefit would be derived from the establishment of a technical reference group, which would include representatives from Local Government and relevant state government agencies, to advise and inform the development of such regulations to ensure their relevance.

Summary

This submission does not cover every aspect of the Bill, but instead pulls together key points of commonality and areas of particular concern for the broad contingent of councils. The level of detail into which some individual council submissions have delved must be acknowledged; the breadth of responses from councils is an indication of the significance of this Bill to the Local Government sector, and confirms the importance of continuing communication with regards to any amendments that are to be made pursuant to this consultation, and also, for example, to the process of developing regulations to accompany new legislation. The Association is appreciative of the opportunities provided to date for consultation and comment, and looks forward to continuing engagement between councils and DPIPWE in relation to this matter. If you have any further queries in relation to this submission, please feel free to contact Melanie Brown, Senior Policy Officer, on 03 6233 5961 or at melanie.brown@lgat.tas.gov.au.