

Is the law a useful communication tool in a changing climate?

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In NSW, coastal councils are at the beginning of a long journey to integrate sea level rise considerations into their strategic planning and development assessment activities. With this comes the need to communicate the intent and impact of such regulation to affected residents and communities. This task is complicated by the fact that the timing and magnitude of impacts are uncertain and traditionally coastal communities have understandably resisted changes to regulation that were seen to impact on existing use rights and property values. This paper looks at the existing responsibilities and legislative tools available to councils in communicating the impacts of sea level rise and associated regulation to coastal communities in NSW.

1. Introduction

As the impacts of sea level rise become widely accepted and understood, the need for coastal councils to demonstrate that they are preparing themselves and their communities for rising sea levels has become critical. As a result councils and the communities they represent find themselves at the beginning of an unavoidable and necessary steep learning curve in responding to the impacts of climate change with little previous experience upon which to draw (Rigby 2005). Of immediate concern to councils is the appropriate level of consideration given to the cumulative impacts of sea level rise with extreme climate events on existing and future developments and then importantly how to communicate the selected statutory and regulatory responses to residents (Lipman and Stokes 2003, McDonald and England 2007).

Over the past 18 months a number of policies and guidelines aimed at addressing the impacts of sea level rise have been released by State Governments across Australia. Table 1 provides a Summary of climate change adaptation requirements in state coastal planning policies.

With the release and implementation of such policies and guidelines comes the need to communicate the intent and impact of such regulation to affected residents and communities. Ensuring that coastal communities understand potential impacts and have the information they require to make a meaningful contribution to adaptation planning in response to climate change is important because community understanding, participation and responsibility in managing natural hazards is essential to achieving effective management strategies (Tarrant 2006).

Table 1: Summary of climate change adaptation requirements in state coastal planning policies.

State	Climate Change Adaptation Requirements in State Coastal Planning Policies
South Australia	The Coast Protection Board (2002) has adopted the median sea level predictions of the IPCC as part of its coastal planning policy – 0.3m sea level rise by 2050, and 1 metre sea level rise by 2100. For major developments, the full range of possible climate change impacts should be considered.
Tasmania	Tasmania has developed an approach based on a 1% annual exceedance probability; that is the probability of a high sea-level event having a 1% chance of occurring once or more in any one year (2008). To determine exceedance probabilities Tasmania coastline is classified into a number of 'tidal zones' and sea level rise projections are based on the IPCC's upper emissions scenarios (A1FI). For any given height of a location, the risk of a high sea level event flooding that point can be determined and the risk over time (up to 2100) can also be identified.
Queensland	The <i>State Coastal Management Plan</i> (2002) identifies a climate change adaptation principles that should be referenced in coastal planning. In assessing coastal erosion prone areas, a 0.3m rise in sea level over a 50 yr planning period and 0.8m rise in sea level over a 100 yr period should be adopted (2005).
Western Australia	The <i>State Coastal Planning Policy</i> (2006) suggests that coastal planning strategies should take into account coastal processes and sea level change. The Policy provides for a benchmark of 0.90m when assessing the potential for erosion on sandy shores.
Victoria	The <i>Victorian Coastal Strategy</i> (2008) provides a policy of planning for sea level rise of not less than 0.8m by 2100.
New South Wales	The <i>Sea Level Rise Policy Statement</i> indicates a sea level rise benchmark of 0.4m by 2050 and 0.9m by 2100, should be adopted in coastal planning.

(Source: Morrison et al 2009)

Legislation, Environmental Planning Instruments as well as policies and guidelines could potentially provide a framework to ensure consistency in the content of information provided on coastal hazards and the legislation to coastal communities. As a result, this paper aims to look at the requirements and opportunities for all levels of government to communicate to coastal communities on existing coastal hazards combined with the impacts of climate change.

2. Why and how to consider Legislation, Policies and Guidelines as communication tools?

Effective and consistent use of a well-designed and comprehensive legislative framework should result in informed coastal communities having the necessary information to make informed decisions about their desired adaptation responses. It is the view of the authors that a lack of communication or poor communication can result in misunderstanding and resistance to adaptation responses within the planning framework and potentially increased exposure to litigation and liability. The legislative framework underpinned by the policies and guidelines provides a framework through which councils are required to communicate:

- the potential impacts of coastal hazards and sea level rise; and
- implement desired adaptation responses.

In 2010 the Sydney Coastal Councils Group engaged the NSW Environmental Defenders Office to do an analysis of Australian planning and coastal legislation, regulations, planning instruments and policies with reference to the terms *sea level rise*, *coastal erosion*, *coastal inundation* and *storm surge*. The aim of this audit is to identify which jurisdictions have legislation and/or policy on sea level rise and coastal erosion (and which level of government has regulatory obligations). This paper draws on and discusses some of the preliminary findings

of this research to look at responsibilities for communication around issues of coastal hazards and sea level rise.

3. Requirements for communication through legislation and regulation

Within the legislative framework there are three ways in which councils are required to present information on coastal hazards and sea level rise. These are:

- Minimum requirements for consultation around plan making
- Planning Certificates
- Planning controls

A description of each of these is provided in Table 2.

Table 2: Legislative mechanisms for the communication of information on coastal hazards and sea level rise

Mechanisms for communication	Description
Minimum requirements for consultation around plan making	Minimum requirements for consultation around plan making include mandatory exhibition periods and duties to consider submissions. For example in NSW, the <i>Coastal Protection Act</i> mandates community consultation around the making of Coastal Zone Management Plans (including a mandatory exhibition period and duty to consider submissions). The <i>Local Government Act 1993 (NSW)</i> exempts local councils from liability where they have provided information in good faith regarding flood liable land and land in coastal zone, in section 733.
Planning Certificates	<p>Planning Certificates provide information on the development potential of a parcel of land including any planning restrictions that apply. In NSW a person can apply to a council for a Planning Certificate under section 149(2) of the <i>Environmental Planning and Assessment Act 1979</i>. When land is bought or sold, the <i>Conveyancing Act 1919</i>, requires that a Section 149 Planning Certificate be attached to the contract for sale</p> <p>The certificate will detail matters relating to the land including zoning, development controls and any other restrictions applying to the land. The mandatory matters to be included in the certificate are listed in schedule 4 of the <i>Environmental Planning and Assessment Regulation</i>. One of these matters is identifying whether the land is hazard prone land (regarding bush fire hazards) .¹</p>
Planning controls	Planning Controls that require the consideration of coastal hazards and sea level rise in development assessment are not a traditional communication tool. However, they do provide a clear message to proponents for development that the impacts of climate change must be considered for all new development

In answer to the question is the existing legislative frameworks providing a good communication tool in a changing climate the belief of the authors is, currently no. Each jurisdiction in Australia has relevant planning legislation (and sometimes specific coastal legislation) dealing with

¹ We note that that there is currently a proposed Environmental Planning and Assessment Regulation being exhibited for public consultation that proposes that section 149(2) certificates contain information about coastal erosion hazard policies that might restrict development on the relevant land. These proposals are yet to be gazetted.

coastal planning; and key elements and provisions addressing community consultation requirements, planning control provisions, planning certificates are common in legislation. However, very few pieces of legislation or regulations explicitly deal with requirements to communicate about specific coastal hazards such as sea level rise and coastal erosion/inundation.

5. Addressing communication through policies and guidelines

Despite the frequent absence of specific provisions in primary planning and natural resource legislation, most Australian jurisdictions have some subordinate documents that do address (to varying degrees), coastal impacts, hazards and information needs of local communities.

While such policies and guidelines clearly identify a need for information and an intent to provide it, this does not legally constitute a statutory requirement to provide specific information. Additionally, while policies can be given some weight by being referred to in the primary legislation, they can still be amended without parliamentary scrutiny.

Within Australia a number of Policies and Guidelines exist that provide councils with information and guidelines on how to address coastal hazards and sea level rise, these include but are not limited to: Sea Level Rise Policy Statement and Coastal Planning Guidelines in NSW; Northern Territory Coastal Management Policy; Draft Queensland Coastal Plan; Coast Protection Board Policy Document 2002; and the Tasmanian State Coastal Planning Policy 2003.

In relation to communication these policies state an intent for coastal communities to be informed about the impacts of climate change as well as ensuring public participation in plan making and decision making. For example, the NSW *Sea Level Rise Policy Statement* of NSW states:

5. Information availability

The Government has provided information to the community on sea level rise projections and the likely impacts of sea level rise on low-lying coastal areas. The Government will continue to provide up-to-date information on sea level rise and its impacts, and will continue to work with local councils to provide information on the impacts of sea level rise on local flooding and coastal hazards.

Continuing public access to current and credible information on sea level rise is important for various reasons, including:

- *supporting community adaptation to sea level rise*
- *supporting the community and the private sector to make appropriate investment decisions in coastal areas*
- *assisting the insurance industry to price risks from sea level rise in their insurance policies.*

(NSW Government, NSW Sea Level Rise Policy Statement, pg 6)

However, even though Policies and Guidelines exist that are beginning to address this issue, there is a lack of consistency between the various subordinate documents. Additionally, they do not have the same legal weight as an Act. While they may address issue this simply indicates intent and is not a statutory requirement to provide information.

Therefore in answer to the question, are policies and guidelines providing a good framework for communication in a changing climate? The answer is no, but getting closer. The articulation of an intent for communication positive but implementation is generally inconsistent due to:

1. A lack of statutory weight; and
2. A need for such policies and guidelines to be underpinned by greater technical support and guidance from state governments to locals.

In NSW, the NSW Coastal Planning Guideline states that councils will be solely responsible for the delivery of information on sea level rise impacts on coastal communities. Therefore, it is important that when Councils are implementing the guidelines and presenting information to their communities on the impacts of sea level rise and the associated management actions they are provided with the necessary tools and support from both State and Federal Governments. This will ensure that councils are not forced to regularly defend the validity of this information and the guidelines.

Overall, the key is getting the balance right. There are strong arguments that can be made that it is better to address such issues in policies as they can be more easily amended or changed in light of new and emerging scientific information. However, as subordinate instruments they do not necessarily mandate specific communication requirements and implementation may vary at the local level.

Conclusion

Coastal communities need information on the impacts of coastal hazards as well as the legislation and policies in place to manage them. As a result governments need to think about the necessary statutory and non statutory tools available to provide such information. The provision of additional statutory and non statutory tools would ensure that coastal residents have the necessary information to make a meaningful contribution to future planning and adaptation strategies for themselves and future generations. It would also provide clarity for the residents in coastal communities on the impacts of coastal hazards and sea level rise on their investments.

In response to the question “is the law a useful communication tool in a changing climate? The short answer is potentially yes, but currently no. There are three main reasons why the “law” (specifically legislation and regulations) is not currently an effective tool in communicating information about sea level rise, coastal inundation and erosion and coastal hazards to the community. These are:

1. Very few pieces of primary legislation around Australia actually address or deal specifically with sea level rise, coastal inundation and erosion and coastal hazards at present;
2. Detail on coastal hazards is generally addressed in subordinate documents (such as policies and guidelines) that do not have the same legislative weight. Often within a jurisdiction there are a number of subordinate instruments that attempt to address the same coastal hazards, leaving a complex, ad hoc and unwieldy framework that is confusing to apply; and,
3. While some specific communication tools do exist (and are mandated in legislation), such as s149 certificates in NSW, these are currently specific and not directed at the general community, and only required at certain times (ie, usually when purchasing property).

The primary recommendation therefore, is that law reform is needed to improve the role of legislation and regulations in mandating the communication of sea level rise, coastal inundation and erosion and coastal hazards to local coastal communities. Incorporating effective tools in legislation would not only inform coastal communities and property owners, but also assist local Councils in implementing local planning and natural resource management responsibilities, and help clarify liability issues.

As a result, communication tools for engaging residents about the impacts of sea level rise and climate change vulnerabilities more broadly are required. The central development of tools and strategies by the NSW Government for a wide range of audiences would ensure this is done consistently and appropriately.

Recommendations

The law is not a communication tool itself, but is currently by default, the source of communication requirements. To address this reform is needed on exactly what information requirements are and exactly who is responsible for providing the information.

Statutory requirements:

- Clear legal requirements in legislation and regulations of what information must be provided to coastal communities.
- Clarification of legal liability for Councils regarding providing information to the community and managing the coast.

Supported by non-statutory tools:

- Resources to ensure that up-to-date and accurate data and mapping is collated for coastal areas.
- The development of standard information and fact sheets (impacts and management strategies)
- Standard media (web, radio, print and television) campaigns
- State-wide sea level rise maps available to public
- Provision of National Risk Assessments

The provision of such statutory and non-statutory tools would assist the delivery of consistent information on coastal hazards and the associated management options to coastal communities. This would ensure that councils have the confidence to discuss the impacts of coastal hazards and sea level rise with their residents and coastal communities have the information they require to make a meaningful contribution to adaptation planning in response to climate change.

References

Lipman, Z. and Stokes, R. (2003), *Shifting Sands- the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land* 20 EPLJ 406 at 421.

McDonald, J. and England, P.(2007) *A Risky Climate for Decision-Making: The Legal Liability of Development Authorities for Climate Change Impacts*, paper delivered to the 2007 QELA Conference, Kingscliff, May 2007.

Tarrant, M. (2006), *Risk and emergency management*. The Australian Journal of Emergency Management, Vol. 21 No. 1, February 2006, pp9-14

Morrison, C., Ghanem, R. and Withycombe. (2008) *Coastal Councils and Planning for Climate change: An assessment of Australian and NSW legislation and government policy provisions relating to climate change relevant to regional and metropolitan coastal councils*. New South Wales Coastal Conference 2008.

Morrison, C., , Lusher, B., Withycombe, G. (2009) *What's the magic number – How can councils consider and plan for rising sea levels?* New South Wales Coastal Conference 2009.

NSW Department of Environment, Climate Change and Water (2009) NSW Sea Level Rise Policy Statement

www.environment.nsw.gov.au/resources/climatechange/09708sealevrisepolicy.pdf

NSW Environmental Defenders Office (2008) *Coastal Councils and Planning for Climate Change: An assessment of Australian and NSW legislation and government policy provisions relating to climate change relevant to regional and metropolitan coastal councils*.

Rigby, J. (2005) *Sea Level Rise and Coastal Settlements: An Analysis of Adaptive Decision Making Within Integrated Coastal Zone Management*, Report to the Tasmanian Government on the findings of an Honours study within the University of Tasmania. Antarctic Climate and Ecosystems CRC: Hobart, Tasmania.