

Draft Submission on the Land Management and Biodiversity Conservation Reforms

June 2017

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general-purpose councils, associate members including special-purpose county councils and the NSW Aboriginal Land Council. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW welcomes the opportunity to make a submission on the draft Regulations and other key products to support the implementation of the new *Biodiversity Conservation Act 2016* and *Local Land Services Amendment Act 2016*.

Purpose

The following documents are on public exhibition:

- Draft Biodiversity Conservation Regulation 2017, and its supporting regulatory impact statement
- Draft Local Land Services Amendment Regulation 2017
- Draft Environmental Planning and Assessment Amendment (Biodiversity Conservation) Regulation 2017
- Explanation of Intended Effect for the State Environmental Planning Policy (Vegetation) 2017
- Land Management (Native Vegetation) Code
- Biodiversity Assessment Method (BAM) and BAM Tool
- Accreditation Scheme for the Application of the Biodiversity Assessment Method
- Draft Sensitive Biodiversity Values Land Map
- Serious and irreversible impacts guidance
- Offsets payment calculator and User Manual

LGNSW's response is based on consultation with councils, however given the quantity of information on exhibition, and the short timeframe to review (6 weeks), this submission will focus on the implementation aspects of the reforms for local government.

The following key issues for local government have been identified:

- Protection of biodiversity in a local context
- Inclusion of local information in the sensitive values map
- Guidance provided to councils in interpreting serious and irreversible impact
- Urban tree management including local amenity, urban forest, shade, heat reduction
- General support and capacity building for councils to implement the reforms
- Legislation commencing prior to the finalisation of all aspects of the reform

Background

The NSW Government has fundamentally changed the way land clearing decisions are made through the introduction of this new legislation. The key purpose of this change is to simplify and streamline legislation to conserve biodiversity and support sustainable development.

LGNSW has provided input throughout the reform process which commenced in 2014. This includes a detailed submission on the draft bills in July 2017. We have maintained a clear

position of protecting biodiversity within an 'avoid, minimise, offset' paradigm in the context of local development. Offsets should be used as a final option to facilitate appropriate development and a transparent, consistent and repeatable system of offsets is needed.

LGNSW has also written to the Minister for the Environment seeking an extension of time for submissions given the large number of documents and supporting material to be reviewed and considered, which is complex and technical. A response has not yet been received.

This submission will focus on the key issues for local government in the implementation of the new legislation. We have previously raised issues of concern about this new approach to the management of biodiversity conservation and land management in NSW, and while many of these concerns remain, we will offer constructive input in relation to local government delivering on their areas of responsibility under the new legislation.

General comments

Councils have expressed concern that the new system is highly complex, and rather than simplifying processes, the system has created more complex pathways and options for approvals for land clearing. Significant concern exists that this may lead to a weakening of biodiversity protection at a local level and fail to achieve a 'no net-loss' biodiversity outcome.

Partial implementation of the new legislation is scheduled for 25 August 2017. Councils have expressed disappointment that the reforms are commencing prior to the finalisation of the supporting materials including the Native Vegetation Regulatory Map, the Biodiversity Conservation Investment Strategy, schedules to the land management codes, and ancillary rules for varying offset requirements. This is already creating confusion within the community and other landholders who will be impacted by the new process. Councils will be placed in the awkward position of dealing with community enquiries from land managers and developers wanting to understand the new process, in a complex interim period with various aspects of the reforms not yet operational.

LGNSW welcomes the capacity building program for local government currently under development. This program proposes to offer a regionally based support system for council with eight positions across NSW assisting councils to implement the Biodiversity Conservation Act and offer both training and a 'help-desk' function to councils. This needs to be established as a priority.

It is apparent that the draft Vegetation SEPP will not be exhibited prior to finalisation. While the EIE is part of the current consultation package, there is considerable concern whether the package without the detail available in the draft SEPP, will achieve its stated objectives. LGNSW has a long held position that all draft SEPPs are to be made available to councils for consultation, given they are responsible for their implementation.

The timeframe to review the extensive amount of material currently on exhibition is inadequate and has not provided an opportunity for councils to undertake an in-depth analysis of some of the detailed products. Councils have expressed extreme dissatisfaction with the time allocated for review, being a total of six weeks to digest a large volume of information.

This submission will provide further detail on general issues which relate to the regulations and supporting materials. More comprehensive analysis will be included on the following specific issues:

1. Sensitive biodiversity values map
2. Biodiversity offset scheme
3. Biodiversity assessment and approvals under the Planning Act
4. SEPP (Vegetation) – Explanation of Intended Effect
5. Serious and Irreversible Impacts
6. Biodiversity Assessment Method
7. Native Vegetation Regulatory Map
8. Other specific comments on the Biodiversity Conservation Regulation

1. Sensitive biodiversity values map

The proposed Sensitive Biodiversity Values Maps will identify land of high conservation value. Any clearing of land in these areas will be subject to the Biodiversity Offset Scheme. These maps are published by the Chief Executive of OEH, and are developed using criteria established in the Biodiversity Conservation Regulation which includes:

'Land identified by Local Government Authorities (and approved by the Minister for the Environment) that contains connectivity features or threatened species habitat which support the object of the BC Act to conserve biodiversity at bioregional and state scales.'

LGNSW supports the inclusion of this locally relevant information. However, the process to facilitate the inclusion of this data, where relevant, was not communicated to councils and as such the opportunity to include this information in the draft maps was missed. This is of concern given the maps will be used from the implementation date of 25 August 2017. The process of updating maps will be a lengthy one given the need for Ministerial approval for each addition of council's information.

Recommendations:

- That the draft regulation is amended to allow the Chief Executive of OEH to approve additional information to be contributed to the map, rather than the Minister, to ensure this can occur in a timely manner.
- That the Sensitive Biodiversity Values Map is subject to a public consultation or review process, or at least to an established consultation process with local government.
- That further clarification is given on the process of reviewing a sensitive biodiversity values map as well as the process of informing councils of any changes to these maps.

2. Biodiversity offset scheme

The proposed offset variation rules provide flexibility to source offsets across NSW. Individual LGAs seek local offsets as a first option and measures to achieve 'no net loss' at the local level. What represents a reasonable effort to find offsets needs a much clearer definition. The variation rules should be rewritten and made more specific to allow less flexibility and strive to achieve the 'no net loss' objective.

In many cases councils are aware of local offset opportunities and can assist developers and the NSW Biodiversity Conservation Trust to identify local offsets. Councils are concerned that an option for developers to manage their offset liability by paying into a fund exists without a

time frame set for delivery of that offset. Councils would like to receive notification of when and where an offset is finally discharged.

The variation rules in section 6.4 of the draft Regulation require as a first step that 'the proponent who is to retire the biodiversity credits has taken reasonable steps to obtain the requisite like-for-like offsets'. A definition of 'reasonable steps' is needed to ensure that like-for-like offsets are given the highest priority as they deserve. Many councils have expressed concern in relation to the variation rules and do not support their use from an ecological perspective. The loss of threatened ecological communities or their habitat and rules which enable offsetting that may not represent the same threatened ecological community will lead to losses of what should be protected species.

The use of offset variations should be limited and a strengthening of the circumstances where variations can apply is supported. A concurrence requirement from OEH or the BC Trust where offset variations are proposed would strengthen their use.

Expertise to assess biodiversity development assessment reports (BDAR)

Councils are concerned that they don't have the expertise required to review a BDAR. It may be necessary and appropriate for council to refer the application to an independent accredited person or body who could provide advice to councils. This model is used for contaminated lands where a Review Board can provide independent verification on a contentious or complex BDAR. Such a Board would have no development application approval powers but could assess the accuracy and make recommendations in relation to the BDAR.

Recommendation

- That a timeframe be included in the process of discharging an offset once a developer pays into the offset fund, and further that councils are notified of the final offset result.

3. Biodiversity assessment and approvals under the Planning Act

Section 79C considerations

Local government is still required to consider Section 79C of the EP&A Act in making a determination on a development decision. Councils are seeking confidence that in instances where a proponent submits a complying BDAR that council may still reject the application based on S79c considerations. Further guidance may be required on this approach and managing the tension with developers in such instances.

Clarity is sought around the role of S79c in situations where clearing proposals are not associated with development but are over the BAM thresholds. In these cases the Native Vegetation Panel (NVP) is the consent authority, but it is unclear as to whether the NVP is still required to consider S79c requirements.

Exempt and complying development

Vegetation clearing that is exempt from approval because it is exempt and complying development needs review to ensure this is not a loophole. This highlights the problems arising from interaction between the EP&A Act, the LLS Act and SEPP (vegetation) which is difficult to fully comprehend and explore until all the proposed provisions are exhibited.

4. SEPP (Vegetation) – Explanation of Intended Effect

The value of vegetation in urban areas extends beyond biodiversity values. In highly urbanised areas the remaining vegetation has an important role in providing shade, amenity, heat reduction and heritage as well as biodiversity value. As such urban vegetation management is best considered in a holistic approach to urban forest management.

It is disappointing that the Vegetation SEPP as described in the EIE has a narrow focus to fill a regulatory gap resulting from the implementation of the new legislation. That focus is to manage vegetation removal not associated with a development application. The title of the SEPP is misleading, given the focus is purely on native vegetation. This has created confusion among councils who are expecting it to be a more holistic approach to managing urban vegetation. There is a disconnect between the Vegetation SEPP with its native vegetation focus, and the bigger picture urban forest perspective of many councils.

As designed currently, the SEPP creates a new regulatory system for the management of native vegetation in urban areas that is unnecessarily complicated and confusing.

The primary criticism of the SEPP is that it is restricted to native vegetation and therefore will have limited application in a non-rural environment, and limited application in E zones where the existing vegetation is more often a mixture of native and non-native vegetation.

It sets up a regulatory system that applies to very few applications and potentially undermines current practice that applies to both native and non-native vegetation. In addition, the definition of native vegetation as it applies to the larger clearing applications on urban fringe areas is likely to be problematic given the mixture of species that commonly occur in these areas.

The secondary criticism is lack of clarity about how the SEPP relates to other SEPPs, council's LEPs and DCPs and other biodiversity policies that cover the protection of bush land, tree preservation requirements, urban canopy and the protection of biodiversity values more generally. We are aware the planning reform package will be simplifying councils' DCPs and it is unclear how this policy direction will be applied to the management of trees and urban forest more generally. We seek a fuller understanding of the emerging system before another SEPP is imposed above the LEPs and DCPs.

Recommendation:

- Change the title of the proposed SEPP to 'Native Vegetation in urban areas SEPP' or something similar so it clearly articulates its role.

Exhibition of the Draft Urban Vegetation SEPP

LGNSW calls on the NSW Government to release the draft SEPP for comment. The detail provided in the SEPP is of particular interest to councils who have responsibility for implementing the SEPP. The key detail sought includes definitions of the following; vegetation (including native vegetation), clearing, size and age of trees, pruning, lopping, distance from fences and boundaries and inclusion of grasses and shrubs.

Recommendation:

- LGNSW calls for all draft SEPPs to be exhibited for comment.

Implementation issues for local government

Councils are seeking further guidance on the update needed to their DCP. A model DCP or model clauses would assist councils to ensure the Vegetation SEPP requirements are taken into adequate consideration and there is some consistency in implementation across council areas, while providing local flexibility where appropriate.

The EIE includes a 28 day turn around for tree clearing permits issued by local government. This is not supported by councils. While some decisions are straightforward, many are not and involve on-site inspections and discussions with other parties. A longer timeframe will provide the opportunity for more diligent decision making.

Recommendations:

- That the NSW Government provides guidance to councils on model clauses, or a model DCP to incorporate Vegetation SEPP requirements.
- Seek an inclusion of a 40 day turn around on permits to be consistent with other development application timing.
- Councils need more detail on how they are to interpret native vegetation and what percentage native vegetation cover on a site is need to trigger assessment through this process.

Land covered by the SEPP

The SEPP will apply to E-zones and urban areas however there is concern in relation to deferred e-zones and how they will be considered under the SEPP. The councils with these deferred E-zones maintain that they should be included under the SEPP given their characteristics meet the E-zone definition.

Recommendation:

- Deferred E-zones should be included as land covered by the SEPP.

Thresholds

Area clearing thresholds do not allow for the consideration of the value of small remnants of vegetation in a heavily cleared or urban landscape. These areas are of high local value and while many are small and often isolated patches, they have a part in providing habitat stepping stones and linkages across the landscape. These sites should be provided with adequate protections. This can be a challenge when land values are high in the urban area and the development pressures are high.

Clearing thresholds should be a percentage of the site, up to a maximum of a certain hectare size and must avoid mapped sensitive value vegetation. This prevents inappropriate clearing of the last remaining remnants of vegetation, and protects other natural resource ecosystem functions such as waterways, soil erosion and connectivity.

Concern exists that minimum thresholds need to apply regardless of lot size. For example lifestyle blocks of over 100 hectares can now clear 25ha without offsets (assuming none is mapped as sensitive value). The cumulative impact of such clearing will result in further loss of vegetation and needs to be closely monitored and reported.

Recommendation:

- That fixed size thresholds should be replaced by thresholds based on the percentage of a site, regardless of lot size.

Compliance

Further information is required on how councils will enforce vegetation compliance once Clause 5.9 and 5.9AA in the Standard Instrument LEP are removed. Councils are unclear how they will enforce penalties for unlawful tree removal or damage and are seeking clarification on what enforcement provisions will apply for both native and non-native vegetation under the new arrangements. In repealing clause 5.9 (where development consent is required for works) what mechanism will there be, or what are the enabling provisions for prosecution?

Noxious weeds

The EIE refers to plants declared to be noxious weeds under the *Noxious Weeds Act 1993*. These references should be removed as this Act has been replaced with the *Biosecurity Act 2015*, which will commence on 1 July 2017.

Inconsistency arising in regulatory pathways

Councils have identified inconsistencies arising from regulatory pathways under the Vegetation SEPP. In an example of a development application that exceeds the BOS threshold, council has the opportunity to refuse the application or apply the BOS (BC Act 7.13). However, it appears that there is no similar role for council to apply 'avoid and minimise' principles to any proposed clearing not associated with a DA that exceeds the BOS threshold. These clearing applications are assessed by the Native Vegetation Panel (NVP). An issue has been raised as to whether the NVP has the same avoid and minimise standards as a council uses to regulate DAs. If not, this is likely to promote pre-emptive clearing and lead to perverse biodiversity outcomes.

Recommendation:

- The NVP should be subject to the same 'avoid and minimise' principles for clearing decisions above the thresholds.

Native Vegetation Panel (NVP)

The Native Vegetation Panel (NVP) will be the consent authority for applications for clearing which are over the BOS threshold and therefore need to be assessed using the BAM process. The draft SEPP refers to the ability of the NVP to delegate their role to a council. Further detail is sought on the process of delegating these functions, and further clarification sought on where these powers are derived in the legislation, regulation or other supporting material. This is currently unclear.

A number of councils have expressed an interest in taking on the role of the NVP, given their planning expertise, mandate from the local community to represent community standards and their knowledge and expertise in local environmental values and local biodiversity protection objectives.

Concern exists that allocating clearing consents to an independent panel may lead to decisions which are not aligned to local community expectations for managing local

biodiversity. If the panel continues with this decision making role, there should be an opportunity for council to input into the approval process.

Recommendation:

- That a clear process of delegating the functions of the NVP to councils is developed, and that this delegation responsibility is appropriately supported in the reform documentation.
- If the NVP maintains the consent authority role there should also be an opportunity for local government input in the approval process.

5. Serious and Irreversible Impacts

A key element of the reform which impacts on councils is the implementation of 'serious and irreversible impact.' The materials on exhibition include draft guidelines on implementing serious and irreversible impact, however these are highly technical and complex and will require a level of expertise and experience that not all councils have. To assess and decide whether a serious and irreversible impact is likely councils will need targeted training on the process and the draft guidelines. Even with this capacity building assistance councils may still require further assistance in applying this concept.

One option may be to seek independent technical advice when implementing serious and irreversible impact when necessary. A referral process to independent technical experts may be an appropriate approach to support councils in this decision making responsibility. Formalising such a process is recommended.

Recommendation:

- That a formal, independent referral process be made available to councils as required, to provide guidance on technical decisions in relation to serious and irreversible impact.

6. Biodiversity Assessment Method (BAM)

Avoid and Minimise

The legislative mandate to ensure that avoiding and minimising impacts are a fundamental part of the process is clear. The structure of the BAM methodology does not provide a clear initial consideration of this objective, or set standards to follow and as a result does not dissuade the use of biodiversity offsets. Specific comments on relevant sections of the BAM are below.

- Consultation note at 2.2.3 of the BAM states that "OEH will consult with local governments on the biodiversity data that they hold and how it may be used to inform a BAM assessment". This is welcomed. Section 6.1.1.5 of the BAM goes on to state that "An assessor may use more appropriate local data instead of data from the Threatened Biodiversity Data Collection. The regulations will set out the circumstances in which more appropriate local data may be used and any approval process for using that data". This provision does not seem to be in the draft Regulation - please include it.

- 10.2.1.4 of the BAM states that “A consent authority may require an assessor to include an assessment of potential serious and irreversible impacts on other threatened entities not listed in the *Guidance and criteria to assist a decision maker to determine a serious and irreversible impact* as part of a development application, clearing or biodiversity certification proposal. What is the process for councils to advise proponents of these additional entities before they prepare a BAM? LGNSW suggests it may be appropriate for proponents to check with councils on this aspect at the same time they are checking for ‘more appropriate local data’.
- Section 10.4.1 outlines the circumstances in which an assessor is not required to determine an offset for the impacts of development or clearing for plant community types (PCTs) that are in very poor condition (of vegetation integrity), regardless of whether they are endangered, critically endangered or associated with threatened species. LGNSW is concerned that this provides an incentive for the poor management of existing native vegetation, and recommends that offsets be determined for all endangered, critically endangered PCTs or those PCTs associated with threatened species.
- The BAM should be applied at the rezoning stage. This will ensure that environmental loss and offsets are planned for upfront, provides greater certainty for all parties during the subsequent DA stages and provides more time for developers to secure offsets.

Biodiversity Offsets Calculator

The Offsets calculator uses records of previous trade prices as the basis for setting prices for plant community types (PCTs). LGNSW understands there are 1392 PCTs, however trade price history information exists for less than 70 PCTs. For the remaining 1300 PCTs, their price is to be set at the average price across all PCTs in the same Interim Biogeographic Regionalisation for Australia (IBRA) region. This is to be updated over time, as trades are recorded for PCTs.

While we appreciate the challenges of setting prices in a new market, using the same price for almost all PCTs does not account for scarcity / occurrence of PCTs, nor provide a differentiation between rare or common PCTs. LGNSW recommends that a scarcity factor be applied to all PCTs using the ‘average price’ until such time as they have an actual trade price as reference. The scarcity factor should reflect the uncleared area of the PCT remaining in each IBRA region (ie, the less PCT remaining, the higher the factor)

Carbon release from land clearing should also be included in the calculations.

7. Native Vegetation Regulatory Map

The delay in finalising the Native Vegetation Regulatory Map prior to the reforms commencing will create confusion among landholders and councils. Widespread support exists across local government for delaying the commencement of the legislation until all elements of the reform are complete.

Councils are seeking the opportunity to request review of the regulatory map in the same way as an individual landholder can. This would enable councils to present locally relevant data or information to be included in the map.

Recommendation:

- The finalisation of the regulatory map is needed prior to the implementation of the Vegetation SEPP.
- Councils are given the same opportunity as landholders to request review of the regulatory map.

8. Other specific comments on the Biodiversity Conservation Regulation

- *Areas of outstanding biodiversity value*

Part 3.1 relates to the criteria for declaring outstanding biodiversity value. The first criteria (3.1.1.a) identifies the area as 'important state, national or global scale'. LGNSW seeks the inclusion of local and regional scale in this section.

- *Stewardship payments*

Division 6.4 of the draft Regulation sets out the operation of the Biodiversity Stewardship Payments Fund, which will manage stewardship payments to landholders for managing offset sites in perpetuity. This part of the regulation outlines how the fund manager will annually calculate operational surplus or deficit where the balance of the site account exceeds/is less than the sum of all scheduled management payments in respect of the site from the current year and extending to perpetuity. Will these calculations use a surrogate time period for 'perpetuity', and will the payments be indexed to ensure they maintain their relative value over time?

Other issues:

Local Government access to information

The reforms intend to encourage greater uptake of private landholder management agreements. Councils seek access to registers of agreements which impact on land management, including set-asides, and any other agreements which need to be included on section 94 certificates. Any agreements which are subject to rate relief must also have a clear process for notification to councils.

Rate relief for conservation agreements

LGNSW has a long standing position that councils should be reimbursed by Government for any rate relief councils are required to provide as part of a landholder management agreement for private land conservation.

The reform process does not intend to provide rate relief for land under a conservation agreement which receives a regular in-perpetuity payment. However there appears to be scope for the Minister for the Environment, on the advice of the Trust, to provide rate relief for

land under an in-perpetuity agreement. There is also an intention to provide rate relief to land under an in-perpetuity conservation agreement where they are not receiving any payments.

LGNSW strongly opposes this proposal given the potential for further loss of rating revenue or a resulting increase in rates for other rate payers in that LGA to ensure that the council's rating income is not eroded. If rate relief is necessary, the Biodiversity Conservation Trust must reimburse the rate to councils to ensure they can maintain rating income without undue burden on other rate payers.

Recommendation:

- It is LGNSW's strong recommendation on behalf of the sector that councils be reimbursed through the Biodiversity Conservation Trust for any rate relief provided for conservation agreements.

Final comments

LGNSW is committed to working with the NSW Government on the implementation of the Land Management and Biodiversity Conservation reforms to ensure local biodiversity continues to be protected. Councils will have a key role as a consent authority for many development applications which have a vegetation clearing component. As such, councils need the adequate training, resources and expertise available to them to build the capacity of their systems and processes as well as staff to undertake this role.

LGNSW welcomes the capacity building project currently under development which will provide key regional positions to support councils in this process. We look forward to working with the Government to ensure this support is available to councils in a timely and efficient way, and prior to the legislation commencing.

We remain concerned that the key elements of this reform including the native vegetation regulatory map and the sensitive values maps have either not been finalised and in the case of the sensitive values map, have not included relevant council data as was committed to in the Act. LGNSW's strong position is that this legislation should not be enacted until these maps have been completed with the council input.

Summary of recommendations

Sensitive biodiversity values map

- To seek an amendment to the draft regulation to allow the Chief Executive of OEH to approve additional information to be contributed to the map, rather than the Minister to ensure this can occur in a timely manner.
- That the Sensitive Biodiversity Values Map is subject to a public consultation or review process, or at the least have an established consultation process with local government.
- That further clarification is given on the process of reviewing a sensitive biodiversity values map as well as the process of informing councils of any changes to these maps.

Expertise to assess biodiversity development assessment reports (BDAR)

- That a timeframe be included in the process of discharging an offset once a developer pays into the offset fund, and further that councils are notified of the final offset result.

SEPP (Vegetation) – Explanation of Intended Effect

- Change the title of the proposed SEPP to 'Native Vegetation in urban areas SEPP' or something similar so it clearly articulates its role.
- LGNSW position that all draft SEPPs should be exhibited for comment.
- That the NSW Government provide guidance to council on model clauses, or a model DCP to incorporate Vegetation SEPP requirements.
- Seek an inclusion of a 40 day turn around on permits to be consistent with other development application timing.
- Councils need more detail on how they will interpret native vegetation and what percentage native vegetation cover on a site is need to trigger assessment through this process.
- Deferred E-zones should be included as land covered by the SEPP.

Thresholds

- That fixed size thresholds should be replaced by thresholds based on the percentage of a site, regardless of lot size.

Inconsistency arising in regulatory pathways

- The NVP should be subject to the same 'avoid and minimise' principles for clearing decisions above the thresholds.

Native Vegetation Panel (NVP)

- That a clear process of delegating the functions of the NVP to councils is developed, and that this delegation responsibility is appropriately supported in the reform documentation.
- If the NVP maintains the consent authority role there should also be an opportunity for local government input in the approval process.

Serious and Irreversible

- That a formal, independent referral process be made available to councils as required, to provide guidance on technical decisions in relation to serious and irreversible impact.

Native Vegetation Regulatory Map

- The finalisation of the regulatory map is needed prior to the implementation of the Vegetation SEPP.
- Councils are given the same opportunity as landholders to request review of the regulatory map.

Rate relief for conservation agreements

- That councils be reimbursed through the Biodiversity Conservation Trust for any rate relief provided for conservation agreements.

We would be pleased to discuss the issues raised in this submission further. Please contact Kirsty McIntyre at LGNSW on 9242 4055 or kirsty.mcintyre@lgnsw.org.au.