Environmental Defenders Office

9 December 2019

Planning Reform
Department of Infrastructure, Planning and Logistics
Darwin NT 0801
By email: planningreform@nt.gov.au

Dear Planning Reform Team

Stage 3 Planning Reforms – Planning Amendment Bill 2019

Thank you for the opportunity to make a submission on Stage 3 of the reforms to the Northern Territory's planning system.

The Environmental Defenders Office (NT) is a community legal centre that specialises in using the law to protect the environment. Our expertise includes planning and environment law, and we regularly give advice to clients engaging with the planning system and navigating the *Planning Act*.

Given our legal expertise, we focus on providing comments on the *Planning Amendment Bill 2019* (**Bill**). We first provide some overarching comments on key issues that we have identified, and then make more targeted comments and recommendations on specific provisions in the Bill.

Overarching comments

Broadly, we consider the Bill clarifies some important matters and may lead to some improvements in administration of the planning system. However, in our view reform of the *Planning Act* does not go far enough. Further, in some respects we consider that amendments may in fact undermine the stated intent of the reforms, particularly in relation to building community confidence and trust in the planning system.

We consider the Bill is a significant missed opportunity to more fundamentally redraft the *Planning Act* and to more holistically consider and reform the planning system on issues that are of key concern to the community, including climate change, environmental impacts, transparency and accountability.

Key issue 1: Climate change must be integrated in the Bill

The NT Government's own Climate Change Response identifies that one of the key ways it will respond to climate change includes embedding greenhouse gas (GHG) emissions reductions and climate risk response considerations across government decision-making. Despite this, climate change is not referred to in the Bill. This is a critical concern.

The integration of climate change is crucial for any planning system. Many climate impacts are authorised by development approvals, and particularly in the case of the Northern Territory, a range of climate change adaptation measures can best be implemented through effective strategic land use planning and development control tools. An effective "climate-ready" planning system is therefore a critical part of the response to climate change.

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A report recently prepared by EDO NSW outlines how a planning system can and should integrate climate change[1]. Many of the recommendations can be directly adapted into the Northern Territory's framework. We strongly recommend the following must be integrated into the Bill, at a minimum:

- The objects clause must include a clear reference to climate change, ensuring the legislative framework for planning is one that drives reducing greenhouse gas emissions through development decisions, and provides guidance on planning for a rapid and just transition to a low carbon economy and planning effectively for adaptation to the impacts of climate change;
- There should be specific requirements to establish a climate change strategic planning principles and policy (under new cl 9A), as well as include specific requirements for climate change overlay provisions for inclusion in the planning scheme (e.g. sea level rise overlay mapping to guide decision-making);
- Climate change must be included as a mandatory relevant consideration for decision-makers (such as the DCA) at key decision points in the *Planning Act*, and particularly in s 51 (matters to be taken into account)[2]; and
- The *Planning Act* should include clear requirements for the development of building sustainability standards and benchmarks for new developments, to accommodate climate change projections (e.g. water efficiency, thermal comfort, energy efficiency, extreme events) in the Northern Territory context.

Implementing these recommendations will more appropriately position the *Planning Act* so that the planning system will play a fundamental role in ensuring the Northern Territory can appropriately respond to the risks associated with climate change and implement actions to mitigate emissions.

Key issue 2: Environmental principles and safeguards must be integrated into the Bill

We reiterate the concerns raised in our submission at stage 2 of the reforms that the *Planning Act* (and thus the planning system more broadly) does not contain adequate environmental safeguards to avoid and mitigate negative impacts of development on the environment (including social and cultural impacts).

The *Planning Act* currently does not include adequate guiding principles and operational provisions to ensure that environmental impacts are properly considered in planning decision-making, despite being a key regulatory framework governing potentially significant environmental threats. For example, the individual and cumulative impacts of land clearing are not appropriately nor adequately regulated by the current arrangements (non-enforceable guidelines) made under the *Planning Act*, and the inclusion of overlays in the planning scheme to identify important environmental values in the planning scheme, while useful, is not a sufficient mechanism to ensure that environmental impacts are appropriately avoided and mitigated through decision-making.

While we largely support the proposed new purpose and objectives clause (Bill, cl 2A) (see further below), and acknowledge that in some instances, decision makers will now be required to consider the purpose and objectives in the decision-making process, we consider that the Bill does not overcome the existing inadequacies of the *Planning Act* noted above. It does not include

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[1] *Climate-ready planning laws for NSW*, see: http://www.edo.org.au/wp-content/uploads/2019/11/EDO-CC-FINAL-full-report-double-spreads.pdf

[2] We note that the recently passed *Environment Protection Act 2019* includes a reference to ensuring the impacts of a changing climate are included in the EIA process.

sufficient amendments to ensure the appropriate, holistic integration of appropriate principles and safeguards at both a strategic planning and development assessment phase.

In particular, we consider the *Planning Act* should be better integrated with, and be consistent with, the guiding principles and framework of the *Environment Protection Act 2019* (**EP Act**) to ensure there is consistency in approach to environmental protection for all decision making that impacts the environment, at all thresholds of impact. For example, this could be achieved by:

- Explicitly integrating the principles of ecologically sustainable development (**ESD**) (as per the EP Act) as guiding principles in the *Planning Act*;
- Adopting the 'environmental decision-making hierarchy' included in the EP Act, which establishes an approach for proponents to 'avoid, mitigate and offset' the impacts of a development proposal (also known as the 'mitigation hierarchy');
- Considering additional safeguard mechanisms to clearly link the two legislative frameworks, such as setting triggers for when certain kinds of development approvals under the *Planning Act* require referral for environmental impact assessment under the EP Act.

Adopting these recommendations would ensure that a consistent, best practice approach to avoiding and minimising the negative impacts of development, at whatever scale, is implemented in the Northern Territory. This would lead to better planning decisions and outcomes, by creating a consistent, systemic method that ensures all projects (regardless of whether they trigger the thresholds for full environmental impact assessment under the EP Act) are designed so as to avoid and minimise their negative impacts on the environment and community. In addition to driving better planning outcomes, we consider it would deliver greater efficiency in the planning system, as any critical impacts or issues would be identified and resolved early in the development assessment process.

Specific recommendations on Bill provisions

In addition to the two key issues identified above, we make some brief comments on some important parts of the Bill.

Purpose and objectives (Bill cl 4)

We consider the proposed new 'purpose and objects clause' includes some significant improvements on the existing objects clause in the *Planning Act*. In particular, we support that proposed new s2A would include specific reference to the responsible use of resources, to maintaining environmental health and protecting ecological processes, and to protecting the quality of life of future generations. These are all critical considerations for a planning system.

However, we are concerned that (as per our comments above), the Bill does not directly adopt the definitions of ESD as per the EP Act, and nor does it include any reference to climate change. Further, the use of the term 'sustainable development' is confusing in this context, particularly because it remains undefined in the Bill and it is not clear whether it is intended to be the equivalent of ESD.

As noted above, adopting the principles of ESD (as defined in the EP Act) would ensure there is better integration and consistency across related Northern Territory statutory frameworks. We note that the *Planning Act (Qld*) (ss3-5) provides a good model that could be drawn on, as it includes references to resilience and climate change (amongst other things), issues of core relevance to a planning system.

Further, we are very concerned that the emphasis of the objects clause been amended from designing a framework for the 'orderly use and development of land' to 'ensure that planning is conducted within a strategic framework that facilitates the development of land'. In our view, it is

important for the planning system (and the legislation that establishes it) to remain focused on good planning, rather than orienting itself as a tool to facilitate development.

Strategic framework and planning scheme (Bill cl 8-9)

While we broadly support the provisions that are intended to give greater clarity to the planning scheme (proposed ss 9A, 9B), it remains a serious concern that the *Planning Act* does not provide any clarity around the legal status of the Northern Territory Planning Scheme. This undermines its rigour, and ability to be enforced, which in turn undermines community trust and accountability.

The Bill must clearly set out a legal hierarchy describing how the various elements of the planning system (strategic framework, planning scheme, planning policies etc) relate to each other. It must be very explicit about the definition of each, their legal status and they are to be made. For example, this would require the Bill to be amended to clarify that a planning scheme sits under a strategic framework or strategic policy document and must be consistent with its terms, and that it is an enforceable statutory instrument. This hierarchy approach would be consistent with the approach of other jurisdictions (e.g. the NSW planning system which establishes a hierarchy of planning instruments – statement environmental planning policies, local environmental plans, development control plans, etc).

Further, we are concerned that the provisions relating to the amendment of the planning scheme enable the Minister to make amendments to the scheme without a process of public consultation. Proposed s13AB provides that the Minister simply must 'consider' whether 'the proposed amendment is not significant enough to require exhibition'. This provides the Minister with an unconstrained, unaccountable discretion. Instead, the Minister should be required to publicly exhibit all proposed amendments to the planning scheme except those that are purely administrative in nature (e.g. to correct typographical errors). The ability for the Minister to avoid scrutiny of amendments to the planning scheme seriously undermines community trust in the planning system.

Submissions (Bill cl 12, 28)

We are concerned that new requirements for making submissions (e.g. requiring that a submission be signed by each person) may have the unintended effect of undermining participation in decision-making, which would be contrary delivering a planning system that 'reflects the wishes and needs of the community' (per new object cl 2A(b)).

We consider a more expansive and 'encouraging' view should be taken to public participation in the planning process. The restrictive requirements for a submission to be validly made and accepted should be removed. In addition, enabling varied methods for making submissions should be considered. For example, the draft Environment Protection Regulations enable submissions to be made in writing, orally in person or by audio or audio-visual communication or recording, or any other manner approved by the EPA (cl 240)[3]. Including this approach in the Bill would be reflective of a more genuine attempt at engaging with the community and seeking input into decisions.

Discretionary decision-making (Bill cl 19, 32)

We remain concerned that, throughout the Bill (and in the *Planning Act*), key decision points do not have appropriate guidance nor constraints around decision-making. For example, in our view it is inappropriate that cl 19 of the Bill enables the consent authority to approve a 'non-complying' development proposal simply if the Minister does not respond within 14 days. It is also

[3] See: https://denr.nt.gov.au/__data/assets/pdf_file/0009/749898/Environment-Protection-Regulations-Exposure-Draft.pdf

inappropriate that the Minister is not required to consider whether the decision to consent to otherwise 'non-complying' development is not required to be satisfied that the decision would otherwise promote the purpose and objectives of the *Planning Act*. These provisions enable decisions to be made in a way that seriously undermines accountability and transparency. They should be amended to include specific criteria or guidance on the decision maker (e.g. with reference to the objects clause, as a minimum).

Enforcement (Bill cl 44)

We largely support the enforcement provisions set out in the Bill, including the offence provisions and powers to issue enforcement notices, although consider they do not go far enough.

We consider the maximum penalty amounts in the Bill are inadequate in relation to the offence provisions they are applied to (e.g. 500 penalty units for carrying out development without a permit or clearing native vegetation without a permit), particularly when contrasted with other jurisdictions. For example, maximum penalty for a corporation in NSW for breaching the *Environmental Planning and Assessment Act 1979* is $5 million.

Setting the maximum penalty at such low levels seriously undermines the deterrent effect of the offence provisions and does not send a proper signal about the seriousness of the various offences. Proponents may simply factor in breaches of the legislation into the 'cost of doing business' if they consider potential penalties are cheaper than compliance. We therefore consider that the penalty amounts need to be significantly increased.

We also consider that there should be tiered offences that each include strict liability offences. This would be consistent with best practice, and is the approach adopted by other recent legislative reform, such as the EP Act.

Finally, we submit that civil enforcement proceedings should be included in the *Planning Act*, similar to the EP Act. These provisions should also include open standing for civil enforcement (as well as judicial review).[4] The inclusion of third party civil enforcement provisions would be a significant safeguard to ensure that the *Planning Act* can be enforced in circumstances where a regulator is unwilling or unable (e.g. due to lack of resources or regulatory capture) to bring proceedings for a breach.

Review rights (Bill cl 68)

We have serious concerns about the provision of expansive appeal rights for proponents (Bill proposed s 111), but the apparent failure to provide equivalent third party merits appeal rights. On this issue, we refer to and reiterate the comments we made on these matters in our submission for Stage 2 of the planning reforms.

The restrictions on third party appeal rights included in the existing Planning Regulations must be repealed. Any limitations on the availability of merits review be based on the level of impact of a development (i.e. merits review not available for low impact development), rather than making an artificial distinction based on amenity only.

As we have previously noted, merits review by third parties is a critical anti-corruption safeguard. The availability of third party merits appeal rights also delivers better planning outcomes that are in the public interest, because it acts as a check and balance on decision-making processes, particularly for contentious or high impact decisions. To exclude third party rights (but provide expansive proponent appeal rights) is also directly inconsistent with the new objects as set out in the Bill, that is, 'to respect and encourage fair and open decision making and public access to

[4] See for example s 9.45 in the *Environmental Planning and Assessment Act 1979* https://legislation.nsw.gov.au/#/view/act/1979/203/part9/div9.5/sec9.45

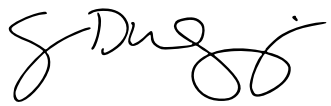
processes for review of planning related decisions' (proposed cl 2A(k)). As currently proposed, the *Planning Act* will remain completely unbalanced, allowing proponents with 'deep pockets' to place pressure on under-resourced regulators through the appeals process.

Transparency and access to information

Finally, we take the opportunity to note that we consider the Bill has missed an important opportunity to be fundamentally updated to improved access to information and transparency around decision-making in the planning system. As noted in our stage 2 submission, key improvements around transparency and access to information would include the statutory requirement for a public register of key documents under the Act (including all development approvals/permits), requirements to notify objectors of decisions, and obligations for decision makers to publish reasons for key decisions. Until these matters are properly rectified in the *Planning Act,* the commitment to building community confidence in the planning system will, in our view, remain hollow.

We thank the Department for the opportunity to make this submission. We would welcome the opportunity to discuss our comments at any stage.

Yours sincerely,



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