edotasmania
using the law to protect the natural and built environment

131 Macquarie Street
Hobart TAS 7000

tel: (03) 6223 2770
email: edotas@edo.org.au

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Department of Justice
Office of Strategic Legislation and Policy
GPO Box 825
Hobart TAS 7001

By email: legislation.development@justice.tas.gov.au

Dear Sir or Madam

Land Use Planning and Approvals (Tasmanian Planning Scheme) Amendment Bill 2015 (the Bill)

EDO Tasmania is a community legal centre specialising in environment and planning law. We provide legal representation and advice on planning and environment law reform and policy formulation. We also undertake community legal education designed to facilitate public participation in environment and planning decision making.

We are pleased to provide the following comments in the relation to the Bill:

Introduction

1. EDO Tasmania supports a consistent set of planning controls across Tasmania. As a general proposition EDO Tasmania supports a single planning scheme for Tasmania as a means of achieving consistency and efficient planning in Tasmania.

2. The primary concern we have with the Bill is the degree to which the decision-making power is being placed in the hands of the Minister. This is not made clear in the Position Paper. There is no explanation as to why Ministerial power is being increased in the manner proposed. Only a close reading of the Bill reveals this fact.

3. Failing to acknowledge this shift is likely to lead to negative community perception of the reform process. The approach proposed by the Bill

will increase the workload of the Minister and his or her staff. It is also likely to lead to the Minister receiving approaches from persons wanting to pursue particular agendas in the planning space. For instance it is likely under the current drafting that the Minister would be "sounded out" by persons considering amendments. This will put the Minister in an invidious position.

The Tasmanian Planning Scheme (TPS)

4. The TPS is to be comprised of State Planning Provisions (**SPPs**) and Local Planning Schedules (**LPSs**). The Bill does not explicitly reflect the division between the SPPs and LPSs in the fashion found in the Position Paper. The current approach found in the *Land Use Planning and Approvals Act 1993* (Tas) (**LUPA Act**) is adopted in the Bill with respect to what can be included in a Scheme; there is very little prescription.

5. LPPs are not restricted by the Bill in terms of what they can contain any more than the SPPs are. The exception to this is that LPSs can only apply to a single municipal area. The implementation of the policy as described in the Position Paper relies on planning authorities preparing LPSs which are consistent with this policy. There is nothing in the Bill which means the LPSs must be drafted so as to reflect the Position Paper's breakdown of responsibility in relation to drafting the LPSs and SPPs.

6. The practical effect of this is that for the overall policy to hang together as set out in the Position Paper the decision-maker in relation to LPSs will need to carefully scrutinise each LPS. Furthermore the policy being implemented through this Bill will only result in good planning outcomes if the TPS is well-drafted and informed by a solid strategic basis. It is concerning that the strategic planning that one might expect to have taken place prior to the TPS being implemented has not taken place (to our knowledge) and is not referred to in the Position Paper.

State Planning Provisions (SPPs)

<u>Making</u>

7. Under the amendments proposed the Minister initiates the process of developing SPPs. The Minister may prepare a draft of the SPP or can provide terms of reference to the Commission and require it to prepare a draft. The Minister can then require the Commission to modify the SPPs in accordance with his or her direction. The Commission, in preparing

and modifying SPPs, must be satisfied that the draft or modified draft meets certain criteria (cl 15(7)), including furthering the objectives of the Resource Management and Planning System (**RMPS**).

8. The Minister next considers whether to approve a draft of the SPPs for public consultation. The Commission should make this decision in our view. The Commission, as an independent planning body, is best placed to do so. There is also no explanation as to why the Minister is given this power.

9. The Commission is responsible for the public consultation process under the Bill. We suggest that the exhibition provisions (c l17(2)) should make explicit that an electronic version of the SPPs is to be made available for download and that a person does not have internet access or capability can obtain copies of the draft SPPs[1]. The current drafting means the Commission could advertise the draft SPPs in a manner that does not allow for a person or entity to obtain a copy.

10. We also recommend that the Commission be given the discretion to accept representations outside the consultation period[2]. The current drafting means that a person or entity, who, through no fault of their own, cannot submit a representation in time, cannot be allowed to do so. This is too prescriptive and will lead to disputes based on common law procedural fairness principles and the application of the *Tasmanian Planning Commission Act 1997* (Tas).

11. Given the extensive notice provisions in this legislation we urge the State government to use this process to also consider whether a notice in a newspaper is the only prescription appropriate in 2015. This is common across legislation in Tasmania. Consideration should be given to notice being provided via other means such as on websites, social media and via subscription (that is, people can sign up online to receive notifications).

12. Clause 19 provides for the Commission to undertake a number of steps leading to the preparation of a report on the draft SPPs to the Minister. This includes holding a hearing. A hearing should be a compulsory requirement for the process leading to the creation of the SPPs. The discretion in this regard should relate only to the length of the hearings. For SPPs which relate to the entire jurisdiction it is appropriate that some

[1] This suggestion applies to the other similar provisions of the Bill in relation to making LPPs and amendments to SPPs and LPSs.
[2] Ibid

form of public forum be mandated in which interested persons and entities can present their views in person to the Commission.

13. Clause 21 gives the Minister the power to make SPPs. Sub-clause (1) provides the Minister must consider the Commission report and "any other matters the Minister thinks fit" prior to making or refusing to make the SPPs. Clause 20 is titled "Matters to be considered in making SPPs". This provides, at sub-clause (1), that the Minister "may inform himself or herself, in the manner he or she thinks fit, in relation to any matter." The Minister cannot make the SPPs unless satisfied of certain matters under sub-cl (4). In combination this provides the Minister with too broad a discretion as to what he or she can consider when deciding whether to make the SPPs.

14. The final decision-making power in relation to the SPPs should reside in the Commission in our view. The Commission is an independent expert body best placed to make the final decision. The Commission also manages the public consultation process. The Bill provides for the Minister to in effect be a proponent and decision-maker for the SPPs. We note that the Minister can draft the SPPs under cl 15.

15. The scope of the Minister's power, in our opinion, is too broad in relation to the modification of draft SPPs at the stage of making SPPs. By cl 21(1)(b) the Minister can modify draft SPPs (which have been through the Commission review process) "without re-exhibition". The modifications can be any that the "Minister thinks fit". The discretion is too broad here. Further there will be a lack of transparency where the Minister modifies an SPP without further exhibition. At the very least the Minister's power to modify should be heavily circumscribed such that it only applies in very limited situations. The Minister should be required to give public notice of the modification (this need not require formal re-exhibition).

16. In the context of a state wide planning scheme it is sensible for the Minister to (in effect) take the place of Councils under the current system. However the integrity of the Commission's current role needs to be maintained. The Commission should be empowered to make, modify or refuse the SPPs, not the Minister. The proposed approach will unduly politicise the process of making and amending the SPPs.

<u>Amendment</u>

17. The remarks above in relation to the Bill's approach to the making of SPPs largely also apply to the SPP amendment clauses, particularly with

respect to the power of the Minister. We also make the following comments:

a. Public consultation should be at the discretion of the Commission and not compulsory in relation to amendment. A statutory test such as found in cl 28(2)(a) should be included to guide the Commission in relation to the exercise of that discretion.

b. The Minister should not be empowered to declare public consultation is not required (cl 28(1)). No rationale has been provided for this provision. This should be a matter for the Commission as the independent expert planning body.

Review

18. The review provisions are vague by virtue of the use of "regularly and periodically" in cl 36(1). We suggest there be a specific time period identified to ensure review takes place. The Commission should conduct the review. The current drafting provides that the Minister could conduct a review without involving the Commission.

Local Provision Schedules (LPSs)

19. A planning authority may provide a draft LPS to the Commission. The Minister may direct a planning authority to provide an LPS to the Commission.

20. The Commission can direct a planning authority to modify a draft LPS. The limit of the Commission's powers is consistency with cl 39. It is not possible to know what restrictions will be placed on LPSs contents as cl 39(3) and (4) provide that the LPSs must be in accordance with "the structure" or "the form" "if any" set out in the SPPs. If no structure or form is set out in the SPPs this restriction has no impact. We assume the intention is for the SPPs to provide a high degree of specificity for what can be contained in LPSs. The current draft of the Tasmanian Planning Scheme, provided to stakeholder consultation groups, does not appear to provide the specifications that might be expected in light of cl 39.

21. There is likely to be dispute where a planning authority seeks to include provisions in LPSs that are not clearly within or outside the requirements of cl 39. These disputes could involve substantive matters as to the contents. Complex legal issues will arise where the consistency of an LPS with the SPS and the amended LUPA Act need to be considered. In

each case it is likely that the validity of relevant provisions of the SPPs will be contested.

22. Clause 41(2) allows the Minister to prepare a draft LPS. This sub-clause does not require the planning authority to undertake the drafting per se. In other words, the Minister could give a draft LPS to the planning authority and direct them to provide it to the Commission. This should be rectified so that it is clear the planning authority itself prepares the LPS and is not merely acting as an intermediary between the Minister and the Commission.

23. We recommend further consideration be given to paragraph (c) of cl 41(3). This gives the Minister very wide discretion to direct a planning authority. It is only circumscribed by the direction having to be "in relation to a draft LPS". Such a broad provision could be used for unintended purposes or could be relied on by third parties seeking Ministerial intervention in planning matters.

24. Clause 43 requires the Minister to approve public consultation for an LPS. This seems to be an overly bureaucratic procedure which could be managed entirely by the Commission. The Minister should not be involved in whether the LPS is exhibited. This can be handled by the Commission subject to guidance provided in the legislation. The proposed approach risks political interference in the public consultation process and could encourage third parties to pressure the Minister to use this power to contract time frames for reasons unrelated to good planning outcomes.

25. The planning authority is responsible for public consultation in relation to LPSs under the Bill. The intent of cl 46(4) is unclear. It is possible that the planning authority may refuse to accept representations which *in part* contravene this clause. We suggest further consideration be given to this. Perhaps the intent here could be achieved by including a provision that makes clear that comments about SPPs being altered can be disregarded for consequential processes. This is not achieved by cl 47 (3) which could be relied on to argue the entirety of the representation (not only the section relating to altering SPPs) should be excluded.

26. The hearing provision (cl 47A) with respect to representations concerning LPSs is supported, save for the comments about excluded representations raised earlier in this document[3].

[3] Note: There is a typographical error in line one of cl 47A(2)(d)(ii) on page 85.

27. Clause 47E provides for the Commission to make a request to the Minister to approve the Commission's approval of an LPS. The Minister is empowered to agree or disagree with the Commission. There are no timeframes on this process or any guidance for the Minister in making a decision in response to the request. This approach appears to be an expanded version of the Ministerial approval under s 29 of the LUPA Act. In our view Ministerial approval is not required. The inclusion of such oversight adds uncertainty into the system. There is no clear rationale provided for this, nor any guidance on when the Minister may choose to make a decision at odds with that of the Commission.

28. Clause 47G(4) provides that a Scheme comes into effect notwithstanding a failure to comply with a procedural requirement. The clause provides this is not the case where there has been a "substantial" failure. This clause is of concern as it appears to excuse important procedural failings which may nonetheless not be considered "substantial". By immediately providing for a mechanism to excuse procedural failings the Bill provides an incentive to cut corners. The need to take a practical approach to procedural matters is already part of administrative law. Where an inconsequential failing is identified the Court has the discretion not to overturn the decision on that basis. This provision and the equivalent provisions elsewhere in the Bill should be removed.

29. The review period of LPSs (cl 47H) should be explicit and reviews should be conducted by the Commission. The use of the expression "regularly" is too vague to be meaningful in this context.

30. The amendment provisions are supported in that land use conflicts that can arise from amendment are addressed (cl 47N). Further consideration should be given to the use of "permissible" in cls 47N(1)(b) & (c). This clause should ensure land uses that are permitted as of right, permitted and discretionary are all considered in the context of an amendment.

31. The amendment provisions provide for the Minister to direct a planning authority to amend an LPS. This power should be limited to the matters set out in paragraphs (a) – (d) of cl 47N. Those matters appropriately raise state wide issues. The inclusion of "any other purpose the Minister thinks fit" is too broad and could lead to the Minister being asked to make area specific amendments as a means of short-cutting the proper process through the planning authority.

Conclusion

32. EDO Tasmania supports a consistent set of planning controls across Tasmania. The Bill creates the legislative framework for a state wide set of planning controls consistent with the Position Paper. Unfortunately the Bill also increases Ministerial power in relation to the TPS in a fashion not clearly articulated in the Position Paper. In our view the Tasmanian Planning Commission should be the primary decision making body in relation to the contents of the Tasmanian Planning Scheme. This will ensure independence and expertise is brought to bear to a critical aspect of the planning reform process.

Yours sincerely,
EDO Tasmania

Adam Beeson
Acting Principal Lawyer