17 October 2018

Via email

Re: Assessment Pathways Discussion Paper

The Environmental Defenders Office (SA) Inc ("the EDO") is an independent community legal centre with over twenty years of experience specialising in environmental and planning law. EDO functions include legal advice and representation, law reform and policy work and community legal education. Thank you for the opportunity to comment on the Discussion Paper. However, our response is somewhat hampered by the overwhelming amount of critical consultation occurring in a very short amount of time in relation to the roll out of the system which we say is in direct contradiction to the purpose and principles contained in the Community Engagement Charter. We also query that given new layers in the system, for example categories of development and decision making bodies whether one of the key goals, namely a simplified system, will be achieved.

A core interest of the EDO and our clients is how the community can engage in decision making around planning matters, particularly assessment of development proposals. The vast majority of our work concerns advising the public as to their rights. The involvement of the public in this area is essential as it facilitates appropriate scrutiny and gives a level of confidence to the public that there has been an open and rigorous decision making process. Research has shown that the most effective consultation recognises the expertise that sits within the general community. Their needs must be listened to and their views properly taken into account in reaching decisions. If this occurs, it is more likely that the outcome of the process will be accepted by the public at large. Public confidence in decision making is promoted by public participation, transparency and accountability which also safeguard against corrupt conduct and the perception of corrupt conduct.

The EDO is concerned that overall the community will be much less involved in assessment processes and have fewer appeal rights as it is the stated intent of the new system to focus less on public participation in this area. In the lead up to these reforms there were a number of changes to the system such that planning applications have been increasingly assigned to categories where the public is excluded from having any rights to have a say let alone challenge a decision. We are concerned that this process will continue under the new system.

We provide comment on some of the matters raised in the Discussion Paper but point out that our responses are made without a real sense as to how the Planning and Design Code, Practice Directions and Regulations under the *Planning, Development and Infrastructure Act* 2016 (the Act) will look.

Public Notification and Consultation

The Act provides third parties with limited statutory rights in decisions regarding planning assessment. In our view the community must have access to comprehensive information about proposals and the ability to make representations and have them considered as part of the assessment and decision making processes. In certain cases appeal rights should apply.

In addition to notification required by the Act the new planning portal should provide notification of **all** development proposals, details as to how they are assessed and a full description of interim and final decisions. Furthermore, community members should be able to sign up to an online service which alerts them to such consultations in their local area. Over time other forms of notification should be used as technology improves. There also needs to be support for those who do not have ready access to computers and a process for dealing with queries about development proposals – a "hotline" or similar.

A new part of the system is the use of a sign on land for the purposes of notifying certain development proposals. The EDO has reservations that this is a viable way to notify all those who have an interest in commenting, however in our view notices must have clear information on consultation rights and process, including a QR Code. The notice should be securely placed there by the applicant who should then complete a statutory declaration as to what steps they took to notify which includes photographic evidence. The applicant should also be responsible for removing the sign. Clear details of this process should be outlined in a Practice Direction or the Regulations.

Where proposals are notified we suggest consultation times could be between two weeks and six months depending on the complexity of what is proposed. This will assist with frank debate and discussion with respect to particular development proposals whether they are mining, industrial, agricultural, commercial or domestic projects.

There are particular matters relating to performance assessed developments. Firstly, it is highly confusing that some aspects of these developments may be consulted on and some not. This has serious consequences as the Act provides that submissions are limited to what should be the decision of the relevant authority as to planning consent in relation to the performance based elements of the development as assessed on its merits. When notification occurs this limitation must be conveyed clearly so that submissions are not ignored on a technicality. Secondly, the Act provides that public consultation can be dispensed with in certain circumstances. It is a concern that there is no detail in the Discussion Paper on this issue nor any question specifically asked. In our view the presumption should be against dispensing with public notification except in exceptional circumstances. In the interests of transparency and accountability criteria need to be developed detailing the circumstances in which this section will operate. Finally, the Act does not allow anyone who makes a submission the right to be heard in person by the decision making authority. There should be such a right enshrined in the Regulations especially where there are complex and contentious issues with a proposal which are not readily resolved.

We also refer to comments in the Summary document regarding impact assessed developments (not restricted) which states[1] "However, in accordance with the community engagement charter, there are avenues for community consultation about all significant development proposals of this size and complexity, and these are determined by the Minister". For clarity this is actually impact assessment by Minister. In any event our query relates to section 44 (8) of the Act which provides that the charter must not relate to the assessment of applications for development authorisations under this Act in addition to the other provisions of this Act that apply in relation to such assessments. Whilst section 113 (6) of the Act provides a broad discretion in that the Minister may undertake, or require the proponent to undertake, any other consultation in relation to EIS as the Minister thinks fit, to say that includes the principles of the charter appears to contradict the intent of section 44 (8). We seek clarification of this matter.

In relation to impact assessed development generally we would expect that the process for notification would include the methods outlined for performance assessed development but the Act does not specify this. We would recommend that this is clarified in the Regulations.

Assessment Categories

[1] P11

The new Planning and Design Code, Practice Directions and Regulations under the Act will guide much of the assessment processes including the important issue of which proposals will be consulted on. In basic terms 'simple, expected forms of development' will not be subject to public consultation but those that don't fit within the rules will be. Depending on the assignment of a proposal certain decisions can be challenged in court. It is therefore critical that the principles used to assign developments or various parts of developments in the new system be carefully developed, clearly understood by the public and consistently applied. Careful consideration also needs to be given before excluding proposals from approval altogether. It should be noted that the notion of impacts is a complex matter and not always easy to categorise. Community members may have important comments to make on the impacts of a proposal beyond those that affect them personally.

Relevant Authority

We do not support the use of accredited private professionals in the planning system especially where applications are publicly notified. The core purpose of the planning system is to serve the public interest by creating city and townscapes which enhance general well being. The use of private certifiers creates a perception of impartiality with the potential to reduce public confidence and trust in the system.

As a general principle decision makers should have all the information necessary before them together with the appropriate skills, understanding and experience according to the complexity of the proposal they are considering. Practice Directions and the Regulations must be very clear in terms of stating what information is required of applicants. Relevant authorities should be allowed to dispense with the requirement to provide the mandatory information listed by the regulations/code/practice directions as that information could be critical to decision making. We also support the ability of the referral agency or assessment panel to request additional information/amendment, separate to the one request of the relevant authority and opportunities to request further information on occasions where amendments to proposal plans raise more questions/assessment consideration.

The EDO recommends timeframes for decision making which mirror the complexity of the project but there needs to be flexibility for unforeseen circumstances. Applicants should not be able to

defer referrals on key matters including environmental considerations. Any use of minor variations needs to be carefully defined to enable consistency in the system.

Crown Development and Essential Infrastructure

This system needs to be overhauled as there are now many projects that are classified Crown development. If an application is categorised as Crown development public notification and consultation is limited and there are no third party appeal rights. At present once decisions are made the information on such projects is no longer readily available online. The types of development covered needs to be clearly defined and truly reflect the intent of this category. The Discussion Paper refers to "community facilities". This could cover a vast range of projects.

Please advise if you require clarification on any of the issues raised in this submission.

If there is an opportunity to discuss these matters directly with the State Planning Commission we would appreciate an invitation.

We also look forward to having further opportunities to comment as the new system is rolled out.

Yours sincerely

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