EDO ENVIRONMENTAL DEFENDERS OFFICE (SA) INC

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EDO(SA) COMMENT UPON SOUTH AUSTRALIA'S EXPERT PANEL "THE PLANNING SYSTEM WE WANT" PUBLICATION (DECEMBER 2014) FEBRUARY 2015

The Environmental Defenders Office (SA) Inc. ("EDO(SA)") is a community legal centre with over twenty years of experience specialising in public interest environmental and planning law. EDO(SA) provides legal advice and representation, undertakes law reform and policy work and provides community legal education.

Since 2013, EDO(SA) has fully participated in the planning review process as a member of the Community Working Party within the Planning Reform Reference Group and made comprehensive submissions to the Expert Panel at every stage of the review process.

EDO(SA) now takes this opportunity to comment upon the Expert Panel's 22 recommendations by emphasising our concerns in regard to four key issues:

1. The failure to promote Ecologically Sustainable Development (ESD);
2. The failure to enhance and support meaningful community participation in the process of development assessment;
3. Resourcing of the recommended reforms; and
4. The significant shift towards greater "private certification" of important planning and assessment functions.

EDO(SA) will provide the comments directly to the Planning Minister.

These comments should be read in the context of, and in addition to, the EDO(SA) response (September 2014)[1] to the 27 "ideas" contained in the Expert Panel's report "Our Ideas for Reform" (August 2014).

1. The failure to promote Ecologically Sustainable Development

The Reform recommendations fail to acknowledge the imperative for a 21st century planning and assessment system to encompass and give effect to the principles of ESD.

For example:

a) The Panel's vision (page 11) for SA's planning system emphasises *"streamlined processes for investment"* while making no reference to environmental and social values. EDO(SA) acknowledges that there is a need to improve the State's economic position, given the loss of industries and jobs in South Australia. Therefore, the intent of the reforms to the state's planning system, aimed at eliminating complexity and overlays that have occurred over the last 20 years is supported in principle. However, if the intent is to facilitate quicker, more

1 https://d3n8a8pro7vhmx.cloudfront.net/edosa/pages/30/attachments/original/1411632799/EDO_Submission_Ideas_for_Reform_25-09-14.pdf?1411632799

efficient processes then longer term social and environmental consequences for local and state wide communities must also be considered.

b) The proposed objectives of the new planning system (page 13) are seriously inadequate and reflect an implicit and unquestioned bias in favour of continued growth in the absence of sustainable environmental and social goals.

There is only token reference to environmental objectives *("eliminate, minimise and mitigate adverse impacts on and contribute to the conservation, restoration and enhancement of (the environment) and promote sustainable use")* rather than a contemplation also of **avoidance** of such impacts and the promotion of ecologically sustainable development as the primary objectives of the planning system.

Note also that this standard is not commensurate with the "avoid, mitigate, offset" hierarchy of principles which underpin the operation of the EPBC Act and would therefore likely preclude accreditation of approval processes under such a system by the Commonwealth.

See Annexure "A" for a draft objects framework for a new planning system proposed by EDO(SA).

c) The reforms reflect the Panel's (and development industry) view that *"development assessment is now a technical discipline that should be undertaken at arm's length from elected bodies"* (page 87). While technical professional expertise is important, such expertise needs to encompass and address the qualitative impacts of proposed developments. Each assessment impacts upon the broader community and future generations to some extent and has social and environmental impacts. Each assessment impacts upon community assets.

Planning expertise does not necessarily encompass local knowledge or impacts - the development assessment process must take into account contextual value issues. Local knowledge does contribute to a deeper comprehension of qualitative values in the balancing of minimum standards of compliance. This is achieved to a great extent by the current balance between elected members of councils and specialist members on development assessment panels. A vital political aspect of state planning and assessment is the establishment of a fair, transparent and responsive process that balances the interests and priorities of all participants in the planning process.

d) The effectiveness of the planning commission will be dependent upon the level and range of expertise and experience that it members have. The suggested expertise for membership of the planning commission (Reform 1 - page 28) places "legal, social ***or*** environmental policy" as 3 alternatives. Each of those areas of expertise **must** be included in the commission membership. The relevantly qualified experts should include: conservation and environmental protection experts; a member of ICOMOS related to heritage values; and a person with practical knowledge of, and experience in, advocacy on planning and development assessment matters on behalf of the community.

e) Social and environmental management expertise **must** be included in the Regional Planning Boards (RPB) (Reform 2) and the Regional Assessment Panels (RAP) (Reform 11).

f) In regard to Reform 10 (staged and negotiated assessment), there will be uncertainty as to the environmental, social and economic impacts of a development, particularly if "outline" consent is granted on the basis of only "in principle" agreements containing little detailed information. Clear zoning guidelines for development, requiring Master Plans of a total development, should identify the end result and areas for clarification for any staged development. The triple bottom line regarding the economic, social and environmental impacts in the longer term must be identified at the Master planning stage and identify matters and responsibilities that need to be resolved.

g) Reform 19 (seamless legislative interfaces) indicates that the Panel recognises the importance of integrating environmental, infrastructure and licensing regulation into the planning and assessment system. However, the proposed reform package does not facilitate the integration of environmental, social and economic considerations, at the higher strategic and policy levels, into the planning and assessment system. This is a fundamental flaw.

Environmental, social and economic sustainability must be at the core of an effective planning and assessment system. An effective planning and assessment system must be responsive to climate change, supportive of renewable resources and cognisant of social trends as well as economic trends.

2.The failure to enhance and support meaningful community participation

With the exception of proposed Reform 12.4,[2] the recommendations (a) fail to enhance and support meaningful community participation in the planning and assessment system; and (b) reduce community participation.

For example:

a) The CCP (Reform 3) does not appear to be legally enforceable. The CCP should not replace community notification rights in regard to development assessments and 3rd party appeal rights for developments that are not consistent with zoning provisions. The CCP is an enabling tool – if it is not utilised, it amounts to no more that "window dressing". The CCP needs to be enforceable in the ERD Court, against planning authorities and proponents, by giving standing to 3rd party community members and organisations on a no costs basis, subject to a frivolous and/or vexatious litigation test.

b) The recommendations are silent upon what approach is to be taken to:
   (i) existing public notification rights - to which of the 4 proposed development assessment pathways (Reform 10- page 83) will public notification rights attach and how will notification occur? Attaching development notices to properties should supplement current category 3 notification requirements.
   (ii) existing third party appeal rights - to which of the 4 proposed development assessment pathways will appeal rights attach and to whom will the rights accrue? – see Reforms 10.5, 10.6 & 10.7.

c) In regard to Reform 11, the avenues for individual and community representations (written and in person) to be made to the Regional Assessment Panels (RAP) on "performance-based" development proposals are unclear. Is the only avenue to be through elected council representatives being invited to appear before RAPs? Will there be rights of notification and representation at the local council assessment report writing stage for certain categories of development? The right to make individual and community representations (written and in person) needs to be retained as a vital feature in a planning system that values community participation, transparency and accountability.

d) The professionalization and regionalisation**(Reforms 2 and 11)** of the planning system is a positive step but a likely consequence of the removal of elected members from RAPs will be the alienation of local communities, who are directly affected by planning and development assessment decisions. The remoteness of the community both in terms of physical distance from and accessibility to the decision-makers will undermine community confidence in, and support for, the system. There should be a minority of local council members permanently on the RAPs who can contribute local knowledge and have voting/decision-making status on the RAPs.

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[2] Reform 12.4 proposes the reinstatement of judicial review rights for projects of state significance and infrastructure approvals. EDO(SA) strongly supports this proposed reform.

e) The Panel recommends that *"Government should provide a transparent whole-of-government response to this report. Draft legislation should be released for comment before it is introduced into parliament."*(page 159). This is strongly supported. By releasing the draft legislation, with a 6 week review period before the introduction of new planning legislation into Parliament, as occurred with respect to the "Hawke Review" of the EPBC Act in 2010-11, the community is able to understand and respond to the government's position in relation to the recommendations of the Panel.

f) It is **essential** that the planning commission's inquiry powers (Reform 1.10) extend to contentious and/or complex development proposals – including major projects. The inquiry power would be exercised to complement the assessment process, not to replace the process or to review the assessment decision. Where the outcome of an issue has the potential to directly affect a particular community, the membership of the planning inquiry should include a person with knowledge of that community.

g) In regard to the making and amendment of state planning directions, regional planning schemes and state wide planning rules (Reforms 5, 6 &7), the reforms are silent regarding what the community consultation processes will be.

h) In regard to the proposed "outline consent" approach (Reform 10), effective community engagement will not be possible at each stage, in regard to larger projects, if the assessment process is broken down into a number of stages. Once a number of stages are approved, the balance of power (in regard to assessment and approval of additional stages) will shift in favour of the proponent because the project will be partially completed and the assessment authority is unlikely to effectively halt or delay a partially completed development through assessment refusal of a later stage.

i) While Reform 12 proposes improvements to the major project triggering mechanisms, there is a failure to provide any detailed outline of a revised major project inquiry and assessment process that reflects contemporary, state-of-the-art practice in this field - for example, the use of public inquiries and strategic environmental assessment mechanisms. More generally, the treatment of this subject reflects a perception that environmental impact assessment (EIA) is an extension of the "normal" development assessment system and fails to reflect an appreciation of its distinct function in providing a detailed, scientifically rigorous assessment of the environmental and social impacts of proposals likely to arise from a major development. This approach puts at risk community and state responsibility to understand the risks and consequential costs of unforeseen (and unassessed) impacts.

j) In regard to Reforms 13 & 17 (streamline assessment for essential infrastructure; infrastructure funding framework) - the current and proposed treatment of "essential infrastructure" projects perpetuates the long-standing and erroneous assumption that such forms of development deserve privileged treatment, via a fast-track approval process (as in the past has been accorded to so-called "public works" prior to the privatisation of many such services). These categories of development should be subjected to the same level of process and community scrutiny as all other forms of development. There needs to be further consultation with government, industry and community stakeholders in regard to the proposed development of a legislative framework for infrastructure funding.

k) In regard to Reform 14 – changes to the ERD Court costs regime[3], vague proposals to set up a RAP decision review process as an alternative of having recourse to the ERD Court and vague recommendations that the ERD Court could be disbanded[4] at some future time undermine community respect for, and engagement in, the planning system. As identified by the Panel, "entrenched practices" (not the actual ERD Court review processes itself) need to be tackled and changed.

l) In regard to Reform 16 - precinct-based greenfields development and urban renewal have the potential to reduce urban sprawl, improve urban quality of life and contribute to more sustainable residential and other development. However, meaningful community engagement will be essential if precinct planning is to fulfil its potential. A significant gap and weakness in the current legislated precinct process is the absence of community consultation or engagement in regard to the decision to establish a precinct. Engagement occurs after the precinct is gazetted (in relation to the preparation of a precinct plan) but not before. In order to encourage community support for the proposed precinct, engagement should be undertaken to obtain views on the proposed establishment of a precinct.

m) In regard to Reform 20 (online planning system) - The proposed local-state governance body to co-ordinate e-planning should include community representatives with "on-line" and IT expertise to assist in creating a system that is user friendly for the broader community (as well as for business and government).

n) In regard to Reform 22 (culture change) - The planning commission should not only work with local government, the public service and professional organisations to pursue these changes – but should also work with environmental and community organisations, whose members and clients regularly interact with the planning authorities and the planning system.

One of the fundamental principles that emerge from the recommended Reforms is that there is to be a substantial shift in community participation from the development assessment process to the policy and strategy development stage (Reforms 2, 3, 10, 11, 14). Increasing community participation in policy and strategy development does not require community participation in the development assessment process to be reduced. The two options can (and should) co-exist. If the policy and strategy participation approach is successful, it should follow that the community's rights to participate in the development assessment process would be resorted to less frequently.

3.Resourcing of the recommended reforms

The recommendations fail to emphasise the need for adequate resourcing of the reforms and fail to recommend practical measures to properly resource the reforms. Resourcing is a fundamental issue, given the trend to cut government staff at the state level and eliminate professional advice in preference to political direction. Effective reform must be properly resourced.

For example:

[3] EDO(SA) has addressed this important issue (for 3rd party appeals and civil enforcement) in a stand alone submission to the Expert Panel (13 June 2014) - https://d3n8a8pro7vhmx.cloudfront.net/edosa/pages/30/attachments/original/1412749967/EDO_Planning_Review_costs_submission_130614.pdf?1412749967

[4] EDO(SA) has addressed this important issue in a stand alone submission to the Expert Panel (July 2014) – detailing a clear rationale for the retention of the ERD Court – https://d3n8a8pro7vhmx.cloudfront.net/edosa/pages/30/attachments/original/1407994573/EDO_submission_on_retaining_the_ERD_Court_030714.pdf?1407994573

a) The proposed multiple roles and responsibilities of the planning commission are extensive and resource intensive. Without the provision of adequate resourcing and expertise to the planning commission to implement and oversee the reform framework, the framework will not function effectively or deliver effective outcomes for government, industry or the community.

b) The reforms rely heavily upon the Charter of Citizen Participation (CCP) to enable adequate community input, engagement and consultation. This may be possible, at the strategic and policy level, IF the CCP is properly resourced to enable the community to understand and exercise their rights. There is no coherent view as to how this fundamental reform will be resourced. Indeed, if the lack of resourcing for community engagement in the current planning reform process is any indication, the Charter may end up being little more than "window dressing".

c) RPBs and RAPs: There is no coherent view as to how these fundamental reforms will be resourced. The suggestion that "co-contributions" will be provided by the State government and "participating" local councils (Reform 2.6) is unrealistically optimistic and impractical.

d) In regard to the evolution of a RPB structure (page 34) in the metropolitan area, the proposed reform provides no certainty as to how and when the "advisory committee" structure will fold into a Board structure.

e) In regard to Reform 15 – the innovative compliance monitoring and enforcement initiatives must be appropriately funded - otherwise, the system would soon be identified as a "toothless tiger". This need not be a cost to the general community/government because it should be a cost "of doing business", absorbed by the development industry, through (for example) a specific "compliance levy". There is also a role for independent audit of these functions.

f) It is encouraging to note that, in regard to Reform 8 (heritage renewal), innovative funding options are proposed: property-related tax discounts and a heritage lottery.

g) The Review provides a "once in a generation" opportunity to explore and implement innovative funding options in a number of areas, including: open space (Reform 18); infrastructure (Reform 17); and (most importantly) support for the provision of training, information and advice to enable meaningful community engagement and consultation. Regrettably, the Review does not take proper advantage of this opportunity.

More broadly, there is no benefit in raising community expectation of greater community participation and engagement (through reforms such as the Charter of Citizen Participation), if the practical reality is that the community does not have access to any advice, training, or information to enable meaningful take up of those opportunities. Without a comprehensive approach to community input comparable with that of developers, the creation of community participation expectations will fundamentally undermine most of the reforms because they will not be understood and will not have community support.

The community engagement and consultation that is envisaged has significant resourcing implications for conservation, environment protection and resident groups. It is counterproductive to have, in theory, community engagement and consultation if, in practice, the community does not have the skills, experience and advice to exercise those rights in a meaningful way.

The provision of those services (advice, training, information) must be done independently of government and by properly trained personnel to avoid issues such as real or perceived conflict of interest and confidentiality.

EDO(SA) proposes the establishment of a "Community Engagement" Fund.

The Fund would provide resources to organisations that have the expertise and independence to provide training, information and advice regarding responsibilities, rights and obligations under planning, environmental and heritage legislation. The Fund could be administered by the Law Society, Justicenet or the Law Foundation

Two possible funding sources should be explored:

1. In Reform 8, in respect of funding for heritage financial assistance, the idea of a lottery is canvassed. This is strongly supported. Moreover, resourcing of community consultation and engagement (advice, training, information) through a "Community Engagement" lottery is another option.
2. Funding through a "Community Engagement" levy on the 50,000 to 70,000 Development Applications each year (set amount on each DA or sliding scale based on value of development).

4.The shift towards greater "private certification" of important planning and assessment functions

The recommendations include proposals that will "privatise/outsource" important functions in the planning and assessment system that should remain the responsibility of government and must be seen to be free of bias and undue influence.

For example:

a) In regard to Reform 8, it is proposed that accredited heritage professionals will undertake regulatory functions whilst being directly engaged/employed by the owners of the (proposed or existing) heritage item. Heritage professionals vary widely in terms of their interpretation of conservation and adaptation principles. Regulatory functions should be undertaken by accredited government employees or independent professionals. Planners must be trained in heritage assessment namely understanding of heritage criteria for listing, values, principles and guidelines provided by the Australian ICOMOS Charter (Burra Charter). The Charter provides definitions and fundamental principles and practices for heritage conservation, adaptation and reuse followed by its membership.

b) In regard to Reform 9 proposals for:
   - The updating of zoning by private infrastructure providers.
   - The updating of zoning by land-owners.
   - The funding of zone changes by private infrastructure providers.
   - The funding of zone changes by land-owners.

   The Panel acknowledges that *"the (Planning) Commission must tightly control this (i.e. zoning changes by private infrastructure providers etc.) against potential misuse."* (page 71).[5] The Panel's proposed solutions to potential misuse are Planning Commission "guidelines" and "enforcement powers" (page 71-72). Without proportionately serious penalties/sanctions and sufficient resourcing for enforcement, these proposed solutions will do nothing to deter abuse of this opportunity to subvert the zoning system for significant financial gain. A complimentary approach would be the establishment of a Code of Conduct for participants in privately funded DPAs requiring complete separation between the proponents of the DPA and the

[5] The Panel's apparent rationale for this proposal to expand private rezoning opportunities (page 71) is that it already happens *("privately funded rezoning – already a common practice" estimated to be about 17% of all DPAs as at 2014).* This rationale is not consistent with good public policy or with enhancing community confidence in the planning system.

investigations and policy formulation by independent planners (whether in local councils or individually). Mishandling of the DPA process should be subject to investigation enabled by specific legislation dealing with the issue. Private bodies and persons would be prohibited from seeking to influence the process either publicly or privately once the statement of intent or equivalent is accepted by the Minister. Current Codes for privately funded DPAs have been developed by a number of local councils concerned over the possibility of real or perceived bias. It is recommended that the state government take the lead in providing guidance on this matter.

c) In regard to Reform 11 – the assessment of 'low risk matters" by professionals who could be *"private consultants contracted as certifiers by applicants"* – there is no indication as to who will and how will the "low-risk" status be determined? Are "low risk matters" the same as "standard assessment" matters?" The assessment of low-risk matters should only be undertaken by accredited council staff.

These "privatisation" processes will be subject to the perception at very best, of a clear conflict of interest and undue influence and at worst, of corruption. For the community to have confidence in and support for the planning system, the integrity of the planning and assessment processes must be apparent and evident in the quality and integrity of the decision-making.[6]

[6] The NSW ICAC Report *"Anti-Corruption Safeguards and the NSW Planning System"* (February 2012), identified that it is important that planning legislation addresses the issue of the appropriate balance of competing economic, social and environmental public interests:

> *"... by recognising and providing guidance on the weight to be given to competing public interests. Disregarding or placing undue weight on relevant public interest objectives leads to perceptions of bias and corruption, which undermine the integrity of the planning system."(page 13)*

Annexure "A"

EDO(SA) proposes the following as a draft objects framework for a new planning system:

1. *The object of the Act is to provide for and promote economic improvement, environmental protection and social well-being through the achievement of ecologically sustainable development, by the application of the principles of ecologically sustainable development (ESD – see below for ESD principles) within the planning and development assessment system.*

"Environmental protection" includes:

a) *the protection and conservation of native animals and plants and their habitats.*
b) *the conservation and sustainable use of built and cultural heritage.*
c) *the effective management of natural, agricultural and water resources.*
d) *The effective management, conservation and preservation of native forests.*
e) *The effective management, conservation and preservation of coastlines.*

"Social well-being" includes:

a) *Having the right to live and work in an environment which is conducive to good health.*
b) *Having the right to a good quality of life that enables the development of human and social potential.*
c) *Having the right to be involved in decision making about the planned interventions that will affect our lives.*
d) *Recognition of the social utility of land.*
e) *Gender inclusiveness, social respect and tolerance.*
f) *Community nurturing .*

"Economic improvement" includes:

a) *The development of affordable housing.*
b) *Development that improves social, environmental and economic outcomes.*
c) *The encouragement of business and industry development in suitable, specific locations.*
d) *Increasing opportunities for local employment.*

2. *In order to achieve its objects, the Act provides for:*
   a) *Opportunities for early and on-going community inclusion in the formulation of strategic planning, strategic decision-making and development assessment.*
   b) *The co-ordination, planning, delivery and integration of infrastructure and services.*
   c) *The delivery of business and housing opportunities (including for housing choice and affordable housing).*
   d) *The provision of land for public purposes.*
   e) *Community integration with related agencies and bodies to maintain effective and inclusive communication and consultation.*

3. *All decisions, powers and functions under the Act and relevant subordinate instruments must be exercised consistently with the principles of ESD, defined below.*

For the purposes of this Act, the following principles are principles of ecologically sustainable development : (from the EPBC Act)

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(e) improved valuation, pricing and incentive mechanisms should be promoted.