

6 October 2015

John Rau MP
Minister for Planning

Via email DPT.Planning@sa.gov.au

Dear Minister Rau

Re: Planning, Development and Infrastructure Bill 2015

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. We appreciate the opportunity to provide a submission on this Bill.

The EDO is of the view that the Bill is being unduly rushed through Parliament without proper public consultation. Queensland is going through a similar process which includes a 6 week public consultation phase. It is our submission that in general the Queensland Bill takes a more balanced approach to planning decisions than what is provided for in the SA Bill. Please see the link below;

<http://www.dilgp.qld.gov.au/planning-reform>

In addition to this letter please see attached table of suggested amendments to various clauses in the Bill.

Executive Summary

We welcome the following initiatives;

1. State Planning Commission (“Commission”) can require councils to inspect development undertaken in their area
2. Minister can order testing and monitoring of impact assessed development
3. Introduction of a Planning Portal to provide access to information.
4. Introduction of orders for adverse publicity and recovery of economic benefit gained by contravention of the Act together with enforceable voluntary undertakings
5. Increase in penalties for breaches of the Act
6. Introduction of a two tier review system

However we are concerned the Bill;

1. Reduces community participation and fast tracks decisions in the planning system significantly;
2. Sets up a State Planning Commission which lacks independence;
3. Gives wide discretionary powers and control to the Planning Minister and proposed State Planning Commission without appropriate checks and balances; and
4. Establishes a framework that contains none of the detail on how the system will work and how it will be implemented. This is left to a second (unseen) Bill to be produced in 2016 along with multiple regulations and Practice Directions and Guidelines.

The EDO's key concerns are set out below:

A. Objects and Principles

Concerns;

- Bill's primary object is to "support and enhance State's prosperity" and to promote and facilitate development. There is no recognition of community "ownership" of the planning system, sustainability or of intergenerational equity (these are relegated to "Good Planning Principles"). The Courts look to the objects of an Act when interpreting its provisions. The emphasis on economics and prosperity in the objects will have significant impacts on the way the provisions are interpreted. Environmental and social impacts will be rendered secondary considerations. These provisions can be contrasted with the content of the objects in the current Act and those in the Queensland Bill.
- General duties of participants in the system include that they are "expected" to cooperate, be honest and be reasonable, however expectations are not enforceable

B. State Planning Commission (SPC)

Concerns;

- SPC will not be independent as it will be "subject to the general control and direction of the Minister" except when undertaking specified duties such as assessing development.
- Appointment of members at Minister's discretion
 - No transparent process for making appointments
 - No requirement for at least one member with social/environment /science expertise.

C. Assessment Panels

Concerns;

- No requirement to appoint members with social/environment/science expertise

- Exclusion of Local Government Councillors who can bring a community perspective to decision making.

D. Community Engagement Charter(CEC) and Planning Portal

Concerns;

- Minister controls the establishment and maintenance of the CEC and its content- can reject what is proposed by the Commission and has a discretion to unilaterally change it
- No time frame for CEC development
- Does not cover community participation in the development assessment process
- No requirement as to what the CEC has to address - the (unseen) regulations will establish requirements for the CEC -any “mandatory requirements” in the CEC can be overridden by the Commission
- CEC is not enforceable by the public
- SPC can direct compliance and seek costs but is not required to
- Will public participation under the Charter be properly funded given the stated desire of the new system is to focus on community engagement at the policy development stage rather than the planning assessment stage?
- Will the Planning Portal be properly funded to give wide and comprehensive accessibility to all types of planning information?
- Lack of detail as to what restrictions there will be on access to information ie provisions refer to confidentiality/privacy, security or for any other reason specified in Regulations.
- Exclusion of the operation of the Freedom of Information Act

E. Assessment Pathways

a. Performance Assessed Development

Concerns;

- Public (other than neighbours)only notified of a development via a notice on the subject property
- Definition of “adjacent” reduced from 60m to “land no more than 40 metres from the other land”.
- Planning and Design Code can exclude public notification
- Time frame for public consultation in unseen regulations and might be set out in an unenforceable Practice Direction

b. Restricted development

Concerns;

- Discretion on the part of the SPC as to whether it allows assessment – criteria for making decisions to be in an unenforceable Practice Direction-certain proposals may be assessed when they shouldn't be
- SPC to determine how public is to be notified – again detail to be in an unenforceable Practice Direction
- SPC can dispense with public notification if it considers it necessary in the circumstances of the particular case – may be a loss of public consultation when it is important that there should be-again detail looks likely to be in an unenforceable Practice Direction

c. Impact assessed projects (specified in Regulations or declared by Minister)

Concerns;

- Where a proposal must undergo impact assessment by way of an environmental impact statement (EIS) a Practice Direction will set out how the public is to be notified, time frame for consultation, criteria etc. The contents of the Practice Direction are unknown at this point in time, can be changed at any time by the SPC and are unenforceable.
- No third party appeal rights

F. Amendments to designated instruments and the role of the Environment, Resources and Development Committee

Concerns;

- Whilst the Environment Resources and Development Committee (ERD Committee) can be consulted early this then bars further scrutiny.
- 'Complying changes' to the Planning and Design Code do not need to be referred to the ERD Committee. 'Complying changes' include changes to the boundary of a zone or subzone or the application of an overlay
- State planning policies with respect to each special legislative scheme (such as a character preservation law or the *River Murray Act 2003*) established by the Minister do not have to be referred to the ERD Committee (and so are not subject to disallowance).
- Interim operation can commence at the same time as the public is consulted on the amendment and before review by the Environment, Resources and Development Committee.

G. Referrals

Concerns;

- Designation of prescribed bodies etc. in unseen regulations
- Unclear whether Environment Minister will have the power to veto or place conditions on projects where environmental matters are likely to be significantly impacted
- An applicant can defer the referral to a later stage in the assessment process. The relevant authority must comply with such a request. This could put the authority under undue pressure if planning consent has already been given.

H. Enforcement

Concern;

- If a third party seeks to bring enforcement action there are significant barriers which include the court's discretionary powers to require security for costs, undertakings as to damages and to make orders for compensation for loss or damage and costs if the third party is unsuccessful

Please contact the writer if you have any queries in relation to this letter or the table.

Yours faithfully



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