



Environmental
Defenders Office

**Submission on Draft Land Use Planning and
Approvals Amendment (Tasmanian Planning
Scheme Modification) Bill 2020**

February 2021

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Introduction

- 1 EDO welcomes the opportunity to comment on the draft Land Use Planning and Approvals Amendment (Tasmanian Planning Scheme Modification) Bill (**draft Bill**).
- 2 The Tasmanian community is a long way through the planning reform process that began in 2014. With a view towards securing positive land use and planning outcomes for all Tasmanians, many landowners, businesses, organisations, groups, and individuals have contributed, and continue contribute, an enormous amount of time and effort into the process for the development of State Planning Provisions (**SPPs**) and Local Provision Schedules (**LPSs**).
- 3 The draft Bill now proposes to introduce another round of amendments to the *Land Use Planning and Approvals Act 1993* (**LUPA Act**) that will:
 - (a) change the process for making minor amendments to the SPPs;
 - (b) introduce a separate process for urgent amendments to the SPPs;
 - (c) change the process for making substantial modifications to LPSs and when those modifications will be given effect in planning decisions;
 - (d) explicitly provide a process for the incorporation of approved interim planning scheme amendments into draft LPSs;
 - (e) change the process for determining planning applications during the transition to the Tasmanian Planning Scheme; and
 - (f) provide a mechanism through which the Minister can direct that certain SPPs be incorporated into interim planning schemes.
- 4 While EDO is supportive of some of the proposed amendments to the LUPA Act, we are concerned that many of the proposed amendments will ultimately deliver greater discretion to the Minister to make changes to the SPPs and interim schemes without public consultation, and will limit and/or undermine the public consultation on draft LPSs. We also consider that the proposed changes will significantly add to the complexity of the planning processes and may ultimately result in poorer planning outcomes.
- 5 EDO considers that in these respects, the proposed amendments do not further the Resource Management and Planning System objectives of providing for the fair, orderly and sustainable use and development of air, land and water, and of encouraging public involvement in resource management and planning.
- 6 In our detailed submission below, we make recommendations as to how the draft Bill may be improved so that there continues to be appropriate checks on the Minister's planning powers and so that the community continues to have meaningful opportunities for input into the planning process. A summary of our recommendations can be found below.
- 7 EDO would welcome the opportunity to discuss our recommendations with the Planning Policy Unit.

Summary of recommendations

Recommendation 1: Amend clause 7, proposed section 30NA(2) to make the Minister’s consultation with planning authorities, and any relevant State Service Agencies or State authorities regarding a draft minor amendment to the SPPs mandatory.

Recommendation 2: Amend clause 7, proposed section 30NA(3) to make the Minister’s consultation with TPC regarding a draft minor amendment to the SPPs mandatory.

Recommendation 3: Amend clause 7, proposed section 30NA(5) and (6) to only allow the Minister to determine public consultation on the draft minor amendment to the SPPs is not warranted where the TPC has provided advice to that effect.

Recommendation 4: Include in clause 7 of the draft Bill a provision, similar to the current section 30I of the LUPA Act, that requires the Minister to publish reasons for his or her decision to dispense with public exhibition for a minor amendment.

Recommendation 5: Amend clause 7, proposed section 30NA(1)(a) to:

- (a) Remove reference to “simplifying” in (iii);
- (b) Delete (vii);
- (c) Remove reference to “or the form that a provision of a LPS is to take” in (viii); and
- (d) Delete (ix).

Recommendation 6: Amend clause 7 of the draft Bill to re-establish the TPC reporting process as currently outlined in section 30J of the LUPA Act.

Recommendation 7: Amend clause 7, proposed subdivision 3B of the draft Bill so that the Minister may only implement an interim amendment to the SPPs on the recommendation of the TPC.

Recommendation 8: Amend clause 7, proposed subdivision 3B of the draft Bill to require the publication of statutory guidelines on the use of the interim amendment power, and for the guidelines to be tabled before both Houses of Parliament.

Recommendation 9: Delete clauses 14 – 19, and 21 of the draft Bill.

Recommendation 10: Amend clause 20 of the draft Bill to delete the proposed subsections (3C) and (3D) of section 51 of the LUPA Act.

Recommendation 11: Amend clause 20 of the draft Bill to remove from the proposed subsection (3A) of section 51 of the LUPA Act reference to “alter”, “altered” and “alter to a substantial degree”.

Recommendation 12: Delete clause 22 of the draft Bill.

1. Proposed changes to process for amending State Planning Provisions

8 The draft Bill proposes to introduce a new subdivision in Part 3 Division of the LUPA Act that changes the process for making minor amendments to the SPPs.

9 EDO has no objection to the proposal to remove the option of having the Tasmanian Planning Commission (**TPC**) prepare a draft amendment to the SPPs for minor amendments, or to the proposed separation of processes for minor and urgent amendments. However, we have concerns that as presently set out in the draft Bill, the minor and urgent amendments processes provide the Minister with too much discretion to make changes to the SPPs and fail to adopt appropriate checks and balances on these significant powers.

(a) Proposed new process for minor amendments

10 In the information package released for the draft Bill (**information package**), it states at p 7:

“The proposed changes to the [SPP] minor amendments process do not alter the degree of public, planning authority, State Service Agency, or State authorities (sic) involvement in the process.”

11 Section 30D(2) of the LUPA Act currently provides that the Minister *must* consult with the TPC, planning authorities, State Service Agencies and State authorities the Ministers sees fit in relation to the preparation of the draft amendment to the SPPs by the Minister. However, under the proposed section 30NA(2) of the Bill, in relation to any draft minor amendment to the SPP, the Minister *may* “consult, as the Minister thinks fit, with planning authorities, State Service Agencies and any State authority.” Furthermore, the proposed section 30NA(3) in the draft Bill gives the Minister discretion as to whether to consult with the TPC on a proposed amendment, whereas currently, the Minister *must* consult with the TPC.

12 Clearly, providing discretion to the Minister about consultation may have a material impact on the level of consultation with relevant authorities with expertise in planning in relation to a draft amendment of the SPPs. The Minister’s failure to consult with these bodies in relation to a proposed amendment, even if it is “minor” in nature, has the real potential to result in unanticipated and/or adverse land use planning consequences that could be avoided where appropriate advice is provided.

13 The information package states (at p 6) that the consultation with the TPC, planning authorities and State agencies “generally involves at least 5 weeks”. We note that there are currently no legislative requirements relating to the timeframes for the consultation process. In the event that there is a minor amendment of an urgent nature being proposed by the Minister, it seems entirely reasonable that a shorter consultation period be adopted as warranted by the complexity of the proposed amendment and the circumstances of the case, rather than this important step be entirely neglected.

14 While Minister’s discretion to categorise an amendment as a “minor amendment” under the proposed section 30NA(1) is subject to the public interest not being “prejudiced” by the failure to follow the procedures set out in subdivision 3 (i.e. the failure to publicly exhibit the proposed amendments), it is very unclear what the “public interest” means in this context. In reality, the public interest test found in the proposed section 30NA(1)(b) of the draft Bill is unlikely impose any real impediment to the Minister determining that a proposed amendment is minor and avoiding public exhibition of the amendment.

- 15 The proposal to remove requirement that the TPC must first find that public exhibition of a proposed minor amendment to the SPPs is unnecessary, eliminates an important check on the Minister's power to change the SPPs. Similarly, the proposed removal of the mandatory requirement for the Minister to provide notice and reasons for his or her decision to dispense with public exhibition in the Gazette (currently section 30I) will do nothing to ensure that there is transparency and accountability in the minor amendment process.
- 16 It is EDO's view that there is unlikely to be any minor planning amendments of such an urgent or critical nature that the Minister will not have sufficient time or capacity to consult with the statutory bodies tasked with the implementation of the Scheme. Consultation with planning authorities, State agencies and the TPC on proposed amendments is likely to further Objectives 1(b) and 1(e) in Part 1 of the Schedule 1 Objectives of the LUPA Act, and encourage public involvement in the planning process where appropriate further to Objectives 1(c).

Recommendation 1: Amend clause 7, proposed section 30NA(2) to make the Minister's consultation with planning authorities, and any relevant State Service Agencies or State authorities regarding a draft minor amendment to the SPPs mandatory.

Recommendation 2: Amend clause 7, proposed section 30NA(3) to make the Minister's consultation with TPC regarding a draft minor amendment to the SPPs mandatory.

Recommendation 3: Amend clause 7, proposed section 30NA(5) and (6) to only allow the Minister to determine public consultation on the draft minor amendment to the SPPs is not warranted where the TPC has provided advice to that effect.

Recommendation 4: Include in clause 7 of the draft Bill a provision, similar to the current section 30I of the LUPA Act, that requires the Minister to publish reasons for his or her decision to dispense with public exhibition for a minor amendment.

- 17 It is noted in the information package (at p 7) that no change is proposed to the criteria for a minor amendment to the SPPs which are currently set out in section 30H(3)(b) of the LUPA Act (the **minor amendment criteria**).
- 18 EDO considers that the minor amendment criteria which are replicated in the proposed section 30NA(1)(a) are so broad that many potentially significant amendments to the SPPs may fall within the category.
- 19 For example, under the proposed section 30NA(1)(a)(iii), an amendment to the SPPs may be considered "minor" where it is "clarifying or simplifying the SPPs". Arguably, amendments simplifying the SPPs could include anything from the deletion of a single word or clause in a Zone to the deletion of an entire Code. In either case, those changes could have drastic land use planning consequences, indeed as many planning appeals attest, sometimes entire developments hang on the interpretation of a single word or clause.
- 20 Proposed section 30NA(1)(a)(vii) allows for the amendments to SPPs to be considered minor where they are introduced to bring the SPPs into conformity with a State Policy. Without currently knowing the content of the State Policies, this clause provides a potentially very broad basis for sweeping changes to the SPPs to be treated as "minor".
- 21 Likewise, the proposed section 30NA(1)(a)(viii) provides broad scope for "changing provisions of the SPPs that indicate or specify... the form that a provision of an LPS is to take" to be classified as minor amendments. The "form of provisions" under LPSs may

include Specific Area Plans, Particular Purpose Zones, or Site Specific Qualifications. Changes to the SPPs that regulate the form of these provisions can significantly impact planning outcomes for areas that the local community has shown a great interest in achieving.

- 22 The proposed section 30NA(1)(a)(ix) also provides that amendments for a “prescribed purpose” could be considered “minor”. Currently no purposes have been prescribed under the regulations under the equivalent provision of section 30H(3)(b)(ix) of the LUPA Act, however, this provision provides an almost boundless opportunity for the Government to prescribe circumstances where amendments to the SPPs do not need to undergo any public exhibition or scrutiny of the TPC.

Recommendation 5: Amend clause 7, proposed section 30NA(1)(a) to:

23 Remove reference to “simplifying” in (iii);

24 Delete (vii);

25 Remove reference to “or the form that a provision of a LPS is to take” in (viii); and

26 Delete (ix).

- 27 The draft Bill proposes to remove the assessment of the proposed minor amendment by the TPC within 42 days of the Minister’s minor amendment declaration (currently provided under section 30J of LUPA Act). Again, EDO considers that this step is critical to guard against unintended consequences arising from proposed minor amendments. Given there is a proposed new separate process for “urgent amendments” (discussed below) no reason has been provided for “minor amendments” to be rushed through without proper scrutiny and consideration by independent planning experts. We again note that consultation with the TPC on proposed amendments furthers Objective 1(b) and 1(e) in Part 1 of the Schedule 1 Objectives of the LUPA Act.

Recommendation 6: Amend clause 7 of the draft Bill to re-establish the TPC reporting process as currently outlined in section 30J of the LUPA Act.

(b) Proposed new process for urgent (interim) amendments

- 28 The draft Bill contains a new Subdivision 3B of Division 2 of the LUPA Act which sets out a new process for making interim amendments to the SPPs.
- 29 In the information package (at p 10), it states that this new process is “similar” to and “reflects” the existing process for amendment interim planning schemes through the issue of an interim planning directive under section 12A of the former provisions of the LUPA Act. It states (at p 10) that, outside of amendments that might fall within the “narrow” category of minor amendments (currently set out in section 30H of the LUPA Act), there is currently no process for the making urgent amendments to SPPs.
- 30 EDO notes that the proposed interim amendment process differs from the interim planning directive process in an important way: An interim planning directive may only be issued by the Minister if the TPC has made a recommendation to that effect (see section 12A(1) and (2) of the former provisions of the LUPA Act). Whereas, in the draft Bill, an interim amendment to the SPPs may be made at the Minister’s instigation and can be made notwithstanding TPC advice that a draft amendment should not be made on an interim basis (refer section 30 NB(1) and (3) of the Draft Bill).

- 31 Unlike with an interim planning directive, before the Minister may make an interim amendment to the SPPs, the Minister must be satisfied:
- (a) it is necessary or desirable to make the interim SPPs amendment in order to address on urgency a critical, or significant, planning issue; and
 - (b) it is in the public interest to give effect as soon as practicable to the provisions of the draft amendment of the SPPs contained in the interim SPPs amendment.

While these tests may be said to impose a check on the Minister's power to make an interim amendment, there is no definition in the draft Bill around what might be a "a critical, or significant, planning issue" or how the Minister might assess the public interest in the making of the interim amendment.

- 32 An interim amendment to the SPPs may be in effect for up to 12 months. In that time, the amendment could have very real and long-lasting impacts on both the natural and built environment. For example, if interim changes were made to the SPPs to allow broad-scale land clearing without a permit for the purposes of bushfire mitigation (notwithstanding the impacts on threatened species or ecosystems), there could be up to 12 months of large-scale vegetation clearing across Tasmania before the TPC has had the opportunity to consider and report on the substantive draft amendment to the SPPs. While this may be an extreme example, it does illustrate some of the problems with the proposed amendments to the LUPA Act.
- 33 If there is to be an interim amendment process for the SPPs, then there should be appropriate checks and balances on the Minister's power, for example, by restricting its use to those circumstances where the TPC has recommended that the draft amendment be implemented on an interim basis. There should also be some guidelines developed to articulate the range of "critical" or "significant" planning issues for which an interim amendment might be appropriate.

Recommendation 7: Amend clause 7, proposed subdivision 3B of the draft Bill so that the Minister may only implement an interim amendment to the SPPs on the recommendation of the TPC.

Recommendation 8: Amend clause 7, proposed subdivision 3B of the draft Bill to require the publication of statutory guidelines on the use of the interim amendment power, and for the guidelines to be tabled before both Houses of Parliament.

2. Proposed changes to Local Provision Schedule processes

- 34 The draft Bill contains a number of proposed changes to the process for the making of Local Provision Schedules.

(a) Directions to publicly exhibit draft Local Provisions Schedules

- 35 EDO considers that the proposed changes to the directions to the timing for public exhibition of draft LPSs so that planning authorities have more time and flexibility in the public exhibition of the LPSs, are sensible.

(b) New process for considering “substantial modifications” to a draft Local Provisions Schedule

- 36 The draft Bill proposes changes to the process for the making of draft LPSs. According to the proposed changes, where the TPC is considering a draft LPS and it directs a council to make a “substantial modification” to that draft LPS, the modification will be made as an amendment to the LPS with the remainder of the LPS is finalised and given effect. The draft Bill also proposes changes to section 51 of the LUPA Act so that, where the TPC has directed a council to make substantial modification a draft LPS, that council will need to apply the LPS to any proposed developments as if that substantial modification is already in effect, notwithstanding that the substantial modification is still to be fully considered by both the community and the TPC through the LPS amendment process.
- 37 A substantial modification to an LPS may include changes to the zoning of particular areas of land, or a change to the application of particular codes to land. As the name suggests, substantial modifications to LPSs may have significant impacts not only on the rights of the owners of land that are affected, but also on the rights and interests of neighbouring property owners and the community more generally.
- 38 The current process allows the public an opportunity to comment on a proposed substantial modification, in the context of the draft LPS, before both the LPS and the substantial modification have been given effect. While under the proposed amendments to LUPA Act, there will still provide an opportunity for public comment on a substantial modification (albeit through the LPS amendment process), this opportunity to comment will be *after* both the substantial modification and the underlying LPS has been given effect. In this way, the proposed changes assume that once the TPC has directed a council to make a substantial modification to an LPS, it is unlikely that the substantial modification to the LPS will change following public comment and TPC hearings on the modification.
- 39 EDO does not support these proposed amendments to the LUPA Act. We are concerned that they have the potential to undermine the ability for the community to have a real say in relation to substantial modifications to the LPSs as the substantial modification will be given effect before they have had a chance to be heard on it. The changes are likely to give rise to the perception that an amendment to an LPS involving a substantial modification is a “done deal” because it has already been given effect. This in turn, may result in fewer people being involved in an LPS amendment process involving a substantial modification.
- 40 Rather than add certainty to the standards that are to apply to a planning application at a particular point in time, some of the proposed changes to section 51(3) of the LUPA Act are liable to cause confusion to councils, applicants, and the community.
- 41 At p 19, the information package cites the “Coty principle” as the basis for the proposed changes to section 51 of the LUPA Act. However, it appears that principle has been misconstrued in some of the proposed amendments.
- 42 The Coty principle is derived from the case *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117. That case held that a planning authority may consider and give weight to a draft planning instrument when it is considering planning applications. The weight the planning authority is to give to the draft planning instrument in its decision-making will depend on how far it has come along the process to being approved. The Coty principle does not stand for giving a draft planning instrument that is not yet close to being finalised

decisive weight as if it already has the force of law. However, this will be the effect of the some of the proposed amendments to section 51.

- 43 The proposed amendments to section 51 to introduce subsections (3C) and (3D) do not grapple with the real possibility that substantial modifications or proposed amendments to an LPS may change as a result of public comment and the TPC hearings. If they are passed, subsections (3C) and (3D) may result in development applications being approved under the terms of a proposed substantial modification or amendment to an LPS, even though those substantial modifications or amendments may have changed as a result of public comment and TPC hearings.
- 44 EDO considers that the current system for substantial modifications to draft LPS should remain and that the proposed amendments to section 51 of the LUPA Act to include subsections (3C) and (3D) should not be made. The current system provides a fairer and clearer process for the creation of LPSs and real opportunities for meaningful public participation in relation to substantial modifications to LPSs.
- 45 Furthermore, consistent with the Coty principle, under the current section 51 of the LUPA Act, councils will still be entitled to consider and give an appropriate amount of weight to a draft LPS (including a substantial modification to it) in deciding an application.

Recommendation 9: Delete clauses 14 – 19, and 21 of the draft Bill.

Recommendation 10: Amend clause 20 of the draft Bill to delete the proposed subsections (3C) and (3D) of section 51 of the LUPA Act.

(c) Including approved interim planning scheme amendments in Local Provisions Schedules

- 46 EDO has no objection to the proposed amendments to the LUPA Act to explicitly allow the TPC and the planning authority to incorporate amendments that have been made to an interim planning scheme while a draft LPS is under consideration by the TPC. However, there is no need for the proposed restrictions on public representations on those changes to the draft LPS.
- 47 The restriction on public representations to be given effect by clause 13 of the draft Bill, appears to proceed on the assumption that, because the TPC has recently assessed the amendment to the interim scheme, there is no need for further consideration of it as part of the draft LPS process. However, incorporation of an interim scheme amendment into the LPS may not be as simple as a direct translation from one scheme to another. There may be changes in zoning, in codes and to the wording of provisions when they are included in the draft LPS that may give rise to issues not considered by the TPC in the interim amendment process and warranting a further opportunity for public comment.
- 48 Allowing public comment on changes to a draft LPS to incorporate amendments that have been made to an interim planning scheme is consistent with Objective 1 (e) in Part 1 of the Schedule 1 Objectives of the LUPA Act.

Recommendation: Delete clause 13 of the draft Bill to remove the proposed inclusion of a new subsection (3A) to section 35 of the LUPA Act.

3. Changes to process for determining applications during transition to the Tasmanian Planning Scheme

- 49 As already touched on earlier in this submission, the draft Bill proposes amendments to section 51 of the LUPA Act.
- 50 EDO is supportive of the proposal to introduce a new subsection (3) which provides for development applications to be assessed against the requirements of the scheme as in effect at the date of lodgment of the application. This approach is similar to the approach in other jurisdictions, such as Queensland, and gives the applicant, council and community certainty as to the requirements that the application will be assessed against.
- 51 EDO also has no objection to the proposed new subsection (3B) to section 51 as it will allow for the application of amendments to schemes or LPSs that are not the subject of further public representations or TPC hearings.
- 52 The proposed subsection (3A) largely reflects the current subsection (3)(c) in that it provides for development applications to be assessed against a provision of an interim scheme as modified under direction of the TPC. However, to the extent that it allows reference to be made to a substantial modification of a scheme that may still be the subject of public exhibition and hearings, EDO does not support its inclusion for the same reasons already outlined earlier in this submission with respect to the proposed application of substantial modifications to draft LPSs to development applications.

Recommendation 11: Amend clause 20 of the draft Bill to remove from the proposed subsection (3A) of section 51 of the LUPA Act reference to “alter”, “altered” and “alter to a substantial degree”.

4. Implementation of certain State Planning Provisions through interim planning schemes

- 53 EDO strongly opposes the proposed amendments to the LUPA Act that will allow the Minister to direct parts of the SPPs to be given effect through changes to interim planning schemes.
- 54 Under the proposed amendments, the Minister may direct the adoption of SPPs in interim schemes to give effect to SPP:
- (a) definitions;
 - (b) exemptions;
 - (c) application requirements;
 - (d) general provisions (under clause 7);
 - (e) development standards relating to dwellings in the General Residential Zone or the Inner Residential Zone; and/ or
 - (f) “any other [SPP] provisions that are necessary or convenient to include for the relevant purposes”. The “relevant purposes” are essentially defined as ensuring that the SPP provisions “operate effectively” with interim scheme provisions.
- 55 The power proposed to be introduced under clause 22 is a very broad power and it is unclear how it would work in practice.

- 56 Interim schemes have been developed and drafted over a long period of time, while the SPPs are largely untested. Changes to interim schemes to bring them into greater conformity of the SPPs may have unanticipated and unintended consequences in that the certain provisions of the SPPs may significantly change the operation of other parts of the interim scheme in a way that is different to how they operate within the SPPs.
- 57 Furthermore, to bring in these changes while LPSs are still being considered may lead to the approval of developments and uses that would otherwise be prohibited or tightly regulated under site specific qualifications, specific areas plans or particular purpose zones under an LPS. This is liable to seriously undermine the community's confidence and participation in the draft LPS process.
- 58 The exercise of the Minister's proposed new power under clause 22 is not subject to any public comment or independent oversight by the TPC. We note that no explanation has been provided for this proposal other than a statement that "there has been growing interest in bringing some elements [of the SPPs] into effect earlier" (information package at p 20). In the absence of a clear and overwhelming need for these provisions to come into effect earlier, we strongly submit that the draft LPS processes need to be allowed to run their course.
- 59 If there is such a strong interest in bringing the Tasmanian Planning Scheme into effect sooner, then we would encourage the Government to provide adequate additional resources to:
- (a) councils to finalise their draft LPSs, and
 - (b) assist the community to be actively involved in the draft LPS process;
 - (c) the TPC to undertake its assessment of the LPSs.

Recommendation 12: Delete clause 22 of the draft Bill.