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

By email: planning.unit@justice.tas.gov.au

Dear Madam / Sir,

Land Use Planning and Approvals Amendment (Tasmanian Planning Policies) Bill 2017

EDO Tasmania is a community legal centre specialising in environmental and planning law. We regularly advise community members concerned about poor planning outcomes, and have a strong interest in ensuring that Tasmania has a planning system that sets up the State for a socially, economically and environmentally sustainable future.

We welcome the opportunity to comment on the draft *Land Use Planning and Approvals Amendment (Tasmanian Planning Policies) Bill 2017* (the **draft Bill**).

This submission makes some general comments regarding the timing and context of the draft Bill and proposed Tasmanian Planning Policies (**TPPs**), as well as specific comments on the draft Bill. While we strongly support the introduction of a comprehensive suite of planning policies, we question whether the proposed Tasmanian Planning Policies are the best mechanism to achieve that outcome.

The published consultation package was inconsistent regarding whether comments were invited regarding the draft Tasmanian Planning Policies. We have not commented on the draft TPPs, on the basis that consultation is intended to be provided following passage of the draft Bill. If this is no longer the case, we request a further opportunity to comment on the draft suite of policies.

SUMMARY OF COMMENTS / RECOMMENDATIONS

- A suite of planning policies should be delivered through the existing State Policies process, rather than creating a whole new planning instrument
- Planning policies should trigger review and amendments of State Planning Provisions and Local Provisions Schedules
- The ad hoc way in which planning reforms are being released makes it difficult for stakeholders to make constructive comments
- Provision should be made for "prescribed matters" to be addressed through planning policies, to avoid any future doubt about whether particular issues (such as affordable housing) can be the subject of a policy
- Public consultation on draft TPPs should be mandatory, for a minimum of 42 days
- Provision should be made for public hearings in relation to draft TPPs
- Modifications to draft TPPs following consultation should be made by the Commission and, unless technical or minor changes only, modified TPPs should be re-advertised
- The Commission's report to the Minister on draft TPPs must be published
- TPPs set the policy direction for the State and should require Parliamentary approval

GENERAL COMMENTS

Role and timing of TPPs

EDO Tasmania, along with many others, has long advocated for the development of well-articulated, Statewide strategic planning policies to guide planning and development controls and improve consistency and integration across Tasmania, and across government decisions. The Explanatory Document also acknowledges this “*widely recognised gap in the planning system.*”

However, such policy statements only serve a genuinely strategic function where they inform the development of planning controls. In contrast, despite s.12B(1)(a) of the draft Bill stating that the purpose of the TPPs is to “*set out the aims or the principles that are to be achieved or to be applied by the Tasmanian Planning Scheme*”, the draft Bill (and subsequent TPPs) will be introduced only after the declaration of the State Planning Provisions.

Unlike State Policies (see below), TPPs do not override Planning Scheme provisions. The draft Bill and Explanatory Document make clear that TPPs will inform the “*first and subsequent five-yearly reviews of the Tasmanian Planning Scheme*”, but are unlikely to alter the SPPs as currently declared.

Furthermore, the transitional provisions for the draft Bill explicitly provide that the initial Local Provisions Schedules will not be required to be consistent even with any TPPs that are adopted before the LPS are declared (see proposed Schedule 7, clause 1).

As we have noted in previous comments on aspects of the Tasmanian Planning Reforms, though a suite of planning policies is welcomed, the value of the TPPs is compromised by their separation from the development of planning instruments intended to serve Tasmania for the next 5 years.

One example of this relates to Aboriginal heritage. The State Planning Provisions explicitly exclude opportunities to address Aboriginal heritage (such as an Aboriginal Heritage Code) on the basis that the *Aboriginal Relics Act 1975* deals with Aboriginal heritage, therefore the matter cannot be addressed through the SPPs. In contrast, the draft TPPs include the following strategies:

- Ensure access to the Aboriginal Heritage Register and if required, undertake appropriate levels of investigation to inform land use planning and development.
- Support the protection and management of Aboriginal cultural heritage in the land use planning system.
- Promote greater understanding and appreciation of Aboriginal cultural heritage through the provision of guidelines and information during the land use planning process.

Recognition of the need for better integration of Aboriginal heritage protection into land use planning is very welcome. However, the draft policies contradict the position that will be implemented through the Tasmanian Planning Scheme until the first five year review.

Need for new process

As noted above, there is a recognised need for a suite of policies to guide planning controls. However, a rigorous process for developing policies to achieve consistency on matters of State significance already exists - State Policies developed under the *State Policies and Projects Act 1993 (SPPA)*.

The explanatory document outlines key differences between TPPs and State Policies, but fails to explain why the differences are necessary or desirable. Differences identified in the Explanatory Document include:

- State Policies apply more broadly (for example, to review of water management plans and marine farming development plans), whereas TPPs will apply exclusively to land use planning;
- State Policies can be self-executing and override planning schemes, whereas TPPs will merely inform the development of planning instruments.

Strategic policies that guide a broader range of decision making are to be supported, particularly as integrated decision making remains a key objective of Tasmania’s Resource Management and Planning System. The content of a State Policy can be limited to land use planning and

management issues, under s.5A of the SPPA. The scope of content under s.5A and the scope of TPPs under the draft Bill are not materially different. Therefore, developing a new instrument to constrain the application of Statewide policy direction to planning matters has not been justified.

The potential for State Policies to be self-executing was confirmed by the Supreme Court in *St Helen's Area Landcare and Coastcare Group Inc v Break O'Day Council* [2007] TASSC 15. However, in practice, State Policies have been written to avoid that outcome and are rarely considered relevant to assessment of a particular development (as opposed to the development or amendment of planning schemes). To the extent that the implications of the Supreme Court decision remain unresolved, clarifying amendments could be made to the SPPA.

As outlined above, policies should guide development controls under the SPPs and LPS, so the reason for creating a new policy instrument that does not override the Tasmanian Planning Scheme (where the Scheme is inconsistent with agreed policies) is unclear.

The explanatory document also notes that: *No changes are proposed to the provisions for making and amending State Policies under SPPA as part of the current reforms.* We question whether the creation of a new planning policy instrument (TPPs) for schemes to be assessed against, in addition to the existing instrument (State Policies), is "faster, fairer, simpler and cheaper."

For these reasons, we consider that a suite of planning policies would be best delivered through the existing mechanism of State Policies, rather than the creation of Tasmanian Planning Policies.

Ad hoc nature of reforms

The unsystematic nature of current planning reforms is further highlighted by the reference in the draft Bill (Schedule 11 and the proposed s.87E) to Planning Panels. In particular, the proposed Schedule refers to the "*Land Use Planning and Approvals Amendment (Tasmanian Planning Provisions and Planning Panels) Act 2017*".

It is clear that the draft Bill was originally intended to incorporate amendments to deliver the Tasmanian Government's proposed new process for assessment of major projects, but those provisions were subsequently removed. According to recent government statements, amendments for major projects are expected to be introduced separately later in 2017.

It is difficult for stakeholders to constructively comment on the operation of the planning system when proposed changes to that system are compartmentalised and presented to the public in an ad hoc manner.¹

SPECIFIC COMMENTS

Content of TPPs

In its report on the State Planning Provisions, the Planning Commission felt constrained by the lack of policy guidance (particularly, referring to affordable housing):

The Commission considers it difficult to make any modifications to the draft SPPs without a greater policy mandate to do so.

We support a wide range of matters being addressed in planning policies to provide confidence to the Commission and to planning authorities regarding the breadth of issues they can consider.

Section 12B(2) outlines what the TPPs may relate to:

- (a) the sustainable use, development, management, protection or conservation of land; or
- (b) environmental protection and management; or
- (c) any other matter that may be included in a planning scheme or a regional land use strategy

As noted above, this is not materially different from the scope of State Policies. However, s.5A(f) of the SPPA also provides that policies can address "*any other matter that may be prescribed.*"

¹ We note with concern that the removal or reduction of third party appeal rights and the introduction of Ministerial call-in powers remain Tasmanian Government policy, despite not being progressed in the current suite of amendments.

To avoid future argument regarding whether relevant socio-economic matters, such as affordable housing, are properly "matters that may be included in a planning scheme", we recommend that "*any other matter that may be prescribed*" be added as 12B(2)(d).

We also recommend that further statutory guidance be provided regarding the structure of TPPs, such as the guidance provided in the Victoria Planning Policy. Section 12B should provide for each TPP to include an objective that sets out the aim of the policy, strategies that outline how the policy is to be achieved, and other policy guidelines. This is consistent with the content of the published draft TPPs, but explicit statutory recognition of this structure would improve consistency of future TPPs.

Requirement for public participation

The draft Bill is not clear about whether the Minister has discretion to determine whether to refer a draft TPP for public consultation.

Section 12C(3) provides that the Minister may direct the Commission to advertise a draft TPP for public comment. The draft Bill goes on to set out the process for consultation in s.12D, including a 42 day exhibition period and reporting by the Commission. However, that process is instigated only if the Minister directs the Commission to advertise the draft TPP.

Section 12G(3) says that the Minister cannot make a TPP until s/he has considered a report from the Commission. This suggests the Minister is required to direct the Commission to undertake public consultation as, without the report that follows consultation, the Minister cannot make a TPP.

We urge you to remove any discretion the Minister has regarding referral to the Commission for public consultation by providing that, where the Minister has determined to progress a draft TPP, s/he must provide a copy to the Commission and direct the Commission to undertake consultation.

Section 12D(4) prescribes an exhibition period of 42 days. We recommend that the section be amended to refer to a period of "at least 42 days" to provide the Commission with the option to allow a longer exhibition period where the complexity or level of public interest in a draft policy calls for additional consultation time.

Public hearings

The Commission is required to consider all representations under s.12E(4), but no provision is made for public hearings. TPPs are intended to be statements of public policy that guide the future shape of communities and, in many ways, are more significant than the Tasmanian Planning Scheme. The hearing requirements should therefore be equivalent to those provided in relation to Local Provisions Schedules.

We note that public hearings are not required in relation to State Policies, however s.9(2) of the SPPA at least makes provision for hearings to be held at the Commission's discretion. At a minimum, a similar provision should be included in s.12E of the draft Bill.

Making TPPs

Under s.12G, the Minister must consider the Commission's report on the draft TPPs (including an assessment of issues raised in representations), but may also "*inform himself or herself, in the manner he or she thinks fit, in relation to a draft of the TPPs*" and make, refuse to make, or modify a draft TPP without any additional oversight. A notice explaining the modifications is to be published (after the TPPs are made), but there is no requirement to readvertise.

While the Minister is also not bound by the Commission's recommendations in relation to State Policies, the following provide for a higher degree of transparency in relation to the making of State Policies:

- Modifications are made by the Commission, rather than the Minister. If the Commission modifies a draft State Policy and considers that readvertising is required, the revised draft Policy will be readvertised and further public comments invited (s.10, SPPA)
- The Commission's report to the Minister must be published when it is made, before the State Policy is laid before parliament (s.11(2), SPPA)
- State Policies must be approved by both Houses of Parliament (s.11(7), SPPA).

These transparency measures reflect the significance of Statewide policy statements that will guide future planning and development decisions. Even though the Government does not propose to abolish State Policies, it appears that TPPs are intended to play the role currently played by State Policies in future. If TPPs are to be introduced to replace State Policies in that regard, similar mechanisms should be adopted.

Amending TPPs

Under s.12H of the draft Bill, amendments of TPPs will be subject to the same assessment and approval process as a new TPP, unless the amendment is minor and will not prejudice the public interest.

The list of amendments considered minor in s.12H(4)(b) is appropriate, other than the inclusion of "any prescribed purpose." Given the consequence of being characterised as a minor amendment (no requirement for consultation or to have regard to recommendations from the Commission), "any prescribed purpose" inappropriately broadens the scope of "minor".²

We recommend that s.12H(4)(b)(vi) be deleted.

Implementation of policies

As noted in the general comments above, we are concerned that implementation of the TPPs through the initial SPPs and LPSs will be limited. Section 8 of the draft Bill (proposed s.30T of LUPAA) provides an option, rather than a requirement, for the SPPs to be reviewed to determine if they are consistent with the TPPs.

If the government proceeds with Tasmanian Planning Policies, we would support the following:

- Introducing a provision similar to s.4J of the *Planning and Environment Act 1987 (Vic)* to allow TPPs to provide for direct amendment of a planning scheme. This would give timely effect to the intention of an adopted policy.
- Statutory obligations for future amendments to SPPs, LPSs and Regional Land Use Strategies to be consistent with TPPs (s.4, 5, 7 and 9 of the draft Bill).

Thank you for the opportunity to comment on the draft Bill. Please do not hesitate to contact us if you wish to discuss anything raised in our submission.

Yours sincerely,

Environmental Defenders Office (Tasmania) Inc



Jess Feehely
Principal Lawyer

² We note the additional requirement for the Minister to be satisfied that the amendment will not prejudice the public interest but, without any clear mechanism to challenge such a decision, it is preferable to be clear about the scope of minor amendments.