Discussion Paper – *Planning, Development and Infrastructure Act 2016* Reform Options

Expert Panel for the Implementation Review

October 2022

Planning System Implementation Review

Government of South Australia

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Planning System Implementation Review

Message from the Chair

South Australia's planning system has undergone significant change in recent years. Firstly, with the implementation of the *Planning, Development and Infrastructure Act 2016* and *Planning, Development, and Infrastructure (General) Regulations 2017* and more recently with the introduction of the state-wide Planning and Design Code.

In response to concerns raised by local communities and industry groups, the Minister for Planning, the Hon. Nick Champion MP, has commissioned a review of South Australia's planning system and the implementation of recent reforms made to it.

I am honoured to have been appointed Presiding Member of the independent panel of experts that has been established to undertake this review. Importantly, each of the Panel members has significant experience with the South Australian planning system, having all lived and worked in South Australia for many years.

I'm delighted to be joined on the Panel by **Lisa Teburea**, independent consultant and former Executive Director of Public Affairs with the Local Government Association of South Australia, **Cate Hart**, President of the Planning Institute of Australia (SA) and Executive Director, Environment Heritage and Sustainability for Department of Environment and Water, and **Andrew McKeegan**, former Chief Development Officer and Deputy Chief Executive for the Department of Planning, Transport and Infrastructure.

The Panel has been tasked with reviewing key aspects of the planning system and identifying opportunities to ensure planning decisions encourage a more liveable, competitive, affordable, and sustainable long-term growth strategy for Greater Adelaide and the regions.

We are pleased to present these Discussion Papers which outline the key areas in the Act, Code, and e-Planning system that the Panel has identified warrant further examination. We encourage all South Australian's – whether industry groups, practitioners, community groups, local government or the general public - to consider these Papers, share their feedback and contribute to the review.

After all, South Australia's planning system affects all of us.

John Stimson

Introduction

The South Australian planning reforms commenced in 2012 with the appointment of the former Expert Panel, which made a series of initial recommendations that shaped new legislation that we now know as the *Planning, Development and Infrastructure Act 2016* (the PDI Act).

For the past ten (10) years, South Australians have considered and contributed to planning policy, and have now lived with the provisions of the PDI Act and Planning and Design Code (the Code) for 18 months.

The Expert Panel for the Planning System Implementation Review was appointed by the Minister for Planning, the Hon. Nick Champion, to review the new system and to consider where there is scope for improvement.

The Panel has been given a Terms of Reference to review:

- the PDI Act;
- the Code and related instruments, as it relates to infill policy, trees, character, heritage and car parking;
- the e-Planning system, to ensure it is delivering an efficient and user-friendly process and platform; and
- the PlanSA website, to check usability and ease of community access to information.

Importantly, the Panel is not a decision-making body, but rather, a group of subject matter experts brought together to review, consider, consult, and make recommendations to the Minister as to what improvements to the new planning system could be. Those recommendations will, of course, be influenced by the feedback received from the community throughout this engagement process.

In preparing its Discussion Papers, the Panel has acknowledged the volume of submissions and representations that have been made by groups and individuals during previous engagement and review processes. Many of the issues that have been raised over the course of the past 10 years have already been thoroughly examined by various bodies, and the Panel considers that the fundamental elements of the PDI Act are sound.

However, this review is an opportunity to reconsider some of the details and the Panel is looking for new information, new feedback and experiences directly related to the implementation of the PDI Act and the Code, and how the community is interacting with the e-Planning system.

In undertaking this review, the Panel will play a key part at a point in time. A time where the system is still young and arguably in its 'teething' phase, but equally a time that is ripe for considering what amendments – big or small – could make what is already a comprehensive planning regime, even better.

This Discussion Paper seeks to identify potential opportunities for improvement in the PDI Act. It will guide you, as the reader, through the matters the Panel has determined to include in its scope of review, the background to those matters and how those matters could be improved through legislative amendment. It will then ask questions for your consideration and response. Notwithstanding, the Panel is, of course, interested to hear about all ideas for reform that may benefit the South Australian community and encourages you to raise any matters that have not otherwise been canvassed in this Discussion Paper.

Finally, and for the avoidance of doubt, the Panel acknowledges that that there are matters that have been (or are currently) the subject of proceedings in the Environment, Resources and Development Court relevant to the PDI Act. The Panel recognises that the outcomes of those proceedings may require it to consider additional matters not otherwise addressed in this Discussion Paper and confirms that, where necessary, it will address those in its final report to the Minister.

The Panel acknowledges and appreciates the time and effort that will be put into preparing submissions for its consideration and looks forward to reviewing and considering all the feedback.

Scope of *Planning, Development and Infrastructure Act 2016* Review

The Panel's Terms of Reference require it to review the PDI Act. However, the Minister did not pre-determine what matters should be within the scope of the Panel's review. This was left to the Panel's discretion.

On that basis, and to give focus and structure to the review, the Panel has resolved to identify the key areas for improvement that it would seek to address, being:

1. Public Notifications and Appeals;
2. Accredited Professionals;
3. Impact Assessed Development;
4. Infrastructure Schemes;
5. Local Heritage in the PDI Act;
6. Deemed Consents; and
7. Verification of development applications.

Whilst the Panel has chosen to focus on the above seven (7) areas for reform, that does not limit or otherwise exclude the community and stakeholders from raising matters that fall outside of this scope during this engagement process. The Panel is interested to hear about any ideas for reform that may benefit the South Australian community.

For completeness, it is also noted that there are some matters raised in the Panel's Discussion Papers on the Code and e-Planning that may result in consequential amendments to the PDI Act. However, those matters are appropriately raised and contained in the other Papers given that, where relevant, they wholly relate to the corresponding subject matters.

Public Notification and Appeal Rights

Background

Under the PDI Act, the public notification and appeal rights of each development application are determined by the assessment pathway that the application follows. The assessment pathways are determined by the Code and Practice Direction 3 – Notification of Performance Assessed Development Applications 2019 then provides further guidance on how notification must be undertaken.

Planning Pathway	Notification	Third Party Appeal Rights
Exempt Development – development approval not required.	Not applicable.	Not applicable.
Accepted Development – only requires building consent and not planning consent.	Not applicable.	Not applicable.
Deemed to Satisfy Development – meets the prescriptive planning rules and planning consent must be issued.	No notification required.	No third-party appeal rights on the merits of the decision.
Performance Assessed Development – assessed on its merits against the Code.	The Code identifies when certain land uses are notified (most expected land uses in a zone are not notifiable). Where a development application is notified, owners/occupiers of adjacent land are notified, along with members of the public more broadly (allowing anyone to lodge a representation).	No third-party appeal rights on the merits of the decision.
Impact Assessed (Restricted) Development.	Owners/occupiers of adjacent land or of land that will be directly affected to a significant degree must be notified, along with members of the public more broadly (allowing anyone to lodge a representation).	Anyone who lodged a representation may appeal the merits of the decision.
Impact Assessed (Declared) Development.	Consultation must be undertaken on the Environmental Impact Statement.	No applicant or third-party appeal rights on the merits of the decision.

It should be noted that a person with sufficient interest may seek a judicial review of a planning decision in the Supreme Court of South Australia. Judicial review is the review of an administrative decision of a government agency to ensure it is properly made, and it applies to all government agencies (not just in relation to planning).

The current system provides for notification of development applications through the following:

- public register of all development applications in the State on the PlanSA portal, allowing members of the public to register for push notifications;
- all applications on public notification listed on the PlanSA portal;
- all public representations or submissions are lodged through the PlanSA portal;
- notified development applications require a sign on the land, which is linked to the PlanSA portal through a QR Code;
- notification period for performance assessed development has been increased to 15 business days, where the former category 2 and category 3 developments only allowed ten (10) business days; and
- anyone can make a submission on performance assessed development, whereas previously only neighbours could make a representation on category 2 development.

As the current pathways are set by the Code, a Code Amendment would be required to amend a pathway for a particular land use. The Code Amendment process requires community consultation in line with the PDI Act's Community Engagement Charter (the Charter), with impacted members of the public required to be notified and provided an opportunity to make a submission. The consultation which occurs through a Code

Amendment is also subject to parliamentary scrutiny by the Environment, Resources and Development Committee of Parliament.

A key aim of the PDI Act when introduced was to highlight the importance of consulting on the planning rules upfront and then (once adopted) allowing landowners to exercise their private property rights in accordance with the rules. The current system envisages improved and increased consultation in setting and determining planning policy, with a reduced ability for third parties to then challenge decisions made against that policy once it has been set and determined. The Panel acknowledges previous feedback from some groups and individuals who consider that the system has not achieved this aim.

The Charter under the PDI Act, while not required to be complied with in relation to the notification of a development application, is required to be complied with in setting policy in the Code. In contrast to the notification of a development application, setting policy may affect the community more broadly, and so the Charter provides a mechanism whereby notification of a Code Amendment is able to be appropriately tailored for the circumstance.

The inaugural Charter was co-designed with more than 50 members of the public that were selected through an expression of interest process. In conjunction with these members of the public, the State Planning Commission (the Commission) then set the five (5) principles that form the basis of the Community Engagement Charter.

In subsequently setting the assessment pathways in the Code, one (1) of the principles applied by the Commission was that if an application meets all the prescriptive rules and the land use is envisaged, then the application should receive a streamlined and assured approval, without notification and third-party intervention, on the basis that a reasonable person would expect that form of development to occur.

The consultation on Phase Three of the Planning and Design Code (Urban Areas) Code Amendment (the full introduction of the Code) led to a range of submissions, particularly from industry and interest groups, on the issue of notification of development applications and third-party appeal rights. These were summarised in the Commission's 'Engagement Report' as well as the higher level 'What We Have Heard' report'.

The Commission's Engagement Report noted that "*community submissions emphasised that public notification should be required where a development fails to meet the planning rules*". It is also noted, particularly regarding residential zone policies, that notification and appeal rights were a concern raised in submissions.

In relation to heritage and character, the 'What We Have Heard' report noted that many submissions across the stakeholder groups highlighted concerns about the loss of public notification and third-party appeal rights within all the heritage and character overlays, particularly in relation to demolition. As a result, notification triggers were improved because of consultation.

Conversely, this report made several observations regarding development industry feedback. While a detailed review of the public notification requirements was supported, there was also broad support for the reduction in third-party notification and its potential appeal risks.

In response to those submissions calling for increased notification and third-party appeal rights, the Commission's engagement report stated that:

> *Regarding requests to ensure additional forms of development are notified, the Commission continues to support the principle that development which is envisaged in the zone should not be subject to notification; except where either acceptable standards of built form or intensity are exceeded, and/or the development is likely to result in substantial impacts on the amenity of adjacent dwellings located on land in another zone.*

The Commission also noted that:

> *Notification of all non-residential development in a neighbourhood-type zone and township zones is not supported, as small-scale non-residential land uses are a legitimate and envisaged form of development in these zones.*

About appeal rights in general, the Commission noted in their engagement report that:

> *…the appeal rights for different categories of development are set out in the PDI Act. Amendment to appeal rights is beyond the scope of the Code and the Phase Three Amendment.*

PDI Act Appeals Pathway

Under section 202 of the PDI Act, a person who has applied for a development authorisation where the relevant authority was an Assessment Manager may apply to the relevant council assessment panel (CAP) for a review of the Assessment Manager's decision. The CAP may affirm, vary, set aside and substitute the decision of the Assessment Manager, as it sees fit.

Whilst this is considered a cheaper and faster process than applying to the ERD Court for a review, it is noted that this is not a mandated pathway and that an aggrieved applicant may appeal directly to the ERD Court, bypassing the CAP review, if they so choose.

If an applicant would like to appeal or seek review of the decision of a CAP or regional assessment panel, their only option is to apply to the ERD Court under the PDI Act.

In relation to restricted development, an applicant may seek a review of a decision of the Commission's delegate to not proceed with assessment of the application with the Commission itself. If the Commission then determines to not proceed with the assessment of the application, the applicant has no right to seek a review of, or appeal, this decision. If the application proceeds to assessment, the applicant may appeal the merits of the final decision in the ERD Court.

Outside of a review to a CAP or a review of a decision of the Commission's delegate, South Australia does not currently have a pathway for review or appeal of a planning decision to a body that is not a court (such as a tribunal).

Jurisdictional Comparison

The public notification requirements vary significantly subject to each jurisdiction's planning rules. Whilst these are consequently difficult to distil into a comparative table, the following is a summary of what sort of development applications may be subject to third-party appeal rights.

Jurisdiction	Third-Party Appeal Rights
South Australia	Third party appeal rights limited to Impact Assessed (Restricted) Development and only available to persons that lodged a representation on the application.
New South Wales	Appeal rights limited to uses such as major developments, where the development is high impact and possibly of state significance. A third-party objector can bring a merit-based appeal in the Land and Environmental Court against a decision to grant development consent only if the development is designated development (development listed as such in the regulations). Third parties have 28 days to lodge an appeal.
Western Australia	No third-party appeal rights exist under the *Planning and Development Act 2005*.
Queensland	Appeal rights limited to 'impact assessable' developments. The person making the third-party appeal must have lodged a 'properly made submission' with the local council within the public notification period for the development application. A submitter may only appeal against the part of the development approval relating to impact assessable development, or a variation approval under section 43 of the *Planning Act 2016*. The appeal can be against one (1) or more of the following: • granting of a development approval • a condition of, or lack of conditions for a development approval • the length of the current period
Victoria	Provision of third-party appeal rights cover most developments in Victoria, however, in several situations there are appeal right exemptions for permit applicants under planning schemes. For example, expected uses in a business zone. To appeal, the third party must have lodged an objection to an application within the advertising period. Anyone who may be affected (including on broad public interest issues) can make an objection. An objector who lodged an objection in writing must make an application for review (appeal) within 28 days of the decision to grant a permit.

Tasmania	Broad appeal rights, but third parties can only object to a planning application if it is a 'discretionary' application, which must be advertised. To appeal, the third-party must have lodged a representation (objection) to an application within the 14-day advertising period. They must lodge their appeal within 14 days of receiving notice of the council decision.
Australian Capital Territory	Third-party appeals are generally available in relation to a decision to approve (or conditionally approve) a development application where it would cause material detriment or refuse a development application, as well as to revoke a development approval. Material detriment means the development would adversely affect the person's use or enjoyment of their land. There may be circumstances where third-party appeals cannot be made or where a development is exempt from third-party appeals, including: • applications that went through minor public notification; and • development in the city centre, a town centre, an industrial zone, Kingston Foreshore or the University of Canberra campus.

Alternative Appeal Pathways

In addition to demonstrating what third party appeal rights are available in alternate jurisdictions, the Panel thought it also important to highlight the alternative planning appeal pathways that are being utilised in Victoria, New Zealand and the United Kingdom.

Whilst the options offered by these three (3) jurisdictions vary, they demonstrate that there may be functional alternatives to a Court appeal that could be considered for implementation in South Australia.

While there may be some benefit in implementing a similar mechanism to the below (appeals through a tribunal) in South Australia, there are some challenges that come with doing so. The first is that any tribunal or government body would need to have the expertise to hear and consider such matters that are already heard by the ERD Court, which would come at a cost.

If any such option is considered further, thought would also need to be given as to how to ensure any third-party appeals heard through a tribunal are not used to delay development that should proceed (i.e. via further appeal through a Court or Government body), as well as the costs involved in the tribunal providing this service. For instance, as a review to a tribunal generally involves less upfront costs to an appellant, the tribunal's resourcing would need to come from elsewhere.

Victoria, Australia

The Victorian Civil and Administrative Tribunal (VCAT) has introduced two (2) processes to assist with efficiently managing appeals and reviews under its *Planning and Environment Act 1987*. Those two (2) processes are:

1. Short Cases List; and
2. Fast Track List.

Short Cases List

Where a planning dispute is not complex and is capable of being handled in a short period of time, an appellant may apply to have the case heard as a short case. The VCAT may also decide to hear a case as a short case.

The Short Cases List has been established to deal with applications with the following characteristics:

- there are limited parties;
- the application, the grounds of review or grounds of refusal suggest that the issues are limited in number and extent;
- the case is capable of being heard and determined within three (3) hours;
- a site inspection is unlikely to be required; and
- any Cultural Heritage Management Plan or other preliminary issues have been addressed.

Applications for review relating to VicSmart permit applications are automatically heard and determined in the VCAT Short Cases List. A VicSmart assessment process differs from the regular permit assessment process as there is no public notice or referrals of the application. Applications subject to the VicSmart assessment pathway are specified in each council's planning scheme.

To further expedite the appeal process, the *Victorian Civil and Administrative Tribunal Act 1998* also allows parties to agree to the VCAT determining a matter 'on the papers' without the need for a hearing. This option is only available if all parties agree or, if a party does not agree, the Tribunal is satisfied that the objection is not reasonable.

Fast Track List

From 1 July 2022, the VCAT also introduced the Fast Track List for primarily 'post permit' applications. The following applications under the *Planning and Environment Act 1987* will automatically fall in the Fast Track List:

- cancellation or amendment of a permit by a non-permit holder;
- refusal or failure to extend time for a permit;
- declarations;

- review of a refusal to extend time by which information must be given in a planning permit application;
- applications about a certificate of compliance;
- review of a decision of a specified body that something must be done to their satisfaction; and
- applications to amend or end a section 173 agreement (similar to a land management agreement).

Applications in the Fast Track List will be given an expedited hearing approximately **nine (9) weeks** after lodgement with the VCAT. If a practice day hearing or preliminary hearing is required, then the main hearing will be listed approximately 12 weeks from the date an application is lodged.

If parties want to amend their planning application or plan, the case will be removed from the Fast Track List and heard as a standard proceeding instead. The usual hearing timeframes will apply if heard as a standard case.

The VCAT aims to issue decisions for applications in the Fast Track List within **2–6 weeks** of the hearing depending on the complexity of the issue.

New Zealand

New Zealand has resource consents, which are an assessment of environmental impacts, and building consents, which are an assessment to ensure the proposed work is safe, durable and doesn't endanger the health and safety of anyone using the building. Under the *Resource Management Act 1991* (NZ), an applicant may have two (2) options if they are unhappy with the decision (or a part of the decision) in relation to a resource consent:

- they may object to the council about the decision (or part of the decision, such as the consent conditions); or
- they may appeal the decision to the Environment Court (there is no right of appeal for a boundary activity unless that boundary activity had a non-complying activity status).

A right of objection to the council is only available for certain decisions or requirements, including:

- the application was not publicly notified;
- the application was publicly or limited notified, but no submissions were received; or
- the application was publicly or limited notified and there were submissions, but they were later withdrawn.

The costs and timeframes for an objection appear to vary between councils, with fees generally being charged per hour, and timeframe dependent on the level of the planner considering the matter and whether it progresses to a hearing at the request of the applicant. For the avoidance of doubt, an objection will only progress to a hearing following the council assessment of the objection and a report being prepared on the same.

If the applicant is dissatisfied with the outcome, they may request that the objection progresses to a hearing; however, this is not a court process and remains part of the council objection process. An applicant may request that an independent Commissioner is appointed to determine the objection.

If an applicant remains unhappy with the outcome of their objection to the council, they may appeal the decision to the Environment Court. Notably, should the matter proceed to the Environment Court, there is a NZ$600 filing fee, NZ$350 scheduling fee and a NZ$350 fee for each half day following the first half day.

United Kingdom

In the United Kingdom, an applicant has a right of appeal against most local authority decisions on planning permission and other planning decisions to the Secretary of State (as opposed to in courts or tribunals). There are no third-party appeal rights in the United Kingdom, although 'interested parties' may comment on applicant appeals.

While the Secretary of State has the power to 'recover appeals', most appeals are heard and determined by Planning Inspectors (within the United Kingdom's Planning Inspectorate) on behalf of the Secretary of State.

A Planning Inspector will make a **new decision** in regard to both the granting of the permission and the imposition of conditions.

There are no upfront fees for an applicant to appeal a planning decision. Having said that, local planning authorities, appellants and interested parties who have taken part in the process, including statutory consultees, may apply for costs or have costs awarded against them. Any costs are generally therefore commensurate to the development size and the complexity of the appeal (and could range anywhere from £3,000 to £20,000). A Planning Inspector may, on their own initiative, make an award of costs, in full or in part.

While the time within which appeals are heard and finalised does depend on the complexity of the matters to be considered, generally they appear to be resolved anywhere between 21 and 43 weeks after commencement.

An appeal decision may only be challenged through the courts on certain statutory grounds.

Discussion

The Panel recognises that rights of notification and appeal are matters of significant interest to the South Australian community, and that frustrations arise in circumstances where people feel that they were not adequately afforded a right to be heard.

However, this recognition is juxtaposed by the fact that the Panel is also supportive of, and wholly agrees with, the position vocalised by the Commission following the Phase Three engagement on the Code that:

> *development which is envisaged in the zone should not be subject to notification; except where either acceptable standards of built form or intensity are exceeded, and/or the development is likely to result in substantial impacts on the amenity of adjacent dwellings located on land in another zone.*

That is, dwellings ought to be able to be built with minimal interference in residential zones, commercial centres ought to be established in locations where that is envisaged and so on.

The natural difficulty that arises is that what is and is not acceptable can appear to be subjective, despite the provisions of the Code. Indeed, anecdotally, the Panel understands that community concern is being driven by a perceived expectation of notification and appeal rights, and a belief that they have been excluded from the development process if they are not afforded both. This consternation has been expressed in connection with the height of certain developments and developments proposed to be built on property boundaries.

However, as the PDI Act and the Code have only been operational for 18 months, it is difficult for the Panel to understand how broad reaching the perceived impacts of the framework are in this space and whether the provisions are having unintended consequences. Despite this, the Panel is cognisant of the rhetoric surrounding notification in the new planning framework and specifically, the fact that it was anticipated that there would be increased notification. As demonstrated by the statistics that follow later in this Chapter, this has not occurred, and the Panel is interested in exploring why.

To this end, the Panel requests that affected persons make submissions explaining the adverse effect the public notification and appeals process has had on them and that these submissions are supported by evidence to demonstrate the same.

Notwithstanding what may be brought to its attention throughout this engagement process, for the avoidance of doubt, the Panel has also considered the available data relating to public notifications and appeals, which is provided below.

Public Notification and Appeals

An analysis of development application data shows that under the *Development Act 1993* for the period 2018-19, there were **711** category 3 (development subject to third-

party appeal rights) development applications lodged across the State. In the period 2019-20, there were a further **708** category 3 development applications lodged across the State. For the same periods, there were **42** third-party appeals lodged with the ERD Court in 2018-19, and **27** in 2019-20.

Since the introduction of the PDI Act, the number of applications classified as restricted (and therefore subject to third-party appeal rights) has dropped significantly. For the period 2020-21 there were **20** restricted development applications lodged (noting the PDI Act was only in full operation across the State for three (3) months) and in 2021-22, a further **88** restricted applications were made. For the same periods, there were **3** third-party appeals lodged in 2020-21, and **25** in 2021-22.

With regards to applications subject to public notification, there has also been a decline in those numbers under the PDI Act. Under the *Development Act 1993* in the period 2018-19, there were **2,569** applications lodged that were subject to category 2 or 3 notification (which are both required to be publicly notified). That represented **10 per cent** of total development applications. For the period 2019-20, **2,541** (**10.4 per cent**) applications were publicly notified.

Under the PDI Act, the number of applications subject to notification (either performance assessed or restricted) has reduced. While for the period 2020-21 there were **383** applications subject to public notification, in 2021-22 (following full state-wide operation of the PDI Act) there were **2,332** applications publicly notified. This represents approximately **5.8 per cent** of the total applications lodged for 2021-22.

While increases to the number and type of applications subject to public notification is a matter that could be achieved through a Code amendment, providing third party appeal rights for such applications would require legislative changes to the PDI Act.

Alternative Appeals Pathway

The option to identify an alternative planning appeal and/or review pathway is an area that the Panel is interested in opening for further consideration and exploration during this community engagement.

As noted above, the CAP review available under the PDI Act is currently limited to decisions of Assessment Managers. However, there may be opportunity to consider whether this approach to review could be replicated and/or what other mechanisms are available for reviewing planning decisions outside of the ERD Court.

Whilst it may not be appropriate to invoke systems like those utilised in Victoria, New Zealand or the United Kingdom, the Panel is interested to hear whether there is support for further investigations to be undertaken in connection with an expedited appeals or review process, and any suggestions as to the form that that could possibly take.

Questions

1. What type of applications are currently not notified that you think should be notified?
2. What type of applications are currently notified that you think should not be notified?
3. What, if any, difficulties have you experienced as a consequence of the notification requirements in the Code? Please advise the Panel of your experience and provide evidence to demonstrate how you were adversely affected.
4. What, if any, difficulties have you experienced as a consequence of the pathways for appeal in the Code? Please advise the Panel of your experience and provide evidence to demonstrate how you were adversely affected.
5. Is an alternative planning review mechanism required? If so, what might that mechanism be (i.e. merit or process driven) and what principles should be considered in establishing that process (i.e. cost)?

Accredited Professionals

Background

Under sections 93 and 97 of the PDI Act, an accredited professional may act as a relevant authority in cases that are prescribed by the regulations.

The *Planning, Development and Infrastructure (Accredited Professionals) Regulations 2019* establish a number of classes of accreditation, with the *Planning, Development and Infrastructure (General) Regulations 2017* (the PDI Regulations) then prescribing the functions of each class of accreditation.

These levels and functions are reproduced below:

Level	Planning	Building
1	• Assess 'deemed-to-satisfy' developments • Includes the assessment of one or more minor variations to the deemed-to-satisfy criteria • Assess 'performance-assessed' developments not assigned to Assessment Panels • Assess and approve land division consent, including community titles and strata titles	• Assess against the Building Rules and provide building consent, with no limitations • Undertake building inspections on behalf of a council • Assess planning consent in relation to deemed-to-satisfy development of a class determined by the Minister (other than where there is a variation)
2	• Assess 'performance-assessed' development applications that are publicly notified	• Assess against the Building Rules and provide building consent, limited to buildings that are no more than three (3) storeys in height or have a floor area of no more than 2,000m^2 • Undertake building inspections (for buildings they are accredited to assess) on behalf of council • Includes Building Level 3 and Building Level 4 accreditation
3	• Assess 'deemed-to-satisfy' developments • Includes the assessment of one (1) or more minor variations to the deemed-to-satisfy criteria	• Assess against the Building Rules and provide building consent, limited to Class 1 and Class 10 buildings that are no more than two (2) storeys in height or have a floor area of no more than 500m^2 • Undertake building inspections (for buildings they are accredited to assess) on behalf of council

4	• Assess 'deemed-to-satisfy' developments • Excludes the assessment of one (1) or more minor variations to the deemed-to-satisfy criteria	• Carry out inspections as provided for under the practice direction on inspection policies
Surveyor	• Assess 'deemed-to-satisfy' land divisions (planning consent only)	Not Applicable

The former Minister for Planning determined that an Accredited Professional – Building Level 1 (AP – BL1) could act as a relevant authority for the purposes of giving planning consent in relation to deemed-to-satisfy development of the following classes of development (other than where there are variations):

- the construction or alteration of, or addition to, an outbuilding, in which human activity is secondary; or
- the construction or alteration of, or addition to, a carport or verandah; or
- the alteration of, or addition to, an existing detached or semi-detached dwelling or a detached or semi-detached dwelling to be erected in accordance with a development authorisation which has been granted; or
- the construction of a new dwelling; or
- remedial or additional construction required for the purpose of achieving compliance with an earlier development authorisation relating to a new dwelling; or
- if planning consent has been granted for a deemed-to-satisfy development for the construction of a new dwelling, a proposed division of land providing for that development.

The ability for building certifiers to issue planning consent in limited circumstances was carried over from the *Development Act 1993*. Only building certifiers (and not planners) were formally recognised under the *Development Act 1993* with a statutory role to approve "Residential Code" forms of development (including issuing both planning and building consents). These statutory functions, including both planning and building functions, were largely transitioned into the PDI Act and the Code.

Jurisdictional Comparison

The following is a summary of who is able to issue the equivalent of planning and building consents in interstate jurisdictions:

Jurisdiction	Planning	Building
South Australia	A relevant authority pursuant to section 82 of the PDI Act. Subject to the type of development being considered this could be accredited professionals, assessment managers, Council Assessment Panels (or a Regional Assessment Panel if constituted by the Minister) or the State Planning Commission.	The council for the area in which the proposed development is to be undertaken or an accredited professional.
New South Wales	Only local councils are responsible for issuing development consent (the equivalent of SA's planning consent).	Construction Certificate may be issued by council or by a registered certifier after development consent has been issued.
Western Australia	Planning approval (the equivalent of planning consent) is issued by the relevant local council.	Council is responsible for issuing building permit. An applicant may have documentation certified by a building surveyor before lodging with council, in which case there is only a 10-business day turnaround.
Queensland	Only local councils are responsible for assessment against a local instrument.	Private building certifiers may undertake assessment against the building rules.
Victoria	Only local councils are responsible for issuing planning permits.	Building permit is issued by a private or municipal building surveyor.
Tasmania	The planning authority responsible for administering the relevant planning scheme is responsible for granting planning permits.	A licensed building surveyor is able to assess building work against the National Construction Code after a planning permit has been issued.

As identified in the above table, whilst other jurisdictions also permit building professionals to issue building consents, South Australia is unique in that it allows accredited professionals to issue planning consents.

Discussion

Now that the Accredited Professionals Scheme (the Scheme) is fully operational, there is opportunity to review the ability for building professionals to issue planning consents, particularly given the PDI Act and the Scheme formally recognise private planning professionals.

In the Panel's view, only allowing building certifiers to issue building consents and planning professionals to issue planning consents would align with the intent of the Scheme. That is, persons need to be accredited in a planning or building field to issue planning or building consents as relevant, and in line with their professional skills and qualifications.

Data from the Development Application Processing (DAP) system suggests that 24 of the 57 AP – BL1 have assessed **2,368** applications for planning consent, with 4 of these AP – BL1 having been audited by the Department for Trade and Investment's (the Department) Audit and Investigations team.

The Audit and Investigations team have advised the extent of errors identified during periodic audits of AP – BL1 includes the following:

- incorrect categorisation of the development e.g. processed as Accepted Development or Exempt Development when it exceeded the criteria for that category;
- failure to ensure required documentation was obtained to support HomeBuilder application assessment;
- failure to obtain all required information set out in the PDI Regulations Schedule 8 – Plans;
- failure to apply Practice Direction 12 mandatory conditions on the Decision Notification Form (DNF); and
- processing Deemed to Satisfy (DTS) where the criteria had not been demonstrated or inclusion of minor variations (AP-BL1's are not permitted to approve DTS with minor variations).

The Audit and Investigations team have noted that in their audits of planning accredited professionals, all applications were categorised correctly. However, there is still failure to obtain all required information under the PDI Regulations and a failure to apply mandatory conditions in Practice Direction 12.

Questions

1. Is there an expectation that only planning certifiers assess applications for planning consent and only building certifiers assess applications for building consent?
2. What would be the implications of only planning certifiers issuing planning consent?
3. Would there be any adverse effects to Building Accredited Professionals if they were no longer permitted to assess applications for planning consent?

Impact Assessed Development

Background

Under the *Development Act 1993,* a separate development assessment and decision-making framework was established for major developments, and it is now retained in a modified form under the PDI Act.

The pathway provides for the proper and orderly assessment of applications considered of such complexity or scale to warrant State Government oversight.

Under the PDI Act, the Impact Assessed pathway primarily involves:

- the Minister declaring a development or project to be assessed as an Impact Assessed project (or it being predetermined by the Code or the PDI Regulations as being Impact Assessed);
- the Commission determines the level of detail required in relation to an Environmental Impact Statement (EIS);
- the preparation of an EIS in accordance with Practice Direction 4 – Restricted and Impact Assessed Development by either the applicant or the Minister;
- consultation on the EIS;
- the Commission preparing an Assessment Report containing an assessment of the development, along with comments received during consultation; and
- the Minister considering the Assessment Report and making a decision on the application.

By comparison, under the *Development Act 1993*, an application considered by the Minister to be of major environmental, economic, or social importance could be declared by the Minister as such, and then subject to a whole-of-Government assessment and decision-making process.

Under the *Development Act 1993*, the process largely involved:

- following declaration by the Minister, the then Development Assessment Commission would set the Guidelines (issues to be addressed), and level of assessment (either a Development Report, Public Environmental Report or EIS), based on scale and duration of expected impacts;
- the document subsequently provided by the proponent would then be placed on council, agency, and public consultation, with the proponent then required to reply to any submission received with the lodgement of a Response Document;

- an Assessment Report was then prepared by the Minster, evaluating all the material received, including a recommendation formed as to whether the application ought to be approved or not, and if approved, under what conditions; and
- the Assessment Report and associated material was then the subject of a submission to Cabinet by the Minister, with the Governor being the decision maker based on advice of Executive Council.

It is noted that the Expert Panel on Planning Reform, chaired by Brian Hayes KC, which was the precursor to the initial introduction of the *Planning, Development and Infrastructure Bill 2015* provided the following alternative range of recommendations:

16.1 Provide for major projects of regional significance to be assessed by a regional assessment panel using the performance-based assessment pathway.

16.2 Convert the existing major project declaration power into a 'call-in' power, with tighter criteria primarily based on the need for fair and appropriate assessment.

16.3 The Minister should only exercise this 'call-in' power following advice from the planning commission based on the commission's assessment against the statutory criteria.

16.4 Require either ministerial-regional concurrence or a full Cabinet decision with approval by the Governor for each major project.

16.5 Reinstate judicial review rights for major projects and associated Crown development and infrastructure approvals.

16.6 Ensure alignment of environmental impact assessment processes with federal laws, with graduated steps for lower impact proposals and more streamlined paperwork.

16.7 Bring mining approvals into the planning system as part of the major projects process, providing a single integrated approval for mine and associated infrastructure development.

Jurisdictional Comparison

The following table provides a summary of how equivalent applications are dealt with in other state-based jurisdictions:

Jurisdiction	Decision Maker
South Australia	The Minister for Planning decides the application following consideration of an Assessment Report prepared by the State Planning Commission.
New South Wales	Independent Planning Commission (State significant development) or Minister for Planning equivalent (where Commission is not the designated consent authority).
Western Australia	Local Government authority or Western Australian Planning Commission (in accordance with the relevant planning scheme). During the COVID-19 recovery period, applications may be made to and determined by the Commission for a significant development.
Queensland	The Minister for Planning equivalent has the power to 'call in' an application, and then may make decisions in relation to the application.
Victoria	The Minister for Planning equivalent may 'call in' an application for a permit if there is a major issue of policy and may make decisions as if the Minister were the responsible authority.
Tasmania	The Development Assessment Panel makes decisions in relation to major projects. The Minister makes the declaration that a project is eligible to be declared a major project under this Act.
	A project may be declared to be a major infrastructure project or a project of State significance by order of the Governor on recommendation of the Minister for Planning. In relation to major infrastructure, the Governor's order may declare the decision maker, whether it be the relevant local council, the Tasmanian Planning Commission or combined planning authority comprising many councils. The Governor is the decision maker for projects of State significance.

It is difficult to make direct comparisons to other jurisdictions, particularly in relation to the Planning Commissions in New South Wales and Western Australia, which operate quite differently to the Commission in South Australia.

In Tasmania, while the Governor is the decision maker under the *State Policies and Projects Act 1993*, they do so by issuing an order on the recommendation of the Minister for Planning. If that recommendation is in accordance with the report of the Tasmanian Planning Commission, the order takes effect straightaway, but if the recommendation is different to the advice of the Tasmanian Planning Commission, approval from both houses of Parliament is required.

Discussion

The current assessment process under the PDI Act streamlines the end point of the assessment of a development declared as impact assessed development, as there is no need for a Cabinet Submission to be prepared and progressed.

While other government agencies are consulted in the preparation of the Assessment Report, other Ministers may not be formally advised of the development application or have an opportunity to influence the final decision made on an application under the PDI Act. Matters considered in an impact assessed development can have a significant impact on a range of ministerial portfolios, including environmental and infrastructure portfolios.

Under the former system, a major development application would have been required to go through Cabinet before the Governor would have then determined the application. While this process added additional time to the processing and assessment of a major development application, it ensured all Ministers were aware of the development application through the Cabinet approval process. This process also provided a whole-of-Government determination on the major project, rather than the decision-making responsibilities resting solely with the Minister for Planning.

In addition, a Select Committee of Parliament inquired into the Kangaroo Island port application. One (1) of the recommendations of the Committee concerned the Minister for Planning being the final decision maker for impact assessed (declared) development.

The Committee recommended "*that the House refer consideration of legislative amendment in respect of major developments under section 115 of the Planning, Development and Infrastructure Act 2016 to the Environment, Resources and Development Committee for inquiry and reporting*".

The Committee's recommendation has not yet been facilitated. However, noting the significant public interest in ensuring and maintaining transparency and accountability in public decision making, the Panel deemed it prudent to consider whether there was scope and/or community desire for Impact Assessed (Declared) decision making to be returned to a whole of Government process.

Questions

1. What are the implications of the determination of an Impact Assessed (Declared) Development being subject to a whole-of-Government process?

Infrastructure Schemes

Background

The PDI Act prescribes two (2) types of infrastructure schemes:

- Basic infrastructure schemes – used for the provision of basic infrastructure that will support, service or promote significant development within a designated growth area.
- General infrastructure schemes – used for the provision of essential infrastructure to facilitate significant development or urban renewal.

The provisions regarding general infrastructure schemes have not yet commenced and before they are commenced, the Commission must conduct an inquiry into schemes in relation to the provision of essential infrastructure under Part 13 of the PDI Act, and a report on the outcome of the inquiry must be laid before both Houses of Parliament.

Under the PDI Act, the process to initiate and implement an infrastructure scheme is summarised as follows:

- Proponent (landowner, council etc) identifies a need for infrastructure and scopes a proposal;
- Minister considers proposal and decides whether to initiate a scheme;
- Proponent prepares a draft outline of the scheme;
- Chief Executive of the Department then appoints a Scheme Coordinator, who prepares the detailed scheme;
- Minister then determines whether to progress with a scheme, with the Governor having to approve any required funding arrangement if required; and
- Scheme Coordinator manages the delivery of the scheme.

Infrastructure schemes are intended to supplement existing arrangements for planning and delivery of infrastructure to support development, such as planning conditions, deeds, and bonding arrangements.

Infrastructure schemes are intended to help facilitate clarity around infrastructure projects by providing planning practitioners, developers, councils, infrastructure providers and landowners with a legislative mechanism and suite of financial tools to assess their infrastructure requirements and delivery options.

Jurisdictional Comparison

The following table provides a summary of how other states manage infrastructure schemes or similar:

Jurisdiction	Delivery of Infrastructure in Interstate Jurisdictions
South Australia	The PDI Act prescribes two (2) types of infrastructure schemes: • Basic infrastructure schemes – used for the provision of basic infrastructure that will support, service or promote significant development within a designated growth area. • General infrastructure schemes – used for the provision of essential infrastructure to facilitate significant development or urban renewal.
New South Wales	The *Environmental Planning and Assessment Act 1979* provides for: • Local infrastructure contributions; and • Special infrastructure contributions. Local infrastructure contributions, also known as developer contributions, are charged by councils when new development occurs. They help fund infrastructure like parks, community facilities, local roads, footpaths, stormwater drainage and traffic management. Special infrastructure contributions support growing communities by funding a range of infrastructure including State and regional roads, public transport infrastructure, pedestrian and cycling paths, health facilities, emergency services, schools, and open space improvements. A special infrastructure contribution is paid by the developer in special contributions areas and only on new development, such as residential subdivisions and industrial estates.
Western Australia	A local government must prepare a development contribution plan for each area identified in a local planning scheme as a development contribution area. A development contribution plan must set out the infrastructure items to be funded through the plan, the method of determining the contribution of each owner of land and the timing for the delivery of the infrastructure.
Queensland	Chapter 4 of the *Planning Act 2016* provides for infrastructure agreements. An infrastructure agreement may be between public sector entities, or a public sector entity and another entity. The responsibilities under the infrastructure agreement attach to the premises and bind the owner of the premises and the owner's successors in title.

Victoria	Part 3AB of the *Planning and Environment Act 1987* allows for infrastructure contributions for new and growing communities. An infrastructure contribution may consist of either or both a monetary component and a land component. An approved infrastructure contributions plan may form part of a precinct structure plan or strategic plan that is incorporated into an approved planning scheme. The Minister may also give a direction to planning authorities in relation to the preparation and content of infrastructure contributions plans.
Tasmania	A planning authority may enter into an agreement with owners (or potential owners) of land in relation to the provision for a payment or other contribution for infrastructure. The agreement may require payment to be made in stages or require works or other development to be undertaken by the owner on behalf of the planning authority.

The legislative provisions surrounding infrastructure schemes under the PDI Act are far more detailed and complex than the legislative provisions in most other jurisdictions. Specifically, the provisions in most other states essentially legislate what can already be achieved through contract law (such as infrastructure deeds), whereas in South Australia landowners may be required to make a contribution towards the delivery of infrastructure (other than prescribed infrastructure, such as education, public transport, emergency services etc).

Discussion

During 2017 and 2018, a pilot program was initiated to test the infrastructure schemes model in a live industry setting. This involved three (3) pilot projects for infrastructure to support developments at Mount Barker, Bowden and Kilburn, with an Outcomes Report being produced.

The key findings of the pilot program were:

- the early stages of infrastructure planning should involve a thorough process to match the infrastructure requirements and complexity with the best tool available for delivery (which may or may not involve an infrastructure scheme);
- a clear business case and a review of funding models at the beginning of the scoping stage is essential. Getting the right technical and professional advice is crucial at the initiation stage to assist with the identification of infrastructure requirements and funding arrangements;
- establishing the governance of a project is also vital, and the pilot projects demonstrated how important it is to have key stakeholders working together;
- funding arrangements for infrastructure schemes was considered an issue as proponents may be required to pay for upfront 'reasonable capital costs' prior to reimbursement through the imposition of charges, or the receipt of contributions;
- there is a need to appoint the Scheme Coordinator at the commencement of the Scheme, and also to fund the Scheme Coordinator, who plays a critical role in bringing together all the stakeholders to move a project forward; and
- the timing of governments forward estimates and certainty beyond the estimates is an issue for funding state infrastructure.

Since the completion of the pilot projects, no infrastructure schemes have been initiated under the PDI Act.

In the Panel's view, this is likely a consequence of the complexity of infrastructure schemes. In the absence of reviewing the existing framework, infrastructure schemes in their current form may be deemed too difficult to work with, thus resulting in them not being effectively utilised.

Accordingly, there remains a need for an effective means to plan and deliver infrastructure over the longer term, to support growth and development.

Questions

1. What do you see as barriers in establishing an infrastructure scheme under the PDI Act?
2. What improvements would you like to see to the infrastructure scheme provisions in the PDI Act?
3. Are there alternative mechanisms to the infrastructure schemes that facilitate growth and development with well-coordinated and efficiently delivered essential infrastructure?

Local Heritage in the *Planning, Development and Infrastructure Act 2016*

Background

Under the *Development Act 1993*, local heritage places were designated in Development Plans. Section 67 of the PDI Act provides that the Code may designate a place as a place of local heritage value, subject to it meeting specified criteria and subject to consultation with the relevant landowner. The current provisions in the PDI Act were carried over from the *Development Act 1993,* with the addition of sections 67(4) and 67(5).

Sections 67(4) and 67(5) prescribe that an area cannot be designated in the Code as an area constituting a heritage, character or preservation zone or subzone unless the amendment to the Code has been approved by **51 per cent** of relevant owners of allotments within the relevant area (based on one (1) owner per allotment being counted under a scheme prescribed by the PDI Regulations). These provisions, however, have not yet commenced.

As the *Planning, Development and Infrastructure Bill 2015* was moving through the Legislative Council, Hon Dennis Hood MLC (Family First Party at the time and now a member of the Liberal Party) moved an amendment to introduce what are now subsections (4) and (5) of section 67 of the PDI Act.

The reason for moving the amendment was to ensure that a minority of those affected by the listing could not be able to overrule the majority (i.e., if only 40 per cent of people agree to the listing, they should not be given preference over the 60 per cent of people who are against the listing).

At the time, the Hon Kyam Maher MLC, indicated that the Government's view was that:

> *…zoning decisions should not only be determined by those who enjoy the local property franchise and who are accorded voting rights in the system. It should also be based on* ***sound and logical policy objectives****.*
>
> *Heritage matters in particular* ***should not be reduced to a question of percentages****, but should include and take into account heritage expertise and applying the right criteria.*
>
> (our emphasis)

The Hon Mark Parnell MLC noted that those affected should be able to approach their local member of Parliament if they are unhappy with a proposed zoning change or heritage listing, and the matter can then be resolved through a debate in Parliament.

He suggested that individual property owners exercising a direct right of veto over a zoning decision may disenfranchise people who live in the area but not own property, as well as disenfranchise people who live around the area but not in the zone.

Without providing reasons, the Hon David Ridgway MLC, indicated during the debate on the proposed amendment that the opposition would be supportive of the changes. As such, the amendment was carried, and the provisions were inserted into the *Planning, Development and Infrastructure Bill 2015.*

The Legislative Council then considered this matter a second time, with the Hon Kyam Maher MLC moving an amendment to delete the inserted subclauses. The Hon Dennis Hood MLC, in opposing the amendment, added that aging properties are unable to be demolished and/or renovated because of their heritage listing. He indicated that the imposition of heritage listing has resulted in the devaluation of properties that are unable to be altered. The Opposition, however, continued to support the original amendment and the deletion of the clauses was negatived by the Legislative Council.

It should be noted that during the debate on these provisions, the Government at the time did signal its intent to conduct a more comprehensive review of the legislation governing local heritage.

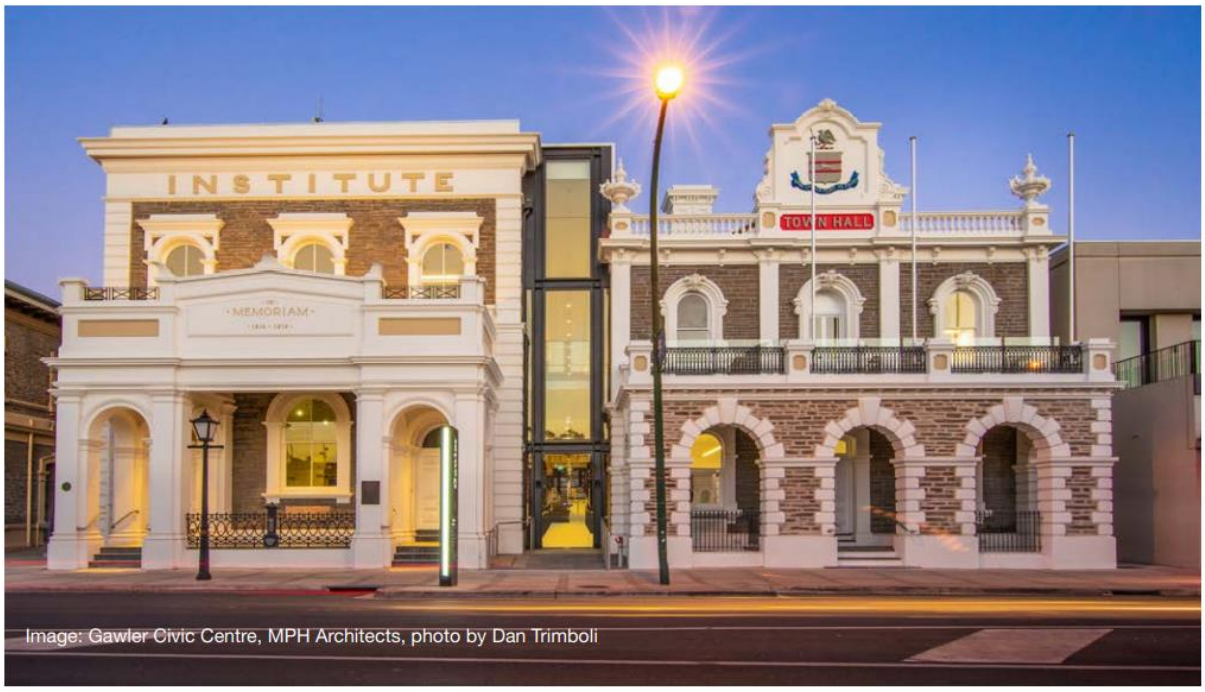


Image: Gawler Civic Centre, MPH Architects, photo by Dan Trimboli

Jurisdictional Comparison

The below table is a summary of how other states manage local heritage, noting that in most states each council has its own set of planning rules.

Jurisdiction	Local Heritage Listing Process
South Australia	Section 67 of the PDI Act provides that the Code may designate a place as a place of local heritage value, subject to it meeting specified criteria and subject to consultation with the relevant landowner.
New South Wales	Heritage items that are important for the community in a local government area are listed in the relevant council's local environmental plan.
Western Australia	A local government may, by resolution, designate that an area is a heritage area in a local planning scheme after having: • given notice of the proposed designation to each affected landowner; and • advertised the proposed designation in accordance with the *Planning and Development (Local Planning Schemes) Regulations 2015*.
Queensland	Under the *Queensland Heritage Act 1992*, a local government must identify places in its local government area that are of cultural heritage significance for the area in its planning scheme or in a local heritage register. Before entering a place into the local heritage register, a local government must give the owner of the place notice of its proposal and consider any submissions it receives.
Victoria	Local heritage places are identified through a heritage study, as well as through consultation with the community, and are incorporated into the relevant local planning scheme.

Discussion

For the avoidance of doubt, the Panel confirms that this Discussion Paper is only dealing with character and heritage matters to the extent that they are relevant to the PDI Act.

These matters are explored in greater detail in the Panel's Discussion Paper on the Code.

Location for Local Heritage

The listing of heritage places is arguably a matter that sits best with heritage experts (as opposed to planning professionals who are ultimately responsible for maintaining the Code). In addition to this, decisions in relation to the demolition (in part or in full) of a local heritage listed place is also a matter that would be best dealt with by a heritage expert.

As such, the Panel seeks feedback on whether there is support for, and agreement with, the notion that the local heritage listing process and any subsequent decisions made in relation to a local heritage place would be more appropriately dealt with by heritage experts.

In the Panel's view, there is value in incorporating the local heritage provisions into the Heritage Places Act to provide legislative separation between heritage listing and planning matters.

Local Heritage Re-Zoning

As they currently stand, sections 67(4) and 67(5) of the PDI Act are unlikely to operate effectively should they commence.

In the Panel's view, it is extremely unlikely that 51 per cent of relevant owners will agree to list their own allotment as a place of local heritage value, as it would result in tighter planning policy applying to their property. This would reduce a relevant owner's ability to develop or alter their property should they seek to do so in the future.

However, it is also relevant to consider that the application of heritage policy is not, and should not, be a popularity contest. The primary purpose of these policies is to protect and retain heritage places for future generations, and to preserve parts of South Australia's memory. The Panel does not consider that it is appropriate for property owners to be able to effectively veto the State Government or a council from determining that an area ought to be captured as a place of local heritage value when there is sufficient justification to do so.

To this end, the Panel considers that there is value in removing these provisions from the PDI Act.

In addition to this, the Panel notes that the State Government made an election commitment to:

Legislate to require that proposed demolitions of State Heritage sites be subject to full public consultation and a public report from the SA Heritage Council.

While it is understood the implementation of this election commitment is still being worked through, there could be an opportunity to combine this body of work with any legislative amendments that arise from the Panel's final recommendations to the Minister.

Questions

1. What would be the implications of having the heritage process managed by heritage experts through the Heritage Places Act (rather than planners under the PDI Act)?
2. What would be the implications of sections 67(4) and 67(5) of the PDI Act being commenced?

Deemed Consents

Background

If a relevant authority does not decide an application within the time prescribed in respect of the provision of planning consent, the applicant may, before the application is decided, give the relevant authority a deemed consent notice that states that planning consent should be granted. This applies for all deemed-to-satisfy, performance assessed and restricted development, as there are timeframes prescribed for the assessment of planning consent.

On the day that the relevant authority receives the deemed consent notice, the relevant authority is taken to have granted the planning consent. The relevant authority may, within ten (10) business days after receiving the deemed consent notice, grant the planning consent itself or grant the planning consent subject to conditions.

If the relevant authority considers that planning consent should have been refused, they may apply to the ERD Court for an order quashing the consent. An application to the ERD Court must be made within one (1) month after the deemed planning consent is taken to have been granted unless the Court, in its discretion, allows an extension of time.

If a relevant authority does not decide an application within the time prescribed in respect of the provision of a development authorisation other than planning consent, the applicant may, after giving the relevant authority 14 days' notice in accordance with the PDI Regulations, apply to the Court for an order requiring the relevant authority to make its determination within a time fixed by the Court

Under the *Development Act 1993*, if a relevant authority did not decide an application within the time prescribed, the applicant could, after giving 14 days' notice in writing to the relevant authority, apply to the Court for an order requiring the relevant authority to make its determination within a time fixed by the Court. If a notice was given and the relevant authority did not make a determination on the application within 14 days after the notice was received, it was taken that the relevant authority had refused the application.

South Australia's Expert Panel on Planning Reform noted in its Report that industry and practitioners expressed concerns about assessment periods and suggested the introduction of measures such as mandatory timeframes and deemed approvals if timeframes are not met.

As the *Planning, Development and Infrastructure Bill 2015* (PDI Bill) was moving through the Legislative Council, Hon Mark Parnell MLC moved an amendment to remove the deemed consent provisions as he believed the Government was

attempting to hold a stick to relevant authorities to make them comply with the prescribed timeframes.

The Hon Kyam Maher MLC opposed the amendment on behalf of the Government. He noted the concept of deemed consent:

> *…is strongly supported by industry with multiple reports as to the problem with the current approach which requires applicants to go to court if a relevant authority fails to determine an application within the statutory time frame. Such provisions operate well in Queensland and Tasmanian planning systems and, indeed, in other areas of law—including South Australia's fisheries law, for example.*
>
> *…*
>
> *The amendment proposed by the Hon. Mark Parnell would maintain the requirement that it is the applicant who, through no fault of their own, must then apply for the court order requiring the relevant authority to make its determination within a time fixed by the court. This situation has proven to be unworkable and unjust. Relevant authorities must be accountable for adhering to prescribed time frames within which decisions must be made. The government believes the concept of 'deemed consent' is a very important part of these planning reforms, and of the proposed planning system.*

The Hon David Ridgway MLC subsequently indicated that the opposition would not support the amendment moved by Hon Mark Parnell MLC. He further indicated the concept of deemed consent was something the opposition had been attracted to for some time and they were pleased the Government had included as part of the reforms. The Legislative Council did not support the proposed amendment to remove the deemed consent provision from the PDI Bill, and the provision was retained.

Jurisdictional Comparison

A comparison on what happens in interstate jurisdictions when an approval is not issued within the prescribed timeframe is as follows:

Jurisdiction	Deemed Consent Comparison
South Australia	If a relevant authority does not decide an application within the time prescribed in respect of the provision of planning consent, the applicant may, before the application is decided, give the relevant authority a deemed consent notice that states that planning consent should be granted. This applies for all deemed-to-satisfy, performance assessed and restricted development, as there are timeframes prescribed for the assessment of planning consent.
New South Wales	A consent authority that has not determined an application for development consent within the prescribed period is taken to have determined the application by refusing development consent.
Western Australia	If the responsible authority has not determined an application within the decision period, the applicant may give written notice of default to the responsible authority. Where a notice of default is given, the applicant may apply to the State Administrative Tribunal for a review as if the responsible authority had refused to approve the application.
Queensland	The process is similar to South Australia's - for applications that are code assessed and where the assessment manager has not decided the application within the period allowed under the development assessment rules, the applicant may give a deemed approval notice to the assessment manager.
Victoria	An applicant for a permit may apply to the Victorian Civil and Administrative Tribunal for review of the failure of the responsible authority to grant the permit within the prescribed time.
Tasmania	The failure of a planning authority to determine an application for a permit before the expiration of the period is deemed to constitute a decision to grant a permit on conditions to be determined by the Appeal Tribunal. The applicant may apply to the Appeal Tribunal for an order determining the conditions on which the permit is granted.

Discussion

The Panel understands that the deemed consent provisions increase the pressure on relevant authorities to undertake their assessment within the prescribed timeframe.

An analysis of data since the inception of the PDI Act (and the ability for deemed consent) shows that up until 28 July 2022, there have been **31 deemed consent notices issued**.

In that period there have been approximately **70,000 applications** for planning consent, and of those, **5,105** consents were issued out of time (i.e. a deemed consent could have been issued). The notices have been issued across **18 councils** and all bar one (1) council have had either one (1) or two (2) notices issued.

It is evident from these figures that deemed consent notices are very rarely required, and the Panel considers that this indicates that the provisions are having the desired effect. That is, applications are being processed in a timely manner and are not being unnecessarily delayed.

Notwithstanding, possible alternatives to the deemed consent provisions may include:

- Deemed approval – Planning and Land Use Services is aware of instances where an applicant has received both planning and building consent for an application and the council has either delayed or refused to issue the final development approval. Such cases often involve the council refusing to accept the planning consent issued by a private accredited professional. Consideration could be given to amending the PDI Act to allow an applicant, after a prescribed period, to apply for a **deemed approval**.
- Final development approval issued by an accredited professional – legislatively it is possible for a regulation to be made to provide that an accredited professional can issue the final development approval.
- A further alternative is to maintain the ability for deemed consent but review the current assessment timeframes. The latest analysis of development assessment timeframes from May 2022 shows the following:

DEVELOPMENT TYPE	Average approval time taken	Statutory timeframe required
Deemed to Satisfy developments	2.25 business days	5 business days
Accepted developments*	9 business days	25 business days
Performance Assessed developments without notification	12.8 business days	20 business days
Performance Assessed developments with notification	49.8 business days	70 business days
Restricted developments (includes public notification)	69.8 business days	95 business days

**Building consent and development approval only, planning consent not required.*

Questions

1. Do you feel the deemed consent provisions under the PDI Act are effective?
2. Are you supportive of any of the proposed alternative options to deemed consent provided in this Discussion Paper? If not, why not? If yes, which alternative (s) do you consider would be most effective?

Verification of Development Applications

Background

Under regulation 31 of the PDI Regulations, on the receipt of an application under section 119 of the PDI Act, a relevant authority must do the following:

- determine the nature of the development;
- if the application is for planning consent – identify the elements for assessment and the category (or categories) of development; and
- determine whether the relevant authority is the correct entity to assess the application.

If the relevant authority is the correct entity to assess the application, they must confirm the appropriate documentation has been lodged, confirm the prescribed fees and provide appropriate notice to the applicant via the PlanSA Portal.

If the relevant authority is not the correct entity to assess the application, the application must be referred to the correct entity to assess the application and notice of this must be provided to the applicant via the PlanSA Portal.

A relevant authority must verify an application within five (5) business days of receiving the application. Once a relevant authority has verified an application, they are considered engaged for the purposes of the PDI Act and the assessment timeframe will commence (if all the fees have been paid).

The Panel is aware that at the time of drafting the verification provisions, there were discussions on whether there should be a penalty for failure to verify within the prescribed timeframe. There were, however, difficulties determining an appropriate and commensurate penalty.

In any event, the PDI Act requires that applications be assessed expeditiously, as well as obliges a person or body performing, exercising or discharging a function, power or duty under the PDI Act to exercise professional care and diligence, and to comply with any code of conduct that applies to the person or body.

All relevant authorities are accredited as accredited professionals under the PDI Act and therefore, must comply with the Accredited Professionals Scheme Code of Conduct (the Code of Conduct). The Code of Conduct requires an accredited professional to ensure that all legislative requirements are met when they are making decisions and taking action and a failure to comply with the Code of Conduct is a breach of the PDI Act.

As there were no private planning certifiers under the *Development Act 1993*, the 'verification' process was less complicated as applications were primarily lodged with

council for assessment against the planning rules. Having said that, in the *Development Act 1993,* the relevant authority was still required to determine the nature of the development and in relation to development identified as residential code development, had to confirm whether the development was in fact residential code development within five (5) business days.

Jurisdictional Comparison

As examined under the Role of Accredited Professionals jurisdictional comparison, most other States require applications to be lodged directly with the local council to obtain the equivalent of planning consent.

Verification is therefore a process that is unique to South Australia (in terms of it being a prescribed process).

Discussion

An examination of the available data demonstrated that a total of **37,734** planning consents were verified in the 2021/22 financial year, with **84 per cent** of verifications undertaken within the statutory timeframe of five (5) business days. This is a year-on-year improvement, as in the 2020/21 financial year, only **78 per cent** of verifications for all applications were undertaken within the statutory timeframe.

The data therefore indicates that **16 per cent** of verifications are occurring outside of the appropriate timeframe, and the Panel would like to hear further information from those relevant authorities that are struggling to achieve verification within five (5) days.

The Panel understands, at least anecdotally, that this may be a consequence of resourcing issues and that the threat of a deemed consent notice results in verification delay. That is, relevant authorities are using the verification period to commence development assessment, thus gaining additional assessment days, and reducing the threat of a deemed consent notice being issued.

The Panel (again anecdotally) understands that this delay is often achieved by relevant authorities issuing requests for information (pursuant to Schedule 8 of the PDI Regulations) during the verification process. To this end, the Panel queries whether there would be merit in amending Schedule 8 as it pertains to verification requirements.

There is also currently no prescribed penalty for a relevant authority who takes longer than five (5) business days to verify an application. If an application is not verified, it means that the assessment timeframe does not commence, and an application can sit idle.

An option to encourage relevant authorities to verify documents more expeditiously is to publish data on the PlanSA Portal reflecting the current practices of relevant authorities. This data could indicate the number of applications verified within the prescribed timeframe by a relevant authority or alternatively, a ranking of relevant authorities by time taken to verify applications.

While the penalty may be too severe, if a relevant authority takes longer than the prescribed timeframe to verify an application, the additional time taken to verify the application could be deducted from the assessment timeframe. However, an amendment of this nature would necessitate an amendment to the PDI Act.

Questions

1. What are the primary reasons for the delay in verification of an application?
2. Should there be consequences on a relevant authority if it fails to verify an application within the prescribed timeframe?
3. Is there a particular type or class of application that seems to always take longer than the prescribed timeframe to verify?
4. What would or could assist in ensuring that verification occurs within the prescribed timeframe?
5. Would there be advantages in amending the scope of Schedule 8 of the PDI Regulations?

Summary of Questions

Public Notifications and Appeals

1. What type of applications are currently not notified that you think should be notified?
2. What type of applications are currently notified that you think should not be notified?
3. What, if any, difficulties have you experienced as a consequence of the notification requirements in the Code? Please advise the Panel of your experience and provide evidence to demonstrate how you were adversely affected.
4. What, if any, difficulties have you experienced as a consequence of the pathways for appeal in the Code? Please advise the Panel of your experience and provide evidence to demonstrate how you were adversely affected.
5. Is an alternative planning review mechanism required? If so, what might that mechanism be (i.e. merit or process driven) and what principles should be considered in establishing that process (i.e. cost)?

Accredited Professionals

6. Is there an expectation that only planning certifiers assess applications for planning consent and only building certifiers assess applications for building consent?
7. What would be the implications of only planning certifiers issuing planning consent?
8. Would there be any adverse effects to Building Accredited Professionals if they were no longer permitted to assess applications for planning consent?

Impact Assessed Development

9. What are the implications of the determination of an Impact Assessed (Declared) Development being subject to a whole-of-Government process?

Infrastructure Schemes

10. What do you see as barriers in establishing an infrastructure scheme under the PDI Act?
11. What improvements would you like to see to the infrastructure scheme provisions in the PDI Act?
12. Are there alternative mechanisms to the infrastructure schemes that facilitate growth and development with well-coordinated and efficiently delivered essential infrastructure?

Local Heritage in the PDI Act

13. What would be the implications of having the heritage process managed by heritage experts through the Heritage Places Act (rather than planners under the PDI Act)?
14. What would be the implications of sections 67(4) and 67(5) of the PDI Act being commenced?

Deemed Consents

15. Do you feel the deemed consent provisions under the PDI Act are effective?
16. Are you supportive of any of the proposed alternative options to deemed consent provided in this Discussion Paper? If not, why not? If yes, which alternative (s) do you consider would be most effective?

Verification of development applications

17. What are the primary reasons for the delay in verification of an application?
18. Should there be consequences on a relevant authority if it fails to verify an application within the prescribed timeframe?
19. Is there a particular type or class of application that seems to always take longer than the prescribed timeframe to verify?
20. What would or could assist in ensuring that verification occurs within the prescribed timeframe?
21. Would there be advantages in amending the scope of Schedule 8 of the PDI Regulations?

Planning System Implementation Review

How can you get involved?

You can participate in this process and contribute to the Expert Panel's deliberations by providing a submission to the Panel:

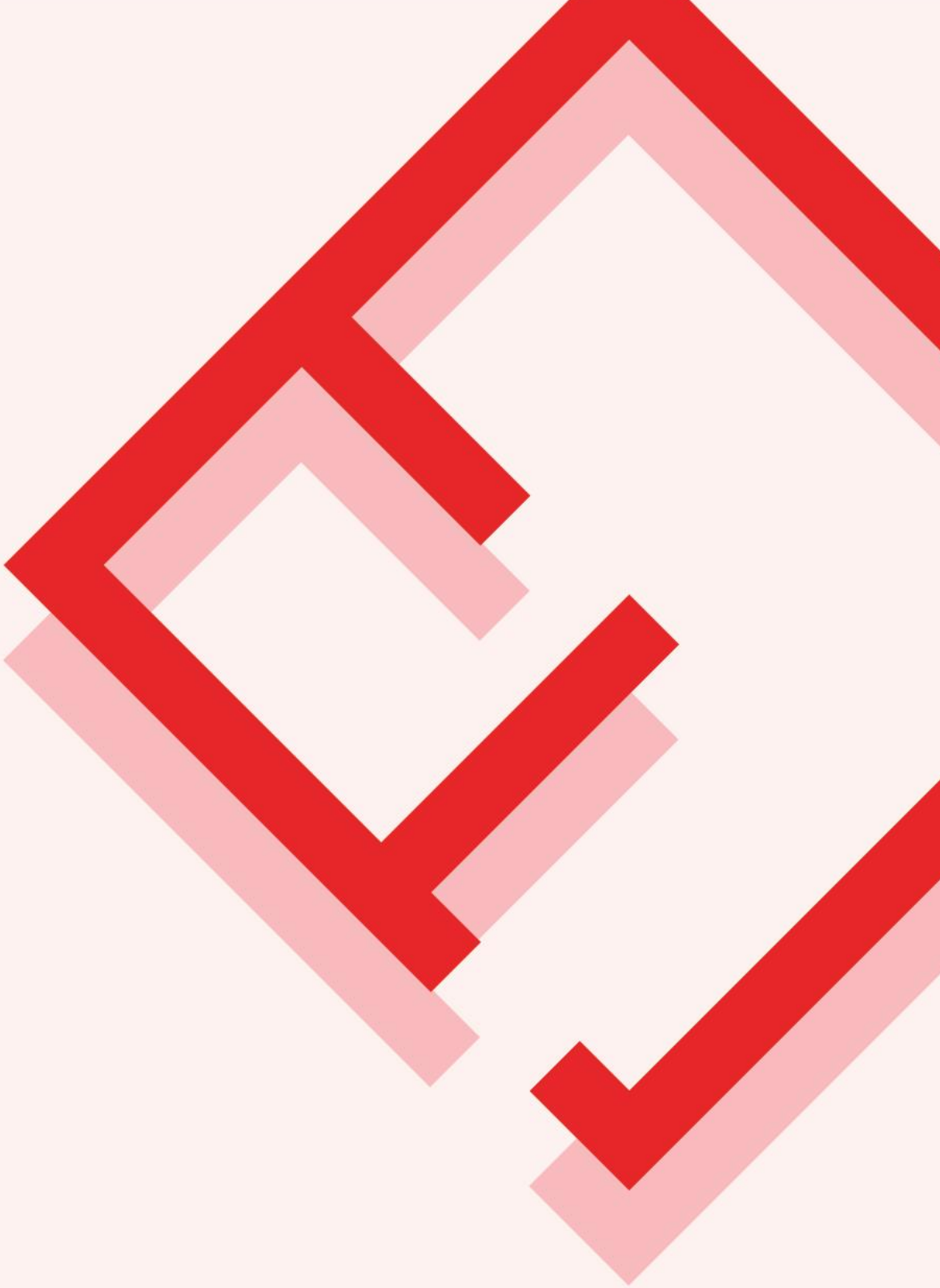
Via email: DTI.PlanningReview@sa.gov.au

Via post: Attention: Expert Panel, GPO Box 1815, Adelaide SA 5001

Via phone: 08 7133 3222

You can also complete a survey on the Expert Panel's YourSAy page: https://yoursay.sa.gov.au/planning_review

For more information about the Expert Panel and the engagement events that it is facilitating, please visit www.plan.sa.gov.au/planning_review



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Government of South Australia