**LEGISLATION POLICY Scrutiny Committee**
**Written Questions**

**Response by the Department of Infrastructure, Planning and Logistics**
**Planning Amendment Bill 2020**

***Clause 4 - proposed section 2A replaced – Purpose and Objectives***

1. Both the EDONT and ECNT have requested that climate change be included as an object of the Act.

**Department response**

It is proposed that no amendment is necessary

a. *Why does the Bill not include the consideration of climate change as an objective for planning legislation?*

Purpose and objectives clauses are intended to give a general understanding of the purpose of legislation. The revision of the objectives in the current Act reflects the increased focus on the role of policy in influencing planning decisions and the role of the objectives as mandatory considerations for the Minister in determining amendments to the planning scheme.

The purpose and objectives within the Bill reflects its intent to:

- facilitate planning for orderly use and development of land;
- establish a system that is accessible to the community and incorporates appropriate public consultation;
- ensure decisions under the Act take account of a broad range of considerations that promote sustainable development, intergenerational equity and reflect good planning principles; and
- assist other legislation with regard to resource management, environment and heritage protection and the provision of infrastructure.

Climate change is inherent in a number of matters that will need to be considered in delivering objectives to:

- promote the sustainable development of land;
- promote the responsible use of land and water resources to limit the adverse effects of development on ecological processes;
- maintain the health of the natural environment and ecological processes; and
- protect the quality of life of future generations.

Specific reference to climate change is not considered to be appropriate given the general nature of the objectives, and specific reference is not necessary to ensure that climate change effects are taken into account in planning decisions.

b. *What would be the effect on the operation of the Bill of including an additional subsection in proposed s 2A to provide that an objective of the Act is to promote effective responses to the challenges of climate change?*

Direct reference to 'climate change' within the objectives is not considered appropriate as it would raise climate considerations above the many other wide ranging environmental, social and economic issues that planning must consider to ensure the wellbeing of Territorians.

The increased emphasis on strategic planning and policy within the Bill will allow for any future planning policies around climate change to have more influence on planning decisions. The inclusion of detailed policy within the NT Planning Scheme is considered a more appropriate and effective means of directing the role of planning in climate change action.

2. EDONT commented that the term "sustainable development" in proposed s 2A(e) is confusing as it is not defined in the Bill and both the EDONT and ECNT recommended that objective (e) be linked to the definition and principles of ecologically sustainable development contained in the *Environment Protection Act 2019.*

**Department response**

It is proposed that no amendment is necessary

a. *What is the intended meaning of "sustainable development" in proposed s 2A(e)?*

Sustainable development is to achieve balance between economic growth, care for the environment and social well-being in a manner that satisfies the needs of the present population without compromising the capacity of future generations to meet their needs.

b. *What would be the effect on the operation of the Bill of making it clear that the term "sustainable development" in proposed s 2A(e) has the same meaning as the definition of ecologically sustainable development in the Environment Protection Act 2019 (s 4) and incorporates the principles of ecologically sustainable development as set out in that Act (Part 2, Division 1)?*

"Ecologically sustainable development" is appropriate to the new *Environmental Protection Act 2019* as that legislation has a narrower objective of protecting the environment of the Territory. However, planning legislation must take into account a far broader range of environmental, social and economic issues in the public interest.

To identify "sustainable development" as being the same as "ecologically sustainable development" in the *Environmental Protection Act 2019* would limit the ability of the Minister and the Consent Authority to consider the broad range of issues that should inform land use planning and development decisions. "Sustainable development" is deliberately referenced in this Bill to ensure that planning for future development has a broader focus, and to avoid duplication with the role of the *Environmental Protection Act 2019* to protect and manage the environment.

The essential principles of ecologically sustainable development that are appropriate to the planning legislation are brought into this Bill through the objectives to:

- promote the sustainable development of land;
- promote the responsible use of land and water resources to limit the adverse effects of development on ecological processes;
- maintain the health of natural environment and ecological processes; and
- protect the quality of life of future generations.

3. A number of submitters recommended the removal of proposed s 2A(j) - *to promote good design and amenity of buildings and other works* – and the reinstatement of s 2A(e). They commented that the wording of proposed s 2A(j) only applies the concept of amenity to buildings or works and does not reflect its broader application to localities. The Committee notes that this broader application is reflected in the definition of amenity contained in s 3 of the Act.

**Department response**

It is proposed that no amendment is necessary

a. *What is the reason for removing s 2A(e) from the Act and replacing it with an object that applies a more limited concept of the term amenity?*

S 2A(e) from the current Act, has been replaced by s 2A(j) in the Bill to best respond to:

- expansion of the objectives of the Act to embrace a broader range of matters including intergenerational equity; and
- expansion of the role of the objectives of the Act to make them mandatory considerations for the Minister when making planning scheme amendments.

S 2A(j) of the Bill does not seek to limit the concept of "amenity" within the Act. As noted by the committee, "amenity" retains its definition and it is also retained (without any changes to wording) as a matter that must be considered by the consent authority when making a decision about a development application under s 51(n).

The revised objective s 2A(j) uses similar wording to that used in NSW legislation and is considered to strike the appropriate balance between strategic planning for future generations in the long term and the interests of existing residents.

b. *What would be the effect on the operation of the Bill of removing proposed s 2A(j) and replacing it with the current s 2A(e) of the Act?*

With the new requirement for the Minister to consider and address the objectives under s 2A when making a planning scheme amendment decision, retaining the wording of s 2A(e) would constrain the Minister to preserve the "existing amenity" of a location.

By virtue of protecting existing amenity (the status quo), significant limitations are placed on the achievement of strategic policy objectives that are required to accommodate future population growth, such as increasing density in locations where

infrastructure has the best potential to support further development. This has a follow-on effect of undermining intergenerational equity principles by increasing future infrastructure costs and obstructing future generations from convenient access to facilities and employment.

***Cl 24 – Section 30W amended – Limits on consent***

4. Several submitters expressed concern regarding the discretionary power granted to the Minister to consent to a proposed development, or to approve the DCA consenting to a proposed development, despite it being contrary to any strategic framework in the planning scheme (proposed s 30W(5) and (6)). They questioned whether the degree of oversight provided by the Bill provided sufficient safeguards to ensure this power was used responsibly and transparently.

**Department response**

It is proposed that no amendment is necessary

a. *What is the rationale for enabling the Minister to consent to a proposed development, or to approve the DCA consenting to such a development, when it is contrary to the strategic framework?*

The Minister is responsible for the establishment of the strategic framework in the planning scheme, including strategic policies and land use plans that guide the development of land. Within that context it is considered appropriate that the Minister be in a position to respond to proposals that may not have been anticipated or addressed by the strategic framework.

At s 30W(5) of the current *Planning Act 1999,* the Minister already has discretionary power to consent to a proposed development or approve the DCA consenting to a proposed development despite it being contrary to a planning scheme provision being a statement of policy in respect of the use in development of land. This discretionary power has not been increased at s 30W(5) and (6) in the Bill. The existing provisions have merely been redrafted to reflect the replacement of 'statements of policy' with the 'strategic framework'.

It is noted that this discretionary power applies only to the contradiction of policy and not to noncompliance with any other requirement in the scheme including zoning and development requirements.

b. *What, if any, criteria is the Minister or the DCA required to consider when deciding to consent to a proposed development that is contrary to any strategic framework in the relevant planning scheme?*

The Minister is responsible for the establishment of the strategic framework in the planning scheme. Amendment to s 13 in the Bill has introduced, for the first time, criteria which the Minister must consider when considering a request to amend the planning scheme.

These criteria would also be appropriate for the Minister to consider in deciding whether to consent to a proposed development that is contrary to a strategic framework. However, given the unpredictability of circumstances which may require approval for the granting of consent to a proposal contrary to the strategic framework, it is considered that the specific introduction of criteria may limit the Minister's ability to respond in a timely manner to a proposal that accords with all aspects of the scheme other than the strategic framework.

c. *Is there anything in the Act which requires the Minister to publish the reasons for their decision? If no, what would be the effect on the operation of the Bill of including a requirement that the Minister publish reasons for their decision or for a decision by the DCA that the Minister has approved?*

Section 53A of the existing Act requires that the consent authority must serve on applicants and submitters and make publically available a notice of determination and the reasons for the approval, notwithstanding noncompliance with the strategic framework. This provision applies to the Minister when acting as the consent authority as well as to the Development Consent Authority.

***Cl 28 – Section 46 amended – Development applications***

5. Litchfield Council commented that the meaning of proposed s 46(3)(aa)(iii) "any person who would *directly benefit* from the development" is unclear and recommended that the term "directly benefit" be clearly defined.

**Department response**

It is proposed that an amendment be prepared in consultation with Parliamentary Counsel and progressed via an Assembly Amendment.

a. *What would be the effect on the operation of the Bill of defining what is meant by "directly benefiting from the development"?*

This requirement to identify the direct beneficiary is intended to improve transparency within the system while recognising that the ultimate benefit is to the land owner. Concern was expressed by the community and members of the Development Consent Authority that an application made on behalf of a land owner provides no indication of the intended developer, creating the potential for perceived or real conflict of interest.

An Assembly Amendment to provide greater clarity around the meaning of 'direct benefit' will be progressed in consultation with Parliamentary Counsel. It is also intended that the approved form required when lodging a development application will provide additional detail.

***Cl 37 - Section 52 replaced – Limits on consent***

**6.** The Environment Centre recommended that the Minister's discretion to consent to a proposed development that is contrary to the strategic framework should be used transparently and suggested that this could be achieved by requiring the Minister to report to the Legislative Assembly the reasons for their decision.

**Department response**

It is proposed that no amendment is necessary

a. *What would be the effect on the operation of the Bill of requiring the Minister to give reasons for their decision to consent to a proposed development that is contrary to the strategic framework?*

The amendment to s 52 mirrors those made to s 30W discussed above in relation to clause 24 in the Bill and that discussion is relevant to the issue of giving reasons.

There is currently no requirement for the Minister to table in the Legislative Assembly any decision in relation to the establishment or modification of the strategic framework within the planning scheme. To introduce such a requirement would limit the Minister's ability to respond to particular circumstances on a case by case basis.

The only current requirements for the Minister to table in the Legislative Assembly are:

- at s 57B in relation to a Ministerial decision contrary to recommendations within a significant development report the Minister requested from the Northern Territory Planning Commission; and
- at s 81Y in relation to an annual report on the performance of the NT Planning Commission.

***Clauses 42-46 – Sections 68, 69, 70, 71 and 72 - Contributions and contribution plans***

7. The Housing Industry Association (HIA) has requested clarification regarding how clauses 42 to 46 of the Bill will impact on industry and, ultimately, housing affordability.

**Department response**

It is proposed that no amendment is necessary

a. *Please clarify what, if any, impact these amended and replaced sections will have on industry.*

The impact to industry and housing affordability from these amended and replaced sections is negligible. The changes will facilitate improved operation of contribution plans by clarifying contributions that are payable under a contributions plan, including that a contribution can be used to provide infrastructure in the future or to recover amounts already spent on infrastructure required to support future development.

***Cl 49 – Proposed s 75C – Clearing native vegetation - offences***

8. The EDONT considered that a tiered structure of offences (as per the *Environment Protection Act 2019*) should be introduced that includes differing levels of liability and associated penalties, tied to the seriousness of an offence (e.g. to differentiate between willful or negligent offences), noting that this would ensure a more consistent approach with other recently reformed legislation in the NT.

**Department response**

It is proposed that no amendment is necessary

a. *What consideration was given to introducing a "tiered structure of offences" as described by the EDONT?*

The tiered approach is appropriate to the *Environment Protection Act 2019* to reflect the complexity of offences that can occur under that Act. It allows penalties to range in severity proportionate to the degree of environmental harm and negligence.
Advice from the Department of Attorney-General and Justice (Legal Policy) was that a tiered approach is not necessary for the offence of unauthorised clearing of native vegetation given the far simpler nature of this offence – either vegetation was cleared or it was not.

***Cl 53 – Section 81L amended – Community consultation***

9. The HIA commented that industry engagement is as important as community engagement and considered that specific reference should be made to communication and engagement activities relevant to industry, similar to the policies on public consultation and public education that the Commission is required to develop in relation to the community under proposed s 81L.

**Department response**

It is proposed that no amendment is necessary

a. *What if any policies are currently in place in relation to engagement and consultation with industry?*

The NT Planning Commission currently has comprehensive consultation protocols in place including engagement with the community, industry and service agencies notwithstanding that the current s 81L refers only to community consultation.

The insertion of new s 81L (2) require the commission to develop, seek Ministerial approval for and publish policies for consultation with the public and specific participants in the planning process.

This will improve transparency around the Commission's consultation and reflect the current commitment to engagement with industry and all other stakeholders in the planning process.

b. *What would be the effect on the operation of the Bill of requiring such policies to be developed?*

The Bill as it is currently drafted introduces a requirement that a policy for consultation with all relevant stakeholders be prepared and published. The future publication of this policy making specific reference to stakeholders other than the community will reassure industry.

***Cl 61 – Proposed s 89 – appointment of members within council area***

10. Both the Litchfield Council and the HIA requested clarification regarding membership of the Development Consent Authority, in terms of criteria and selection processes.

**Department response**

It is proposed that no amendment is necessary

a. *Are employees of a local authority only precluded from being appointed as a community member of the DCA or could they be appointed as a specialist member if they have the requisite skills under proposed s 89(4)?*

Employees of a local authority are only precluded from being appointed as a community member of the DCA. An employee of a local authority could nominate to be a specialist member and, subject to the Minister being satisfied that the person has the skills, qualifications or experience prescribed in the regulation, be appointed as a specialist member.

b. *Are employees of service authorities precluded from membership of the DCA?*

No. Employees of a service authority could achieve membership of the DCA as a community member if nominated by the relevant local authority. They may serve as a specialist member if the Minister was satisfied that the person had the relevant qualifications, skills or experience.

c. *Are industry staff, representatives or members of an industry association eligible for selection as a community member of the Development Consent Authority?*

Yes. Anyone other than an employee of a local authority or the Department of Infrastructure, Planning and Logistics may be nominated by a local authority for selection as a community member of the Development Consent Authority.

11. Proposed s 89(4) states that "A person is eligible to be appointed to be a specialist member if the Minister is satisfied the person has the skills, qualifications or experience prescribed by regulation".

**Department response**

It is proposed that no amendment is necessary

a. *What criteria will be used to determine the skills, qualifications and experience required?*

The draft *Planning Amendment Regulations 2020* that are currently on exhibition establishes that, for section 89 of the Act, the Minister has the discretion to determine a person is eligible to be appointed as a specialist member if the person has skills, qualifications or experience in one or more of the following areas of expertise:

- architecture;
- engineering;
- environmental studies;
- landscape design;
- law;
- property development or management;
- town planning; or
- urban design.

It is considered necessary that the Minister has discretion as to the eligibility for appointment of specialist members within the above parameters to accommodate the varying needs and localities of DCA divisions. Regional divisions of the DCA such as Tennant Creek and Batchelor pose greater challenges in attracting nominations than Darwin or Alice Springs and the types of applications typically assessed require different skill sets.

***Cl 67 – Proposed s 100A – Development Consent Authority – removal from office***

12. Litchfield Council recommended that proposed 100A be amended to provide that where the Minister terminates the appointment of a member of the DCA nominated by the local authority they must provide written reasons for the termination to the local authority. Similarly, if the local authority requests the termination of a community member they should be required to provide reasons to the Minister for the request.

**Department response**

It is proposed that an amendment be prepared in consultation with Parliamentary Counsel and progressed via an Assembly Amendment.

a. *What would be the effect on the operation of the Bill of including a provision to this effect?*

This amended clause does not represent any change to the provisions in the existing Act. New s 100A is simply a renumber version of the current s 100. The renumbering is required because of the inclusion of a new s 100 which gives the Minister the ability to establish and publish a code of conduct that members must abide by.

Notwithstanding that standard practice would see the Minister provide reasons, inclusion of a requirement to provide reasons for decisions to a terminated member and a local authority in the case of a community member nominated by the local authority under s 100A would improve transparency within the planning system.

### *Cl 82 – Proposed s 139A – Electronic publication*

13. Litchfield Council commented that proposed s 139A would reduce transparency and limit access to information for some people, particularly those who may not be comfortable using the Internet and those without Internet access, noting that Internet access is not available or reliable in all areas of the Northern Territory.

**Department response**

It is proposed that no amendment is necessary

a. *What would be the effect on the operation of the Bill of retaining existing requirements for newspaper publication of documents and amending the Bill to also require these documents to be published on a website or other electronic platform?*

The provisions of s 139A that provide for a future transition to online platforms are being included into all statutes in accordance with best practice of future proofing all legislation in the Northern Territory.

Existing requirements for newspaper publication are being retained and notices are already published on established electronic platforms. Enhancement of online information in relation to planning in the Northern Territory is progressing and it is hoped it will go live when the new legislation and planning scheme are commenced.

### *Cl 84 – proposed s 148 – Regulations*

14. Currently, s 148(1)(j) of the Act provides that the Administrator may prescribe penalties, not exceeding 10 penalty units for offences against the Regulations. Proposed s 148(1)(J) and (k) increase this to a fine not exceeding 200 penalty points for offences other than strict liability offences and not exceeding a 100 penalty points for offences of strict liability. The Housing Industry Association (HIA) commented that this is a significant increase which may cause hardship given the current economic climate in the NT and recommended that a transitionary approach be adopted with a focus on education, a warning system and a staged increase in penalty units over several years.

**Department response**

It is proposed that no amendment is necessary

a. *What is the justification for the significant increase in penalty rates?*

This section establishes the upper limits on penalties prescribed in the regulations.

The *Planning Amendment Regulations 2020* are currently out for consultation and do not include any increases to penalties within the current Regulations. Penalties associated with infringement notices are to be 4 units for an individual, and 20 for a body corporate.

The amendments to s 148(1) are intended to create the ability to apply higher penalties should it be necessary in the future.

b. *What consideration has been given to ensuring industry is informed of the increases in penalty rates?*

Any future change to penalty rates would be subject to consultation.

c. *What would be the effect on the operation of the Bill of implementing transitional arrangements for proposed sections 148(1)(j) and (k)?*

Transitional arrangements are not required as these sections have not introduced any increases to penalties in the regulations.

Department response to comments by the Committee's Legal Counsel – Appendix B

1. **Proposed s 16(7): this amendment imposes strict liability for the offence under s 16(6). However, it seems that the reference should be to s (6)(a) and (c), rather than (b) and (c). Subsection (6)(b) includes the fault element of intention.**

   **Department Response**

   It is proposed to amend the reference to s 16(6)(a) and (c) through Assembly Amendment.

2. **Proposed s 18: the word 'in' should be deleted.**

   **Department Response**

   It is proposed to delete 'in' through Assembly Amendment.

3. **Proposed s 30J(3B): this amendment imposes strict liability for the offence under s 30J(3A). However, it seems that the reference should be to s (3A)(a) and (c), rather than (b)and (c). Subsection (3A)(b) includes the fault element of intention.**

   **Department Response**

   It is proposed to amend the reference to s 30J(3A)(a) and (c) through Assembly Amendment.

4. **Proposed s 30W(8): by proposed 30W(6), the Minister may give the Development Consent Authority ('DCA') approval to consent to a proposed development despite it being contrary to a strategic framework in the planning scheme. Proposed 30W(7) provides:**

   > **The Minister's approval may be obtained by written request setting out the Development Consent Authority's reasons for the request.**

   **By use of the word 'may' does that mean a request can, alternatively, be oral? Or should the subsection be framed in terms of, for example: 'Any request by the DCA for the Minister's approval must be in writing and include reasons for the request'**

   **Department Response**

   It is considered that the provision as drafted means that an application may be made, but it is to be in writing with reasons. It is proposed that no amendment is necessary.

   **Proposed s 30W(8) then provides:**

   > **The Development Consent Authority is taken to have the Minister's approval if the Minister does not respond to the request within 14 days after receiving the request.**

   **For evidential purposes and to avoid uncertainty, it might be appropriate to specify that the deemed approval arises where the Minister does not respond to the request in writing.**

   **Department Response**

   It is proposed that it will be clarified that the lack of a **written** response is necessary for the Development Consent Authority to proceed assuming approval be provided via an Assembly Amendment.

**The same issue arises in relation to proposed s 52(6).**

**Department Response**

It is proposed that it will be clarified that the lack of a **written** response is necessary for the Development Consent Authority to proceed assuming approval be provided via an Assembly Amendment.

5. **Proposed s 49: there are two questions here. First what is the 'exhibition period' for the purposes of the section and, second, how does the time frame of 'within the exhibition period' in the proposed subsections 49(4), (6) and (8) sit with the time frames specified in the existing and ongoing subsections 49(1) to (3) of the Act. In relation to the first question, s 3 of the Act defines the term 'exhibition period' only for the purposes of concurrent applications and refers to s 30F(3) of the Act. Section 30F(3) makes it clear that it is defining the term for the purposes of concurrent applications only. Concurrent applications are dealt with in Part 2A of the Act. Proposed s 49 will appear in Part 5 of the Act, which deals with development permits. There does not appear to be any definition of the term 'exhibition period' for the purposes of Part 5 of the Act.**

   **Department Response**

   The Bill uses the term "exhibition period" in the same way as the current Act does in provisions outside Part 2A. For example, see s 18, 157 and 159. As the Committee's Legal Counsel has identified a potential benefit from clarification, this will be clarified through an Assembly Amendment.

   **As to the second question, existing s 49(1) to (3), which have not been amended, require written submissions to be made 'within the period specified in the public notice about the application'. However, proposed s 49(4) and (6) require that submissions be lodged 'within the exhibition period'. By proposed s 49(8), the consent authority may extend the times in subclauses (4) and (6). It would seem that the section as a whole should refer either to the exhibition period (to be defined) or the period specified in the notice.**

   **Department Response**

   It is agreed that this section would benefit from clarification and this will be addressed through an Assembly Amendment.

6. **Proposed s 66: by existing s 66(1) the Minister may 'revoke or modify' a development permit. By proposed s 66(6) a person, having been served with a notice of the proposed revocation or modification, commits an offence if they intentionally continue to use or develop the land and the use or development is permitted only under the permit. See also proposed s 66(7). Where there is only a proposed modification of the permit, and perhaps only a minor modification, a question arises as to whether it is necessary to impose a blanket suspension of work on the development, rather than a suspension of work that is related to the proposed modification only.**

**Department Response**

The provisions in the Bill mirror the provisions in the existing Act with changes limited to those necessary to update provisions in relation to penalties. As the final extent and nature of the proposed modification of the permit is not finalised until an inquiry has been conducted under s 144 and the Minister has subsequently made a decision under s 66(4), it is considered appropriate that any use or development permitted under the permit must cease until the Minister has notified the decision. This is the same limitation under existing s 66(5). It is proposed that no amendment is necessary.

7. **Proposed s 75C: this provision creates an offence relating to the clearing of 'native vegetation'. However, that term is not defined. A person should not be subjected to criminal liability in circumstances where the indicia of the offence are not clear. Compare, for example, the detailed definition of 'native vegetation' in the NSW *Native Vegetation Conservation Act 1997*.**

**Department Response**

The 'clearing of native vegetation' is defined in the Northern Territory Planning Scheme which is the applicable planning scheme referenced at s 75C(1)(a). This is the same as the offence at existing s 75A which has been subject to successful prosecution.

Section 7 of the Act applies the NT Planning Scheme to the whole of the Territory, except that which is not otherwise covered by another planning scheme or which is not specifically excluded in the NT Planning Scheme itself. The NT Planning Scheme contains a definition for 'clearing of native vegetation' as well as 'native vegetation'.

There are only two schemes currently in existence in the NT (the other being the Jabiru scheme). Any future scheme that may come into existence to supersede the NT Planning Scheme for an area of land would have its own requirements about the clearing of native vegetation.

Consequently, for the purposes of s 75C the NT Planning Scheme and definitions therein would apply and it is proposed that no amendment is necessary.

8. **Proposed s 75D: provides that a person issued an enforcement notice (see s 77) commits an offence if they intentionally contravene the notice. Strict liability applies in relation to the issue of the enforcement notice: s 75D(2). It is not clear how the notice is to be issued to a person. Proposed 77D provides that where there is a variation or revocation of the enforcement notice it must be served on each person bound by the notice. Particularly given the fact of strict liability, there is a question of why service is not required in relation to the notice itself.**

**Department Response**

Existing s 139 provides for the process for the service of notices and documents and this will apply to enforcement notices. It is proposed that no amendment is necessary.

9. **Proposed s 79: s 78 allows a person to lodge a complaint that another person has contravened the Act or regulations. By s 79(3), where the consent authority investigates a complaint they must give to the person the subject of the complaint a notice which includes 'the substance of the complaint'. By s 79(4), the recipient of the notice may respond in writing. However, there is no requirement to tell the person the**

**subject of the complaint the name of the complainant. That detail could give context to the substance of the complaint and its reliability, including any motive for misrepresentation, and be an important consideration in formulating any response. It could, for example, give rise to suggestions as to other appropriate people the consent authority might consult. Certainly, it is unusual that a person who is the subject of an investigation does not know the identity of their accuser, in circumstances where following the investigation an enforcement notice can be issued: see s 79A(1)(b).**

**Department Response**

The types of conduct for which a complaint might be lodged under s 78 cover a range of issues. Generally speaking, those kinds of complaints would be for types of conduct where the credibility of the complainant is not relevant. For example; whether or not something is on land in contravention of a provision of the Act.

In those circumstances, the substance of the complaint can be independently verified and presented to the person who is the subject of the complaint without divulging the name of the complainant. The person would not be impeded in their ability to answer the complaint by not knowing the name of the complainant.

Because of the nature of the environment in which such complaints are received, the identities of complainants is generally kept private as knowledge of the complainant could give rise to retribution, particularly in small communities. The consent authority also has the ability to consider if a complaint is frivolous or vexatious, including the reliability and motivation of the complainant.

If however, the credibility of the complainant were a factor in the person who is the subject of the complaint being able to understand the substance of the complaint and respond to it, the person who is the subject of the complaint might be entitled to know the identity of the complainant. The provision is drafted in such a way that the complainant's name is not required to be provided, but the consent authority is not specifically precluded from providing it either, should it be necessary.

It is proposed that no amendment is necessary.

10. **Proposed s 80B: provides that in addition to any penalty for an offence under the Act, a court may impose a default penalty 'in respect of each day during which the offence continued to be committed after the first day on which it was committed if:**

    **(a) the offence provides for a default penalty; and**

    **(b) the Court is satisfied that the person continued to commit the offence after the date the person is notified of the alleged offence'.**

**The impact of subsection (b) is unclear. If, for example, the offence is discovered and the person is notified of the alleged offence 100 days after the offence was first committed, and continues for one further day after notification, are they subject to a default penalty of 101 days or one day?**

**Department Response**

The wording of s 80B(b) is considered to be correct. The default penalty would only apply for each day that the offence continues to be committed after they are notified that they are committing an offence. However, as the Committee's Legal Counsel has identified a

potential lack of clarity the meaning of s 80B will be clarified through an Assembly Amendment.

11. **Proposed s 80F: what is a 'declared provision' in s 80F(1)(a)? – there is no other reference to a 'declared provision' in the Act or the Bill. Should it refer to contravention of a provision of the Bill/Act? There are 'declared offences': see s 80F(7). Also, by what measure is the officer in a 'position of influence' within the meaning of s 80F(1)(b)? It is noted that strict liability applies in relation to that subsection.**

    **Department Response**

    It is agreed that 'declared provision' is incorrect. It is proposed that this is addressed through an Assembly Amendment.

    80F(1)(b) refers to an officer being in a 'position **to** influence' rather than 'position **of** influence'. This is a question of fact due to standard wording used in s 125D of the Criminal Code. It is proposed that no amendment is necessary.

12. **Proposed s 81D: s 81D(1) provides that the Commission must perform its powers independently, impartially and in the public interest. Proposed s 81D(2)(d) then provides that the Chairperson and other members of the Commission must in the performance of their functions and the exercise of their powers 'comply with any policies made by the Commission under s 81L(2)'. It is very unusual to elevate policies to mandatory status. More usually they reflect guidelines and aspirations and, generally, are not legally binding. Not infrequently, circumstances will arise where it is appropriate to depart from policies. If this provision is preserved, a great deal of thought will need to be given to the formulation of the policies, both in substance and drafting, to ensure that all contingencies are covered. Also, it could give rise to a good deal of litigation, questioning whether the policy has been observed in given cases.**

    **Department Response**

    The policies made by the Commission under s 81L(2) require approval by the Minister. It is considered appropriate that a policy endorsed by the Minister should be binding on members of the Commission in the performance of their functions and exercise of their powers. It is agreed that careful drafting of policies will be required. It is proposed that no amendment is necessary.

13. **Proposed s 84(5): Should words to the following effect be entered between the words 'consent authority' and 'if the Minister'? – 'and a person's name may be entered on the register'.**

    **Department Response**

    The person is registered as a specialist advisor only if the Minister is satisfied the person has the skills, qualifications or experience prescribed by regulation. It is proposed that no amendment is necessary.

14. **Proposed s 100A(2)(a): this provides that that the Minister may terminate the appointment of a member of the Development Consent Authority if the member is absent from 3 consecutive meetings of the Development Consent Authority. However proposed s 103(1A) specifies that the minutes of meetings must record, among other things, 'the number of members attending the meeting'. There is no requirement to record the names of those who attend. On that basis, a question arises as to how**

**absences are to be established. Also, there is no requirement to record whether a person has leave to be absent.**

**Department Response**

Agreed the Minutes should record the names of any members present or absent at a meeting and it is proposed that this will be addressed through an Assembly Amendment. The important element is that individual voting by members is not recorded in the minutes, only the numbers for or against a proposal.

15. **Proposed s 135B: provides that the Minister may issue directions on how to interpret and administer the provisions of the Act, the regulations and planning schemes. It is quite extraordinary that a Minister be given power to issue directions on how to interpret an Act of Parliament. Interpretation is a matter for the courts. It might be asked what status is to be given to the Minister's direction where the meaning of a provision of the Act is being considered by a Court. I could find no equivalent provision in any other Australian legislation.**

**Department Response**

The purpose of proposed s 135B is to provide the Minister with the ability to provide guidance to the Development Consent Authority and Planning Commission as to how to administer and apply processes under the Act. Similar types of provisions are in other environmental/planning legislation such as the *Environment Protection Bill 2019*,

> *s.291 Guidance documents*
>
> *(1) The Minister, the CEO and the NT EPA may publish guidance documents in relation to any requirements or processes under this Act.*
>
> *(2) The purpose of a guidance document is to provide advice on the operation of this Act.*
>
> *(3) A guidance document must not be inconsistent with this Act.*
>
> *(4) A guidance document may refer to or adopt a published standard as in force from time to time*

and the *Queensland Planning Act 2016*,

> ***283 Guideline-making power***
>
> *(1) The Minister or chief executive may make guidelines about—*
>
> *(a) the matters a person must consider when performing a function under this Act; and*
>
> *(b) another matter the Minister or chief executive considers appropriate for the administration of this Act.*
>
> *(2) The Minister or chief executive must consult with the persons the Minister or chief executive considers appropriate, before making a guideline.*
>
> *(3) The Minister or chief executive must notify the making of a guideline by a notice published in the gazette.*
>
> *(4) The guideline starts to have effect on the day after the notice is published.*

and a more general power exists in the *South Australian Planning Development and Infrastructure Act 2016 s 42-43.*

It is considered appropriate and necessary that the Minister should have the ability to issue Guidelines for the administration of the Act. However, it is acknowledged that the proposed wording of s 135B, in particular the use of 'directions' and 'interpret', could be alternatively expressed as 'Guidelines' that the Development Consent Authority and Planning Commission must take into account in performing their functions and exercising their powers. It is proposed that this will be addressed through an Assembly Amendment.