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Crime and Corruption
Commission

QUEENSLAND

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18 January 2016

Research Director
Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Research Director

RE: PLANNING BILLS 2015

The Crime and Corruption Commission (CCC) welcomes the opportunity to comment on both the Private Member's Planning and Development (Planning for Prosperity) Bill 2015 and the Queensland Government's Planning Bill 2015, with its associated draft Planning Regulation and Development Assessment Rules.

The enclosed submission does not represent an exhaustive review of all Bills under Committee inquiry. Instead, the submission aims to bring potential corruption risks associated with the reform to the attention of the Committee, as part of the CCC's commitment to examine the public sector activities at the highest risk of corruption.

Should you require further information, please contact
or rebecca.denning@ccc.qld.gov.au.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'A. MacSporran', with a long horizontal line extending to the right.

A J MacSporran QC
Chairman

Encl. – *The CCC's Submission on the Planning Bills 2015*

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The Crime and Corruption Commission's corruption function

Under the *Crime and Corruption Act 2001*, one of the two principal purposes of the Crime and Corruption Commission (CCC) is to reduce the incidence of corruption in the public sector. The CCC focuses on more serious or systemic corrupt conduct and those matters that have the greatest potential to threaten the safety and security of the Queensland community and erode the integrity of its public institutions.

In performing its corruption function, the CCC:

- receives and assesses complaints of corruption
- conducts independent investigations to identify and respond to the most serious and systemic cases
- monitors, through reviews and audits, how agencies manage corruption allegations.

It also conducts research to support the proper performance of its corruption function.¹

In 2015, the CCC made a commitment to examine the activities in the public sector at the highest risk of corruption. A number of research, policy, review and audit activities have been undertaken to this effect.

Local governments are vulnerable to corrupt conduct² due to the diverse functions they undertake, the substantial amounts of money involved in their functions, and the considerable authority and decision-making powers their employees possess. Approximately 30 per cent of all corruption allegations about public sector agencies (excluding police) received by the CCC each year are related to local government, a substantial number of which are development-specific.

The introduction of two suites of Planning Bills (i.e. the Government's Bills and the Private Member's Bills) provides the CCC with an opportunity to bring potential corruption risks associated with the reform to the attention of the Committee and an opportunity to make recommendations for the Committee to consider particular aspects of the proposed development assessment process in seeking to reduce corruption risk.

Broad objectives of the legislative reform and potential for corruption risk

Both suites of Planning Bills seek to deliver:

- a clear and easy to understand Planning Act, achieved through reducing complexity and increasing conciseness

1 Section 52 of the *Crime and Corruption Act 2001* outlines the CCC's research function.

2 As defined by s. 15 of the *Crime and Corruption Act 2001*.

- a practical process for assessing development applications, achieved through increased flexibility and efficiency.

The core objectives of the reform — simplification, conciseness, flexibility and efficiency seek to respond to problems identified in a significant review process and deliver better planning and development outcomes. It is important to ensure that in making these reforms, opportunities for corrupt behaviour are not created.

Fundamentally, the challenge is to strike the right balance between simplifying the legislation and making it more concise but not eliminating important information that is necessary to explain and regulate development processes. The desire to enhance flexibility to adapt processes to unique circumstances must not undermine the ability to achieve consistent and predictable outcomes. The desire to achieve efficiencies in the process must not remove the obligation to have effective checks and balances or lower standards of accountability.

Reducing corruption risk

Specific examples have been selected from the Planning Bills to illustrate how the broad objectives identified above have the potential for unintended consequences and corruption risk. From the CCC's perspective, key issues in seeking to reduce corruption risk in the proposed development assessment process are discretion, conflicts of interest and concentrated decision-making.

Discretion

Discretion involves the power to choose whether to act or not act, to approve or not approve, or to approve with conditions, if no procedure is set out in legislation (Ombudsman Western Australia 2009; Queensland Ombudsman 2007). Although decision-making in local government, and the legislation that governs it, requires a discretionary element in order to be responsive to local needs and demands, it can be misused by public officials through corrupt conduct at large economic costs (Bardhan 1997; Duvanova 2011; IBAC 2013; Jain 2001; Mauro 1995). Legislation, policies and guidelines that do not compel a decision-maker to act in a particular way, or lack adequate guidance on the exercise of discretion, can lead to potentially ambiguous conclusions, perceived corrupt conduct and reduced public confidence (ICAC 2012).

There are several examples in the Planning Bills, and the supporting statutory instruments, where there is a lack of information available to guide assessment managers in their decision-making. Specifically:

- what constitutes “minor or inconsequential” effects of a development when determining whether an exemption certificate applies³

3 Section 46(3)(b)(i) PB; s. 41(3)(b)(i) PDB.

- removing an appropriately qualified person from an alternative assessment managers list⁴
- whether the creation of an alternative assessment managers list is limited to code/standard assessments⁵
- negotiating the required fee with an applicant⁶
- how consent of the owner must be given.⁷

Anti-corruption reports and academic literature warn that a high level of discretion in decision-making, when combined with inadequate accountability, increases public sector corruption risk (Attorney-General’s Department 2011; Gorta 1998; Graycar & Sidebottom 2012; Klitgaard 1988; Le et al. 2014; McCusker 2006; Rose-Ackerman 1999). The Bills do incorporate mechanisms that are capable of ensuring accountability and transparency, but in some instances the effectiveness of these mechanisms is undermined by discretionary decision-making within the mechanism. For example:

- Although the Explanatory Notes suggest service level agreements between prescribed assessment managers and chosen assessment managers could incorporate standards of service, the discretion to do so is in the hands of the prescribed assessment manager.⁸
- Where there is some noncompliance with the Development Assessment Rules in relation to public notification, the assessment manager has considerable discretion in deciding whether the noncompliance has adversely affected the public’s awareness of the existence and nature of the application or restricted the public’s opportunity to make submissions about the application.⁹
- Discretion exists regarding whether re-notifying the public is required upon a change (that is not a minor change) and whether that change would not be likely to attract a submission objecting to the change if notified.^{10, 11}

The CCC recommends that the Committee consider whether legislative amendment is required to maintain the integrity of mechanisms designed to promote accountability and transparency within the development application process.

Conflicts of interest

A conflict of interest exists when there is a conflict between a public official’s duty to serve the public interest, and the public official’s private interests. According to the Department

4 Section 48 PB; s. 43 PDB.

5 Both sets of Explanatory Notes (PB, p. 59; PDB, p. 50) state “impact [merit] assessment... is more appropriately undertaken by a directly accountable body such as a local government”.

6 For a chosen assessment manager. See “required fee” in schedule 2 PB & PDB.

7 Section 51(2) PB; s. 46(2) PDB.

8 Explanatory Notes, PB, p. 62; Explanatory Notes, PDB, p. 52.

9 Section 53(3) PB; s. 48(5) PDB.

10 Subclause 41.1(3) Draft Development Assessment Rules.

11 Therefore, as identified in the Draft Development Assessment Rules, the test used to determine whether a development application requires re-notification must have sufficient information to guide assessment manager discretion. See schedules 1 & 3 Draft Development Assessment Rules.

of Infrastructure, Local Government and Planning (2015):

A conflict of interest exists when a reasonable member of the public with the proper information would think that the conflict is unacceptable and might inappropriately influence a local government's decision or action or lead to a decision that is not in the public interest.¹²

Having a conflict of interest does not in itself amount to corruption. However, when decision-making lacks transparency, or the rules governing conflicts of interest are not readily understood, the promotion of private interests and the corruption of proper administration are possible consequences (Victoria Ombudsman 2008). Not only can this create a perception of biased decision-making, but it can also contribute to a decrease in public confidence in the development assessment process.

Increasing flexibility within the development assessment process may result in opportunities for unmanaged conflicts of interest. As previously highlighted, the role of the assessment manager has a substantial discretionary element and thus a large scope for unmanaged conflicts of interest. Furthermore, the Planning Bills provide an applicant with the flexibility to choose an alternative assessment manager (from a list created by the prescribed assessment manager) to decide their development application.¹³ When an alternative assessment manager is external to the local government, it is possible that their discretionary decision-making is not subject to equivalent levels of scrutiny.

There is a need to ensure that all assessment managers who decide development applications — particularly those who are external to the local government or who are exercising delegated decision-making responsibilities within it — are subject to appropriate policies and guidelines to require suitable disclosure and management of their personal interests.

Conflict of interest requirements and ethics principles are generally incorporated in the *Local Government Act 2009* and the *Public Sector Ethics Act 1994*, respectively. However, the CCC recommends that the Committee consider better ways to manage real and perceived conflicts of interest in the context of development applications. It may be useful to consider specific conflict of interest provisions, relevant to the development assessment context, within the dedicated Planning Act to provide more comprehensive and effective guidance for all actors in the system.

Concentrated decision-making

An individual or agency can have competing or incompatible public duties when they have end-to-end control of, or control over two or more points in, the development assessment process (ICAC 2011). Although the CCC recognises that separating every point of potential conflict in the development assessment process may create unnecessary burden,

¹² See also s. 173 *Local Government Act 2009*.

¹³ Section 48(3) PB; s. 43(3) PDB.

opportunities to conceal errors or promote corrupt conduct may arise when a decision-maker has multiple functional roles or has sole responsibility for providing a service.

In creating an efficient and streamlined process, the Bills and supporting statutory instruments give the assessment manager end-to-end decision-making authority across the proposed development assessment process. For example, the assessment manager may:

- discuss a proposed development application with the applicant prior to them submitting an application¹⁴
- deem an application properly made, even if it is not accompanied by the required documents, form or fee¹⁵
- negotiate the required fee with an applicant¹⁶
- provide advice on an information request¹⁷
- provide further advice about an application at any stage of the development assessment process¹⁸
- decide the public notification requirements for an application¹⁹
- give public notification of a development on behalf of the applicant, for a reasonable fee²⁰
- agree to extend timeframes throughout the development assessment process²¹
- take on the powers of a referral agency²²
- assess and decide part or all of an application and impose conditions if required.²³

End-to-end decision-making authority may result in a number of unintended consequences. It creates opportunities for private interests to influence decisions, as well as for this influence to be concealed. It may also lead to an assessment manager feeling a degree of ownership over, or developing a personal interest in, an application. This phenomenon is referred to as regulatory capture (Adams et al. 2007). In this context, regulatory capture would occur when an assessment manager inappropriately identifies with the interests of an applicant. This can lead to perceived or actual favouritism, such as a reluctance to ensure compliance with the development assessment rules or impose conditions on the development. Assessment managers and applicants may develop close ties throughout the development assessment process, especially when the same applicant frequently submits development applications to that assessment manager. This could increase the likelihood of regulatory capture through the provision of assistance and negotiation of compliance.

14 Written opt-out evidence can require minutes of a pre-application meeting with an assessment manager (subclause 9.1 & schedule 5 Draft Development Assessment Rules).

15 Section 51 PB. This discretion is not specified under the PDB.

16 For a chosen assessment manager. See “required fee” in schedule 2 PB and PDB.

17 Subclause 11.1(2) Draft Development Assessment Rules.

18 Subclause 54.1(1) Draft Development Assessment Rules.

19 Subclause 27.1 Draft Development Assessment Rules.

20 Section 53(8) PB; s. 48(8) PDB.

21 Subclause 48.1 Draft Development Assessment Rules.

22 Section 54(3) PB; s. 49(3) PDB.

23 Section 60 PB; s. 56 PDB.

It is recommended that the Committee consider how best to achieve adequate segregation of duties across the development application process.

Final remarks

All public sector employees are expected to use their powers and resources in a way that is consistent with the public interest, and in accordance with legislation and government policy. However, legislative, policy and system vulnerabilities may be exploited by unscrupulous individuals.

In considering the Bills before it, the CCC recommends the Committee consider:

- whether legislative amendment is required to ensure the integrity of mechanisms designed to promote accountability and transparency within the development application process
- better ways to manage real and perceived conflicts of interest
- how best to achieve adequate segregation of duties across the development application process.

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