STATE PLANNING COMMISSION

Agenda Report for Decision

Meeting Date: 3 March 2022

Item Name	Response to Recommendations 1 & 2 of the Legislative Review Committee of Parliament's Report *Legislative Council's Petition No 2 of 2020 – Planning Reform*
Presenters	Chelsea Lucas and Nick Buick
Purpose of Report	Decision
Item Number	5.2
Strategic Plan Reference	N/A
Work Plan Reference	N/A
Confidentiality	Not Confidential (Release Delayed). To be released following the Minister for Planning and Local Government's response to the Legislative Review Committee. Anticipated by 17 March 2022
Related Decisions	Item 5.3 SPC Agenda Report for Noting – 16 December 2021

Recommendation

It is recommended that the State Planning Commission (the Commission) resolves to:

1. Approve the designation of this item as Not Confidential (Release Delayed). The Minister for Planning and Local Government (the Minister) is yet to formally respond to the Legislative Review Committee (the Committee) of Parliament's *Legislative Council's Petition No 2 of 2020 – Planning Reform* Report (the Report); therefore, any advice on the Report and the Minister's potential response should be kept confidential until the Minister has provided a response to the Committee (anticipated by 17 March 2022).
2. Note the Report (**Attachment 1**) and summary of recommendations (**Attachment 2**) from the Committee.
3. Authorise and approve the Chair of the Commission to sign the response letter to the Committee (**Attachment 4**), including making any minor amendments as required to finalise.

Background

On 17 November 2021, the Committee tabled its Report into a petition on planning reform (**Attachment 1**). Under the provisions of the *Parliamentary Committees Act 1991,* the Committee is required to inquire into any petition of more than 10,000 signatures.

On 30 April 2020, the Hon Mark Parnell MLC tabled a petition signed by 13,928 people expressing concerns about planning reforms; in particular:

- The consultation process for the Planning and Design Code (the Code).
- The governance of the Commission and the State Commission Assessment Panel (SCAP).
- The potential for improper influence from the development industry.
- The impacts of the *Planning, Development and Infrastructure Act 2016* (the PDI Act) and the Code on property development within the State.

On 24 November 2021, the Hon Nicola Centofanti MLC, Presiding Member of the Committee, wrote to the Chair of the Commission regarding Recommendations 1 and 2 of the Report. A summary of the Report's recommendations is provided at **Attachment 2**.

Separately to this response, the Minister is currently considering his formal response to the Report. On 16 December 2021, the Attorney-General's Department (the Department) provided the Commission with its preliminary views on the recommendations. The Department now provides further advice which will inform the response from the Commission to the Committee on this matter.

A copy of the Agenda Report on this matter from the 16 December 2021 meeting is provided at **Attachment 3** for reference.

Discussion

The Committee made 14 recommendations covering six 'themes'. These recommendations are detailed on pages 14-16 of **Attachment 2**, and in full in the Committee's Report at **Attachment 1**. These recommendations can be summarised as:

- Recommendations 1 to 4: relates to the Code development and a request for Ministerial risk assessment of Code outcomes.
- Recommendations 5 and 6: relates to a review of the PDI Act and the potential for State Planning Policies (SPPs) to be included in the Code.
- Recommendation 7 and 8: relates to the use of the Planning and Development Fund (P&D Fund) for planning reforms and the potential PDI Act amendments governing the use of the fund.
- Recommendation 9: relates to the disallowance process governing regulations.
- Recommendation 10 to 13: relate to heritage reforms.
- Recommendation 14: relates to a potential inquiry into the governance and operation of the Commission and SCAP.

Recommendations 1 and 2

These recommendations relate to the consultation that was undertaken in relation to the staging of the implementation of the PDI Act and the Code. Given the Commission's key involvement in the preparation and consultation of the Code, the Committee has specifically sought a response on these two recommendations.

It should be noted that at the time of the petition being circulated in the community (early 2020), there was a level of uncertainty about the degree of change being advocated in the Code compared to existing Development Plan policies. That uncertainty was largely coupled with concern in some sectors of the community that that there was insufficient consultation being undertaken.

With regard to these recommendations, Planning and Land Use Services (PLUS) of the Department considers that the consultation undertaken was broad and far-reaching, and much greater than any previous engagement that occurred in relation to Development Plans.

Specifically, the Phase Three (Urban Areas) Code Amendment was originally released for public consultation from 1 October 2019 to 28 February 2020. During this consultation period, 1,790 written submissions were received. Substantial changes were proposed to be made to the amendment in response to this initial five-month consultation period. A further six weeks of public consultation was undertaken from 4 November 2020 to 18 December 2020. This additional consultation period allowed the public to use the Code in its online and electronic form for the first time.

It should also be noted that since the introduction of the Code in full, there have been significant learnings with regard to both the level and type of consultation on Code Amendments. These are matters that are constantly evolving to suit the specific circumstances of each Amendment. For example, where traditionally consultation on Amendments to council Development Plans largely involved notices in newspapers and occasionally, targeted mail outs, we are now seeing the use of social media as a further means to inform the community of proposed Code Amendments.

PLUS is confident that these changes are leading to a greater level of community engagement and awareness. Notwithstanding that, there is continual review of consultation on Code Amendments, particularly through the Code Amendment Engagement Report, as set out in the Commission's *Practice Direction 2 – Preparation and Amendment of Designated Instruments* and under section 73(7) of the PDI Act. The learnings from those reports is used to ensure that consultation is targeted, appropriate and meets community expectations.

A draft letter of advice to the Presiding Member of the Committee is attached for the Commission's approval and sets out these matters (**Attachment 4**). The Department's advice to the Minister on recommendations 1 and 2 largely mirrors these details.

Next steps

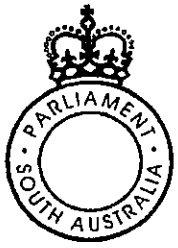
It is noted that the Commission have previously expressed a desire to review some of the key elements of the new system, including any early areas for improvement in the PDI Act. As a result, the recommendations of the Committee (including recommendations relating to the Code Amendment process and the associated consultation) will be considered as part of a Commission's upcoming strategic planning workshop scheduled for April 2022.

Attachments:

1. Legislative Review Committee of Parliament's Report on *Legislative Council Petition No 2 of 2020 – Planning Reform* (#18376819).
2. Summary of Recommendations – Legislative Review Committee of Parliament's Report on *Legislative Council Petition No 2 of 2020 – Planning Reform* (#18091401).
3. Suggested letter of response to the Presiding Member, Legislative Review Committee (#18335564).
4. SPC Agenda Report for Noting – Legislative Review Committee of Parliament's Report on *Legislative Council Petition No 2 of 2020 – Planning Reform* – 16 December 2021 (#18088404).

Prepared by:	Nicholas Buick
Endorsed by:	Chelsea Lucas
Date:	22 February 2022

P.P. 398



Parliament of South Australia

Legislative Review Committee

Report on

Legislative Council Petition No 2 of 2020

PLANNING REFORM

SECOND SESSION
FIFTY-FOURTH PARLIAMENT

LEGISLATIVE REVIEW COMMITTEE

The Legislative Review Committee is a Parliamentary committee established by section 10 of the *Parliamentary Committees Act 1991.*

Members of the Legislative Review Committee[1]

Hon Nicola Centofanti MLC, Presiding Member

Hon Zoe Bettison MP

Hon Connie Bonaros MLC

Hon Irene Pnevmatikos MLC

Mr Nick McBride MP
(From 13 October 2020)

Mr Peter Treloar MP
(From 2 March 2021)

Secretariat

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[1] The following were also Members of the Legislative Review Committee during its inquiry into this Petition: Mr Josh Teague MP (until 8 September 2020); Mr Fraser Ellis MP (from 8 September 2020 to 2 March 2021); and Mr Dan Cregan MP (until 13 October 2020).

Functions of the Legislative Review Committee

Under section 12 of the *Parliamentary Committees Act 1991*, the functions of the Legislative Review Committee are:

(a) to inquire into, consider and report on such of the following matters as are referred to it under this Act:

(i) any matter concerned with legal, constitutional or parliamentary reform or with the administration of justice but excluding any matter concerned with joint standing orders of Parliament or the standing orders or rules of practice of either House;

(ii) any Act or subordinate legislation, or part of any Act or subordinate legislation, in respect of which provision has been made for its expiry at some future time and whether it should be allowed to expire or continue in force with or without modification or be replaced by new provisions;

(iii) any matter concerned with inter-governmental relations;

(b) to inquire into, consider and report on subordinate legislation referred to it by the *Subordinate Legislation Act 1978*;

(ba) to inquire into, consider and report on petitions referred to it under section 16B;

(c) to perform such other functions as are imposed on the Committee under this or any other Act or by resolution of both Houses.

Eligible petitions referred to the Legislative Review Committee

Section 16B of the *Parliamentary Committees Act 1991* states:

Section 16B—Certain petitions referred to Legislative Review Committee

(1) Each eligible petition is, on being presented to the House of Assembly or the Legislative Council by a member of the relevant House, referred to the Legislative Review Committee by force of this section.

(2) In this section—

eligible petition means a petition of not less than 10 000 signatures that complies with any relevant requirements of the Standing Orders of the House in which it is presented or the Joint Standing Orders (as the case may require).

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LIST OF ACRONYMS AND ABBREVIATIONS

Charter	*Community Engagement Charter* (April 2018)
Code	*Planning and Design Code* (as implemented on 19 March 2021)
Commission	State Planning Commission
Committee	Legislative Review Committee
Committee's webpage	https://www.parliament.sa.gov.au/Committees/lrc
DPA	Development Plan Amendment
DPTI	Department of Planning, Transport and Infrastructure (now subsumed by the Attorney-General's Department)
Department	Department of Planning, Transport and Infrastructure, subsequently the Attorney-General's Department (used to refer to both Departments in the role overseeing planning)
Draft Code	The version of the *Planning and Design Code* that was released for consultation commencing 1 October 2019 for Phase Two and Phase Three
Expert Panel	The Expert Panel on Planning Reform that prepared the report *The Planning System We Want* in December 2014
Former Minister	The former Minister for Planning and Local Government, the Hon Stephan Knoll MP (in that role from 22 March 2018 to 26 July 2020)
GHG	Greenhouse gas
HCSA	History Council of South Australia
ICAC	Independent Commission Against Corruption
LGA	Local Government Association of South Australia
Minister	Minister for Planning and Local Government (currently the Hon Vickie Chapman MP, Attorney-General)
PDI Act	*Planning Development and Infrastructure Act 2016*
Petition	Petition No 2 of 2020 – Planning Reform
PLUS	Planning and Land Use Services of the Attorney-General's Department
Previous planning system	The planning system under the *Development Act 1993* that was in effect until the *Planning, Development and Infrastructure Act 2016* was implemented, and consisted of separate development plans for each local government area

Revised Draft Code	The version of the *Planning and Design Code* released for further consultation from 4 November 2020 to 18 December 2020 for Phase Three
SCAP	State Commission Assessment Panel
SPP	State Planning Policy
UDIA	Urban Development Institute of Australia (SA)
WSUD	Water Sensitive Urban Design

EXECUTIVE SUMMARY

Parliament has undertaken the most significant planning reforms in South Australia for a generation by enacting the *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*') and establishing the State Planning Commission (the 'Commission') as the State's principal planning advisory and development assessment body. The Commission established the State Commission Assessment Panel ('SCAP') to undertake the Commission's functions and powers to determine planning applications. The Commission was also responsible for developing and implementing the *Planning and Design Code* (the 'Code') and the ePlanning portal to provide the public with digital access to the new planning system. Mr Michael Lennon, in his role as Chair of the Commission, offered the following about the work that the Commission has undertaken:

> We have delivered a Code that is the cornerstone of the most significant reform of South Australia's planning system in more than 25 years. It replaces 72 individual council development plans with a single Code that is consistent statewide, gives property owners a clear understanding of what is required of them, and enables councils to assess and review plans simply and easily.
>
> (Commission, Committee Hansard, 16 March 2021, 110)

Once the Code was developed and implemented in the Outback Areas of SA, there was a growing discontent in the community regarding following:

- the consultation process for the Code;
- the governance of the Commission and SCAP;
- the potential for improper influence from the development industry; and
- the impacts of the *PDI Act* and the Code on property development within the State.

That discontent led to Petition No 2 of 2020 – Planning Reform (the 'Petition') signed by 13 928 residents of South Australia. The Petition was presented in the Legislative Council by the Hon Mark Parnell MP on 30 April 2020 and referred to the Legislative Review Committee (the 'Committee') under section 16B of the *Parliamentary Committees Act 1991*.

The Committee received 103 submissions in response to its call for public submissions and heard from a total of 27 witnesses, including representatives of the Attorney-General's Department (the 'Department'), the Commission and SCAP. The submissions overwhelmingly welcomed the addition of an ePlanning system and supported a move to make the planning system more efficient, consistent and modern.[2] Submitters approved of the laudable goals of the ePlanning system to provide accessible, clear and certain information to the public, and enable a person to simply enter an address to determine the relevant policies for a property.[3]

However, the evidence received by the Committee also revealed a dissatisfaction with the changes made by the new planning system. Submitters expressed concern both with many of the reforms that were taking place and the manner in which they were being implemented. The Committee also received complaints about the planning system generally, including criticisms that the planning

[2] See for example Urban Development Institute of Australia, Committee Hansard, 16 February 2021, 84; National Trust SA, Committee Hansard, 26 November 2020, 58.

[3] Christine Francis, Submission 58, 3; Australian Institute of Architects, Committee Hansard, 13 October 2020, 20; Planning Institute of Australia, Committee Hansard, 17 November 2020, 46.

reforms failed to rectify problems that existed under the previous planning system.[4] These submissions expressed the view that the once-in-a-generation reforms presented an opportunity to correct deficiencies with the previous planning system by improving protections or providing pathways to improve the built and natural environment of South Australia. They were concerned this opportunity may be missed.

The Committee heard that the community was dissatisfied with the public consultation that occurred on the planning reforms and in particular on the Code and that there was little, if any, modelling or risk assessment done on the new planning instruments, including the Code. Submitters expressed concern that the *PDI Act* would reduce the rights of community members and the role of local councils in making planning decisions and developing planning policy. The community expressed concern that the *PDI Act* will not ensure the sustainability of infill and other development and will not sufficiently protect the environment from the impacts of climate change. The primary issue for many of those who provided evidence to the Committee was that South Australia's heritage will not be adequately protected under the *PDI Act* or the Code.

Submitters also reported that the Commission and SCAP are dominated by property development interests and appear to favour the development industry over community, heritage or environmental groups. Some submissions mentioned that these bodies conduct much of their operations in secrecy and are not sufficiently accountable to the public or to Parliament.

In addition, submitters echoed the fourth prayer in the Petition by calling for legislation banning political donations from property developers, similar to the legislation in New South Wales and Queensland. Submitters expressed concern that, because property developers stand to gain or lose substantially as a result of decisions made by political entities, they should be prohibited from making political donations.

The Committee recognises the extent of the task that was set for the Department and the Commission under the *PDI Act*. However, the Committee also appreciates that the risks of getting it wrong are substantial and enduring. A task of this magnitude must not be rushed, but be undertaken with the utmost caution, and with respect and consideration for the stakeholders. The fact that 13 928 residents were motivated to sign this Petition demonstrated that the community was not brought along with these reforms at the time of the Petition's lodgement.

The Committee faced some challenges in completing its inquiry. The Committee's inquiry was complicated by the amendments that were repeatedly made to the Code prior to its full implementation on 19 March 2021. The vast majority of the submissions received by the Committee were based upon the version of the Code that was released for public consultation on 1 October 2019. This version is referred to throughout this Report as the 'Draft Code'. The Draft Code was updated and implemented for Phase Two (Regional Areas) on 31 July 2020, just prior to the Committee's call for submissions. This version was again amended and released for further consultation on 4 November 2020. This version is referred to throughout this Report as the 'Revised Draft Code'. The Revised Draft Code was further amended and implemented for Phase Three (Urban Areas) on 19 March 2021.

[4] For example, Guy Freeman, Submission 24, complained about infringements on individual property rights restricting his activity on his property zoned rural farming; SA Independent Retailers, Submission 84, raised concerns about 'out of centres' retail developments.

As a result of the amendments that occurred and the resulting versions of the Code, the submissions before the Committee, and many of the comments included in this Report, were not based upon the Code as implemented throughout South Australia on 19 March 2021. The Committee accepts that some of the complaints made by submitters in relation to provisions of the Code may have been addressed, or partially addressed, by subsequent amendments.

Another challenge faced by the Committee was to consider the Petitioners' third prayer: for implementation of the *Planning and Design Code* to be deferred pending a thorough public consultation, independent modelling and risk assessment of the Code. The Petition was referred to the Committee less than three months prior to Phase Two of the Code going live on 31 July 2020, and Phase Three was then scheduled to go live in September 2020. The Minister then announced a second round of pubic consultation surrounding the Code. However, even with the subsequent delay of Phase Three by the Minister until 19 March 2021, the broad scope of the Petition, the number of submissions received and the number of witnesses from whom the Committee sought evidence meant that the Committee could not have fulfilled its obligations, in accordance with section 12(ba) of the *Parliamentary Committees Act 1991*, prior to the implementation date. Nonetheless, the Committee received evidence, considered and reported on the issues raised by the Petitioners, and made recommendations accordingly.

Given the enormity of the task of reforming planning in South Australia and the extent of the issues raised by the Petition, this Committee recognises that it does not have the subject matter knowledge, time or staffing resources to conduct a broad-based inquiry or provide for specific recommendations that would no doubt arise from such an inquiry. This Committee's core function is the scrutiny of delegated legislation, which is of itself a specialised and demanding function. As noted in the Report of the *Select Committee on the Effectiveness of the Current System of Parliamentary Committees*, the addition of the petitions function to this Committee has led to an untenable workload,[5] limiting its ability to conduct a more in-depth inquiry. As a result, that Select Committee Report recommended that the petitions function be assigned to Portfolio Committees in the future.[6]

Consequently, the Committee's recommendations contained in this Report are of a general nature and address higher level concerns. In the Committee's view, other bodies would be better placed to conduct broad-based inquiries into the more specific issues raised in the Petition.

This Committee would like to acknowledge the time and effort contributed by the members of the public and various organisations to prepare submissions and, in some cases, to appear before the Committee to provide evidence. The knowledge, expertise and insight provided by this evidence was invaluable to the Committee in conducting this inquiry and preparing this Report.

[5] Legislative Council of SA, Report of the *Select Committee on the Effectiveness of the Current System of Parliamentary Committees* (25 August 2021) 7.
[6] Ibid 13.

RECOMMENDATIONS

The Legislative Review Committee recommends that:

Recommendation 1

1.1 The State Planning Commission review the comments of the submitters included in this Report with a view to improving the engagement processes for future revisions to the *Planning and Design Code* and other planning instruments. This includes a focus on genuine community engagement. Further, the Legislative Review Committee recommends that the State Planning Commission collaborate and engage closely with the Local Government Association of SA and councils on all revisions to the *Planning and Design Code* and associated planning instruments. In addition, future engagement must allow sufficient time for councils, the Local Government Association of SA, the public and other stakeholders to familiarise themselves with the impacts of the new policies, procedures and amendments before providing feedback. The stakeholders must be given adequate time to review and understand any proposed revisions before they are implemented.

Recommendation 2

1.2 A further period of consultation of not less than 12 weeks be afforded to the public and stakeholders to provide feedback on the *Planning and Design Code* and the ePlanning system as implemented in South Australia.

Recommendation 3

2.1 The Minister for Planning and Local Government instigate an annual independent risk assessment of the *Planning and Design Code* to identify the potential risks resulting from planning policy, procedures and the operation of the ePlanning system. The Committee recommends that a report of the findings of the risk assessments and the Minister's responses be provided to the Environment, Resources and Development Committee for review.

Recommendation 4

2.2 The Minister for Planning and Local Government introduce amendments to the *Planning, Development and Infrastructure Act 2016* requiring the Environment, Resources and Development Committee to monitor annual risk assessment reports of the *Planning and Design Code*. The Committee recommends that reports on these assessments, the Minister's responses and any action taken be tabled in both Houses of Parliament.

Recommendation 5

3.1 The Minister for Planning and Local Government establish an independent review of the *Planning, Development and Infrastructure Act 2016* and the implementation of the *Planning and Design Code* to determine its impacts on community rights, sustainability and protection of the environment as identified in this Report. A review would also include the fees, charges and costs to councils of operating the new planning system. The Committee also recommends that the report resulting from the review be tabled in both Houses of Parliament by the close of 2022.

The independent review should be undertaken by the Expert Panel on Planning Reform, or a panel of similarly qualified professionals, and must include consultation with community representatives.

Recommendation 6

3.2 As part of the review of the *Planning, Development ond Infrostructure Act 2016* in Recommendation 5, the reviewing body assess whether State Planning Policies should be incorporated into the *Planning and Design Code* in order to ensure that policy matters are considered by the Relevant Authorities in determination of development applications.

Recommendation 7

3.3 The Economic and Finance Committee undertake an inquiry, under section 6 of the *Parliamentary Committees Act 1991*, into the cost overruns, financing and use of funds from the Planning and Development Fund for the planning system reforms, including the implementation of the *Planning and Design Code* and the ePlanning system.

Recommendation 8

3.4 The Minister for Planning and Local Government introduce amendments to the *Planning, Development ond Infrastructure Act 2016* to restrict the use of the Planning and Development Fund or the Urban Tree Canopy Off-set Fund to creating and developing open and green space.

Recommendation 9

3.5 To avoid regulations being repeatedly remade immediately after being disallowed by Parliament, the Attorney-General introduce amendments to the *Subordinate Legislation Act 1978* to prohibit the re-introduction of a regulation that is the same in substance as one that has been disallowed by Parliament, for six months from the date of disallowance. The amendment should permit Parliament, by resolution, to permit the making of the new regulation within the six-month period.

Recommendation 10

7.1 The Minister for Planning and Local Government implement each of the recommendations made by the Environment, Resources and Development Committee in its *Inquiry into Heritage Reform* (2019) as a matter of priority.

Recommendation 11

7.2 The Minister for Planning and Local Government appoint a representative from local government, nominated by the Local Government Association of SA, to assist on the recently appointed Heritage Reform Advisory Panel to represent the interests of local councils.

Recommendation 12

7.3 The Minister for Planning and Local Government add to the terms of reference for the Heritage Reform Advisory Panel's Heritage Reform Review, a review into demolition controls under the *Planning and Design Code* to advise on the impact of the Code on approvals for demolition of heritage assets.

Recommendation 13

7.4 The Minister for Planning and Local Government add to the terms of reference for the Heritage Reform Advisory Panel's Heritage Reform Review, a review into the outcomes for 'Representative Buildings' and whether the protections provided under the *Planning and Design Code* and its supporting instruments are sufficient to protect Representative Buildings and retain the character of neighbourhoods.

Recommendation 14

8.1 The Statutory Authorities Review Committee conduct an inquiry into the governance and operation of the State Planning Commission and the State Commission Assessment Panel under section 15C(a) of the *Parliamentary Committees Act 1991*, including a review of:

- Membership, including consideration of representation from local government
- Codes of Conduct
- Management of conflicts of interest
- Transparency, accountability and public access to information
- Meeting procedures
- State Planning Commission Governance Manual

CONDUCT OF THE INQUIRY

The Petition

On 30 April 2020, the Hon Mark Parnell MLC tabled Petition No 2 of 2020 – Planning Reform (the 'Petition'), signed by 13 928 residents of South Australia, in the Legislative Council. On 8 May 2020, the Legislative Council referred the Petition to the Legislative Review Committee (the 'Committee') under section 16B of the *Parliamentary Committees Act 1991*. The Petition states:

> **To the Honourable the President and Members of the Legislative Council in this present Parliament assembled –**
>
> The humble Petition of the undersigned residents of South Australia Respectfully sheweth:- That South Australia's precious natural and built heritage is being put at risk by laws, policies and practices that allow for destruction and degradation of heritage and environmental values in contravention of the public interest.
>
> Your petitioners pray that this Honourable House will:
>
> 1. Undertake an independent review of the operation of the *Planning, Development & Infrastructure Act* to determine its impact on community rights, sustainability, heritage and environment protection;
> 2. Undertake an independent review of the governance and operation of the State Planning Commission and the State Commission Assessment Panel;
> 3. Urge the Government to defer the further implementation of the Planning and Design Code until:
>   a. a genuine process of public participation has been undertaken; and
>   b. a thorough and independent modelling and risk assessment process is undertaken;
> 4. Legislate to ban donations to political parties from developers similar to laws in Queensland and NSW.
>
> And your petitioners, as in duty bound, will every pray.

Protect Our Heritage Alliance initiated and coordinated the Petition as a means to raise public awareness about the need to protect the State's built and natural heritage and the impact of the *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*') and the *Planning and Design Code* (the 'Code') on the lived amenity and environment of South Australian communities.[7]

Inquiry

For the purposes of inquiring into the Petition, the Committee first heard evidence on 3 June 2020 from the Hon Mark Parnell MLC, as the member who laid the Petition on the table in the Legislative

[7] Protect our Heritage Alliance, Committee Hansard, 22 September 2020, 13 - 14.

Council. At the time of giving his evidence, the Hon Mark Parnell MLC tabled two documents: suggested questions for the Minister for Planning and suggested witnesses for the inquiry.[8]

The Committee then sought a response to the Petition and to the evidence and questions provided by the Hon Mark Parnell MLC from the then Minister for Planning, the Hon Stephan Knoll MP (the 'former Minister').[9] The former Minister resigned from the Ministry on 26 July 2020, and the Planning portfolio was assigned to the Attorney-General, the Hon Vickie Chapman MP (the 'Minister') on 29 July 2020. The Minister responded on 31 July 2020.[10]

Call for public submissions

The Committee published calls for submissions on the Petition as follows:

- *The Advertiser* on Saturday 15 August 2020
- *In Daily* for 7 days from Monday 17 August 2020
- Parliament website homepage Monday 17 August 2020
- Parliament (HA) Facebook page Monday 17 August 2020
- Twitter (@seclrc_SA) on Monday 17 August 2020

Submissions closed on 14 September 2020. The Committee granted extensions as requested and also determined to accept some further submissions after the closing date. The Committee began receiving submissions from 26 May 2020, and received its last submission on 24 May 2021 (the Final Report of the Working Group on Planning and Climate Change in South Australia).

The Committee received 103 submissions in total, a list of which is available at Appendix C. The submissions are available on the Committee's webpage.[11] Twenty-one submissions included a request to provide oral evidence before the Committee.

Submitters

Many of the people and organisations who made submissions on this Petition have been involved with the planning reform process over several years, such as Community Alliance SA, the Local Government Association of SA, South West City Community Association Inc, City of Adelaide and the Kensington Residents Association Inc. The City of Norwood Payneham & St Peters had also been actively involved, and advised it has produced approximately 20 submissions related to the planning reform process, documents and draft legislation.[12] This demonstrates the commitment these groups have to the planning reform process.

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[8] Hansard transcripts of the evidence of the Hon Mark Parnell MLC and other witnesses and tabled documents from this inquiry are available at: https://www.parliament.sa.gov.au/Committees/lrc under Petitions > Planning Reform > Witnesses.

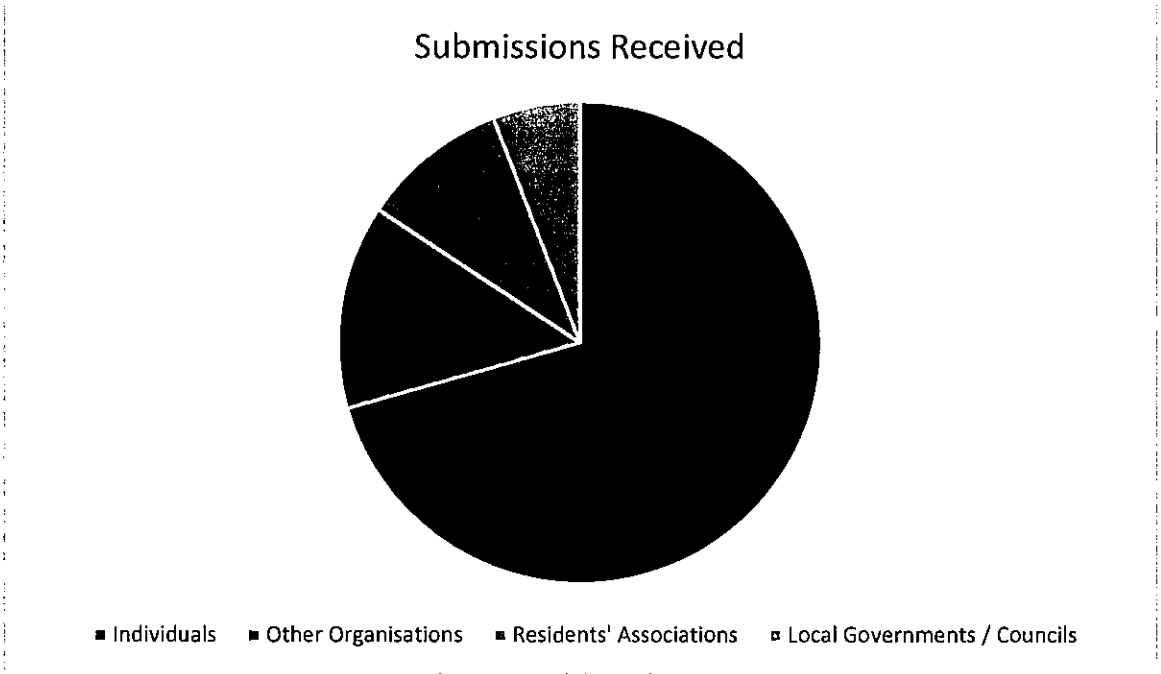
[9] The Committee's letter to the former Minister dated 2 July 2020 is at Appendix A.

[10] The Minister's response is at Appendix B.

[11] https://www.parliament.sa.gov.au/Committees/lrc under Petitions > Planning Reform > Submissions.

[12] City of Norwood Payneham & St Peters, Submission 77, 1.

The Committee received submissions from a variety of stakeholders who shared an interest in the quality of our built and natural environment and a view that planning decisions impact the public's wellbeing, enjoyment and pride in their communities.



Individuals

Submissions from individuals varied from very brief to extensive and detailed submissions. Several of the individuals who made submissions work in the planning and development industry or are involved in local neighbourhood associations. Others sought to share their personal experiences or impressions of the planning system and reforms. All of the submissions expressed a general displeasure with the planning reforms and agreement with the prayers set out in the petition.

Residential Associations

The Committee received ten submissions from representatives of residential associations, all within metropolitan Adelaide. The majority of these highlighted concerns about community rights, protection of heritage and the consultation process. Many of these associations have had continued involvement with the planning reform process. The Committee was assisted by these generally lengthy and detailed submissions.

Local Government

The Committee received very thorough and helpful submissions from six representatives of local government. Five of these were directly from councils and the other from the Local Government Association. Local government is a primary stakeholder and plays an important role in the planning

system and its reform. Successful planning reform requires a 'partnership approach between state and local government and communities.'[13]

Local government groups shared concern that the *PDI Act* and the Code erode community input into their neighbourhoods by reducing rights for members of the public to be notified of development applications and third party-appeal rights. They also claim that heritage protection is reduced under the new planning system. Councils expressed concern about the environmental impacts of the new system on their local areas, including sustainability of infill and other development and increasing pressures on infrastructure. Some local governments pointed out the heightened demand for open community spaces as a result of the COVID-19 pandemic, where people are increasingly seeking to connect and exercise outdoors, and emphasised the importance of green community space for the mental health and wellbeing of their communities during such trying times.

Other Organisations

A variety of other organisations with interests in the planning and building industry provided submissions, including organisations involved in heritage, the environment, design and architecture, planning and the retail sector. These submissions generally discussed the area in which they specialised, but often spoke to other issues as well. The Committee was greatly assisted by these specialised groups sharing their expertise and providing insights into the various issues raised in the Petition.

Publication of evidence

All of the submissions, Hansard transcripts of evidence, tabled documents and responses to questions on notice have been published on the Committee's webpage.[14] The Committee resolved on 23 September 2020 to publish all submissions received on the Committee's webpage. Once public hearings commenced, the Committee resolved on 2 December 2020 that transcripts of all evidence heard, any documents tabled by witnesses and any responses to questions on notice would be published on the Committee's webpage as soon as practicable once received. This Report will also be published on the Committee's webpage once it has been tabled in both Houses of Parliament.

Public hearings

The Committee scheduled additional meetings on Tuesdays of each sitting week to hear witnesses on this Petition. The Committee generally heard from two witnesses (or sets of witnesses) at each Tuesday meeting for 30 minutes each. The Committee did not invite all submitters who requested an opportunity to appear before the Committee to give evidence.

[13] Expert Panel on Planning Reform, *The Planning System We Want* (December 2014) 5.
[14] https://www.parliament.sa.gov.au/Committees/lrc Petitions > Planning Reform.

The Committee invited 18 witnesses or organisations to provide oral evidence, including the first witness, the Hon Mark Parnell MLC. Eight of those invited had two representatives appear together before the Committee and one appeared twice, for a total of 27 witness appearances. Appendix D to this Report lists the witnesses who appeared before the Committee and the dates of their appearances. The following table sets out the various types of witnesses that appeared before the Committee.

Table 1: Witness appearances

Witness Appearances	Witness Type	Witnesses
3	Individuals	Jeff Smith Guy Freeman Janet Scott
5	State Government	Department Commission SCAP
3	Local Government	Local Government Association
5	Planning & Development Organisations	Australian Institute of Architects Planning Institute Australia Urban Development Institute of Australia
10	Other Organisations	Community Alliance SA Protect Our Heritage Alliance SA Independent Retailers SA Heritage Council National Trust SA Working Group Environmental Defenders Office
1	Members of Parliament	Hon Mark Parnell MLC

To gain a broad understanding of the issues raised by the Petition, the Committee extended invitations to some submitters who did not request to be heard, including SA Heritage Council, Australian Institute of Architects and SA Independent Retailers. For additional perspectives into the planning reforms, the Committee also invited some organisations to provide evidence that did not make submissions, such as the State Planning Commission, the State Commission Assessment Panel and representatives from the Attorney-General's Department and the Urban Development Institute of Australia.

The Committee invited the Local Government Association to present evidence to the Committee on a second occasion to hear feedback subsequent to the implementation of Phase Three on 19 March 2021, as to whether the concerns raised by councils were addressed in the implemented version of the Code.

All views expressed by the Committee in this Report are based on the evidence presented before it.

LEGISLATIVE FRAMEWORK

Background

In 2012, with a view to addressing a mounting dissatisfaction with the existing planning system, the State Government convened the Expert Panel on Planning Reform (the 'Expert Panel') to prepare a report on a way forward to reform the planning system in South Australia. In 2014, the Expert Panel presented its report *The Planning System We Want* to the Government.[15] The Expert Panel found several failings in the existing system, including that it

- has become 'unnecessarily costly, complicated, cumbersome and focussed on processes rather than outcomes';
- 'discourages innovation and locks out new investment and the jobs it brings';
- 'generates divisive debate for minimal gain';
- 'fails to protect the things we value as a society';
- contains 'duplication and layers of inefficient practices that have become entrenched and add to costs for taxpayers and ratepayers.'[16]

The report recommended a number of reforms to change the system to provide more certainty and a more effective, efficient and simplified system, including the following:

Reform 1	Establish a state planning commission
Reform 3	Legislate to create a charter of citizen participation
Reform 7	Establish a single state-wide menu of planning rules
Reform 8	Place heritage on renewed foundations
Reform 9	Adopt clear, simple development pathways
Reform 20	Establish an online planning system.[17]

In 2016, in response to the Expert Panel's report, Parliament enacted the *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*') to gradually replace the *Development Act 1993*.

Planning, Development and Infrastructure Act 2016

Commencement

The *PDI Act* was assented to on 21 April 2016 and has since been gradually enacted to replace the *Development Act 1993*. A number of *PDI Act* provisions commenced on 1 April 2017, including the following Parts:

- Part 1 Preliminary
- Part 2 Objects, planning principles and general responsibilities
- Part 3 Administration

[15] Expert Panel on Planning Reform, *The Planning System We Want* (December 2014).
[16] Ibid 4.
[17] Ibid 2-3.

- The majority of Part 4 Community engagement and information sharing

Some sections within Part 5—Statutory instruments were also commenced at that time, including Division 1 (Principles), Subdivision 2 (Regional plans), Subdivision 3 (Planning and Design Code) and Subdivision 4 (Design standards). The commenced sections included those establishing the State Planning Commission,[18] joint planning arrangements[19] and practice directions and guidelines.[20] The *Community Engagement Charter* and online planning services[21] provisions were also initiated at that time. Various other provisions in the *PDI Act* subsequently came into force including as follows:

Table 2: Commencement of PDI Act *provisions*

Commencement Date	Provisions	Provision Subject
1 August 2017	Part 5, Division 2, Subdivision 1	State planning policies
	Part 6, Division 1	Relevant authorities
	Part 6, Divisions 2 and 3	Assessment panels and managers
	Schedule 8	Transitional schemes for panels, managers and accredited professionals
1 February 2019	Sections 11 and 63	Recognition of legislative schemes
1 April 2019	Section 88	Accreditation scheme for accredited professionals
1 July 2019 (Phase One implementation)	Provisions in Part 4, Division 2	Aspects of Online planning services and information Relevant authorities, development assessment scheme and regulatory provisions
	Provisions in Part 5, Division 2, Subdivisions 2, 3 and 4	Aspects of regional plans, Planning and Design Code (applying in Outback Areas only) and design standards
	Part 6, Divisions 4, 5 and 6	Accredited professionals, determination of relevant authority, delegations
	Parts 7 to 12	Development assessment, building activity and use
	Parts 14 to 19	Funds and off-set schemes, disputes, reviews and appeals, civil enforcement
	Clauses in Schedule 6	Repeal and amendments

[18] *PDI Act*, Part 3 (Administration), Division 1 (State Planning Commission).
[19] *PDI Act*, Part 3 (Administration), Division 3 (Joint planning arrangements).
[20] *PDI Act*, Part 3 (Administration), Division 4 (Practice directions and practice guidelines).
[21] *PDI Act*, Part 4 (Community engagement and information sharing), Division 1 (Community engagement) and Division 2 (Online planning services and information).

31 July 2020 (Phase Two implementation)	Clauses in Schedule 8	Some transitional provisions
19 March 2021 (Phase Three implementation)	Schedule 6, Parts 2-4 and 9	Repeal and amendments, including clause 2, repealing the *Development Act 1993*.
	Clauses in Schedule 8	Transitional provisions

Some provisions remain suspended, including subsections 64(4) and (5), which some submitters argued should be repealed, as is discussed below at section *7.8.7 Repeal subsectians 64(4) and (5) of the PDI Act*. Also uncommenced are Section 164 (Initiation of scheme) which allows the Minister to initiate a scheme for the provision of essential infrastructure; some amendment provisions in Schedule 6; and some transitional provisions relating to local heritage, significant trees and other topics in Schedule 8.

Objects of the *PDI Act*

The first prayer of the Petition calls for a review of the *PDI Act* and its impacts. Part 2 of the *PDI Act* sets out the 'Objects, planning principles and general responsibilities' under the Act. The objects of the Act are set out in section 12 as follows:

(1) The primary object of this Act is to support and enhance the State's liveability and prosperity in ways that are ecologically sustainable and meet the needs and expectations, and reflect the diversity, of the State's communities by creating an effective, efficient and enabling planning system, linked with other laws, that—

(a) promotes and facilitates development, and the integrated delivery and management of infrastructure and public spaces and facilities, consistent with planning principles and policies; and

(b) provides a scheme for community participation in relation to the initiation and development of planning policies and strategies.

(2) In association with the object referred to subsection (1), the scheme established by this Act is intended to—

(a) be based on policies, processes and practices that are designed to be simple and easily understood and that provide consistency in interpretation and application; and

(b) enable people who use or interact with the planning system to access planning information, and to undertake processes and transactions, by digital means; and

(c) promote certainty for people and bodies proposing to undertake development while at the same time providing scope for innovation; and

(d) promote high standards for the built environment through an emphasis on design quality in policies, processes and practices, including by providing for policies and principles that support or promote universal design for the benefit of people with differing needs and capabilities; and

(e) promote safe and efficient construction through cost-effective technical requirements that form part of a national scheme of construction rules and product accreditation; and

(f) provide financial mechanisms, incentives and value-capture schemes that support development and that can be used to capitalise on investment opportunities; and

(g) promote cooperation, collaboration and policy integration between and among State government agencies and local government bodies.

13—Promotion of objects

A person or body involved in the administration of this Act must have regard to, and seek to further, the objects established by this section.

Community Engagement

Prayer 3(a) of the Petition suggests that a genuine process of public participation and consultation did not occur as required under the *PDI Act.* Part 4 (Community engagement and information sharing), Division 1 (Community engagement), section 44 (Community Engagement Charter) of the *PDI Act* requires the State Planning Commission (the 'Commission') to establish and maintain a *Community Engagement Charter*[22] (the *'Charter'*). The *Charter* relates to 'public participation with respect to the preparation or amendment of any statutory instrument where compliance with the charter is contemplated by this Act'.[23] The preparation or amendment of the *Charter* must consider the following principles under section 44(3) of the *PDI Act*:

(a) members of the community should have reasonable, timely, meaningful and ongoing opportunities to gain access to information about proposals to introduce or change planning policies and to participate in relevant planning processes;

(b) community engagement should be weighted towards engagement at an early stage and scaled back when dealing with settled or advanced policy;

(c) information about planning issues should be in plain language, readily accessible and in a form that facilitates community participation;

(d) participation methods should seek to foster and encourage constructive dialogue, discussion and debate in relation to the development of relevant policies and strategies;

(e) participation methods should be appropriate having regard to the significance and likely impact of relevant policies and strategies;

(f) insofar as is reasonable, communities should be provided with reasons for decisions associated with the development of planning policy (including how community views have been taken into account).

[22] Commission, *Community Engagement Charter* (April 2018).
[23] See *PDI Act* s44(4)(a)(i).

The Commission published the *Charter* in April 2018 which includes methods to evaluate the engagement process. Consultation under the *Charter* is mandated[24] for the preparation or amendment of 'designated instruments'[25], which include state planning policies, regional plans, the Planning and Design Code or design standards.[26] Section 73 states in part:

(6) A person or entity authorised or approved under a preceding subsection (a *designated entity*), after all of the requirements of those subsections have been satisfied—

(a) may prepare a draft of the relevant proposal; and

(b) must comply with the Community Engagement Charter for the purposes of consultation in relation to the proposal; ...

(7) The designated entity must, after complying with subsection (6), prepare a report in accordance with any practice direction that applies for the purposes of this section (including information about any change to the original proposal that the designated entity considers should be made) and furnish a copy of the report to the Minister.

(8) The designated entity must, after furnishing a report to the Minister under subsection (7), ensure that a copy of the report is published on the SA planning portal in accordance with a practice direction that applies for the purposes of this section.

...

The 'Engagement Reports' published by the Commission on the PlanSA website in support of the three phases of the Code were made in compliance with section 73(7) of the *PDI Act* set out above. After receiving the report from the designated entity under subsection (7) above, the Minister may adopt the designated instrument, make alterations to the designated instrument, or pursue other options set out in subsection (10). The Minister must then publish the Minister's final advice on the SA planning portal under subsection (11).

Planning and Design Code

Part 5 (Statutory Instruments), Division 2 (Planning instruments), Subdivision 3 (Planning and Design Code) of the *PDI Act* sets out that the Commission must establish a *Planning and Design Code*:

65—Establishment of code

(1) There must be a *Planning and Design Code.*

(2) The Commission will be responsible for preparing and maintaining the Planning and Design Code.

66—Key provisions about content of code

(1) The Planning and Design Code must set out a comprehensive set of policies, rules and classifications which may be selected and applied in the various parts of the State through

[24] *PDI Act* s73(6)(b).
[25] *PDI Act* s73(1) and (2) (Preparation and amendment).
[26] *PDI Act* s70 (Interpretation).

> the operation of the Planning and Design Code and the SA planning database for the purposes of development assessment and related matters within the State.
>
> ...

As required under section 73 of the *PDI Act* (set out above) the Commission produced the *Planning and Design Code* (the 'Code') to replace the 72 distinct council Development Plans that existed across the State. The Code has become the single source for assessing development applications in South Australia.[27] The Code is intended to streamline the planning process, making it quick, simple, consistent and clear.

Phase One: The Outback

To support a smooth transition for stakeholders, the Code was implemented over three phases, with each phase activating the new system across three geographical areas of South Australia. The first phase, Phase One (Outback Areas) covered 70% of the State, including the Outback, any land outside of council areas, parts of the coastline and coastal waters. Public consultation was held on a draft version of the Code for Phase One between 5 February 2019 and 29 March 2019.

The Code went live in Phase One: Outback Areas on 1 July 2019. A number of critical provisions in the *PDI Act*, as set out in *Table 2: Commencement Table* above, became operational, and the *Development Act 1993* ceased application in the Phase One areas of South Australia. The State Government manages planning in these areas, and so the changes had little impact on councils and private planning professionals.

Phase Two: Rural Areas

The Commission made amendments to the Phase One: Outback Areas version of the Code in response to feedback and engagement from that consultation, culminating in the next version of the Code (the 'Draft Code').[28] The Draft Code was released on 19 September 2019 and was on public consultation for eight weeks for Phase Two (Rural Areas) from 1 October 2019 until 29 November 2019.[29] Phase Two (Rural Areas) consists of rural councils with small towns and settlements and the Code went live in those areas on 31 July 2020.[30]

Phase Three: Urban Areas

Phase Three (Urban Areas) covers all land in urban councils and councils with regional towns and cities. The Draft Code consultation for Phase Three (Urban Areas) commenced concurrently with the Phase Two (Rural Areas) consultation, on 1 October 2019, and continued for 22 weeks, until 28 February 2020. Phase Three (Urban Areas) was originally scheduled to come into effect in July 2020, but the former Minister for Planning and Local Government postponed the planned commencement until

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[27] Commission, *Phase Three (Urban Areas) Planning and Design Code Summary of Engagement Report* (March 2021) ('*Phase Three Summary of Engagement Report*') 4.

[28] Commission, *Phase Two of the Planning and Design Code (Rurol Areos): What We Hove Heord* (March 2020) ('*Phase Two What We Have Heard Report*') 17.

[29] Ibid 19.

[30] *Phase Three Summory of Engogement Report*, 4.

September 2020. The Attorney-General (the 'Minister') was assigned the Planning and Local Government portfolio on 29 July 2020 and announced on 18 August 2020 that implementation of Phase Three (Urban Areas) of the Code would be further deferred until the first quarter of 2021. Professor Elizabeth Vines OAM of Community Alliance SA reported that the Minister stated on radio on 18 August 2020 that she further delayed implementation because she was 'not going to present the government something that does not work.'[31] Subsequently, on 16 October 2020, the Commission announced that a Revised Draft version of the Code (the 'Revised Draft Code') would be made available for a further six-week period of public consultation from 4 November 2020 to 18 December 2020.[32] The Revised Draft Code was further amended in response to the additional consultation.

On 19 March 2021, the amended version of the Code for Phase Three (Urban Areas) was released and implemented throughout South Australia (referred to herein as the 'Code'). Also, on that day, the *PDI Act* became operational for all urban councils and councils with regional towns and cities and the *Development Act 1993* was repealed. All remaining development plans were revoked and the Code became the single policy source for planning and development assessments throughout the State.

The ePlanning system is available through the PlanSA portal, including the Code, the Property and Planning Atlas (maps) and Development Assessment Processing System.[33]

State Planning Commission & State Commission Assessment Panel

Prayer 2 of the Petition requests that the Parliament undertake an independent review of the governance and operation of the Commission and the State Commission Assessment Panel ('SCAP'). The Commission was established under Part 3 (Administration), Division 1 (State Planning Commission), Subdivision 1 (Establishment and constitution of Commission) of the *PDI Act*.

17—Establishment of Commission

(1) The *State Planning Commission* is established.

(2) The Commission is a body corporate.

(3) The Commission is an instrumentality of the Crown.

(4) The Commission is subject to the general control and direction of the Minister.

(5) However, the Minister may not give a direction where—

(a) the Commission is making or required to make a recommendation; or

(b) the Commission is providing or required to provide advice to the Minister; or

(c) the Commission is required to give effect to an order of a court; or

(d) the Commission has a discretion in relation to the granting of a development authorisation.

[31] Community Alliance SA, Committee Hansard, 22 September 2020, 8.
[32] Planning and Land Use Services, *Planning Ahead* Newsletter (October/November 2020) 1.
[33] *Phase Three Summary of Engagement Report*, 4.

(6) The Commission must, in the performance of its functions, take into account—

(a) a particular government policy; or

(b) a particular principle or matter,

specified by the Minister (subject to any relevant principle of law).

18—Constitution of Commission

(1) Subject to this section, the Commission consists of—

(a) at least 4 and not more than 6 persons appointed by the Governor on the nomination of the Minister; and

(b) a public sector employee (other than the Chief Executive) who is responsible, under a Minister, for assisting in the administration of this Act, designated by the Minister by notice in the Gazette (*ex officio*).

(2) The Minister must, when nominating persons for appointment as members of the Commission, seek to ensure that, as far as is practicable, the members of the Commission collectively have qualifications, knowledge, expertise and experience in the following areas:

(a) economics, commerce or finance;

(b) planning, urban design or architecture;

(c) development or building construction;

(d) the provision of or management of infrastructure or transport systems;

(e) social or environmental policy or science;

(f) local government, public administration or law.

(3) In making a nomination that is relevant to the operation of subsection (2)(f) insofar as it relates to local government, the Minister must take reasonable steps to consult with the LGA [Local Government Association] before the nomination is made.

(4) The Minister will appoint 1 member of the Commission to chair the meetings of the Commission.

(5) The Governor may, on the recommendation of the Minister, appoint a suitable person to be a deputy of an appointed member of the Commission and to act as a member of the Commission during any period of absence of the appointed member.

...

20—Conditions of membership

(1) An appointed member of the Commission is appointed on conditions determined by the Governor on the recommendation of the Minister and for a term, not exceeding 3 years, specified in the instrument of appointment and, at the expiration of a term of appointment, is eligible for reappointment.

...

22—Functions

(1) The Commission has the following functions:

(a) to act as the State's principal planning advisory and development assessment body;

(b) to support the Minister in the administration of this Act and, in so doing, to provide advice, and make recommendations, to the Minister on the administration of this Act and with respect to the effect of any other legislation that is relevant to the operation of this Act;

...

The Commission established SCAP under Part 3 (Administration) Division 1 (State Planning Commission), of the *PDI Act*.

29—Committees

(1) The Commission—

(a) must establish 1 or more committees in connection with its functions and powers as a relevant authority under this Act (to be known as *Commission assessment panels*); and

...

30—Delegations

(3) In addition, the Commission must delegate its functions and powers as a relevant authority with respect to determining whether or not to grant planning consent under this Act to—

(a) a Commission assessment panel established under section 29(1)(a); ...

The Commission has delegated its functions as a relevant authority to SCAP. Details of those functions are set out below under section *8 State Planning Commission and the Stote Commission Assessment Panel*.

The remainder of this Report considers each of the prayers of the Petition in detail.

1 PUBLIC PARTICIPATION

PETITION PRAYER 3:

Urge the Government to defer the further implementation of the Planning and Design Code until: (a) a genuine process of public participation has been undertaken; and (b) a thorough and independent modelling and risk assessment process is undertaken

Petitioners sought in this prayer to defer further implementation of the *Planning and Design Code*. At the time the Petition was tabled in the Legislative Council, Phase One of the Planning and Design Code (Outback Areas) ('Phase One') had already been implemented on 1 July 2019 and Phase Two (Rural Areas) of the Planning and Design Code ('Phase Two') was implemented less than three months after the Committee received this Petition, on 31 July 2020.

The implementation of Phase Three (Urban Areas) of the Planning and Design Code ('Phase Three') was delayed, initially until September 2020 by the Hon Stephan Knoll MP, the Minister for Planning and Local Government (the 'former Minister'). On 26 July 2020, the former Minister resigned from the Ministry, and the Planning portfolio was assigned to the Attorney-General (the 'Minister') on 29 July 2020. After assuming the position, the Minister further delayed the implementation of Phase Three until 19 March 2021.

The submitters welcomed the delayed implementation of Phase Three, although they sought a much longer delay. Even with the delay granted by the Minister, this Committee was not able to inquire into, consider and report on this Petition, in fulfillment of its obligations under section 12(ba) of the *Parliamentary Committees Act 1991,* prior to the *Planning and Design Code* going live across South Australia on 19 March 2021.

This section of the Report looks at the public participation and consultation that occurred in relation to the *Planning and Design Code*, and the next section considers the Petitioners' calls for independent modelling and risk assessment to be undertaken.

The community was consulted on Phase One from 5 February 2019 to 29 March 2019. Consultation on Phase Two and Phase Three commenced on 1 October 2019 and ran for eight weeks for Phase Two and 22 weeks for Phase Three. The version of the *Planning and Design Code* released for this consultation period is referred to in this Report as the 'Draft Code'. The Draft Code is the version that was available to the public at the time the Petition was tabled and the Committee called for submissions. Therefore, the comments and quotations from submitters and witnesses contained in this section of this Report primarily refer to the consultation on the Draft Code that occurred from 1 October 2019 to 28 February 2020.

The State Planning Commission (the 'Commission') made amendments to the Draft Code in response to feedback received during that round of consultation. On 16 October 2020, the Commission announced a further consultation on Phase Three for an additional six weeks, from 4 November 2020 to 18 December 2020.[34] The version of the *Planning and Design Code* released for this period of consultation is referred to as the 'Revised Draft Code' in this Report. News of additional consultation

[34] Planning and Land Use Services, *Planning Ahead* Newsletter (October/November 2020) 1.

was welcomed by submitters, but they complained that the consultation period was too brief to allow sufficient time to review the extensive materials presented and provide meaningful feedback.

On 19 March 2021, a further amended *Planning and Design Code* (the 'Code') went live for Phase Three and throughout South Australia. Although further consultation did occur, and implementation of Phase Three was delayed, the evidence the Committee received suggests that most of the submitters were still not satisfied with the consultation process.

The Petitioners asserted that the public participation and consultation that occurred in relation to the *Planning and Design Code* was not genuine, contrary to the clear obligations under the *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*'). The Committee expects that its examination of the process of public participation and its recommendations will assist in future consultation undertaken by the Commission with respect to future corrections, amendments or additions to the planning instruments, as required under section 73(6)(b) of the *PDI Act*.

1.1 The *Community Engagement Charter*

1.1.1 Principles of the Charter

In preparation for sweeping planning reform in the state of South Australia, the Government asked the Expert Panel on Planning Reform (the 'Expert Panel') to 'explore the best path for planning in this state.'[35] In the resulting report, *The Planning System We Want*, the Expert Panel outlined the importance of community participation in the planning reform process:

> Communities must be engaged meaningfully in decision-making processes, from the earliest stages of strategy and policy-setting. To do this, we propose a 'Charter of Citizen Participation' that will set outcome-focused principles for community participation at all stages of the planning system.[36]

The Expert Panel's recommendation for community participation was incorporated into the *PDI Act* in Part 4 (Community engagement and information sharing), Division 1 (Community engagement), which requires the Commission to establish and maintain a *Community Engagement Charter* (the '*Charter*'). Section 44(3) of the *PDI Act* (as set out above) mandates the principles that must be reflected in the *Charter*.

The Commission published the *Charter* in April 2018, which provides an engagement framework intended to:

- Foster better planning outcomes that take account of the views and aspirations of communities
- Establish trust in the planning process, and
- Improve the understanding by communities of the planning system.[37]

The *Charter* notes the importance of co-operation and respect between participants from the community and the Government proponents of the new system.[38] It sets out the following mandatory

[35] Expert Panel, *The Planning System We Want* (December 2014) 4.
[36] Ibid 12.
[37] Commission, *Community Engagement Charter* (April 2018) 3.
[38] Ibid 8.

principles for engagement, in accordance with section 44(3) of the *PDI Act,* to ensure that a full range of public views is captured and reported:

1. Engagement is genuine: proactively seek community participation and genuinely listen to the range of views and perspectives.
2. Engagement is inclusive and respectful: people can have their say at an early stage so they can influence the process, and their views are acknowledged and considered.
3. Engagement is fit for purpose: engagement is scaled to the significance of the change, including technology-based engagement where appropriate.
4. Engagement is informed and transparent: participants must have access to all relevant information and understand the consequences of the changes in order to participate fully.
5. Engagement processes are reviewed and improved: process is reviewed to ensure principles have been met.[39]

Enforcement of the *Charter* is left to the Commission, which has the power to require an entity to comply with the *Charter*. The Commission 'is not compelled to accept any of the [designated policies, strategies and schemes] until it is satisfied with the engagement process.'[40] Given that the Commission is primarily responsible for the development of the relevant documents, and it conducted the engagement, in conjunction with the Department for Planning, Transport and Infrastructure ('DPTI'), and subsequently the Attorney-General's Department (jointly, the 'Department'), it seems highly unlikely that the Commission would reject its own instruments or criticise its own engagement process.

1.1.2 Engagement at early stages of development

The Expert Panel called for public participation to take place up front, to guide clear directions, policies and rules in order to support community buy-in and meet community expectations.[41] The *PDI Act* incorporated this position, including the principle in section 44(3)(b) that 'community engagement should be weighted towards engagement at an early stage and scaled back when dealing with settled or advanced policy.' The *Charter* reflects this principle by requiring community engagement and input at the development stage of policies, strategies and schemes, not at the final stage of assessment of individual development applications.[42]

The Planning Institute of Australia agreed with this approach:

> Strategic planning is about getting a net benefit from coherent planning and investment decisions. It means setting a strategy with stakeholders and the community for how we want our cities, towns and regions to grow or change.
>
> (Planning Institute of Australia, Submission 96, 2)

However, this notion that the community should participate at the policy development stage and not during the development approval process was rejected by most submitters:

> Central to our concerns regarding community rights is that the Act, in our view, embeds the ill-conceived notion that public participation should be most focused on policy development, not in the

[39] Ibid 7-9.
[40] Ibid 4.
[41] Expert Panel, *The Planning System We Want* (December 2014) 38.
[42] *Charter* 4-5.

assessment phase. The *Community Engogement Chorter* reflects this change. However, it is simply the case that most of the community do not have an interest in or understanding of policy development and only show interest when a development is proposed in their neighbourhood. We think that this will bring about less transparency and accountability in the system in the long term.

(Environmental Defenders Office, Committee Hansard, 1 December 2020, 77)

The Act states that the community must be consulted in the early stages of changes to the Planning and development system when policy is being developed. This is supposed to give us better ability to influence the system but we have found it does the opposite. We believe that this gives developers and planners significant advantage as many matters such as for example Technical Numerical Variations require planning expertise to understand and the community in general does not have this expertise. So why are we being asked to comment on areas where we have no expertise? We are better able to comment on the impact of actual developments in our streets and communities.

(Prospect Residents Association Inc, Submission 59, 4)

Regardless of these objections, the *Charter* embraces the position of the Expert Panel that consultation should occur in the early, planning stages of policy development. However, if that is the stage at which consultation is to be concentrated, and not at the development approval stage, it is even more imperative that the consultation meets the criteria set out in the *Charter* to ensure that the community has a genuine opportunity to impact that strategy and policy development.

1.2 Community consultation process

Consultation occurred in relation to different planning documents, policies and discussion papers as directed by the *Charter*. Consultation also took place on the *Planning and Design Code* during its development. The following table sets out the consultation that occurred on various phases of the *Planning and Design Code*:[43]

Table 3: Consultation on the Planning and Design Code

Consultation	Document Version	Method
5 February 2019 – 29 March 2019 (8 weeks)	Phase One of the Planning and Design Code (Land not Within a Council Area) (the Outback Code)	Collaboration with industry practitioners (Code Working Group); YourSAy survey; livestream events; community drop-in sessions; tours of Outback communities; promotional activities
1 October 2019 – 29 November 2019 (8 weeks)	Phase Two (Rural Areas) of the draft Planning and Design Code (the 'Draft Code')	Consultation events held with Phase Two councils, industry groups and community groups; 1800 Hotline; email accounts and the YourSAy website; social media; SA Planning Portal

[43] Commission, *Phase Three (Urban Areas) Planning and Design Code Amendment Engagement Report* (March 2021) (*'Phase Three Engagement Repart'*) Chapter 1, 19, 27.

1 October 2019 – 28 February 2020 (22 weeks)	Draft Phase Three (Urban Areas) Planning and Design Code: covering urban areas and councils with regional towns and cities in SA (the 'Draft Code')	Consultation page made available on SA Planning Portal and YourSAy website; print advertisements; engagement program of council and community information sessions; direct mail to councils, industry groups and community organisations; social media; explanatory videos
4 November 2020 – 18 December 2020 (6 weeks)	Revised draft Phase Three (Urban Areas) Planning and Design Code: covering urban areas and councils with regional towns and cities in SA (the 'Revised Draft Code')	All the above for the previous consultation; available electronically on the PlanSA portal with an online Code feedback tool; allowed the public to use the Code in its online and electronic form; allowed the public to see how their feedback in previous consultations was proposed to be incorporated

Mr Michael Lennon, then Chair of the Commission, described in evidence before the Committee the consultation process conducted on these reforms as 'one of the most exhaustive public consultations in South Australian planning history ...'[44] Mr Lennon described the process as follows:

> For the past three years, the Commission has sought community and stakeholder voices to express their views about the Planning and Design Code both in its early development stages via a number of discussion papers and policy workshops and more recently by releasing drafts for each phase of the Code—Phase One in the outback areas, Phase Two in rural areas and Phase Three in urban areas—for broad public comment.
>
> In total, the Commission conducted nearly 10 months of public consultation, which culminated in more than 2600 submissions, 320 engagement events, plus 12 tours to rural and outback areas across the state. All of the feedback provided was considered, documented and, where appropriate, changes were made to the Code. This has been both a thorough and honestly a genuine effort by the Commission to engage widely with the South Australian community about our new planning system.
>
> I struggle to see what more we could have done to encourage public participation in the process.
>
> (State Planning Commission, Committee Hansard, 16 March 2021, 109)

Nonetheless, the evidence received by the Committee indicated a dissatisfaction with the community engagement process. The submissions described the consultation process as confusing, inadequate, frustrating and futile.[45] Submissions commented that the *Charter* requirements for consultation and community engagement were not adhered to, that the consultation process was rushed to meet implementation deadlines and that the community participation was not genuine.

Mr Mario Dreosti, an architect with Brown Falconer, identified two key difficulties with the consultation:

> One is that a lot of the early phase consultation was on very high-level motherhood statements that you really couldn't disagree with or couldn't challenge, then the next round of consultation was often

[44] Commission, Committee Hansard, 16 March 2021, 109.

[45] See for example National Trust SA, Submission 92, 32; Protect Our Heritage Alliance, Submission 19, 1.

> on a very resolved piece of work ... I think the other key thing ... is that a number of things were asked to be commented on when we didn't have the other frameworks in place that we needed in order to make that comment.
>
> (On behalf of Australian Institute of Architects, Committee Hansard, 13 October 2020, 22.

Some submitters claimed that, due to the state of the Draft Code and the inadequate consultation process, there should have been a further consultation on the complete final Code prior to Phase Three being implemented. For example:

> Before Phase 3 implementation is considered there is a need for an evaluation of Phase two with the results being published and used to refine Phase 3. This must be followed by a final full public consultation process so that the various parties can actually comment on a completed document that is not full of errors and omissions.
>
> (Prospect Residents Association Inc., Submission 59, 11)

> The community's right to understand how they may be engaged with the planning system during assessment has not been made clear, and this is one of many reasons consultation on a complete Code with a fit for purpose electronic platform should be undertaken prior to finalising and implementing the new planning system for phase 3.
>
> (City of West Torrens, Submission 51, 8)

The Draft Code was amended in response to consultation and released as the Revised Draft Code. As discussed below in section *1.4 Additional consultation from 4 November to 18 December 2020*, the Minister then announced a further postponement of the implementation of Phase Three of the Code and an additional six-week consultation on the Revised Draft Code.

The majority of the submitters and witnesses the Committee heard complained that the consultation process on the Draft Code was not adequate. Many of them argued that the five mandatory principles for engagement from the *Charter*, set out above in this Report at *1.1.1 Principles of the Community Engagement Charter*, were not followed during the consultation process. Each of those principles is examined below.

1.2.1 Engagement is genuine

As noted above, the *PDI Act* directs the community consultation to be focused on the policy development phase, at the beginning of the process of reform. As a result, there is less consultation at the final stages, where development applications are being assessed. In keeping with this approach, there were fewer development pathways under the Draft Code that required public notification. Genuine consultation during the development of the *Planning and Design Code* is even more important where application assessments are being removed from community scrutiny, as noted by Dr Jennifer Bonham:

> The lack of genuine consultation on the Code is especially important given the assessment pathways have been designed to reduce the number and type of developments that are publicly notified.
>
> (Dr Jennifer Bonham, Submission 66, 1)

Announce and defend, not consult

The Committee received evidence that the participants in the consultation process experienced the Commission and the Department presenting rather than discussing, debating or consulting on what would be in the Code.[46] Submitters made the following comments:

> In terms of consultation, the prevailing strategy to date in the delivery of the Code has been to 'announce and defend'. What was lacking in any awareness raising exercise was the opportunity for people to hear seasoned professionals (urban planners, architects etc) present alternative points of view to the one announced (but not negotiated) by government bodies.
>
> (Norwood Residents Association Inc, Submission 78, 5)

> In working to replace council Development Plans with a 'simplified' system of planning guidelines, the State Planning Commission has failed to work collaboratively with the community and councils. We have seen an 'announce and defend' process.
>
> (Evonne Moore, Submission 60, 1)

> Some of the feedback that we have received has been very arms-length: 'Look at the state Planning Portal.' We've got a lot of 'What have we heard?' In fact, jokingly we have said at times that it should be a 'What have we chosen to hear?' response. So the feedback has been very filtered and very much directed at, again, supporting these what would appear to be quite predetermined outcomes.
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2020, 20)

The submissions received by the Committee indicated that the community engaged in the consultation process did not feel that they were being consulted, but simply advised about what was occurring. The same sentiment was experienced by those attending in-person consultation events.

In-person consultation events

The Commission advised that a total of 320 'engagement events' were held during the consultation periods.[47] These events were hosted by the Commission and the Department and consisted of community information sessions, community events on specific Code topics and industry events to educate industry professionals.[48] Some submissions received by the Committee suggested that the in-person consultation events presented to the public and planning groups were very difficult to follow. The Committee heard evidence that attendees at these events also experienced the 'announce and defend' style of consultation. The sessions gave attendees the impression of being advised or spoken to about what had already been decided, rather than a consultative discussion whereby ideas were exchanged. The Committee heard the following:

> The consultative process to date has not been constructive or collaborative. DPTI and Public meetings with the SPC [Commission] about the Code mostly consisted of informing participants what was proposed – a fait accompli. There was little opportunity to ask questions and consultation was minimal.
>
> (History Council of SA, Submission 55, 3)

[46] For example, Community Alliance SA, Submission S3, 3 and Committee Hansard, 22 September 2020, 10; National Trust SA, Committee Hansard, 26 November 2020, 60.

[47] Commission, Committee Hansard, 16 March 2021, 109.

[48] Commission, *Phase Three of the Planning and Design Code (Urban Areas): What We Have Heard Report*, (June 2020) 9.

> Public information sessions have been few and the overriding approach has been about announcing/defending decisions, not consultation.
>
> (Christine Francis, Submission 58, 2)

> Public meetings have been held to PRESENT (not debate) information, and when concerns have been made by the community generally or individuals in particular, they have been DISMISSED and IGNORED. This is not in keeping with processes one expects in a democracy.
>
> (Léonie Ebert, Submission 68, 2)

> [Consultation was provided in the form of] ... lectures, structured and tightly controlled public forums and confusing 'briefings,' which were often inscrutable to participants and defied explanation by facilitators.
>
> (Protect Our Heritage Alliance, Submission 19, 1)

The Committee heard that efforts to notify members of the community about the events were not genuine and did not give sufficient notice. National Trust SA claimed that less than one week's notice was provided for 30 per cent of community information sessions; two were advertised the same day that they were held; the Plan SA website displayed the wrong time and address for some sessions; promotional postcards were not distributed as was planned in the Community Engagement Plan; Facebook and LinkedIn advertisements were posted after community sessions had concluded; and the session times were unsuitable in that they clashed with the harvest period in rural districts and were during normal working hours, making it difficult for many to attend.[49] There was very low attendance in some areas which could have been mistaken for agreement, when in fact, people were unaware or simply overwhelmed by the process.[50] National Trust SA stated:

> The Department and the Commission's lack of genuine effort to seek the participation of affected communities is not in accordance with the requirements of the Charter and resulted in poor levels of engagement, further disenfranchising South Australians.
>
> (National Trust SA, Submission 92, 31)

Dr Iris Iwanicki complained that the information provided at these sessions was not sufficiently clear or detailed to constitute proper consultation:

> The public and other workshop consultation presentations, generally about an hour or two were necessarily introductory to systemic changes rather than specific 'how this will affect you and your area'. Bewildered members of the public who did attend were unable to be advised specifically regarding questions about zoning details.
>
> (Dr Iris Iwanicki, Submission 37, 4)

Professor Warren Jones AO of Protect Our Heritage Alliance described the consultation as 'farcical'[51] and attempts to provide meaningful feedback on the draft Code as 'frustrating and futile'.[52] Professor Jones acknowledged that the representatives from the Department were hardworking and well-

[49] National Trust SA, Submission 92, 32.
[50] Ibid.
[51] Protect our Heritage Alliance, Committee Hansard, 22 September 2020, 15.
[52] Protect our Heritage Alliance, Submission 19, 1.

meaning and attempted to explain the Code and the ePlanning system, but they were only partially effective.[53] Professor Jones continued:

> I would have to say that, by and large, the oral consultations were not particularly helpful and the important points of the submissions that were made variously to the two phases were, by and large, ignored.'
>
> (Protect our Heritage Alliance, Committee Hansard, 22 September 2020, 15)

National Trust SA noted some of the feedback given to the Commission and the Department after the in-person consultations:

> In relation to Phase 2 even amongst those most involved in the community engagement process through attendance at community information sessions and the making of written submissions – at its conclusion 59% disagreed with the notion that they had had a genuine and adequate opportunity to have their say on the Code. Rather than 'genuine' the engagement process was described as 'insulting', 'completely flawed' and 'tokenistic'. ... Such feelings of disenfranchisement are completely at odds with the performance outcomes of the Charter and are an unequivocal indication of how far the community engagement process has fallen foul of the principles of the Charter.
>
> (National Trust SA, Submission 92, 33)

Duration of consultation period

In addition to claims the engagement process was ingenuine, many submitters also maintained that the time allotted for consultation was insufficient, particularly given the complexity and volume of materials that were made available only shortly before consultation commenced, and the way in which those materials were presented. Following are some examples of those comments:

> [T]he Planning and Design Code, which is the primary mechanism for actually working out whether something is assessed and approved or not, came out as a 3000-page, unformatted document which we literally had to wade through, like walking through wet cement, in the months leading up to Christmas. That was the only chance we got to review that document. As I say, we still haven't had a chance to properly have the ePlanning system presented to us. Those are the two key things that we need to make this system work, and they have been left right to the last minute.
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2020, 23)

> Phase 2 communities had just 8 weeks over October and November 2019 (some of which was during harvest time, bushfires and drought) to provide feedback on a complex policy document—much less time than the 20 weeks given to phase 3 communities. Currently the same amount of time is allocated to straightforward amendments to development plans. Communities were also given just 4 weeks to comment on draft Historic Area Statements (although some building owners had just 3 weeks notice).
>
> (Environmental Defenders Office, Submission 94, 15)

The short consultation caused particular difficulties for local government councils:

> The LGA [Local Government Association] and many Phase 2 councils expressed concern about the insufficient period of time provided to consider the substantial and complex draft Code and prepare a comprehensive, robust and professional response by the consultation early closing date of 29 November (a period of only 8 weeks).

[53] Protect our Heritage Alliance, Committee Hansard, 22 September 2020, 15.

(Local Government Association, Submission 57, Appendix 2, 2)

> Council Administration has been asked on many occasions to act at a practitioner level, without sufficient time provided to engage with its elected body. When DPTI representatives were reminded of how Local Government operates (i.e. In many cases decision-making is not delegated from Elected Members to the Administration—and therefore issues must be reported to council for an approved position/decision,) Senior DPTI staff stated that if council practitioners were unable to participate without sharing the information with their Elected representatives, then the only option available was to withdraw from the conversation. This would have put the Administration at risk of not being informed of upcoming policy changes, nor able to appropriately advise the elected Council, or offer advice and insights into any local considerations to be accounted for.

(City of West Torrens, Submission 51, 9)

The short duration of the consultation period mirrored the short period of time that Phase 2 communities had to prepare for the implementation of the Draft Code in rural areas:

> An updated draft Code was released publicly on the 30 June 2020. Phase 2 communities had just 4 weeks to familiarise themselves with this and importantly the 'mechanics' of the new ePlanning system prior to implementation on the 31 July.

(Environmental Defenders Office, Submission 94, 15)

> It is clear the timetable was ambitious and practically unachievable given the issues with internet access and problems with the Planning Portal. Technically the process has had significant problems.

(Dr Iris Iwanicki, Submission 37, 4)

As noted above, the Minister released the Revised Draft Code and announced additional consultation over six weeks between 4 November 2020 and 18 December 2020. The Revised Draft Code had grown to approximately 8000 pages. Melissa Ballantyne of the Environmental Defenders Office indicated that this consultation was also too short, and gave the following evidence before the Committee during that consultation process:

> [A]ccess to this revised document is difficult. There are three ways to access the document, including a PDF version which is incomplete. We, and many of our clients, are struggling with the short deadline and online tools to give meaningful feedback. The process is further compromised by the upheaval caused by the pandemic. There have been cancellations of community meetings, and the community meetings that are to be held are short and few in number. Given these issues, it is our view that the consultation period of just six weeks should be extended and full implementation of the Code should not be rushed until there has been a careful consideration of all feedback from the community and appropriate changes are made.

(Environmental Defenders Office, Committee Hansard, 1 December 2020, 78)

Ms Ballantyne suggested that further consultation should run for at least 12 weeks, including further public meetings, in order to be genuine and meaningful.[54]

[54] Environmental Defenders Office, Committee Hansard, 1 December 2020, 78.

1.2.2 Engagement is inclusive and respectful

As well as being genuine, the principles of the *Charter* direct that community engagement must be inclusive and respectful. The Committee heard evidence that participants in the consultation process did not feel that this principle was achieved.

Inclusive

Several submitters complained that the materials provided for consultation were so complex, extensive and disorganised so as to be unapproachable and incomprehensible for the majority of individuals, community groups or residential associations without the expertise, time or resources to properly examine the materials and provide meaningful feedback. The Committee also heard that the Commission and the Department were more accessible to property developers and their professional organisations than individuals or bodies representing the community, heritage or the environment. The City of Adelaide proposed that to meet the inclusivity requirements of the *Charter*, every South Australian should be 'notified of the changes proposed to their property ...'[55] Other submitters noted:

> This inaccessibility to non-experts excluded and disenfranchised the community from the process of policy development, a direct and major breach of the Community Engagement Charter created under the Act.
>
> (National Trust SA, Submission 92, 29)

> The State Planning Commission has and continues to treat the community and anyone that seeks change or opposes all or part of the planning reforms with contempt. It appears that it only listens to developers and in particular to the Urban Development Institute of Australia (UDIA). It has failed to engage in a process of true consultation despite the Community Consultation Charter enshrined in the PDI Act.
>
> (Kensington Residents Association, Submission 28, 4)

Mr Pat Gerace, on behalf of the Urban Development Institute of Australia (the 'UDIA'), indicated that it was adequately consulted, its feedback considered by the Commission and the Department, and it was invited to provide regular input throughout the reforms:

> We have participated with the department and the government all the way through to the point where we meet even weekly with departmental officials to talk through some of the challenges that exist.
>
> (UDIA, Committee Hansard, 16 February 2021, 84)

The UDIA expressed the view that it was appropriate for industry bodies to have more input in the consultation process:

> I think it's also important to recognise that the Urban Development Institute, like lots of others, is an industry body that has members whose livelihoods involve being responsible for the supply of housing to Adelaide. It is mostly about members' day-to-day jobs and livelihoods that we are talking about. I don't think the government should be apologising for talking to people who put their livelihoods on the line to provide housing because there are some who don't get their way. I think that the former government or this government has got that balance right.
>
> (UDIA, Committee Hansard, 16 February 2021, 86)

[55] City of Adelaide, Submission 64, 18.

Mr Colin Shearing on behalf of SA Independent Retailers ('SAIR') noted that they have driven their own consultation with the Department and the Commission and that he felt that the feedback made by SAIR was being taken seriously.[56] However, Mr Shearing stated 'I have to say that we are not absolutely reassured that what we are saying is being acted upon. It has been listened to, but it's not being acted upon.'[57]

The Professional Institute of Architects praised the Commission for its efforts to reach out specifically to councils, yet still found that councils were experiencing frustration:

> We commend PLUS [Planning and Land Use Services] for appointing Council Liaison Officers (CLOs) to liaise directly with local government in relation to the Code transition, which includes communicating policy changes with staff.
>
> Unfortunately, the common feedback we receive from local government planning departments is that this process has not worked especially well due to the extensive staff turnover at PLUS. It is our understanding that this turnover of CLOs has caused significant frustration in some Councils due to the inconsistency of communication regarding the strategic basis for policy changes or loss of local policy content.
>
> (Planning Institute of Australia, Responses to Questions on Notice, 2 February 2021, 5)

The UDIA expressed the opinion that councils and individuals were adequately represented by the Local Government Association, which was also involved in consultation on the reforms throughout the process:

> If we understand, all the private citizens have had an opportunity, through all of their local government, to talk. All the local government sector has had an opportunity to raise issues through the Local Government Association. The State Planning Commission has travelled the state, listening to people. There is a difference between not getting what you want versus not being consulted, and I think that's important to recognise—we'll call that out.
>
> I think the other thing, too, is that those community concerns have been able to be funnelled through the Local Government Association, which sits at all the same forums that we do. So there is an opportunity for those people. It is a representative level of government that is there, designed to be closest to the community, as they say.
>
> (UDIA, Committee Hansard, 16 February 2021, 86)

While the UDIA was satisfied with its inclusion in the consultation process, some individuals expressed concern that the materials were not accessible for the general public who did not have relevant expertise. This is discussed further in the next section *1.2.3 Engagement is fit for purpose*.

Respectful

The Committee heard that some individuals, particularly those who attended in-person consultation events, did not feel that participants were treated with respect in those forums. Professor Elizabeth Vines OAM of Community Alliance SA advised the Committee that members of the community and council officers have been 'dismissed and ignored' at consultation sessions.[58] In its submission to the Committee, Community Alliance SA described a radio interview in which Alan Holmes of the Commission publicly insulted Professor Vines OAM, accusing her of 'scare mongering' and not telling

[56] SAIR, Committee Hansard, 13 October 2020, 27.
[57] Ibid.
[58] Community Alliance SA, Committee Hansard, 22 September 2020, 8.

the truth, when he disagreed with her opinion on heritage matters.[59] Professor Vines stated that in her 40 years of experience as an architect in the heritage field, 'I have never experienced the disdain shown to those experienced professionals like me and other members of our organisation, where we have contributed suggestions or opinions.'[60]

Other submissions also described community engagement that failed to meet the *Charter* principle of being respectful:

> At a DPTI run session I attended at the Payneham Library, the mood became quite volatile when presenters shut down attempts to challenge/debate issues from the floor and threatened agitators with expulsions.
>
> (Christine Francis, Submission 58, 2)

> At various meetings organised by either politicians, the Community Alliance or DPTI, members of the Commission have been patronising and rude to participants.
>
> (Kensington Residents Association, Submission 28, 4)

These comments suggest that many participants did not feel that their views were acknowledged and considered, as required under the second principle in the *Charter*.

1.2.3 Engagement is fit for purpose

This *Charter* principle directs that the scale of the consultation meets the scale of the change. It also suggests that the method of engagement needs to function to permit the community to garner a clear idea of the proposed system.

The Draft Code was open for consultation for Phase Two from 1 October 2019 to 29 November 2019 (8 weeks), and simultaneously for Phase Three, from 1 October 2019 to 28 February 2020 (22 weeks). Submitters advised that at the time of these consultations, the ePlanning portal was not yet functional and as a result the public could not adequately assess its performance. As the Draft Code was not able to be delivered electronically for consultation, as it was designed to be, it was instead provided as a 3000-page pdf document.[61]

The Committee received submissions indicating that the Draft Code was difficult to navigate and riddled with errors.[62] It was impossible for those reviewing the Code to determine what was an error and what was an actual policy change, and therefore impossible to provide any comprehensive feedback on policy issues.[63] The Committee heard that the lack of substance and clarity of policy positions during the consultation was contradictory to the aim set out by the Expert Panel, and enshrined in the *Charter*, that substantive consultation is to take place at the policy stage.

Errors in the Draft Code

The Committee heard that some of the materials for the consultation on the Draft Code were released late or were inadequate, limiting the public's ability to review the materials prior to community events

[59] Community Alliance SA, Submission 53, 3 and Appendix 7.
[60] Community Alliance SA, Committee Hansard, 22 September 2020, 8.
[61] City of Norwood Payneham & St Peters, Submission 77, 10.
[62] City of Marion, Submission 21, 1.
[63] National Trust SA, Submission 92, 29.

or the deadline for submissions.[64] The materials provided were extensive, making meaningful consultation very difficult for lay members of the community as well as professionals. Submissions suggested that the Draft Code on consultation contained so many errors that it was difficult to decipher what was error and what was intended policy, as is reported in the following comments:

> The validity of community consultation was always going to be compromised by the state of the draft Code. At the time of its premature release in October 2019, it was incomplete, inaccurate and confusing. It was, and still is, inaccessible in both hard copy and electronic versions. It is still substantially flawed, has remained difficult to differentiate between policy statements and mistakes.
>
> (Protect our Heritage Alliance, Submission 19, 1)

> The draft Code was not ready to be released as there were many policy gaps and errors which made it very difficult to know what was a policy position and what was an error/omission/ inconsistency. A collation of some of the acknowledged errors and responses was released on 20 December 2019. This led to redrafting of policy, however the redrafted parts were not subject to any further public consultation.
>
> (Environmental Defenders Office, Submission 94, 15)

> The only version of the Code sighted, even to this day some six months later [September 2020], is the one full of acknowledged errors and/or major changes to our Development Plan. As a result we still cannot ascertain what are errors and what are proposed changes, so how can this be considered proper consultation.
>
> (Stirling District Residents Association Inc, Submission 31)

> [The Draft Code] left us alarmed and confused: alarmed at the apparent loss of detailed, clear measures contained in the existing Development Plan, but confused because the many obvious mistakes left us wondering what changes were deliberate and what were not.
>
> (Norwood Residents Association Inc, Submission 78, 4)

> The ability of communities to even wade through the proposed code, let alone understand it, has been stretched to breaking point ... [T]he complexity of the document, coupled with the high numbers of error and omissions, made it impossible to understand with any degree of certainty what changes were being proposed and how these would affect us.
>
> (Joanna Wells, Submission 29, 2)

For some illustrative examples of specific problems faced by members of the public in trying to decipher the draft Code, see the submission of Dr Iris Iwanicki.[65]

Volume of materials

As noted above, the Committee heard that the extensive volume of materials that were provided for consultation made it difficult for members of the public to meaningfully review and comprehend the impact of the Draft Code provisions. The following comments were included in submissions received by the Committee:

[64] National Trust SA, Committee Hansard, 26 November 2020, 60.
[65] Dr Iris Iwanicki, Submission 37, 9-12.

> [T]he consultation process ... ought to have been scalable to not be so overwhelming huge [sic] as to be beyond the reasonable time capacity of individuals or communities to become informed and engaged in understanding or grappling with the plethora of changes and propositions.
>
> (The North Adelaide Society Inc, Submission 46, 1)

> The result of over four years of work is that we have a monstrous user-unfriendly on-line document of over 3000 pages replacing individual council Development Plans. Even developers are aghast at how hard it is to navigate the system.
>
> (Evonne Moore, Submission 60, 1)

> I had to sift through the 3000 page long new Code document and find out what parts of it were applicable for [sic] to where I live. Compare this to the current City of Mitcham's Development Plan where I would only have to scroll through 8 pages that applied to my area. For council planners tasked with responding to the new Code, they had to work through the 3000-page document as well compared to the typical council development plan of around 400 pages. The Code had failed on its primary objective.
>
> (Tom Morrison, Submission 48, 1)

Even the UDIA, an industry association that was involved with the planning reforms from the early stages of development, found the materials overwhelming:

> We had a lot of consultation. I guess we were calling for more detail early, and then what happened is we got a lot of detail really kind of lumped on us and we, even as an industry association, were struggling to navigate through this new planning system and hundreds of pages and what it all meant.
>
> (UDIA, Committee Hansard, 16 February 2021, 86)

The Committee heard that as well as being an unmanageable volume of materials that was replete with errors, the format in which the Draft Code was provided also made it difficult for those being consulted to access the materials.

Format of the ePlanning system

The primary premise of the new system was that it would be digital and available to everyone online. However, when produced for consultation, the Draft Code and the ePlanning portal had not yet been integrated, requiring the public to navigate a paper version. The following submissions explain the difficulty this created, even for planning and development professionals and councils:

> The Draft Code was designed for an ePlanning format however was not ready for viewing in this format when public consultation was undertaken resulting in consultation on a document that was arguably not 'fit for purpose'.
>
> (City of Adelaide, Submission 64, 18)

> Many concerns have been raised that the ePlanning system was not integrated with the Code policy that was made available to the public and the industry more broadly. Many of our members [Planning Institute Australia] have found it difficult navigating the 3000 page document due to the format in which it was delivered.
>
> (Planning Institute of Australia, Submission 97, 3)

> The ePlanning Portal was late in development and is difficult to navigate, making the draft Code inaccessible to many, including planning professionals and architects.

(History Council of SA, Submission 55, 2)

> The draft Code comprised 1833 pages of unclear and inconsistent policy in a paper format which was not indexed and therefore not easily searchable. In addition the community was provided with a number of complex accompanying explanatory documents.

(Environmental Defenders Office, Submission 94, 15)

> The ePlanning system was also grossly inadequate during the consultation phase and people who tried to access it found it full of errors and to tell the user almost nothing about where they lived.

(Prospect Residents Association Inc, Submission 59, 3)

> The Draft Code Map viewer that was also released with the consultation had many errors, relating to ambiguities with technical and numerical variations. This created confusion.

(City of Adelaide, Submission 64, 18)

The Commission provided evidence as to why the Draft Code presented for consultation was not fit for purpose. Mr Michael Lennon, then Chair of the Commission, acknowledged in his evidence before the Committee that the first draft of the Code was perhaps released too early.

> I will make a couple of criticisms of ourselves. One of the things we did in retrospect that did not help, was that we released the first Code structure quite early in the process, when it was rudimentary. Given that no-one had done this before, in good faith we were trying to respond to demands for what this would look like. Of course, when people saw it it was still in a formative stage, it lacked a lot of detail, and that produced its own response. However, genuinely what we were trying to do was to show people how you could consolidate this monster into something that was accessible.
>
> The second thing was that we were also asking people to imagine what a digital system would look like by giving them a piece of paper, which is quite a difficult thing to do. So there was a frustration around that, where you would say, 'It will do this,' but you're reading paper to do it.

(Commission, Committee Hansard, 16 March 2021, 117)

The Committee acknowledges that the Commission acted in good faith in releasing the Draft Code to the public for consultation. However, the result is that the Draft Code provided for consultation was difficult to understand or navigate for most stakeholders, making it near impossible for many to provide productive feedback. The Committee understands this was likely done as a result of working within an untenable timeline, however the Committee feels that in doing so, the Commission risked compromising the engagement process.

1.2.4 Engagement is informed and transparent

The evidence received by the Committee indicated that the state of the Draft Code and the ePlanning portal, when presented for consultation from 1 October 2019 to 28 February 2020, made it difficult for councils and other stakeholders to be informed of the policy intent or practical outcomes of the planning reforms.

National Trust SA noted that the rural 'councils are least well-resourced to perform the necessary review and community consultation on the draft Code materials and were given just eight weeks to

respond to highly inadequate and deeply flawed materials.'[66] Further, some of the important policy information, such as the Historic Area Statements, was not provided to councils until half way through the Phase Two consultation period, leaving rural stakeholders very little time to review, assess and respond to policy issues.[67] This posed a particular difficulty for rural communities to be able to provide meaningful feedback or to prepare for the implementation of Phase Two on 31 July 2020. The document that went live for Phase Two, was only released publicly one month earlier, on 30 June 2020.

In-person consultation events

Submitters complained that the presenters at the public consultation sessions were unable to answer questions posed by members of the public:

> What we found was that they were held when the staff presenting them could not answer most of the questions raised by the public so the consultations were being held on a reform that was still under construction and not ready for public consultation. Many of the questions had to be taken back to DPTI. Although DPTI had an information line there are people who have never had their calls returned.
>
> (Prospect Residents Association Inc, Submission 59, 3)

> I have attended some of the public meetings offered by the State, and state government and State Planning Commission representatives have not been able even to explain the changes relevant to the areas affected, and the hard resources available (visual presentations etc) have been mostly illegible. The technology required to utilise the new proposed system was not functioning adequately for it to be demonstrated to the public. In addition, there were so many errors and inconsistencies in the substance of the draft Code being presented that people were unable to understand what was being proposed and therefore were not able to make intelligent comments.
>
> (Sue Giles, Submission 80, 1)

Like-for-like

Several submitters complained that the advice and information provided by the Department and the Commission was inaccurate or erroneous. In this regard, one of the most common complaints was that the Commission had stated that the new planning system would be 'like-for-like' with the old system; the planning policy from the development plans in the previous system would be copied over into the new ePlanning platform.

The Kensington Residents Association quoted from an e-newsletter from the State Planning Commission which stated that 'this first generation of the Planning and Design Code is largely about transitioning and consolidating existing contemporary policy from individual council development plans into the Code.'[68] Professor Elizabeth Vines OAM confirmed this was the view held by Community Alliance SA:

> CASA [Community Alliance SA] has always been of the understanding that there would be like-for-like policy transition from existing development plans, with an emphasis on a different delivery mechanism—that is, on the ePlanning portal.
>
> (Community Alliance SA, Committee Hansard, 22 September 2020, 7-8).

[66] National Trust SA, Submission 92, 30.

[67] Ibid 31.

[68] Kensington Residents Association, Submission 28, 2, quoting from DPTI's *Planning Ahead* Newsletter, Edition 27 (November 2019). See also Dr Iris Iwanicki, Submission 37, 6.

Submissions expressed concern that despite claims by the Commission that the new planning system would be like-for-like with the old system, the result was something quite different. The Draft Code lacked much of the policy detail that existed in the previous planning system and significant zoning infill and policy changes were made in the Draft Code,[69] as noted by the following submitters:

> The proposed Planning and Design Code represents revolution with nuclear impact rather than an evolution with regard to local environs and character. It has occurred in such haste and complexity as to have the effect of imposition rather than credible consultation.
>
> (The North Adelaide Society, Submission 46, 2)

> In actual fact there have been significant changes to existing policies, generally resulting in their weakening and the introduction of entirely new policies which have questionable value.
>
> (Kevin O'Leary, Submission 49, 6)

This evidence demonstrates that submitters and witnesses were not of the opinion that the consultation was informed or transparent.

Consultation on Heritage

The complaints around the lack of information and transparency relating to the changes to the planning policies was most pronounced in the area of heritage. Evidence was presented to the Committee suggesting the heritage policy paper that should have commenced the consultation discussion was only released one week prior to the Draft Code, and policy position papers on heritage were not consulted upon.[70] Most significantly, the Committee received complaints that the community was not informed in advance that Contributory Items (discussed further below at *7.6 Contributory Items / Representative Buildings*) were being excluded from the Draft Code. National Trust SA described the consultation on heritage:

> [T]here has been an absolute failure to properly consult on Code policies impacting heritage protection. There has been no policy debate about the changes to definitions, protections and interpretation emerging for the first time in the draft Code, as the key policy document that was meant to initiate that debate – the *People and Neighbourhoods* Discussion Paper – was released just one week ahead of the draft amendment, precluding any community consultation or input on the policy informing the Code provisions. In May 2019 the Commission did release position statements on heritage protection but these were expressly not subject to community consultation.
>
> (National Trust SA, Submission 92, 11-2)

As part of the consultation, the Commission sent out letters to homeowners of historic properties to advise that 'there is no fundamental change to the planning policy intent for historic areas' without any more detail, and with no mention of contributory items.[71] Submitters complained:

> The letter referred recipients to a website (without even providing a web address) which in our experience had no clear information or explanation of the changes. The National Trust itself received five of these letters, none of which even identified the property address affected. This type of incoherent and evasive communication which characterised the consultation process during the development of the Code.

[69] Dr Iris Iwanicki, Submission 37, 5-6.
[70] National Trust SA, Submission 92, 11-2
[71] Ibid 17.

(National Trust SA, Submission 92, 17; Attachment A to the submission is a sample of the letter)

> In the heritage policy space there was no prior consultation process due to the delay with the *People and Neighbourhoods* discussion paper. Instead, in May 2019 the State Planning Commission released 'policy position papers' (not discussion papers accompanied by a period of public consultation). The public was given no opportunity at that time to respond to key changes to heritage policy including the proposal not to transition Contributory Items into the Code.
>
> (Environmental Defenders Office, Submission 94, 16)

> Coupled with the rushed implementation schedule and the failure to allow sufficient time for response to the draft amendment, the draft provisions in respect of heritage protection are likely to be highly detrimental to the economic and social interests of all South Australians. Perhaps more than any other aspect of the draft amendment, the treatment of heritage places and areas is most urgently in need of further, deeper consideration and general public debate.
>
> (National Trust SA, Submission 92, 34-5)

An earlier consultation process on heritage was conducted by DPTI in 2016. Professor Norman Etherington, former director of National Trust SA, described the consultation process as follows:

> This section, like other documents on the subject emanating from the State Planning Commission, cites the Parliamentary ERD [Environment, Resources and Development Committee] Enquiry while ignoring the much larger Consultation on Local Heritage carried out by DPTI in 2016. That consultation showed overwhelming community support for existing heritage policies, including listing of Contributory Items. There is clearly an intention to pretend the hundreds of submissions from local government, community groups and individuals never happened. This is consistent with the Planning Commission's evident intention to ignore and override public opinion.
>
> (quoted by Kevin O'Leary, Submission 49, 5)

Heritage is discussed in much more detail below in section *7 Heritage* of this Report.

1.2.5 Engagement processes are reviewed and improved

This principle of the *Charter* requires that the engagement process be reviewed to ensure that all of these principles have been met. The Commission published an 'Engagement Evaluation' in its *Phase Three Engagement Report*[72] which sets out responses from surveys and an assessment of the engagement process by the Commission. The results in the *Phase Three Engagement Report* are discussed in more detail in the next section.

National Trust SA found the evaluation of the engagement process by the Commission to be 'superficial, self-serving and misleading. Clearly, genuinely independent evaluation of the engagement process is required if the Community Engagement Charter is to be fulfilled ...'[73] The Norwood Residents Association Inc summed up the sentiment of most submitters who commented on the consultation process to the Committee:

> Citizens have a right to be part of a process that affects their lived environment and quality of life. This very principle, though an integral part of the Community Engagement Charter, has largely been ignored in the rush 'to get the job done'. Technical jargon, a complex and dysfunctional e-planning set-up, scant

[72] *Phase Three Engagement Report,* Attachment A – Original Consultation Engagement Results, 28-38.
[73] National Trust SA, Submission 92, 34.

public meetings designed for information provision rather than debate and short response timeframes right from the start, have left many residents feeling uninformed and resentful.

(Norwood Residents Association Inc, Submission 78, 5)

Dr Darren Peacock, CEO of National Trust SA, asked the Committee to 'convey to the government the risks of rushing into implementation with a system that is clearly not ready, not fit for its purpose and which lacks community support.'[74]

1.3 Commission *Phase Three Engagement Report*

The Commission reported in the *Phase Three Engagement Report*[75] that it engaged the public in the following consultation during the five-month consultation period on Phase Three of the Draft Code held from 1 October 2019 to 28 February 2020:

- 1790 formal submissions
- 189 consultation events
- 38 print advertisements
- 1110 enquiries received
- 40 000 direct mail letters[76]

The *Phase Three Engagement Report* then sets out how it complied with the principles in the *Charter*.

1.3.1 Adherence to *Charter* principles

The *Phase Three Engagement Report* identified how the engagement process for the Draft Code (Phase Three) met each of the principles outlined in the *Charter* as set out below.[77]

The engagement was genuine: the Commission provided a variety of different opportunities to participate in the engagement along with an extensive range of guides and factsheets on the SA Planning Portal. Department staff presented at in-person at consultation events and the Draft Code was released online.

The engagement was inclusive: it was tailored to address the differing levels of understanding between industry professionals and community. Letters, emails, telephone calls, meetings, and information sessions were used to advise how the revised amendments to the Code would affect stakeholders. There were opportunities to ask questions and to seek clarification.

The engagement was fit for purpose: it was conducted across all urban council areas that will be affected by the Draft Code (Phase Three). The Commission provided a dedicated service desk 1800 hotline, Planning Reform email address, and a dedicated YourSAy page was made available to assist community members to provide their views. Foreign language factsheets were developed.

[74] National Trust SA, Committee Hansard, 26 November 2002, 57.
[75] *Phase Three Engagement Report,* Attachment A – Original Consultation Engagement Results 28-38.
[76] Ibid, Attachment A – Original Consultation Engagement Results 5.
[77] Ibid, Attachment A – Original Consultation Engagement Results.

The engagement was informed and transparent: submissions received during the consultation period were made publicly available on the SA Planning Portal. On completion of the engagement a detailed *What We Have Heard Report* was published on the SA Planning Portal, which summarised feedback received on the Draft Code (Phase Three).

Engagement was reviewed and improved: on the completion of each activity participants were provided with a post-engagement survey to provide feedback on how the session could be improved and an online survey link was provided to the submitters to provide further feedback on the engagement and submission process.

1.4 Additional consultation from 4 November to 18 December 2020

As a result of the initial consultation from 1 October 2019 to 28 February 2020, revisions were made to the Draft Code, resulting in the Revised Draft Code. A number of submissions received by the Committee requested that further public consultation be held on the Revised Draft Code and on a fully operational ePlanning portal.[78] Community Alliance SA noted that the vast changes to the Revised Draft Code would need to be fully consulted upon and emphasised that that consultation must be genuine and comply with the *Charter*.[79] The Planning Institute of Australia added:

> It is also our view that any consequential changes to the Code, beyond that which was publicly notified, should undergo a targeted public consultation that involves the community as well as property industry stakeholders. This would minimise risk and improve procedural fairness in line with the Community Engagement Charter.
>
> (Planning Institute of Australia, Submission 96, 4)

The Minister announced on 18 August 2020 that implementation of Phase Three of the Code would be delayed and that the Revised Draft Code would be available for a further six-week consultation from 4 November 2020 to 18 December 2020. The Committee was able to receive some evidence from witnesses in relation to this further round of consultation, and most witnesses were still not convinced that the further consultation was sufficient. The UDIA appreciated the delay of the implementation of Phase Three:

> It was certainly welcome, the delay that the current minister put in place to be able to let everyone have a bit of a breather. We had COVID, we had HomeBuilder and a whole range of things that were going on, so we certainly welcomed that. I would have to say it wasn't perfect, but certainly the department and the government have made themselves available to us to go through matters ...
>
> (UDIA, Committee Hansard, 16 February 2021, 86)

National Trust SA prepared a further submission to the Commission for the consultation on the Revised Draft Code. Dr Darren Peacock, CEO of National Trust SA, stated that even with the additional six-weeks of consultation provided from 4 November to 18 December 2020, the *Charter* 'has been disregarded and breached at every step of the consultation process around the new Planning and

[78] See for example Town of Gawler, Submission 93, 7.
[79] Community Alliance SA, Submission 53, 3.

Design Code.'[80] Dr Peacock stated that the additional six weeks of consultation was not long enough and that the materials were still very complex, fundamentally flawed and kept changing. In addition, consultation events were cancelled:[81]

> The latest iteration of the Planning and Design Code released at the start of this month runs to almost 8000 pages and is almost incomprehensible to anyone but experts. The online planning portal, produced at such an exorbitant cost, is similarly inaccessible to lay users and remains riddled with erroneous information and software bugs. The public is being forced to wear the direct and indirect costs of a major policy and administrative failure and, also, to forfeit even more of their rights to know and to have a say in the future of their streets, neighbourhoods, cities and towns.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 57).

In Dr Peacock's opinion, the materials are still inadequate for a genuine process of consultation, as adequate consultation would require access to a completed Code.[82] Dr Peacock understood that the Revised Draft Code was still changing and that some aspects of the Revised Draft Code were not going to be released until implementation. For consultation to be adequate and genuine, '[t]here has to be a lot of information around what the impacts are, so people can understand that.'[83]

> So there really hasn't been a very systematic attempt to give people a genuine chance to engage. We would need a whole new, properly managed process; just an extra six weeks with inadequate materials really doesn't cut it.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 58)

Once the Code is complete and the tools presented in a more user-friendly way, Dr Peacock believed a consultation process of approximately six months would be required to allow people to understand what the changes mean for them.[84] However, Mr Jeff Smith thought six weeks was adequate for further consultation, but warned that more important was what the Commission does with the feedback it receives.

> Six weeks [of additional consultation], yes it is an appropriate time I suppose, but what is more important to me is that at the end of that time let's get serious about what we're trying to do or deal with and the changes we're going to be making. They have to be for the benefit of the community, they have to be for the benefit of the public generally, because they have to understand what this is about.
>
> (Jeff Smith, Committee Hansard, 10 November 2020, 36)

Ms Elinor Walker of Planning Institute Australia advised in evidence before the Committee that the Revised Draft Code addressed some of the comments and feedback provided to the Commission that arose from the earlier consultation:

> [S]ome of those issues that we have raised in our various submissions and also directly with the Attorney-General have actually been addressed recently through the introduction of public notification of phase 3 of the Code ...
>
> (Planning Institute of Australia, Committee Hansard, 17 November 2020, 43)

[80] National Trust SA, Committee Hansard, 26 November 2020, 56.
[81] Ibid 57.
[82] Ibid 61.
[83] Ibid.
[84] National Trust SA, Committee Hansard, 27 November 2020, 61.

However, other evidence received suggested that dissatisfaction with the Code remains prevalent, even with the version implemented on 19 March 2021.

1.5 Implementation

The Revised Draft Code was further amended in response to the additional consultation, and on 19 March 2021, the Commission provided its final recommendation to the Minister in its *Phase Three Engagement Report* pursuant to section 73(7) of the *PDI Act.* The *Phase Three Engagement Report* (nearly 1200 pages) included technical details of the results of the consultation, how the Commission believes the Revised Draft Code should be amended, proposed policy changes and an evaluation of the success of the engagement process against the *Charter* principles.[85] The same day, the Minister endorsed the *Phase Three Engagement Report* and published it on the SA Planning Portal.[86] Also on that day the Code, amended pursuant to the *Phase Three Engagement Report* recommendations, was released and implemented throughout South Australia.

Planning Institute Australia expressed concern as late as February 2021 that, although a date had been set for implementation, the *Phase Three Engagement Report* and the final version of the Code had still not been released:

> [I]t is worth noting that a report required by Section 73 of the PDI Act has not been circulated to the industry for Phase Three of the Code [at the time of writing], despite the announcement of the Code being implemented 19 March 2021.
>
> We understand that this is a result of the Code content not yet being finalised, however the decision to announce the commencement of the Code prior to the Code being fully finalised further undermines confidence in our new system.
>
> (Planning Institute of Australia, responses to questions on notice, 2 February 2021, 5)
>
> As we have neither reviewed a Section 73 Report nor cited the final version of the Code, it is our view that it is premature to release what is a statutory planning tool, until such time as the industry has had time to understand the new policy setting, once finalised.
>
> (Planning Institute of Australia, Responses to Questions on Notice, 2)

The Local Government Association (the 'LGA') also commented that not having access to the final Code, or an opportunity to review the Commission's *Phase Three Engagement Repart,* in advance of implementation of the Code made it much more difficult for Phase Three councils to prepare for the Code to go live.[87] The LGA acknowledged that the training and practice opportunities for councils on the online planning tools had improved since the Phase Two implementation, and that 'over 4000

[85] Commission, *Practice Direction 2: Preporotion and Amendment of Designoted Instruments,* (Version 2 - 28 November 2019) ('*Practice Direction 2*') para 6 (Requirements in relation to preparing an Engagement Report following consultation); *PDI Act* s73(7); Commission, *Phase Two What We Have Heard Report* 22.
[86] In accordance with *PDI Act* s73 and *Practice Direction 2,* para 6 (Requirements in relation to preparing an Engagement Report following consultation); Commission, *Phase Two What We Have Heard Report* 22.
[87] LGA, Responses to Questions on Notice, 4 March 2021, 5.

council staff and industry members have registered for the various training modules available.'[88] However, the LGA continued,

> [o]ur preference for the implementation process would have been for Phase Three councils to have ample opportunity to operate in a training and testing environment where a finalised Code was available, and for the problems with the online system and processes identified during the Phase Two period to have been fully resolved.
>
> This would have enabled councils to road test many different types of applications to understand changes to policy and procedure and identify any concerns that should be addressed before the 'go live' date.
>
> (LGA, Responses to Questions on Notice, 4 March 2021, 4)

The City of Adelaide agreed, and expressed frustration at not having access to the amended Code prior to implementation:

> Unless Councils are able to review a complete version of a working Draft of the Phase 3 Planning and Design Code, we are unable to determine if the mechanics of code policy application are fit for purpose and enable the intended assessment outcomes to be effectively delivered 'in practice'.
>
> (City of Adelaide, Submission 64, 12)

Professor Warren Jones AO of Protect Our Heritage Alliance acknowledged that the planning reforms were a massive undertaking and that the Commission did not want to further delay its implementation,

> but our view is that we have to have some sort of breathing space to get it relooked at and that there is an option of creating a forum or a mechanism for reviewing what has gone on, not only the governance but the content of the code, and genuinely involving the public because that has been an appalling process.
>
> (Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 17)

Ms Elinor Walker of the Planning Institute of Australia recognised that it is important to avoid unnecessary delay in implementing the planning reforms to retain and attract investment in the State, but also expressed the importance of the Code being complete prior to implementation:

> It is our view however, that Phase Three of the Code should only be implemented in full when it is up to a sufficient standard that can be comfortably tested and relied on in the Environment Resources and Development Court as a basis for decision making.
>
> ...
>
> PIA therefore feels it is important, given the statutory planning implications, that further time for familiarisation and training for both the private planning consultants and local government would undoubtedly result in better planning outcomes and help to avoid a myriad of unintended consequences.
>
> (Planning Institute of Australia, Responses to Questions on Notice, 2)

The Australian Institute of Architects would have also liked more time to review and test the system and the associated policies prior to implementation throughout the State:

[88] Ibid 4.

> In conclusion, what we would like to see before phase 3 goes live is genuine testing and consultation in relation to the ePlanning system; finalisation of the associated systems and documents, including the accredited professional scheme and the local design review scheme; genuine implementation of a Community Engagement Charter, because clearly the community is not feeling comfortable with the system as it stands; and clarity regarding the ongoing resourcing to allow implementation, management and periodic review moving forward.
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2020, 21)

National Trust SA suggested that the implementation of Phase Three should have been delayed until a new round of public consultation could have been undertaken, 'with complete and accessible consultation materials, managed by a competent body independent of the State Planning Commission and Planning Department.'[89]

1.6 Recommendations

The Committee heard extensive evidence that the consultation process did not meet community expectations, nor the principles set out in the *Charter*. The Commission and the Department advised of the extent of the consultation that took place in relation to the various versions of the Code. However, the majority of the submitters who commented on the consultation process suggested that there needed to be a further period of consultation with complete, accurate, detailed information and explanations of the effects of the policy changes reflected in the Code. While there was an additional period of consultation, most witnesses advised that the materials and duration were still insufficient.

The Committee is hopeful that the following recommendations will ensure consultation on future instruments and amendments will be more genuine, inclusive, transparent and fit for purpose.

The Legislative Review Committee recommends that:

Recommendation 1

1.1 The State Planning Commission review the comments of the submitters included in this Report with a view to improving the engagement processes for future revisions to the *Planning and Design Code* and other planning instruments. This includes a focus on genuine community engagement. Further, the Legislative Review Committee recommends that the State Planning Commission collaborate and engage closely with the Local Government Association of SA and councils on all revisions to the *Planning and Design Code* and associated planning instruments. In addition, future engagement must allow sufficient time for councils, the Local Government Association of SA, the public and other stakeholders to familiarise themselves with the impacts of the new policies, procedures and amendments before providing feedback. The stakeholders must be given adequate time to review and understand any proposed revisions before they are implemented.

[89] National Trust SA, Submission 92, 36.

Recommendation 2

1.2 A further period of consultation of not less than 12 weeks be afforded to the public and stakeholders to provide feedback on the *Planning and Design Code* and the ePlanning system as implemented in South Australia.

2 INDEPENDENT MODELLING AND RISK ASSESSMENT

PETITION PRAYER 3:

Urge the Government to defer the further implementation of the Planning and Design Code until: (a) a genuine process of public participation has been undertaken; and (b) a thorough and independent modelling and risk assessment process is undertaken

The previous section examined the first branch of prayer 3 of the Petition, for implementation of the *Planning and Design Code* (the 'Code') to be deferred until a genuine process of public participation is undertaken. This section of the Report considers the second part of that prayer: that 'a thorough and independent modelling and risk assessment process is undertaken.' The Committee acknowledges that, now that Phase Three (Urban Areas) of the Code ('Phase Three') has gone live, deferring its implementation is no longer feasible. However, the Petitioners' call for independent modelling and risk assessment should still be considered.

2.1 Importance of modelling and risk assessment

The Committee received 15 submissions calling for more testing, modelling and risk assessment to be done of the Code and the online ePlanning system. Ms Nicolette Di Lernia, Executive Director (SA) of the Australian Institute of Architects, acknowledged that in order to determine what aspects of the system do not work, the system must first be implemented. However, Ms Di Lernia also noted:

> I think there is a need to go through, especially with the ePlanning system, further review and validation of that system, because if it gets implemented too early and it produces poor, ineffective outcomes, we will wear that as a community for decades.
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2020, 21)

Ms Di Lernia appreciated that some teething problems are inevitable in a project of this magnitude:

> Yes, I think there will still be problems even if we give it a bit more time to settle. It is the difference between whether they are going to be, 'Oh my good God, we really wish we hadn't gone there' problems or 'That was a bit unfortunate, but we can live with it' problems. Buildings aren't five-minute exercises. They are here with us for a long time. They impact on people's lives, through the entirety of their being, and if they are not done well they cause untold stress and discomfort to people. We know there are people living in really, really substandard conditions throughout Australia because of the poor quality of our housing. We don't need to exacerbate that problem.
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2020, 21-22)

Modelling and risk assessment takes on greater importance where, as here, the Code was neither drafted by professional drafters (such as Parliamentary Counsel), as is most legislation of this magnitude, nor is it a disallowable instrument and as such subject to the technical scrutiny of the Parliament through this Committee. One complaint the Committee heard is that the *Planning, Development and Infrastructure Act 2016* (the *'PDI Act'*) leaves too much of the substance of the planning system to the Code and other documents, which are not subject to technical Parliamentary

scrutiny.[90] Mr Michael Lennon, then Chair of the State Planning Commission (the 'Commission'), the body tasked with preparing the Code, advised the Committee in evidence:

> The Code was assembled by a multiplicity of parties. It was laid out in an outline structure initially. Departmental staff were responsible for much of the writing. Council planners were seconded or participated in the process. In relation to the heritage provisions that we talked about before, we used specialist heritage architects to define and write the historic area statements. It was an attempt to bring an assembly of knowledge and expertise into the drafting.
>
> (Commission, Committee Hansard, 17 March 2021, 117)

The variety of individuals involved in drafting the Code and the content of the Portal, none of whom are professional legislative drafters, underscores the importance of thorough, independent modelling and risk assessment on such an impactful instrument, which is now the sole source of policy for planning and development decisions across South Australia.

2.2 Testing undertaken by the Commission

The Attorney-General's Department (the 'Department') and the Commission gave evidence that testing has occurred. In its *Update Report on Phase Three (Urban Areas) Code Amendment*, the Commission advised:

> For the Phase 2 Code, a testing program has also been undertaken with a number of planning practitioners, where a range of development applications were assessed against the draft Code. The feedback from this testing will be considered in finalising Phase 2. A similar process is underway for the Phase 3 Code. There will be industry sessions scheduled to undertake further testing of the Code.[91]

In addition, a set of 'Development Assessment Scenarios' for different development types was available on the SA Planning Portal for the pubic to access and a 'Planning and Design Code Consultation Map Viewer' was available for review.[92]

Mr Lennon gave evidence before the Committee that from December 2019 there was in place 'a full risk assessment and framework to thoroughly consider and review the complexity of establishing Australia's first truly online digital planning system.'[93] Mr Lennon also advised that a review of Phase Two (Rural Areas) councils has provided data indicating that the processing times for applications has reduced almost by half, and that they have received positive feedback from those councils. Mr Lennon advised the Committee:

> In terms of the feedback from local government, we have met with all mayors [of Phase Two councils] in the last 10 days and specifically sought their feedback. As expected, in some cases there was a need for greater training of staff, and in some cases the systems or computer-based capacity of staff needed support and encouragement, but consistently we have had a steadily increasing familiarisation with the

[90] National Trust SA, Committee Hansard, 26 November 2020, 55.
[91] Commission, *Planning and Design Code Phase Three (Urban Areas) Code Amendment – Update Report* (23 December 2019) 5.
[92] Ibid 7.
[93] Commission, Committee Hansard, 16 March 2021, 110.

> system. As the results show, if I showed you this by breakdown over time, you can see the trend improving month by month. We expect the same circumstances to occur in phase 3 councils.
>
> (Commission, Committee Hansard, 16 March 2021, 111)

The Department advised the Committee that Phase Three of the Code underwent testing and validation from February 2021 to March 2021, the results of which are included in the *Planning Reform Program Phase 3 Code Quality Assurance – Summary Report* (the *'Summary Report'*), available on the SA Planning Portal, dated 23 February 2021.[94] The *Summary Report* advised:

> It is important to appreciate that this final round of quality assurance of the Phase 3 Code essentially started once the public consultation finished on 18th December 2021 [sic]. From this point the team commenced work on the final version of the Phase 3 Code supported by iterative rounds of targeted testing and validation.[95]

The *Summary Report* indicates that this quality assurance testing focused on mechanical testing, including linkages of overlays, activities and statements with the appropriate policies.[96] According to the *Summary Report*, the objective of this testing was 'to support a decision by management that the Code is of sufficient quality that it is worthy of approval and ultimate release for use by the public.'[97]

The Committee questions how adequate testing of such an extensive system could be completed within this timeframe, particularly when Phase Three went live on 19 March 2021 and the *Summary Report* was published on 23 February 2021. This date suggests the complete testing and validation of the Code occurred, and the *Summary Report* written, over a short period of time. The *Summary Report* identifies the limited time available to conduct the testing as a major constraint.[98] In addition, the stated objective of this testing, 'to support a decision by management ...' illustrates the necessity of modelling and risk assessment being done by an independent body.

2.3 Criteria for modelling and risk assessment

2.3.1 Independence

In the Committee's view, the quality assurance testing that has been carried out by the Department and the Commission has been limited and technical in nature. The data provided by the Commission considers the processing time for development applications. In addition, the modelling and assessment done to date has not been independent; it has been conducted by the same bodies that developed and promoted the Code. The Petitioners specified that modelling and risk assessment should be independent, and this request was supported by submissions received by the Committee:

> [Independent modelling and risk assessment] should be conducted by persons other than those who have already participated in the Planning Reform to date, and who are not property developers.

[94] Department, Responses to Questions on Notice, 12; *Planning Reform Progrom Phase 3 Code Quality Assurance – Summary Report* (23 February 2021).
[95] Ibid 5.
[96] Ibid 11 and 15-16.
[97] Ibid 5.
[98] Ibid 9.

(South West City Community Association, Submission 54, 3)

The Commission and the Department did not provide the Committee with any examples of modelling or risk assessments of the Code or the ePlanning system that were undertaken by an independent body.

2.3.2 Adequate time

The Committee received submissions arguing that the implementation of Phase Three of the Code was done too quickly to allow for proper risk assessment and modelling.[99] Ms Rowena Dunk suggested that the impacts of the implementation of the Code on Phase Two (Rural Areas) ('Phase Two') should have been reviewed after it had been operating for a period prior to Phase Three being implemented.[100] Others agreed with this approach:

> There should be an assessment of the impact of the Phase 2 implementation after six months of operation. The assessment should be made public and lessons learnt incorporated into the Phase 2 Code and the draft Phase 3 Code.
>
> (Kensington Residents Association Inc, Submission 28, 5)

> The Code needs to be road-tested to a greater extent and a more detailed review of the implementation of stage 2 needs to be conducted. In short, there is no urgency to leap into implementation of stage 3 of the Code ... I have noted numerous inconsistencies, random changes to zone boundaries and potential administrative issues that are likely to give rise to public mistrust of the planning system to a greater extent than gave rise to the planning review in the first instance.
>
> (Jeff Smith, Committee Hansard, 10 November 2020, 32-33)

> There also needs to be an independent assessment of the impact of the Phase 2 implementation after six months of operation and this assessment made public with lessons learnt incorporated into the draft Phase 3 Code and changes made to the Phase 2 as required.
>
> (Community Alliance SA, Submission 53, 3)

The Committee notes that the Department and the Commission did delay the implementation of Phase Three of the Code until 19 March 2021, more than seven months after the implementation of Phase Two. This delay would have provided further time to instigate an independent modelling and risk assessment process on Phase Two prior to the implementation of Phase Three.

2.3.3 Scope

The City of Adelaide agreed that time should be taken to properly assess Phase Two and noted that the delayed implementation of Phase Three provided an opportunity to do so. The City of Adelaide also suggested some specific aspects of the Code that should be more closely assessed:

> The recently extended implementation date for the Planning and Design Code provides a valuable opportunity to ensure that critical issues of completeness, quality, consistency, and implementation readiness are resolved prior to the Code coming into effect as the State's most significant instrument

[99] Rowena Dunk, Submission 43, 4.

[100] See also Dr Iris Iwanicki, Submission 37, 13.

for development assessment. To ensure these issues are resolved before implementation, it is important that the following is undertaken:

- Provide adequate time to prepare for the full implementation of the changes, including the considerable integration works required to Council's business systems in order to maintain current business operations and service levels to our community.
- Full and comprehensive testing of the Planning and Design Code to identify significant policy changes, errors, missing content and/or unintended consequences to allow for required policy amendments.
- Test the effect of the proposed Planning and Design Code in the ePlanning system (as originally proposed for in the announced transition process).
- Incorporate the policies developed collaboratively by the City of Adelaide and DPTI in good faith, and/or clearly communicate why this body of work was excluded from the Draft Code.
- Ensure forms of development assessed on merit currently are not classified as restricted under the Planning and Design Code, but rather performance assessed with reference to appropriate policies to be included in the Code.
- Provide comprehensive policies within the Planning and Design Code to assist with assessment or allow for matters to be conditioned, to truly streamline assessments.

(City of Adelaide, Submission 64, 19)

Mr Peter Croft recommended further modelling and risk assessment be done to assess the effect of the provisions of the Code on the tree canopy in South Australia:

> We recommend that: Modelling and risk assessments be commissioned to determine how the proposed Planning and Design Code can be amended to ensure that there is a practical pathway to achieve an increase of 20% in tree canopy by 2045—required to help the community adapt to climate change.

(For the Tree Action Group and Grow Grow Grow Your Own, Submission 23, 3)

The magnitude of the planning reforms makes it clear that the scope of influence of these reforms will be vast. The Committee considers it important that the impacts are known, intended and desired. Local councils are at the forefront of these reforms and those that provided submissions to the Committee supported the call for independent modelling and risk assessment.

2.4 Councils

Nearly all the councils that made submissions on the Petition supported the call for independent modelling and risk assessment to be undertaken in connection with the Code. Councils were generally concerned that they had not had an adequate opportunity to assess the outcomes and impacts that the new provisions would have on their communities. The City of Norwood Payneham & St Peters protested that the assessment process undertaken under the previous Development Plan Amendment ('DPA') process was more thorough than what has occurred for the once-in-a-generation changes occurring with the planning reforms:

> All good planning policy should be developed through a solid evidence base and approach which investigates the current situation, future needs of the community and the likely impacts of any policy change. Through the DPA process, the DPA authors need to prepare detailed Statements of Intent prior

> to preparing the draft policy, and provide detailed investigations and evidence to accompany the draft policy document. While there was a suite of discussion papers issued prior to the draft Code, none of these provided investigations at a level commensurate with a DPA. It is acknowledged how challenging it would be to undertake such a detailed level of investigation across the State, however if satisfactory investigations cannot be undertaken to provide sufficient evidence for change to policy, then the policy should not change.
>
> (City of Norwood Payneham & St Peters, Submission 77, 11)

The City of Norwood Payneham & St Peters stated that, given the scope of the changes in these planning reforms, the assessment process should be more thorough:

> The planning reform program alters almost every aspect of the planning system: legislation, decision makers, policy frameworks, and the introduction of a new ePlanning system. Such a significant change of course carries significant risk. In particular, Councils hold significant concerns and reservations regarding potentially poor development outcomes resulting from the completely revised policy framework. Development Plans have been created, amended and implemented over time with a suite of locally specific policies to address local needs and nuances. The Code will provide a much more generic suite of policies which will inevitably provide less guidance and be more open to interpretation.
>
> (City of Norwood Payneham & St Peters, Submission 77, 12)

Other councils had specific areas of concern that, in their opinion, should be the subject of more focused risk assessment and testing. For example, the City of Adelaide pointed out that there has been no assessment of any possible financial impacts to development feasibility, noting that '[i]ncreased construction costs may impact development opportunities in the city.'[101]

The submission from the City of West Torrens commented that the Code contained significant changes to zoning and infill across the state which need to be tested for infrastructure capability, consulted upon and reviewed by councils.

> Council has asked that development assessment testing occurs to ensure that unintended consequences are adequately remedied prior to the introduction of the new planning system. This has not yet occurred, the Code is currently still being drafted and refined. This is concerning given the Minister has proceeded to go ahead and implement the Code in Phase 1 and 2 areas despite these consistent concerns not being addressed.
>
> (City of West Torrens, Submission 51, 10-11)

The Town of Gawler was the only council that suggested that independent modelling would be too onerous and was not necessary:

> From the perspective of independent modelling, this would cause such a delay and be so unreasonably costly that it is not recommended this path be taken. It is better that the SPC [Commission] and PLUS [Planning and Land Use Services of the Attorney-General's Department] work with South Australian councils and the public to achieve a workable system which respects the values of the community.
>
> (Town of Gawler, Submission 93, 7)

Nonetheless, the Town of Gawler agreed with the other councils that a risk assessment process was vital:

[101] City of Adelaide, Submission 64, 17.

> A thorough risk assessment is an integral part of the project management process. As a duty of care, it is essential, with the scale of the planning reform project, that it should be revisited on a regular basis to ensure that risk is identified and minimised.
>
> (Town of Gawler, Submission 93, 7)

Councils generally are not satisfied with the testing that was conducted in advance of the Code going live in Phase Two or Phase Three. The Committee received some evidence about how the new system was operating for Phase Two councils.

2.5 Reports from Phase Two councils

Phase Two councils, community organisations and the development sector reported to the Local Government Association (the 'LGA') that after implementation on 31 July 2020, 'the Code and the Portal are not delivering as promised.'[102]

> We are hearing that the process to fix errors or to make improvements to the system can be slow and that issues with the ePlanning system are being dealt with less consistently and with less communication than issues with policy and the Code.
>
> (LGA, Committee Hansard, 4 May 2021, 132)

National Trust SA and Protect Our Heritage Alliance reported on the experiences of the Berri Barmera Council on how the Code and the e-Planning portal were working since going live in rural areas on 31 July 2020. Professor Warren Jones AO from Protect Our Heritage Alliance shared excerpts from the Berri Barmera Council's Agenda for its meeting on 22 September 2020 relating to the new planning system:

> The Development Assessment (ePlanning) Portal is much more complex, cumbersome and time consuming than staff were led to believe or trained for and the Planning and Design Code is not delivering the assessment pathways to make development more streamlined for our community ...
>
> (Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 14)

In addition, that Agenda noted other issues including:

- The public notification tool was not working, requiring Council to hold any applications requiring public notification until this was fixed;
- The six web-based programs required to assess a development application were not integrated and did not communicate with each other, resulting in the processing of applications taking longer than with the paper-based system;
- The Code is vague and generates inapplicable policies, making it time consuming for staff and confusing for applicants;
- The applications are taking much longer due to lack of integration or automation.[103]

[102] Environmental Defenders Office, Submission 94, 16.

[103] Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 14-5; see also National Trust SA, Submission 92, 36.

Professor Jones AO advised that almost every rural council in the state had indicated to Protect Our Heritage Alliance that they were extremely unhappy with the new system.[104] In contrast, the Department gave evidence that they were proud of the support that they were providing the councils in relation to the ePlanning system, and that the Department was 'certainly not hearing any negativity coming through from the phase 2 councils in relation to "go live".'[105]

The anecdotal evidence relating to assessment of how the Code is impacting rural councils falls short of providing the meaningful data that would result from an independent modelling and risk assessment process. The Code will be able to adjust to concerns that arise now that it has been implemented throughout the State. An assessment of the impacts of the Code, now that it is fully implemented, should contribute to or drive that evolution.

2.6 Evolution of the Code

Ms Rebecca Thomas, Presiding Member of the State Commission Assessment Panel ('SCAP'), noted that the Code as implemented will need to be improved and amended:

> It's not a fixed-in-time document: it is going to evolve. It needs to evolve and adapt and change, and there will be omissions and things that we identify that need to be fixed.
>
> (SCAP, Committee Hansard, 2 March 2021, 104)

The Commission agreed that the Code will need to evolve over time:

> [T]he new planning system is a significant step forward for South Australia, but obviously it is just the beginning. The Code is a dynamic platform that will evolve and adapt over the years to meet changing economic and social circumstances.
>
> (Commission, Committee Hansard, 16 March 2012, 111)

Submissions noted that the Code will need the ability to be easily amended and corrected, especially now that it has already been implemented throughout South Australia. The Urban Development Institute of Australia (the 'UDIA') noted that it is crucial that the new system can

> pivot and respond quickly to challenges. ... It won't be easy but the test will be how quickly the government can respond to any issues that come up.
>
> (UDIA, Committee Hansard, 16 February 2021, 85)

2.6.1 Policy integration

The Working Group on Land Use Planning and Climate Change in South Australia (the 'Working Group') expressed concern that there are no provisions to allow the planning system to evolve and change with broader policy development at various levels of government. The importance of 'cooperation, collaboration and policy integration' are recognised in the objects set out in section 12(2)(g) of the *PDI Act*. The Working Group recommends that 'mechanisms to facilitate cooperation and integration ...'

[104] Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 15.
[105] Department, Committee Hansard, 30 March 2021, 120.

with developing State climate policy would assist the planning system to meet the *PDI Act*'s objective of promoting 'cooperation, collaboration and policy integration ...' between government bodies.[106]

For example, the State Government has established the Premier's Climate Change Council (the 'PCCC') under the *Climate Change and Greenhouse Emissions Reduction Act 2007*, the primary function of which is set out in section 11(1) of that Act:

> To provide independent advice to the Minister about matters associated with reducing greenhouse gas emissions and adapting to climate change, including by achieving energy efficiencies, increasing the use of renewable energy, developing methods to remove greenhouse gases from the atmosphere, and establishing and achieving relevant targets.[107]

The Working Group advised of communication from the Chair of the PCCC to the Department indicating: 'the Code will be an incredibly important factor in our state's ability to respond and adapt to climate change.'[108] Therefore, the Working Group emphasised that

> it is crucial that the planning system aligns with South Australian Climate Policy, and has the capacity to keep pace with ongoing changes in this regard. It is therefore essential that the SPC [Commission] liaise closely with the PCCC to ensure consistency and maximize opportunities for synergy between the planning system and state climate change policy.
>
> (Working Group, Interim Report tabled on 1 December 2020, 17)

The Department advised the Committee that efforts were being made to integrate broader policy from other areas of government into the planning reforms and that the Commission invited the PCCC on two occasions during the planning reform process to discuss climate-related planning reforms.[109] Mr Michael Lennon, then Chair of the Commission, advised the Committee that the Commission was working to incorporate current recommendations from ongoing reviews (such as the bushfire review) into the planning system:

> Over the last 12 months, with the assistance of federal government grant funding, we have produced extensive mapping of bushfire risks based on a set of objective factors, and the intention during the current 12 months is to engage with landowners and councils in those areas in order to identify mitigations where bushfire risk is drifting into extreme levels.
>
> (Commission, Committee Hansard, 16 March 2021, 111)

Mr Lennon noted a similar approach to flood mapping, indicating that any necessary changes to the planning provisions would be made to accommodate the findings of State reviews and studies.[110]

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[106] Working Group, Interim Report tabled on 1 December 2020, 7.

[107] As quoted in the Working Group Interim Report tabled on 1 December 2020, 17.

[108] The Working Group, Interim Report tabled on 1 December 2020, 17, quoting from a letter from Martin Haese, Chair PCCC to Alison Collins, Project Lead, People and Neighbourhoods Discussion Paper, DPTI, dated 25 February 2020.

[109] Commission, Committee Hansard, 16 March 2021, 111-2; see also Department, Responses to Questions on Notice, 3.

[110] Commission, Committee Hansard, 16 March 2021, 111-2.

2.6.2 Amendment processes

The Department confirmed there would be an ongoing process in place for the Code to respond to feedback from stakeholders and to evolve over time. Ms Sally Smith, Executive Director of Planning and Land Use Services, provided evidence that the team that previously worked on development plan amendments under the old system would be transitioning to consider feedback and make any necessary amendments to the Code.[111] Ms Smith noted that under the Code there is a broader range of stakeholders that are able to make recommendations for Code amendments and those recommendations can now be made through the PlanSA Portal:

> [L]andowners can, obviously councils can continue to do so, state agencies, and then the Commission can initiate Code amendments off their own back as well.
>
> We have more people participating and able to potentially initiate Code amendments, but we do have a team ready to support that. We expect in the first few months that we will need to fix a few minor errors, and we have a process in the Act under section 76 whereby we can do that. We already did our first one for phase 3 last Thursday. We have a quick and simple process whereby we can manage any errors. There's actually a place on the PlanSA portal whereby anybody can log errors, and we check them regularly.
>
> ... [F]or a while now you have been able to initiate a Code amendment through the PlanSA portal, it then goes to the State Planning Commission and they advise the Minister as to whether she should support initiation or not.
>
> (Department, Committee Hansard, 3 March 2021, 120-1)

Mr Lennon commented that under the new system, amendments to the Code and supporting policies have been streamlined:

> [T]he processes for making changes to policy—will be dramatically shortened. In the current situation, if a council or someone else wants to make a change through a plan it can regularly take two to three years from the beginning to the end of the process, by which time the circumstances have all changed. We think that Code amendments should be able to be processed within a matter of months—and in some cases, very short periods—and in the early stages we prioritised a process in order that errors and omissions could be dealt with as quickly as possible.
>
> (Commission, Committee Hansard, 16 March 2021, 116-7)

In addition, Code amendments that are being considered will be available to the public for comment on the PlanSA Portal:

> There are a lot more opportunities for people to be involved, and Code amendments are also the same. All code amendments that are on consultation will now be centralised through the PlanSA website, so people have one place to go to see if there is a Code amendment that is on display so that they can make comment or see the status of that code amendment. In that respect, I think the information is much more transparent and easier to find for members of the general public.
>
> (Department, Committee Hansard, 30 March 2021, 122)

The Committee asked Mr Lennon whether there was a budget provision for the ongoing amendment process for the Code. Mr Lennon responded:

[111] Department, Committee Hansard, 30 March 2021, 120-1.

> These are covered by outlays within the Attorney-General's Department budget processes. We have submitted to the Attorney and the planning minister our work plan for the current year. Included with that is our estimation of the work demands that will come forward.
>
> Chair, as I think you are alluding to, there is a built-up demand for improvements in planning policy caused by the introduction of the new system. The Commission expects to be very busy over the next 12 to 18 months. The work plan doesn't specifically identify the resources, but what we have proposed is an agreement between the Commission and the Attorney-General's Department in order that adequate staffing and professional resources are available.
>
> (Commission, Committee Hansard, 16 March 2012, 111)

The Committee agrees that the Code will need to be dynamic and to continue to evolve, particularly over the short term where errors, omissions and other issues will arise now that the Code is fully operational. The Committee commends the Department and the Commission for the processes they have put in place to allow members of the public to identify errors and to suggest amendments to the Code in a timely manner.

However, the Committee remains concerned that the Department has not initiated or planned an independent risk assessment of the Code and the impacts that it will have on development, councils, the community, the environment and heritage.

2.7 Recommendations

Now that the Code has been implemented, it is not possible for this Committee to grant a delay to allow for further independent modelling or risk assessment to take place. Rather than modelling, outcomes can now be monitored, assessed and reviewed. An independent risk assessment should be undertaken in order to identify the risks of poor development outcomes resulting from the Code and the ePlanning system. The Committee has heard that there was a process in place to investigate recommended development plan amendments and their impacts, so such a process is not unfamiliar and could provide insight into the impacts of the Code.

Risk assessment is an integral aspect of management of any significant project. The Commission and the Department have a duty of care to anticipate and mitigate the possible risks associated with the impacts of the Code. The fact that the Code has already been implemented throughout South Australia does not alleviate this responsibility; the duty is ongoing, particularly for a project of this scale.

The Legislative Review Committee recommends that:

Recommendation 3

2.1 The Minister for Planning and Local Government instigate an annual independent risk assessment of the *Planning and Design Code* to identify the potential risks resulting from planning policy, procedures and the operation of the ePlanning system. The Committee recommends that a report of the findings of the risk assessments and the Minister's responses be provided to the Environment, Resources and Development Committee for review.

Recommendation 4

2.2 The Minister for Planning and Local Government introduce amendments to the *Planning, Development and Infrastructure Act 2016* requiring the Environment, Resources and Development Committee to monitor annual risk assessment reports of the *Planning and Design Code*. The Committee recommends that reports on these assessments, the Minister's responses and any action taken be tabled in both Houses of Parliament.

3 INDEPENDENT REVIEW OF THE *PLANNING, DEVELOPMENT AND INFRASTRUCTURE ACT 2016*

PETITION PRAYER 1:

Undertake an independent review of the operation of the *Planning, Development & Infrastructure Act* to determine its impact on community rights, sustainability, heritage and environment protection

The Petitioners called for an independent review of the *Planning Development and Infrastructure Act 2016* ('*PDI Act*'). This section of the Report considers whether an independent review of the *PDI Act* is warranted and, if so, what form that review should take. The following sections of this Report then address each of the areas identified in the Petition upon which the *PDI Act* impacts: community rights, sustainability, the environment and heritage.

The Committee heard evidence that the *PDI Act* failed to meet the objects as stated in section 12 of the Act, which are set out in full in the *Legislative Framework* section of this Report. The primary object of the *PDI Act* is set out in section 12(1) of that Act:

> [T]o support and enhance the State's liveability and prosperity in ways that are ecologically sustainable and meet the needs and expectations, and reflect the diversity, of the State's communities by creating an effective, efficient and enabling planning system ...

The *PDI Act* is intended to promote development and infrastructure that is consistent with the principles and policies set out in the *PDI Act* and to provide for community participation in developing planning policy and strategies. The *PDI Act* supports a digital platform to achieve these objects and to make the system more transparent and accessible to the public.

Schedule 4 (Performance targets and monitoring) of the *PDI Act* provides that the Minister for Planning and Local Government (the 'Minister') can set performance targets and monitor performance and trends in relation to 'any goal, policy or objective under a state planning policy ...' and the State Planning Commission (the 'Commission') is to monitor, review and evaluate whether those targets are being achieved.[112] National Trust SA suggested that an independent review of the *PDI Act* should consider any performance targets that may have been set and monitored under Schedule 4:

> [A]n independent assessment [should] be undertaken of the impact to date of the changes already resulting from the Act including how they have been measured, monitored, evaluated and reported (see Schedule 4 of the Act).
>
> (National Trust SA, Submission 92, 5)

In considering whether a review is warranted, the Committee considered the objects of the *PDI Act* and whether they have been achieved.

[112] *PDI Act,* Schedule 4, clause 1(1)(a).

3.1 Objects of the *PDI Act*

The Expert Panel on Planning Reform (the 'Expert Panel') in its report *The Planning System We Want* described the shape of the new planning system it envisaged:

> Planning rules must be clear, consistent and focussed on high-quality design. The minister must have clear, transparent and timely means to mandate policy directions, and to determine matters of state significance. A new state planning and design code will set rules that will be consistently applied across the state. This code will be supported by a contemporary, user-oriented, electronic platform that will give everyone transparent access to information, clarify the expression of policy, and improve the cost-effectiveness of processes across the system.[113]

The objects set out in section 12 of the *PDI Act* support the Expert Panel's aspirations for the planning system. Those objects include 'creating an effective, efficient and enabling planning system ...'[114] that is 'simple and easily understood and that provide[s] consistency in interpretation and application ...'[115] and promotes 'certainty for people and bodies proposing to undertake development ...'[116]

The Committee heard that most submitters supported the goals set by the *PDI Act*:

> Overall, speeding up, refining and standardising development applications across the state to achieve certainty and efficiency is a laudable goal.
>
> (Christine Francis, Submission 58, 3)

> The [Planning] Institute supports the overarching objectives of the planning reform process, namely, to provide a modern planning system to help the state remain livable, prosperous and vibrant ... and to improve community confidence.
>
> This is underpinned by a number of really laudable objectives, which the Act supports: shared planning vision to provide strategic long-term decision-making; the involvement of the community in planning; consistency across the state; improving design quality; a clear approach which embodies this idea of making the planning system consistent, easier to read and having an ePlanning mechanism that allows ease of access; the engaging of suitably qualified professionals to provide confidence and also improve the quality of outcomes; coordinated and equitable infrastructure delivery; and the control of urban sprawl to protect food production areas.
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2020, 20)

> In terms of planning reforms, we have been supportive of the need for planning reforms all the way back before my time at the UDIA [Urban Development Institute of Australia] 10 or 15 years ago and supported the expert panel review into planning reforms. We were very vocal and worked alongside the review to give feedback on that, and that was largely driven around the need for greater clarity, speed of transparency in the system, the need for things to move quickly and to really overhaul what was a fairly cumbersome process notwithstanding it had evolved over a number of years and had within it the capacity to respond to some local challenges in different development plans across Adelaide.

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[113] Expert Panel, *The Planning System We Want* (12 December 2014) 12; see also See Local Government Association, Submission 57, Appendix 2 for a *Summary of the relationship between the Expert Panel's Guiding Principles and the LGA Planning Reform Objectives* with an assessment of those principles against the Code.
[114] *PDI Act* s12(1).
[115] *PDI Act* s12(2)(a).
[116] *PDI Act* s12(2)(c).

(UDIA, Committee Hansard 16 February 2021, 84)

While the goals of the *PDI Act* were supported, the submissions received by the Committee largely expressed disappointment with the outcomes of the *PDI Act*. This disappointment was succinctly put by Dr Darren Peacock, CEO of National Trust SA:

> This Act, and the changes and bodies emerging from it, have already come at an enormous cost to the people of South Australia. The emerging planning system lacks transparency and accountability, greatly diminishes the public's rights to know about and participate in decision-making, and does little to improve the protection of our heritage, significant trees and open space. It reduces public and private amenity through promoting unfettered infill development in urban areas and fails to address in any significant way the pressing consequences of climate change.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 57)

Submitters also expressed dissatisfaction with the Planning and Design Code (the 'Code') that was developed under the *PDI Act* for not meeting the objectives of that Act:

> In trying too hard to be uniform, the draft Code has resulted in what former [National Trust SA] President Professor Norman Etherington has described as 'mediocrity through uniformity'. Without more detailed policy, the level of certainty and transparency around planning decisions will dramatically reduce.
>
> (National Trust SA, submission on the Draft Planning and Design Code, 3, included as Attachment 6A to Community Alliance SA, Submission 53)

> The new Planning Code needs to address the lack of community consultation, lack of sustainability provisions and heritage protections, and absolute lack of any defining protections for trees before it can be considered to adequately address planning within our city.
>
> (Alicia Seigel, Submission 45, 3)

The planning reforms were intended to make the planning system more accessible, efficient and cost-effective, yet the Committee received many complaints that these objects have not been met.

3.1.1 Simple and easily understood system

As noted above, the move to a digital planning platform was widely supported by the community and the Petitioners. The Code residing on a single digital portal significantly improves accessibility.[117] The Committee notes that the ePlanning portal was not yet fully functional when the Committee called for submissions and so very little evidence was received on the functionality and accessibility of the portal itself in delivering on the objectives in the *PDI Act*.

However, the Committee did receive submissions indicating that the new system continues to be very complex and difficult to access for professionals as well as lay people. The following are examples of some of the comments complaining that the new system had become even more complex than the previous system:

> The worrying aspect with the new code is the multiple layers of development control it contains. In actual fact the code is even more complex than existing development plans! In terms of layers to navigate through there are zones, subzones, overlays, general development provisions, desired

[117] Ms Rebecca Thomas, SCAP, Committee Hansard, 2 March 2021, 98.

outcomes, performance outcomes, deemed to satisfy provisions, restricted development provisions, accepted development classifications, procedural matters and more.

(Kevin O'Leary, Submission 49, 12)

The 2012 City of Adelaide Development Plan was a self-contained document consisting of less than 500 pages of easily-understood policies, zones, rules and mapping that had evolved over a number of years. Community, Council and developers all knew what could be built where. ... They were compact, written in plain English and were easily understood. ...

The State Planning Commission appears to have *simplified* and *clarified* the planning process by incorporating a 400-page plus mapping self-contained document for the City into a 3031 page incomplete Code, a part of which is a 927 page Council-specific extract from the Code for the City of Adelaide. This is double the size, and contains less information. Also attached to the Code is a separate digital mapping tool and 737 reference documents which include fact sheets, guides, extracts and other tools to assist the general public to navigate the Code.

(South West City Community Association Inc, Submission 54, Attachment 1 *Submission to Department of Planning Transport and Infrastructure*, 2)

The Commission emphasised the accomplishment of transitioning the 72 individual Development Plans that were in effect across the State, comprising 23 000 pages, into a single, State-wide Code. In his evidence before the Committee, Mr Michael Lennon, then Chair of the Commission, stated that he was of the opinion that the Code was more streamlined than under the previous planning system.

I think we would be disappointed if anyone now doubted the reduction in complexity that has been achieved. When parliament set the ambition to take all 72 development plans and produce a single code, it was a daunting prospect. As you can imagine, over a period of 30, 40, 50 years individual councils, individual planners, had written their own narratives, their own texts: there can be desired future character statements that go three pages long and that are then debated in the courts by both parties. It is that kind of inconsistency and vagueness that has benefited no-one: 1500 plus residential zones, most of them are doing very, very similar things.

In all of this we have got the Code down to a very measurable size. When it was printed off for the Attorney, it was about three inches compared to a wall full of documentation. I have no doubt that at that level we have streamlined the system. In terms of the approvals process, the discussion we had before means there are much clearer assessment pathways and there is much clearer transparency and accountability for who is making the decisions when.

(Commission, Committee Hansard, 16 March 2021, 116)

Mr Stephen Smith, Planning Reform Partner of the Local Government Association ('LGA'), pointed out that the Code is not a simplification for most councils, whose planners under the previous system would have considered only the development plans in their own local government area. In regional areas, that may have only involved 50 or 60 pages. Those councils now have a much larger volume of detail to review in order to understand the requirements.[118] Mr Smith advised:

Since the first draft of the code, there has been a dilution of the former development plan policy controls and replacement with a more disjointed and complex series of statutory and advisory planning documents. Heritage policy and guidelines now reside in around seven different places, which we believe undermines the intent of a simpler and more streamlined planning process.

[118] LGA, Committee Hansard, 4 May 2021, 133.

(LGA, Committee Hansard, 4 May 2021, 130)

The Committee accepts that the Commission's direction from Parliament was to integrate 72 development plans into one code, which of necessity is going to be larger and more complex for individual councils to navigate. The increased complexity, however, should be managed with the digital platform of the Code, which is intended to produce greater efficiencies by directing users to only the information that is relevant to their query.

3.1.2 Efficiency of planning system

In the opinion of Ms Rebecca Thomas, Presiding Member of the State Commission Assessment Panel ('SCAP'), expressed in her evidence before the Committee, the new planning system is more efficient than the previous planning system:

> [T]he ability to access the portal and search the Code as a whole or input an address and identify the policies related specifically to a property is a huge advance from what we have had in the past. It is certainly quicker. Again, I recognise that I am probably quicker than some others who don't work in the industry, but in terms of even the ability to talk someone through—to look up online the policy that impacts their property, it is actually quite a simple process to talk them through doing that online as opposed to the current manual process of development plans.
>
> ... [T]hat process and the access to the information alone will have notable benefit, I would say, from both a cost and time point of view if people can access the information themselves and not necessarily rely on a planning consultant, for example.
>
> (SCAP, Committee Hansard, 2 March 2021, 98)

Mr Michael Lennon, then Chair of the Commission, providing evidence on behalf of SCAP, agreed with Ms Thomas:

> we would certainly say that there is considerable evidence now that the utility of the digital platform and the ability to make decisions in shorter time periods is evident to everybody.
>
> (SCAP, Committee Hansard, 2 March 2021, 103)

Ms Sally Smith, Executive Director of Planning and Land Use Services ('PLUS') of the Attorney-General's Department (the 'Department'), provided statistics to demonstrate that the new system was increasing efficiency in completing planning assessments:

> We are definitely seeing a more efficient service, and we can tell this for the first time because with the ePlanning system we can actually monitor on a daily basis how the development assessment system is performing.
>
> In terms of the stats from the Phase 2 Code, which went live in the middle of last year, I can tell you that for deemed to satisfy applications, which are the applications whereby if you meet the rules you are required to get a decision within five days, we are seeing on average that those applications are being decided within 3.6 days. Under the old system, the equivalent is what we call complying development, and they were taking eight days under the *Development Act*. So we are definitely seeing an improvement, particularly for those expected developments.
>
> Then in terms of performance assessed development, where we are not requiring notification, again we are seeing improvement: on average, 14.7 days compared with 17.7 days under the *Development Act*. For those performance assessed applications based on merit, where there is notification, again we

> are seeing improvements there of an average of 40.7 under the PDI compared with 47.5. So we are seeing a lot of efficiencies from the system.
>
> We are also seeing for the first time obviously people able to go online and view the Code at a statewide level, being able to put in their address and having rules returned that are relevant only to that site for that particular use, and that is returned in a few seconds.
>
> (Department, Committee Hansard, 30 March 2021, 119-20)

Mr Lennon provided evidence to the Committee that 'deemed-to-satisfy' applications were being processed in just over half the time as they were under the previous system, and that there has also been a substantial reduction in the time taken to assess 'performance assessed' applications both with and without notification.[119]

Despite these assurances provided by the Department and the Commission, the LGA has indicated that the new system is creating additional work for councils. The increase in materials that each council area must be across, coupled with the demands of learning the new ePlanning system, placed a great deal of pressure on council staff processing planning applications after implementation of the Code.[120] The demands of learning the new system were exacerbated by councils generally seeing an increased workload to process HomeBuilder applications and respond to impacts from COVID-19. To assist with these pressures, the LGA established a procurement panel to provide councils with additional staff or experts as needed.[121]

Mr Stephen Smith of the LGA reported that Phase Two (Rural Areas) councils were finding the process under the new system to be slow, and that their staff are spending more time in advance of an application being lodged to provide advice and information to potential applicants:

> [T]here is that recognition that it's still a slow process. It has a lot to do with the assessment pathways and the time it does take to go through an application. I think what they are saying is that no two applications are necessarily the same now. ... That pre-lodgement advice is very difficult to give because people have to go through the whole code and nobody can necessarily speak off the top of their head now about what some of those requirements may be, which they have been able to do in the past.
>
> (LGA, Committee Hansard, 4 May 2021, 133)

Mr Smith commented that Phase Two (Rural Areas) councils are managing to meet the strict timeframes imposed in the *PDI Act*; however, in order to do so, council staff are putting in additional hours:

> [S]ome of those applications are taking two or three times longer to assess, which is clearly putting a strain on some of the council resources in the smaller councils.
>
> (LGA, Committee Hansard, 4 May 2021, 130)
>
> [Y]ou could still deal with an application under the old process in maybe four or five hours, if it was a fairly basic one. Under the new process, it may take anywhere between 10 and 20 hours. So that's the sort of increase that people are seeing. Some of the council planners in some of the regional areas were

[119] Commission, Committee Hansard, 16 March 2021, 111; see also, *Phase Two (Rural Areas) PlanSA reporting pack*, 31 July 2020 – 1 March 2021 tabled in evidence before the Committee, available on the Committee's webpage under 2 Petitions > Planning Reform > Evidence > Mr Michael Lennon.
[120] LGA, Committee Hansard, 4 May 2021, 132.
[121] Ibid 133.

saying that they were working 14 to 15-hour days just to keep up and to make sure that they met the new time frames.

(LGA, Committee Hansard, 4 May 2021, 133)

The LGA noted that staff were putting in that additional time in order to process applications within the strict timeframes imposed to avoid applicants receiving 'deemed planning consents' under section 125 (Time within which decision must be made) of the *PDI Act*.[122] Deemed planning consents are discussed further in section *4.1.4 Assessment timeframes and deemed consents* of this Report. Mr Smith of the LGA advised the Committee:

> What we are seeing, and one of the parts of the new system, is this new verification process. The clock doesn't start until an application is verified and, from what we are hearing, on the whole a large number of applicants aren't lodging the necessary information at the start. Probably part of that frustration and that learning experience from an applicant's perspective is they are submitting their application and then it's being sent back, saying 'You've actually now got to provide all this information before the clock even starts.'
>
> There isn't a lot of information being made available to people to say, 'Well, really if you don't do this right up front your application won't start the process from the beginning.' I think that's where the education and the information needs to be provided to the community, about what they need to do up-front so that their application can start and move swiftly through that system.
>
> (LGA, Committee Hansard, 4 May 2021, 134)

Clearly the long hours being worked by some council staff belies claims that applications are being processed more quickly; counting the days within which applications are processed does not tell the full story. It appears that more time is being spent by councils and applicants preparing an application before the clock starts calculating the time taken to process the application.

The City of Adelaide also questioned the efficiency of the new planning system:

> An aim of the planning reform process as per the Expert Panel's recommendations was to streamline development assessment, reduce unnecessary cost and time, and provide clarity and certainty for applicants, planning authorities and communities.
>
> As it stands, the Draft Code incorporates barriers to more streamlined development assessment, specifically as a result of the imprecise guidance provided for pathways of development due to minimal development types identified within the classification tables of each Zone.
>
> There are instances in which implementation of the Draft Code would require that applications that are simple and straightforward under the current Development Plan, to be processed under a more onerous assessment process than under the current system despite their low community impact or desirable development outcome.
>
> (City of Adelaide, Submission 64, 16)

The City of Adelaide identified the areas of the Draft Code where it predicted delays would arise:

> Aspects of the Draft Code which may increase the time and cost of development assessment specifically relate to:
>
> - Determination of relevant authorities

[122] LGA, Committee Hansard, 4 May 2021, 130.

- Missing land uses and forms of development within classification tables
- Increased requirements for public notification and specialist technical advice.

(City of Adelaide, Submission 64, 16)

While the Department and the Commission claim that the new system is more efficient, this is contrary to the feedback that the LGA has received from Phase Two councils after the Draft Code went live in Rural Areas of South Australia.

3.2 Cost of the system

3.2.1 Development application fees

Another goal that the new planning system set out to achieve was to reduce costs.[123] Ms Sally Smith, Executive Director of PLUS acknowledged in her evidence that some of the fees have increased in the new planning system, including the application fee, but suggested that those increases in costs to larger property developers would be offset by the certainty of receiving an earlier decision.[124]

> In terms of running the system, the fees have had to be set to allow us to run the ePlanning system, so there is some increase in the lodgement fee, but the benefit you get with that is a much more certain and efficient decision. In some cases the DA fees might be slightly higher but you have a certain decision. Getting a decision in three days and moving forward with a development is a good thing. For those people at the more complex end of the spectrum you often have holding costs on land and you can be in a development assessment cycle for a very long time. If you're getting certainty of a 40-day decision for a more complex scenario, you are not having those ongoing holding costs, so I think it is a bit of a trade-off.
>
> (Department, Committee Hansard, 30 March 2021, 120)

3.2.2 Councils' costs

National Trust SA advised that the planning costs to be borne by councils have increased, and yet the Department now retains the development application fees.[125] In its submission to the Committee, the City of Norwood Payneham & St Peters explained the fees paid by councils for the planning system:

> Councils pay an annual Planning Portal subscription fee based on the cost of development undertaken within the council area. For the first two years, the Department allowed a 50% discount in recognition that the Portal was still in development. The City of Norwood Payneham & St Peters' 'discounted' rate is currently $29 000 per annum and will increase to $58 000 per annum (or as otherwise adjusted by the Department). In addition to the Portal fee, the lodgement fee for all development applications ($177) will be retained by the Department for the cost of supporting the planning system.
>
> (City of Norwood Payneham & St Peters, Submission 77, 2)

The LGA provided details of the costs to the local government sector as a whole:

[123] National Trust SA, Submission 92, 26.
[124] Department, Committee Hansard, 30 March 2021, 120.
[125] National Trust SA, Submission 92, 26.

> In 2018-2019 and 2019-2020 the local government sector contributed over $1.1 million to the cost of the establishment of [the ePlanning system] and this is to increase to around $1.2 million annually in future years.
>
> (LGA, Submission 57, 9)

The LGA anticipated that, in addition to those annual payments, costs to councils will also increase for the following activities as a result of the new planning system:

- Additional meetings for Assessment Panels (Panel member fees, staff time, council resources);
- System costs for the ePlanning portal (ePlanning levy);
- Staff resources to assist applicants to electronically lodge applications;
- Resources to achieve required timeframes, compliance, public education on the new system and implementation of building policies; and
- Professional accreditation and ongoing training.[126]

The LGA advised that the State Government intends to undertake a review of the fees and charges after the system has been operating for 12 months.[127]

3.2.3 System costs

Despite the fees paid by councils and application fees being retained by the Department, the costs of running the new planning system have well exceeded the budgeted amount, causing the Department to seek additional funding to cover cost overruns:

> There have been numerous time and cost overruns with the development of the Planning and Design Code and the e-planning system. The purpose of the system is to improve efficiency and reduce costs. To date, all the indications are that this system is seriously flawed, unfit for purpose as well as seriously late and over budget.
>
> (National Trust SA, Submission 92, 26)

National Trust SA advised in evidence before the Committee that the Minister acknowledged, in the November 2020 estimates hearings, 'a $20 million cost blowout in implementing the new Planning and Design Code ...' and that most of the overrun was funded from the Planning and Development Fund.[128]

3.2.4 Planning and Development Fund

In order to cover the cost overruns of developing and implementing the Code and the ePlanning portal, and the increased costs of operating the system, the Government sourced funds from the Planning and Development Fund (the 'Fund').[129] The Fund was established to allow developers in certain circumstances to contribute to the Fund in lieu of creating open space within a development that would otherwise be required under their development approval[130] (see details under *6.2 Off-set*

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[126] LGA, Submission 57, 8-9.
[127] Ibid 9.
[128] National Trust SA, Committee Hansard, 26 November 2020, 56.
[129] City of Norwood Payneham & St Peters, Submission 77, 3.
[130] PlanSA, *Planning and Development Fund* (2021) available online at (accessed 12 November 2021): https://plan.sa.gov.au/our_planning_system/schemes/planning_and_development_fund.

schemes below). In its submission to the Committee, the City of Norwood Payneham & St Peters explained the Fund and the method used by the Government to access monies from the Fund:

> Recent amendments to the *Planning Development & Infrastructure (General) Regulations* also allow resources from the *Planning and Development Fund* to finance the new planning system, including implementation of the planning reform program (Regulation 119(b)). The *Planning and Development Fund* consists of contributions received from applicants of land division applications via the *Open Space Contribution Scheme* (under both the *Development Act* and the *Planning Development & Infrastructure Act*). The intent of the Fund is primarily to finance public open space projects to balance the increase in urban infill which is created by land divisions. The recent amendments allowing diversion of these resources from public open space to the planning reform program is not supported. This regulation change comes at a particularly challenging time when Local Government's role in providing local, accessible, healthy outdoor recreational space is highlighted during a global pandemic and the challenges of community isolation.
>
> Despite this being a recent amendment, in the Annual Report to Parliament, it was reported that during the 2018-19 financial year, $5.35 million was taken from the Fund to finance the implementation of the *Planning Reform Program* and a further $2.04 million was used for other '*administration*' aspects of the new planning system, resulting in over 30% of the available funds being taken from the *Open Space Contribution Scheme* to fund planning reforms not necessarily endorsed by Local Government.
>
> (City of Norwood Payneham & St Peters, Submission 77, 3)

To allow monies in the Fund to be used to finance the planning reforms, the Minister has sought to vary Regulation 119 (Application of Fund) of the *Planning, Development and Infrastructure (General) Regulations 2017* on multiple occasions. On each successive occasion, the variation regulations have been disallowed by the Legislative Council. Nonetheless, each time the Legislative Council disallows the variation regulations, the Government immediately promulgates identical variation regulations, allowing the Government to withdraw monies from the Fund from that time until the Legislative Council has an opportunity to disallow each new set of variation regulations.

The Committee received the following comments regarding the Government's use of the Fund to support the development, implementation and cost overruns associated with the ePlanning system:

> Applicants paying monies into the fund and Local Government, have a rightful and clear expectation that funds raised under the *Open Space Contribution Scheme* will solely be used for the purposes of purchasing and developing open space. This Scheme is an important source of funds to support Local Government's ability to provide accessible, quality open space in the form of parks, reserves and upgrades to the public realm and its quantum should not be diminished through this change to the regulations.
>
> (City of Norwood Payneham & St Peters, Submission 77, 2-3)
>
> [M]oney has been plundered from a fund supposed to be invested in creating public open space, not to support a new planning system that will further diminish it.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 56)
>
> Professor Warren Jones has pointed out that DPTI [Department for Planning, Transport and Infrastructure] had already blown the budget of $20m set aside for the development of the code in October last year [2019]. What further funds have been approved for development of the code has yet to be revealed. Certainly the plundering of the Planning and Development Fund to pay for the huge cost of the planning reforms has been an alarming development. With densities of development being

increased over the city the provision of open space to offset the downsides of doing this has become even more important goal [sic].

(Kevin O'Leary, Submission 49, 14)

A recent amendment to the PDI Act has seen Open Space and Places for People funding now able to be applied to ePlanning related expenses at the time that the planning policy is now creating the opportunity for more wide-spread distribution of development density unlike we have ever seen before in Adelaide Metropolitan area.

(City of West Torrens, Submission 51, 6)

Changes were recently made to the Regulations to allow the Planning and Development Fund (the Fund) to be used to fund the Planning Reforms process. This has been met with concern from both local government and the development sector as the fund was intended to provide quality public open [space] throughout the State.

(Town of Gawler, Submission 93, 5)

Without careful oversight, there is real danger of eroding the potential of the Planning and Development fund to deliver public green open spaces, which are integral to enabling healthier communities particularly in light of the implications of the COVID-19 pandemic and the increasing need to provide accessible and inviting open spaces.

It is recommended that a greater level of transparency be introduced into the Planning and Development Fund to provide public accountability as to how these funds are allocated in the future.

(Planning Institute of Australia, Submission 96, 5)

National Trust SA has called for an independent examination of the future costs of the planning system and for the Auditor-General to conduct an independent review of the cost overruns of the implementation of the Code and the ePlanning system, particularly given that the new system was intended to reduce costs.[131] Whilst such an examination may not fall under the jurisdiction of the Auditor-General, the Committee accepts the call for a review.

3.3 Who should conduct an independent review?

The Committee queried some witnesses as to who they thought would be an appropriate person or body to conduct in independent review of the *PDI Act*. The Local Government Association suggested Brian Hayes QC and the other members of the Expert Panel, as they would be well placed to also assess the outcomes from the *PDI Act* against the recommendations in their report, *The Planning System We Want*.[132] In addition, National Trust SA noted that the former Minister for Planning and Local Government reconvened the Expert Panel to 'review the heritage and character policies proposed by the State Planning Commission for the draft Planning and Design Code'. However, the

[131] National Trust SA, Submission 92, 26.
[132] LGA, Committee Hansard, 16 February 2021, 92.

Expert Panel was unable to do so, citing time constraints, limited terms of reference and lack of thorough community consultation.[133]

Other suggestions regarding an appropriate person or body to conduct an independent review of the *PDI Act* included the following:

> I think to do an independent review of governance, you would want a governance expert. In terms of the Planning and Design Code and the community engagement, there are lots of experts who can run a community engagement process. Why didn't they engage a properly qualified body to do that, I don't know. They have spent enough money, they could have. I think you would need someone who is independent but skilled in genuine community engagement.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 61)

> It is our recommendation that, in order to obtain true and full independence, a panel of 'planning system' experts be assembled to review the operation and framework of the *Planning, Development and Infrastructure Act 2016* (PDI Act) including the Planning & Design Code. It is important, if this were to occur, that a combination of strategic and statutory planners be involved to ensure that any recommendations are derived through the lens of contemporary planning concepts and national best planning practice.
>
> ...
>
> It would be helpful to obtain a diversity of advice from planning law experts, specifically from members of the legal profession who represent both the development industry and local government in planning matters.
>
> (Planning Institute of Australia, Responses to Questions on Notice, 1)

> An independent person or agency with appropriate qualifications and experience particularly in community engagement techniques and practice.
>
> (Environmental Defenders Office, Responses to Questions on Notice, 2)

> The Working Group [on Planning and Climate Change in South Australia (the 'Working Group')] believes that if Parliament were to initiate an independent review of the PDI Act, an additional advisory group on climate change comprising those with appropriate expertise in the mitigation of and adaptation to climate change should be appointed to contribute to the review process.
>
> (Working Group, Responses to Questions on Notice, Q8 – *Defer for Independent Review*)

The Working Group also noted that a review of the *PDI Act* should be 'as independent as possible ...', and 'could occur under the auspices of an advisory body established by the SPC [Commission] at the request of the Minister under the *PDI Act* and comprise members who are independent and appropriately qualified to advise the SPC on this issue.'[134]

3.4 When should an independent review be conducted?

[133] National Trust SA, Submission 92, 21-2, quoting the Expert Panel on Planning Reform, *Report on Heritage and Character in the Planning and Design Code* (December 2019).
[134] Working Group, Responses to Questions on Notice, 1-2.

Another consideration is when a review of the *PDI Act* should take place. The Minister stated in correspondence to the Committee prior to the Code being fully implemented that it 'is premature to hold an independent review of the operation of the *Planning Development and Infrastructure Act 2016*, given that it is not yet fully operational and the advantages of the new system have not yet been fully realised.'[135] The Working Group disagrees, and believes that a review of the impacts of the *PDI Act* on climate change should occur immediately:

> We believe that review of the relationship between climate change management and the State's land-use planning system should commence as a matter of urgency with progressive attention given to ways and means of addressing shortfalls in that respect in the system.
>
> (Working Group, Responses to Questions on Notice, 4)

The Environmental Defenders Office agreed that a review could commence immediately to assess aspects of the system that have already been in place for some time:

> [R]eview could commence by tracking progress against the recommendations of the Expert Panel. Also, parts of the system have now been in place for some time so they could be reviewed (Engagement Charter; Phase 1 & Phase 2 Code areas).
>
> (Environmental Defenders Office, Responses to Questions on Notice, 2)

Other submitters that commented on this topic suggested a review should be undertaken 12 months after full implementation of the Code. The LGA noted that 12 months would allow for the impacts of the Code to be realised and assessed:

> It's difficult to understand at present what the full implications of the Act and the Code will have on communities and their councils. Only when it's fully operational will we see the unforeseen, the seen and unintended consequences of the Act and the Code and any real gaps or barriers in the Act in its subordinate legislation.
>
> This is why the LGA has been calling for a review to be undertaken following 12 months of full operation of the Act, which will more appropriately identify concerns relating to community rights, sustainability, heritage, environment protection and the legal construct and interpretation of the Act.
>
> Those operational matters will probably be able to be assessed after 12 months in terms of how the Act is working, how the different moving parts are coming together. In terms of the Code and whether or not it has met its intent to deliver good planning policies that improve climate change conditions, increase tree canopy and address car parking concerns, they probably won't be known for quite some time.
>
> In 12 months' time we will be able to see how the Act is operating, but whether or not the reforms have met their policy intent is probably about a five-year horizon. We'll need to look very carefully at whether or not the Act has actually achieved its intended benefits, and have a process in place where we can quickly reset those aspects of policy and those aspects of the Act that perhaps aren't working as well as they should.
>
> (LGA, Committee Hansard, 16 February 2021, 90)

[135] Correspondence from the Minister to the Committee dated 31 July 2020, 1 (Appendix B to this Report).

3.5 Recommendations

The Petitioners request that an independent review be conducted to consider the impact of the *PDI Act* on community rights, sustainability, the environment and heritage. Each of these issues is considered separately in the following four sections of this Report. Whilst in the Committee's view, these topics should be addressed by an independent review of the *PDI Act*, the topic of heritage can be separately considered by recommendations made in that section *7 Heritage* below. Heritage has already been the subject of an inquiry by the Environment, Resources and Development Committee, who have produced a report and made recommendations. Those recommendations, addressed in that section of this Report, are endorsed by this Committee.

The Committee is convinced that, in order to have an impact on development, important policy issues such as Design Quality, Climate Change and Cultural Heritage must be reflected in the *Planning and Design Code*. This could be done by translating State Planning Policies into the criteria set out in the development pathway tables such as 'deemed-to-satisfy' and 'performance assessed'.

In addition to community rights, sustainability and protection of the environment, the Committee advises that the following topics be addressed in the independent review of the *PDI Act* recommended below:

- Whether the recommendations of the Expert Panel on Planning Reform have been fully realised;
- Whether the Code provisions are consistent with the objects of the *PDI Act*;
- Any performance targets and monitoring that have been undertaken pursuant to *Schedule 4 – Performance targets and monitoring* of the *PDI Act*;
- Consider guidelines for resolving competition and conflict between State Planning Policies.

The Legislative Review Committee recommends that:

Recommendation 5

3.1 The Minister for Planning and Local Government establish an independent review of the *Planning, Development and Infrastructure Act 2016* and the implementation of the *Planning and Design Code* to determine its impacts on community rights, sustainability and protection of the environment as identified in this Report. A review would also include the fees, charges and costs to councils of operating the new planning system. The Committee also recommends that the report resulting from the review be tabled in both Houses of Parliament by the close of 2022.

The independent review should be undertaken by the Expert Panel on Planning Reform, or a panel of similarly qualified professionals, and must include consultation with community representatives.

Recommendation 6

3.2 As part of the review of the *Planning, Development and Infrastructure Act 2016* in Recommendation 5, the reviewing body assess whether State Planning Policies should be

incorporated into the *Planning and Design Code* in order to ensure that policy matters are considered by the Relevant Authorities in determination of development applications.

Recommendation 7

3.3 The Economic and Finance Committee undertake an inquiry, under section 6 of the *Parliamentary Committees Act 1991*, into the cost overruns, financing and use of funds from the Planning and Development Fund for the planning system reforms, including the implementation of the *Planning and Design Code* and the ePlanning system.

Recommendation 8

3.4 The Minister for Planning and Local Government introduce amendments to the *Planning, Development and Infrastructure Act 2016* to restrict the use of the Planning and Development Fund or the Urban Tree Canopy Off-set Fund to creating and developing open and green space.

Recommendation 9

3.5 To avoid regulations being repeatedly remade immediately after being disallowed by Parliament, the Attorney-General introduce amendments to the *Subordinate Legislation Act 1978* to prohibit the re-introduction of a regulation that is the same in substance as one that has been disallowed by Parliament, for six months from the date of disallowance. The amendment should permit Parliament, by resolution, to permit the making of the new regulation within the six-month period.

4 COMMUNITY RIGHTS

PETITION PRAYER 1:

Undertake an independent review of the operation of the *Planning, Development & Infrastructure Act* to determine its impact on community rights, sustainability, heritage and environment protection

This section of the Report considers the impact of the *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*'), and the new planning system created under the *PDI Act*, on several aspects of community rights raised by submitters and witnesses including the following issues:

- reduced involvement of local councils in the policy development and development approval processes;
- 'Deemed-to-satisfy' provisions that remove a number of developments from scrutiny;
- shortened timelines for approval and 'deemed consents' where timeframes are not met;
- decreased public notification of development applications;
- decreased public access to information;
- reduced third-party (also known as representor) appeal rights;
- the subjectivity of performance assessed assessments;
- lack of local policy content transferred into the *Planning and Design Code* (the 'Code'); and
- lack of design standards to guide development.

Submitters feared that each of these factors serve to weaken community rights and disenfranchise councils, communities and individuals from having input into planning decisions that affect their local character and amenity. The following evidence identifies some of the submitters' concerns:

> The lack of checks and balances and the exclusion of elected council members and the community from decision-making further reduces accountability and transparency and creates a corruption risk that appears not to have been assessed or mitigated in any meaningful way.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 57).

> The removal of notification requirements, representation rights and non-complying development categories, combined with the introduction of 'deemed to satisfy' and 'Performance Planning', is a massive removal of protection currently afforded under the current planning regulations.
>
> (Stirling District Residents Association, Submission 31, 6)

> Applications currently allowing wide consultation and appeal rights have been reclassified so that less consultation is required and [third-party] appeal rights no longer exist. However, for these applications, the applicant will still have appeal rights and in addition the ability to obtain deemed consents—a process that we oppose—will apply if shortened assessment time frames—another aspect we do not agree with—are exceeded.
>
> (Environmental Defenders Office, Committee Hansard, 1 December 2020, 78)

> Rights to participate in decision-making around proposed developments have been removed. There is a loss of appeal rights about development decisions. The opportunity to meaningfully participate in policymaking has not been honoured in the process for developing the Planning and Design Code and,

adding insult to injury, it now appears that our right to know about development proposals and approvals are being removed in the new e-planning system.

(National Trust 5A, Committee Hansard, 26 November 2020, 56)

The ways in which submitters suggest the *PDI Act* impacts upon community rights are discussed in this section.

4.1 Councils' role in the planning process

4.1.1 Policy development

Under the previous planning system, councils were very involved in the planning process, including the development of policy, amendments to development plans and approval of applications. The *PDI Act*, however, strips much of that involvement away from local councils in favour of a more centralised policy and decision-making process. The following comments from submitters indicate the concerns they share regarding the reduced involvement of local councils, and the loss of the local knowledge they have amassed over decades, in the process of policy development:

> Previously, under the Development Act, Councils were included as a key decision maker in Development Plan Amendments and the Administration would liaise with DPTI [Department for Planning, Transport and Infrastructure] and ultimately formal decisions were made by Council and the Minister for Planning. The PDI Act has removed Council as a decision maker in the process ...
>
> (City of West Torrens, Submission 51, 5)

> Without a formal mechanism for Council to provide input into policy development process, or having a role to play in the assessment of significant applications, [a] wealth of local knowledge is missing from the process, to the potential detriment of on-ground outcomes and as evidenced in the draft Code.
>
> (City of West Torrens, Submission 51, 5)

> Council input in the new planning and development Code is paramount and should be taken seriously as their wealth of knowledge and many years of experience in planning is a valuable asset. They have developed DPAs which have taken years to develop and 'PERFECT'.
>
> (Tony Di Giovanni, Submission 12, 4)

> Councils (Local Government) are surely best placed to actually be the driver of investigations into future changes. They have the empathy with the amenity of the community that State Government Departments can't have. ... I request therefore that you respect the role that Councils can and do provide. Please, not only re-include them in the process, but consider allowing them to be the driver of future considerations for change.
>
> (Alan Gilbie, Submission 18, 2)

> We need to go back to giving Councils and residents some say in the development of areas where they live, because these are the people who are affected. This is especially so when many people are spending more time in their residential areas.
>
> (Elaine Dyson, Submission 73, 2)

As well as knowledge and experience in policy development, councils also have developed expertise in planning decision-making through representation on assessment panels.

4.1.2 Assessment panels

Submitters object to the reduced role for local council members on assessment panels in the new planning system. Section 83 (Panels established by joint planning boards or councils) of the *PDI Act* sets out the requirements for appointing a local assessment panel. Section 83(1)(b) states:

> (b) a designated authority must determine—
>
> (i) the membership of the assessment panel, being no more than 5 members, only 1 of which may be a member of a council, and, if the designated authority thinks fit, on the basis that the assessment panel will be constituted by a different number of members depending on the particular class of development that is being assessed by the assessment panel ...

Submitters made the following comments:

> The previous assessment panel model comprising equal numbers of independent members and elected members with an independent chair provided a good balance of local knowledge and experience and professional independent expertise. The LGA [Local Government Association] advocated for this model to be retained in the *PDI Act*.
>
> (LGA, Responses to Questions on Notice, 4)

> The EDO [Environmental Defenders Office] has serious concerns that the loss of Council representation on assessment panels will erode the role of the community in planning matters.
>
> (Environmental Defenders Office, Submission 94, 4)

> Community Assessment Panels ... now have four people from the development industry and only one community representative.
>
> (Prospect Residents Association Inc, Submission 59, 4)

> Local democracy in the planning system, both in the development of policy and decision making, is fundamental to a good planning system and to strengthening communities. The changes to assessment panels have reduced local representation and decision making by the elected representatives of the local community.
>
> (LGA, Responses to Questions on Notice, 4)

> [W]hat we see is that that local connection and that local accountability that you get through council participation in planning is really being written out of the new system. We have the reduction of council membership on council assessment panels, but the idea that so many of these applications are now going to go through streamlined processes will mean that councils won't even see them.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 59)

The 'streamlined processes' referred to by National Trust SA are the 'deemed-to-satisfy' and 'deemed consent' processes which are discussed under the next headings in this Report.

The Attorney-General's Department (the 'Department') explained that the number of local council members on assessment panels has been reduced to provide

> a more professional and accountable basis for planning decisions by the establishment of an Accredited Professionals Scheme and, accordingly, for persons appointed to council assessment panels to be accredited professionals, other than allowing for one member of the council to be appointed to a panel. This requirement is set out specifically within the Act.
>
> (Department, Responses to Questions on Notice, Q3)

As alluded to by the Department, in addition to the removal of council members on council assessment panels, the Code also provides for private certifiers to determine both planning and building approvals.[136] Under section 92 (Use of term 'building certifier') of the *PDI Act*, someone who is qualified as an accredited professional under the scheme in the *PDI Act* may be known as a *building certifier*, and may be the relevant authority for assessing a development's compliance with the Building Rules.[137] The Commission has advised councils that they cannot withhold approval for a development application that has been approved by an assessor.[138] This leaves councils in an awkward position, as explained by the following comments:

> Ultimately, councils will be responsible for issuing the final development approval for an application that it may not ordinarily approve based on the assessment undertaken. This will result in follow up and compliance on an application councils have issued development approval for, although not actually engaged in any of the assessment.
>
> (City of West Torrens, Submission 51, 6)

> [Use of private certifiers] is of great concern as the only accountability they will have is to an occasional audit (once every 5 years). They will be a law unto themselves and do not have to report to anyone in their work once trained and accredited. No one oversees their work. These people are dependent on the industry for future work and so much more likely to approve developments that do not meet the criteria required and to sign off development before they are fully completed.
>
> (Prospect Residents Association Inc, Submission 59, 5)

The Committee heard that submitters are concerned that councils are now less involved in planning assessment decisions, and also that more development applications will not be reviewed at all due to 'deemed-to-satisfy' and 'deemed consent' provisions in the *PDI Act*.

4.1.3 Deemed-to-satisfy assessments

Submitters complain that under the *PDI Act*, significantly more development applications will not face any scrutiny by local assessment panels or the public, as a large proportion of developments will be classified as 'deemed-to-satisfy'. A proposed development is classified as deemed-to-satisfy where the plans meet the criteria set out in the deemed-to-satisfy classification table for the relevant zone in the Code.

Where a proposed development meets the deemed-to-satisfy criteria, the application must be granted planning consent under section 106 (Deemed-to-satisfy) of the *PDI Act*. Section 106 states:

> (1) If a proposed development is classified as deemed-to-satisfy development, the development must be granted planning consent.

[136] City of West Torrens, Submission 51, 6.
[137] *PDI Act* ss99(1)(d)(i) and 99(2)(b)(i).
[138] City of West Torrens, Submission 51, 6.

(2) If a relevant authority is satisfied that development is deemed-to-satisfy development except for 1 or more minor variations, the relevant authority must assess it as being deemed-to-satisfy (and that determination will then have effect for the purposes of this Act).

(3) A planning consent under this section must be granted without undertaking a process for public notification or submissions in relation to the proposed development.

...

Section 106(2) of the *PDI Act* requires a Relevant Authority to assess a development as deemed-to-satisfy, and therefore grant planning consent, even where there are 'one or more minor variations ...' from the deemed-to-satisfy criteria. This phrase has been criticised in some submissions as being too vague. Section 43 (Practice guidelines) of the *PDI Act* permits the Commission to produce practice guidelines with respect to the interpretation of what constitutes a minor variation for the purposes of the deemed-to-satisfy provisions, however, it appears this has not been done.

The State Planning Commission (the 'Commission') advised that the deemed-to-satisfy provisions created an incentive for developers to meet those criteria:

> From a proponent's point of view, using the deemed-to-satisfy route is a huge incentive for them in terms of time savings, efficiency, getting a result, getting started. All of the feedback we've got is that this will be earnestly used. We have also applied the same logic in master plan greenfield sites where, following land division and within building layout plans agreed, proponents there can simply move through straight into building. I do think, in those circumstances, there will be a substantial improvement.
>
> (Commission, Committee Hansard, 16 March 2021, 115)

4.1.4 Assessment timeframes and deemed consents

The assessment timeframes under the new planning system have been revised to allow more time for consideration of complex applications. However, the timeframe for 'performance assessed' applications, which are likely to constitute the majority of development applications, have been shortened from 40 days to 20 days.[139] National Trust SA stated that the reduced timeframes for approvals place a heavy burden on planning authorities and reduce opportunities to negotiate better design solutions.[140] The following submitters agreed:

> While many straightforward applications can be determined within this timeframe, other developments require complex and time consuming assessment processes, particularly non-statutory referrals to heritage advisors, engineers (of varying disciplines) or arborists.
>
> (City of Norwood Payneham & St Peters, Submission 77, 4)

> It is considered that the assessment timeframes in the *Planning, Development and Infrastructure (General) Regulations 2019* (Regulations) do not give adequate consideration to the resources available to councils, particularly regional and smaller councils, to deal with more complex applications. Nor do the timeframes consider those councils that strive for best practice, or are in a period of growth, that

[139] *Planning, Development and Infrastructure (General) Regulations 2017*, regulation 53(1)(b).

[140] National Trust SA, Submission on the Draft *Planning and Design Code*, 11 (provided to the Committee as Attachment 6A to the submission of Community Alliance SA, Sub 53).

> are required to consider multiple complex applications at once. This consideration process requires significant expertise on hand and time to work closely and negotiate with developers.
>
> (LGA, Submission 57, 7)

Where the Relevant Authority fails to make a decision on a development application within the prescribed time, an applicant may secure automatic approval, known as 'deemed consent', under section 125 (Time within which decision must be made) of the *PDI Act*. A deemed consent is an approval for the development to proceed without any further scrutiny.[141]

The pressures deemed consents place on local government planning departments, trying to process applications in advance of strict time limits, were mentioned above under *3.1.2 Efficiency of planning system*. The pressure on councils to meet these deadlines and granting deemed consents may not support the best development outcomes, as noted in the following comments:

> It is the LGA's view that the assessment timeframes in the Regulations and the deemed planning consent provisions in Section 125 will result in reduced opportunities for best practice outcomes to be negotiated and will encourage a more adversarial assessment environment, at the expense of the best possible planning outcomes.
>
> (LGA, Submission 57, 7)

> Deemed consents are considered to pose considerable risks, particularly given that Councils have no ability to appeal deemed consents relating to private accredited professionals. The 'threat' of a deemed consent may also encourage relevant authorities to refuse applications within the prescribed timeframe rather than taking additional time to negotiate and resolve issues to achieve better outcomes.
>
> (City of Norwood Payneham & St Peters, Submission 77, 4)

The submission of the North Adelaide Society Inc noted that the time frames for a member of the public to provide a representation where an application is publicly notified is also very limited:

> An applicant has as much time as they wish in which to lodge an application, yet a representor will be fortunate if notified and will have very little time (i.e. in their own 'after work time') to understand the application and the applicable planning and design requirements and then to make such representations (if any) they wish. An assessor similarly has an untimely short period in which to decide or provide a report and assessment to a decision-making body.
>
> (North Adelaide Society Inc, Submission 46, 2)

The City of West Torrens expressed concern that short timeframes for assessments and deemed consents may have the unforeseen consequence of increasing council's legal costs and administrative work involved in the process.[142] The LGA suggested that the *PDI Act* be amended to limit the application of deemed consents:

> The LGA is of the view that prescribed timeframes should apply to all categories of development, however, deemed planning consents should apply to accepted and deemed to satisfy categories of development only. This would be achieved by amending Section 125 (10) of the PDI Act to exclude all performance assessed development and restricted development from the operation of Section 125.

[141] LGA, Submission 57, 8; National Trust SA, Committee Hansard, 26 November 2020, 57.
[142] City of West Torrens, Submission 51, 3.

(LGA, Submission 57, 7)

Submitters are concerned that the *PDI Act* will curtail local government councils' ability to drive planning policy for their communities, removing much of their influence over local planning decisions and therefore the character and amenity of their neighbourhoods.

4.2 Public involvement in the planning process

The Committee received submissions suggesting that, as well as eroding the powers of councils, the *PDI Act* also diminishes the involvement of the public in local planning decisions. Submitters claim the public has reduced rights to be notified of developments, to appeal planning assessment decisions and to have input into planning policies. Many submitters shared the views of Ms Alicia Siegel who stated:

> Citizens deserve the right to object and appeal developments in their area that affect the established quality of living. Increased density and heights and therefore increased traffic, minimal setbacks and little landscaping change the face of street-scapes, residents need a functional community consultation process for their voices to be heard.
>
> (Alicia Siegel, Submission 45, 1)

4.2.1 Public Notification

Many submissions claimed that under the *PDI Act,* fewer development applications will attract public notification requirements. This includes any development that meets the deemed-to-satisfy criteria, under section 106(3) of the *PDI Act*. Under the previous planning system, as explained by the City of Norwood Payneham & St Peters, notification was required for certain development applications based on the scale of the development:

> For example, a residential development in a residential zone may result in impacts which warrants Category 2 notification to neighbours, whereas a more obtrusive or unusual development may result in further reaching impacts warranting broader notification and third party appeal rights.
>
> Under the *Planning Development & Infrastructure Act*, public notification for performance assessed developments (i.e. the majority of developments) is condensed so it is either required or not required.
>
> (City of Norwood Payneham & St Peters, Submission 77, 3)

The City of West Torrens noted that the public was led to believe that there would in fact be broader requirements for public notification under the *PDI Act*:

> Early messaging to community stated that ***more*** notification would occur. The statement was technically true, because in some cases, more people *may* be notified on specific applications through the change in definition to 'adjacent land' and the method of notification to occur i.e. a sign on the land. However the number of people to receive direct notification and have any kind of appeal rights is significantly reduced. While the message may have been *technically* true, it was misleading in that **fewer types of development** will be notified—including development types for which community members would usually expect to receive notification.
>
> (City of West Torrens, Submission 51, 3)

The Norwood, Payneham and St Peters Council has done an analysis of the number of recent applications that would have been notified under the new system:

> It appears that the Planning and Design Code will significantly reduce the number of development proposals that require notification. The Norwood, Payneham and St Peters Council has calculated that the proposed planning system would have caused a 41% reduction in notifiable applications in 2018 with a further 11% remaining unclear, and a 56% reduction in notifiable applications in 2019 with a further 16% remaining unclear. A reduction in notifiable developments of this scale significantly disenfranchises the community and diminishes the rights of property owners to information about proposed developments that materially affect their interests.
>
> (National Trust SA, Responses to Questions on Notice, 3)

The Committee received other submissions urging that public notification be increased:

> It is vital that the Code provides those people impacted by new development the opportunity to voice their concerns (or approval) given the vast changes to local development plans.
>
> (Helga Lemon, Submission 52, 1)

> We urge that you seek to ensure that the public's right to at least know about proposed developments in their areas are not further curtailed under the new system and are preferably enhanced to support the transparency and integrity of the new planning system.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 56)

> We ask that notification and representation rights be retained and that appropriate lists of non-complying development be reintroduced into the new Code.
>
> (Stirling District Residents Association, Submission 31, 5)

> The Code should include notification for all development that increases development intensity, including additional dwellings on the site, two storey developments, earthworks where the new dwelling is located 600mm above ground level and or change of use from residential to non-residential.
>
> (Prospect Residents Association Inc, Submission 59, 1)[143]

Mr Michael Lennon, then Chair of the Commission, gave evidence before the Committee that the new notification requirements under the *PDI Act* and the *Planning and Design Code* (the 'Code') would increase public notification, including provisions requiring placement of a sign on development sites in some circumstances.

> [T]he new planning system will give more people the opportunity to comment on developments that are in their neighbourhood. One of the measures we have introduced in the Code to increase community awareness of development is to implement the requirements for a sign to be placed on affected land. Previously, where only immediate neighbours were informed by a letter, under the Code anyone who sees the sign can make a representation.
>
> In addition, there is also a public register for all development applications available on the PlanSA portal, which people with an interest in a particular development can access and track the progress of that development application online. Previously, this information could only be accessible by contacting

[143] This proposal was also supported by Stephen English, Submission 10, 2; Sacha Ure, Submission 14, 1; and Gordon Ure, Submission 15, 2.

> the relevant council. Ultimately, the new planning system gives people far more insight into what development is happening in their neighbourhood and across the state than ever before.
>
> (Commission, Committee Hansard, 16 March 2021, 109)

The Department also reported to the Committee that the Department anticipates even more public notification will occur under the new system. Ms Anita Allen, Director of Planning and Development, Planning and Land Use Services ('PLUS') with the Department stated in evidence before the Committee:

> In my opinion, the notification requirements are much broader under the *Planning, Development and Infrastructure Act* than under the *Development Act*. We do expect that there will be more public notification under the Planning and Design Code than there was before. I think the reason for that is that the way the legislation was drafted is that you identify matters that are exempt from notification, and previously it was the reverse of that. As a result of that, if it doesn't meet the requirements, or it wasn't an envisaged land use under the Planning and Design Code, it is more likely that it will be notified.
>
> Things that aren't deemed-to-satisfy ... are much more likely to be publicly notified. The public notification period has been extended from 10 business days to 15 business days for those sorts of applications, so in all cases public notification is longer. The notification process is more transparent in that you have the letter to adjoining landowners, but you also have the sign on the land, and of course they can be heard at any hearing as well.
>
> So my view is, if it were fully analysed, that public notification will be greater.
>
> (Department, Committee Hansard, 30 March 2021, 122)

Ms Allen also advised that all development applications that are on public consultation in South Australia can be viewed on the ePlanning system, allowing the public to search for applications within their suburb.[144]

Mr Stephen Smith of the LGA noted that some Phase Two (Rural Area) councils are reporting an increase in notifiable development applications under the Code, but explained that this may be inadvertent:

> Some of the Phase Two councils ... have advised that they are experiencing more development that is subject to public notification, but this is likely as a result of the assessment pathways being unclear or not stated in the Code, rather than a deliberate policy intent within the Code.
>
> (LGA, Committee Hansard, 4 May 2021, 130)

National Trust SA identified another inadvertent outcome of the new notification system:

> Applications which should be subject to public notification, such as demolition of a State Heritage Place or local Heritage Place are not required to undergo public scrutiny under the Draft Code. However, an application for 'conservation work' to a heritage place would default to 'all other code assessed development' and would require public notification. This would appear to be an adverse outcome that does not support the aims of the Code.
>
> (National Trust of SA Submission on the Draft *Planning and Design Code*, 11)

[144] Department, Committee Hansard, 30 March 2021, 122.

Most of the submitters that commented on the issue of public involvement in planning sought increased public notification of development and are concerned that under the new planning system, the public will receive less notification. Submitters also were concerned that under the new system, less information is available to the public.

4.2.2 Public access to information

Public notification facility

One of the objects of the ePlanning system is to make information more readily available to the public,[145] yet submitters suggested that less information is available under the new planning system. National Trust SA advised that the Commission has failed to implement a direct public notification facility, contrary to the *PDI Act*.[146] Section 48 (SA planning website) of the *PDI Act* states:

> (5) The SA planning portal must also include a facility that allows members of the public to be notified directly about specified classes of matters or issues that are of interest to them (subject to any rules, requirements, restrictions or exclusions determined by the Chief Executive for the purposes of this subsection and subject to any determination of the Chief Executive as to the cost, practicality and viability of providing such a service).

The Environmental Defenders Office also noted the absence of a direct public notification facility under the new system:

> The Act provides that the portal must include a facility that allows members of the public to be notified directly about specified classes of matters or issues that are of interest to them. However, it has recently been cited by the Chief Executive of Planning that the scope of the notification facility is to be restricted to the search and subscription facilities currently available on the online portal.
>
> I recall on numerous occasions during the course of the process to bring these changes about that there were assurances that there would be a full notification system for the public. This has been curtailed at the last minute. I do acknowledge that the Act allows the CE to make such decisions on resourcing grounds but it is a significant setback for community rights.
>
> (Environmental Defenders Office, Committee Hansard, 1 December 2020, 78)

Public register of development applications

The Committee heard evidence that not all development applications were available on the ePlanning system. Ms Sally Smith, Executive Director of PLUS for the Department, gave the following explanation for the apparent lack of information available on the PlanSA website:

> I might start with the public register, which is on the SA Planning Portal, which is where all development applications lodged under the *PDI Act* will now be available. I think there was some concern that when people went on that register they weren't finding all development applications, but that's because Phase 3 was not actually on that webpage until the 19th [of March 2021, when Phase 3 of the Code was implemented]. The public register does provide a way for all members of the public to access all development applications in the system. That includes information about what has been lodged and where, through to a decision notification form.
>
> (Department, Committee Hansard, 30 March 2021, 121)

[145] *PDI Act* s12(2)(b).

[146] National Trust SA, Committee Hansard, 26 November 2020, 57, 58.

Ms Smith acknowledged that site plans for applications that are deemed-to-satisfy will not be included in the public register:

> If you meet the lifted bar [for deemed-to-satisfy] and you are providing what is required, there is no requirement for notification. It will still be on the public register, so someone will know that you have lodged for a house at that property, but if you are deemed-to-satisfy there will be no plans uploaded, but your decision notification form will be uploaded.
>
> (Department, Committee Hansard, 30 March 2021, 126)

Removal of publicly notified materials

Submitters also complained that the materials relating to a development application that is publicly notified are removed once a determination is made on the application. The Environmental Defenders Office particularly noted this issue with regards to the more significant applications determined by the State Commission Assessment Panel ('SCAP'). Public access to the applications and accompanying documents is removed once SCAP has made its decision.[147] Ms Smith of the Department advised:

> For matters that are publicly notified, ... where there was perhaps a community expectation that it was a certain height or a certain setback, and the public notification process in accordance with the Act and regulations, but once a decision is made those plans are removed from the public register and all that remains at that point is the description, the site that it is located at, and the decision notification form.
>
> (Department, Committee Hansard, 30 March 2021, 126)

The Department has determined that it is not in the public interest to maintain public access to supporting documents and materials on an application beyond the decision on that matter. Ms Smith advised the Committee that the information was removed to protect the privacy of the applicants:

> There are concerns raised about if something is on notification how much data is actually available. During the actual notification process, in accordance with the Act, that information is available, but is removed post a decision. There are provisions in the Act that talk about protecting people's privacy and confidentiality, so there is some reason why that information isn't available forever and a day, but it's available during the statutory consultation process.
>
> (Department, Committee Hansard, 30 March 2021, 121)

The Department argued that the information retained on the website after the matter is determined is sufficient to keep the public notified:

> It is considered that the development application register (including the DNF [decision notification form]) will provide sufficient information to enable members of the public to be properly informed of developments that may impact them, and in order to initiate discussions with local councils (if necessary) on any enforcement issues.
>
> (Department, Responses to Questions on Notice, 9)

The Committee heard that the submitters are of the opinion that there is less information available to the public under the new system. However, the Department and the Commission argue that there is more information available and that information is much more accessible to the public through the ePlanning system.

[147] Environmental Defenders Office, Committee Hansard, 1 December 2020, 78.

4.2.3 Third-party appeal rights

Under the previous planning system, neighbours to a property where a development was being proposed were able to make representations on certain development applications. These neighbours, known as third-parties or representors, had rights to appeal a decision of the Relevant Authority in relation to a proposed development. The Environment, Resources and Development Court could also review a decision.[148] However, under section 202(1)(d) of the *PDI Act*, third-party rights to make representations and appeal only exist with the very few developments that are classified as restricted, where SCAP is the relevant authority.[149]

Several submitters argued that third-party appeal rights provide important community involvement in the planning process, which 'is extremely beneficial and helps to ensure decision making within the public sector is held to account.'[150] These submitters argue that adjacent landowners' rights to appeal should be restored:

> Under what's being proposed currently, the restricted form of development, which is what's replacing a noncomplying form of development, will have appeal rights. The community's right of appeal is only through the council assessment panel or regional assessment panel, rather than through the Environment, Resources and Development Court.
>
> (Planning Institute of Australia, Committee Hansard, 17 November 2021, 44; see also Planning Institute of Australia, Submission 96, 4)

> What is missing are the Third Party Appeal Rights to the Environment, Resources and Development Court for residents to exercise against exceptional development proposals. The future loss of third-party appeal rights to adjoining owners and other interested parties is a most serious omission in the new Code. There was no good reason to abandon this level of protection to neighbours and other representors if badly determined assessments arise and affords no opportunity for redress in the case of an erroneous decision. The proposer can of course, return with an amended application. What opportunity do residents or other affected representors have? Applicants who are commercial developers usually do not develop properties for themselves and live with the consequences of what may be adverse impacts for adjoining residents, the amenity, or the general community. That is poor planning policy.
>
> (North Adelaide Society Inc, Submission 46, 2-3)

> Whilst the ability for representors to present their concerns to the Regional or Council Assessment Panels is retained, this is not considered adequate until such time that at least one experienced planning law professional is mandated on every assessment panel. It is worth noting that the only avenue left to representors under the PDI Act is judicial review within the scope of incorrect categorisation of a development which is extremely limited.
>
> (Planning Institute of Australia, Submission 96, 4)

The impact on the community of losing third-party appeal rights is exacerbated by what many submitters see as a botched community consultation process at the policy development stages of the new planning system and, in particular, the Code. For example:

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[148] Planning Institute of Australia, Committee Hansard, 17 November 2020, 44.
[149] LGA, Committee Hansard, 4 May 2021, 130; National Trust SA, Responses to Questions on Notice, 3.
[150] Planning Institute of Australia, Submission 96, 4.

> The reduction in rights was based on the notion that the public would be more involved in the policy development rather than assessment process.
>
> (Environmental Defenders Office, Submission 94, 2)

> It was the intention of the 2014 Expert Panel and Parliament that the emphasis on community engagement at the policy creation stage would make it less necessary to have extensive third-party input at the development assessment stage. This means it was imperative that there be full and proper community consultation on the version of the Code which will be used in development assessment processes and not on a draft version which even the Planning Commission acknowledges was replete with missing portions and errors.
>
> (National Trust, Submission 92, 6)

The submissions received by the Committee suggest that the community's rights to be involved in the planning and development processes have been reduced by the *PDI Act*. Submitters expressed that, under the new system, fewer members of the public are being notified about development applications, there is less information available to the public and the public has fewer opportunities to appeal decisions. As well as these concerns, submissions received by the Committee also complained that the decision-making pathways are also reducing community rights by the incorporation of performance-based planning processes into the system.

4.3 Performance assessed development

Submitters claim that performance-based planning reduces the objective criteria by which development applications are determined and increases the subjectivity of decision-making. The Committee heard that the resulting uncertainty for communities impacts on their rights. Performance assessed development is described in the *PDI Act* section 107 (Performance assessed development):

> (1) In a case where proposed development is to be assessed as code assessed development and the development cannot be assessed, or fully assessed, as deemed-to-satisfy development, the development will be assessed on its merits against the Planning and Design Code.
>
> (2) In connection with subsection (1)—
>
> (a) to the extent that 1 or more elements of the proposed development may be classified as deemed-to-satisfy under the Planning and Design Code (if any)—that part of the development will be taken to have been granted planning consent; and
>
> (b) to the extent that paragraph (a) does not apply (including on the basis that that paragraph does not apply at all)—the development will be assessed on its merits against the Planning and Design Code; and
>
> (c) to the extent that paragraph (b) applies—the development must not be granted planning consent if it is, in the opinion of the relevant authority, seriously at variance with the Planning and Design Code (disregarding minor variations).
>
> ...

The following submitters were critical of the emphasis on performance assessed development in the Code, which, they argue, permits the Relevant Authorities to exercise excessive discretion in determining applications:

> [The Code] moves away from more specific and prescriptive rules controlling development to a more open-ended setoff 'performance-based' planning requirements which enable decision makers to exercise a much higher degree of discretion in their decision-making processes.
>
> (National Trust SA, Submission 92, 5)

> Performance planning has become front and centre of the planning reforms even though it has been regarded as a total disaster in the places where it has been applied.
>
> (Kevin O'Leary, Submission 49, 2)

> While the purported intent of [Performance Planning] is to increase flexibility in planning decisions the balance of evidence and opinion is that there are more negatives than positives to its use, these include:
>
> - A greater number of unacceptable seriously non complying development applications
> - Greater complexity of debate on the merits of a proposal because objectivity is replaced by subjectivity and consequent slowing down of the time to process applications on the basis of [Performance Planning]
> - Individual developers influencing outcomes rather than outcomes being driven by a plan (by councils or state) focussed on a collective good for the community derived from good planning and consultation
> - ...
> - Significantly greater opportunity for corruption, due to the lack of objectivity
> - Undermining of community confidence in the planning process ...
>
> (Stirling District Residents Association, Submission 31, 5)

> Flexibility afforded by performance assessed developments leaves room for wide interpretations of how the policies are to apply and will result in little certainty for developers or the community as a result. The Code provides discretionary interpretation of performance guidelines to a variety of accredited private and council professionals in a system of ongoing accreditation that is quite complicated.
>
> (Dr Iris Iwanicki, Submission 37, 5)

Under the Code, private individuals can receive professional accreditation under the complicated system referred to by Ms Iwanicki above. Once an individual receives professional accreditation, they can become a Relevant Authority for determining development applications, which heightened the concerns of National Trust SA:

> The exercise of this high degree of discretion has now also been extended into private hands through accredited professionals now being relevant authorities for the purpose of the Act. ... [T]hese changes create the potential for perceived or actual undue influence over decision making and should be the subject of an independent risk assessment, as other jurisdictions have done.
>
> (National Trust SA, Responses to Questions on Notice, 8)

Mr O'Leary noted that performance planning practices have been attempted and found to be lacking in Queensland, New Zealand and the USA, and quotes a number of planning experts who claim that performance-based planning is administratively burdensome, excessively complex, lacking certainty

and transparency and can lead to inconsistent decision-making.[151] Stirling Districts Residents Association also noted international rejection of, and reports critical of, performance-based planning in other jurisdictions.[152]

Mr O'Leary provided an example of the subjectivity of interpretations that arise with performance-based planning. Section 107(2) (Performance assessed development) of the *PDI Act* directs that planning consent must be refused if the development is 'seriously at variance' with the Code. However, SCAP has interpreted 'seriously at variance' narrowly to approve developments that appear to many in the community to be contrary to the Code.[153] Mr O'Leary is concerned that the subjective interpretations encouraged under the *PDI Act* result in 'spot rezoning', which he views as a missed opportunity in planning reform:

> Instead of spot rezoning, the government should be adopting a more comprehensive master planning approach to high-rise development in which a wider range of economic, social and environmental factors are taken into account including the likely impacts of the development on traffic congestion, the neighbourhood skyline, heritage values, the local urban grain, the existing streetscape character and important local views, prospects and panoramas.
>
> (Kevin O'Leary, Submission 49, Attachment C, 3)

The City of Norwood Payneham & St Peters also questioned the seemingly ad hoc nature of decisions by SCAP:

> [T]he Council is particularly concerned about the reactive, ad-hoc nature of changing processes to accommodate specific Development Applications. The Council is supportive of a transparent, equitable and consistent process for identifying areas where special policy treatment or policy changes are required rather than through Ministerial rezoning, major development declarations and Coordinator-General call-in powers. ... There have been various examples of developments approved in recent years by the State Commission Assessment Panel (SCAP) within the City of Norwood Payneham & St Peters which substantially depart from 'up to date' Development Plan policy. These outcomes undermine community confidence and certainty in the planning system and State decision makers.
>
> (City of Norwood Payneham & St Peters, Submission 77, 1)

Stirling District Residents Association expressed concern about the removal of detailed assessment criteria in the performance-based system and the resulting uncertainty for their neighbourhoods:

> [The draft Planning and Design Code] significantly waters down safeguards against inappropriate decision making. Removal of detail character statements for each area, notification and representation rights, design diagrams and other prescriptive criteria contribute to uncertainty.
>
> (Stirling District Residents Association, Submission 31, 5)

Ms Rebecca Thomas, the Presiding Member of SCAP, provided evidence before the Committee that, while some discretion is inevitable in planning decisions, the performance-based approach is less subjective than the previous system. Ms Thomas stated:

> The Code performance objectives are very much aligned with policies within existing zones and council-wide policy. Within the Code, as you probably have seen, there are also deemed-to-satisfy provisions,

[151] Kevin O'Leary, Submission 49, 10 and 2-3.
[152] Stirling District Residents Association, Submission 31, 5.
[153] Kevin O'Leary, Submission 49, 4 and examples of developments assessed not to be 'seriously at variance' in Attachment B.

> which are again a guide—they are all guides—that provide some quantitative assistance in terms of how you might achieve the performance objective. I think this structure, to me, is really robust because it provides someone with the confidence that, if they want to achieve the performance objective, here is one way of doing it, and they can have the confidence and certainty that that has resolved the particular issue. The challenge we have at the moment is that it is entirely subjective. It is up to the individual planning officer, and different councils approach it very differently.
>
> ...
>
> ... It's not a process that is black and white. It requires a nuanced assessment and a balance of policy consideration. That's unavoidable, but I don't feel that the Code is more subjective than the current system.
>
> (SCAP, Committee Hansard, 2 March 2021, 99)

Mr Michael Lennon, then Chair of the Commission, agreed with Ms Thomas, suggesting that the new system provides for objective assessments.

> The broad intention of the new planning system given by parliament is to provide more certainty. At present, development assessment is often highly subjective, with decisions based upon an interpretation of the policies in a council development plan. The Code enables objective assessments to be made through what are termed deemed-to-satisfy provisions. Where proposals meet these objective standards, they can proceed and receive quick approvals. When they don't meet those standards, they follow a different assessment pathway which will take longer. One of the many requirements of parliament for the new planning system is a performance-based model.
>
> (Commission, Committee Hansard, 16 March 2021, 109)

The Committee heard from submitters that the lack of local policy content that was transitioned into the Code contributes to the subjectivity of the new system.

4.4 Community Rights and the Code

4.4.1 Local policy content

The Development Plans of the previous planning system reflected local policy that was developed by councils, in consultation with their communities, over many years in attempts to retain their specific local character and amenity.[154] These Development Plans went through the extensive and expensive processes of development, consultation and Ministerial approval. However, this local policy content has not been reflected in the Code and will now need to be renegotiated.[155] The Expert Panel on Planning Reform recommended that local variation should be retained in the Code.[156] The following submissions agreed:

> [M]any of our members are concerned with the loss of local policy content within this initial iteration of the code ... It is our view that this was not the initial intent of the reform and we would encourage

[154] See for example Joanna Wells, Submission 29, 2; Environmental Defenders Office, Submission 94, 3.
[155] LGA, Submission 57, 13.
[156] Environmental Defenders Office, Submission 94, 3; Expert Panel, *The Planning System We Want* (12 December 2014) Reform 7.4, 58.

the Committee to review the current proposed system changes within the context of the original intent and within the ultimate aim of what progresses good planning in this state.

...

[The] role of local government in policy development is currently not clear moving into this new system and which is of great concern given the decade's worth of policy content that currently sits within the planning system.

PIA [Planning Institute of Australia] sees a clear role for a local planning strategy narrative to be recognised in the planning system to give more nuanced local effect to state policy.

(Planning Institute of Australia, Submission 96, 3-4)

Policy intent, content and tools fundamental to councils' ability to sustain and enhance the quality of suburbs and neighbourhoods from existing Development Plans, have not been replaced with substantive planning policy of a level of detail or rigour necessary to enable good development outcomes.

(LGA, Submission 57, 12)

A vast range and number of policies important to provide a robust planning assessment document for the city context ... have been developed by council over a long period of time in consultation with the community and have been implemented for good reason. The exclusion of these policies creates uncertainty in the assessment process and invites poor development outcomes that have a negative effect on the look and feel of our city.

(City of Adelaide, Submission 64, 16)

Development Plans are the product of decades of local community engagement and policy refinement tailored to local special conditions, context and community expectations. Their replacement will inevitably result in a significant loss of positive, locally-responsive policy. ... [A] significant suite of qualitative and detailed Development Plan policy will be replaced with generic statements not nuanced enough to reflect local expectations.

(City of Norwood Payneham & St Peters, Submission 77, 1-2)

Far from simply transitioning existing arrangements, the Government took the opportunity to install new conditions favouring much more intensive development. The huge amount of thought, research and care that has gone into our current Development Plan was blithely ignored in many instances. What replaced it was often vague, or dramatically different or just factually wrong. The differences were not discussed, justified or highlighted. They were presented without any evidence or substantive argument to support such changes.

(Norwood Residents Association Inc, Submission 78, 4-5)

Ms Thomas of SCAP maintains that, despite some loss of local policy content, the planning reforms provide more consistent and certain planning outcomes across South Australia:

[F]rom my perspective, having that singular, consistent suite of policy—where no matter where you live if you are in that area you know what you can and can't do, and you know what your neighbour can and can't do, and we're all on the same playing field—is of huge benefit.

At the local level, with multiple development plans there are some councils that obviously have the finances to invest in regular policy review and have much more advanced policy in their development plans that deal with things like water-sensitive urban design, for example. Other councils don't have

> the luxury of that level of policy review. Their development plans, to be frank, are really outdated and lacking in policy, which means that when you go to assess a proposal, if the policy isn't up to date and best practice, you can't impose policy provisions that aren't in the development plan.
>
> (SCAP, Committee Hansard, 2 March 2021, 105)

The Commission acknowledged that it received similar complaints about the loss of local policy during its consultation on the Code. As a result, 'the Commission recommended substantial changes to the People and Neighbourhoods policy theme, including the transition of more localised policy content to reflect neighbourhood characteristics and Development Plan content ...' as well as the creation of new zones to acknowledge some of the unique areas.[157]

Many submissions expressed disappointment that by excluding local policy content in the Code, the Commission failed to deliver the promised 'like-for-like' transition of existing policy into a new online format.

4.4.2 Like-for-like policy

Representatives of the Department and the then Chair of the Commission, Mr Michael Lennon, described the planning reforms as a consolidation and transfer of current planning policy into a simplified electronic ePlanning system which would be 'like-for-like' with the current system.[158] The Commission had assured: 'this first generation of the Planning and Design Code is largely about transitioning and consolidating existing contemporary policy from individual council development plans into the Code.'[159] Community Alliance SA complained:

> As it has unfolded, this had been far from the truth, with complete rewriting and 'dumbing down' of planning policy in certain areas such as heritage protection for contributory items. The draft Code, as consulted on in December 2019 for Phase 3, does not transition and consolidate the existing Council Development Plans into the Planning & Design Code and the subsequent changes made to this Draft means that the Code is now very different to that put out for public consultation.
>
> (Community Alliance SA, Submission 57, 2)

However, Ms Thomas of SCAP described the new system in her evidence before the Committee as 'very like-for-like in terms of its assessment process, and the policy content isn't drastically different. ... [I]n essence we haven't noted any notable policy changes from what we would have received before.'[160]

In the Commission's *Draft Planning and Design Code Phase Three (Urban Areas) Code Amendment – Update Report*, the Commission acknowledged that the terminology 'like-for-like' could be construed differently by different stakeholders. The Commission provided the following further expression of its meaning:

> Transitioning 1500 zone variations and more than 23 000 pages of policy content into one Code is not a **cut and paste** exercise. Rather, the process has involved reviewing, understanding, harnessing and

[157] *Phase Three Summary of Engagement Report*, 7.
[158] Community Alliance SA, Submission 53, 1-2.
[159] DPTI, *Planning Ahead* Newsletter, Edition 27 (November 2019); see also Community Alliance SA, Submission 53, 1-2.
[160] SCAP, Committee Hansard, 2 March 2021, 98.

expressing the intent of our planning policies clearly and concisely, and in turn seeking to apply them consistently across the state.

In undertaking this transition, the Commission recognises that the transition of zoning from the relevant development plan to the draft code is not always straight forward. This is made more complex where certain development plans have not been converted to the better Development Plan format, which relied on the South Australian Policy Library, which has formed the basis of the draft Code.[161]

The Commission also pointed out that the Commission and the Department have responded to some of the concerns raised in feedback they received during the consultation periods relating to the dearth of local policy content transitioned into the Draft Code. For example, the Commission provided the following in its Responses to Questions on Notice:

> [I]n response to feedback, the Commission introduced a broader range of zones than the original proposal, in order to better accommodate the range of policy approaches in South Australia. In particular, a new Established Neighbourhood Zone was introduced to respond to local conditions.
>
> Local policy variations have been incorporated into the Code in a variety of ways:
>
> - The selection of appropriate zones (65), subzones (62) and overlays (69) that are available within the Code Policy Library.
> - Technical and Numeric Variations (TNVs) are used to apply different data parameters to policy in zones, subzones and overlays based on its location, such as minimum site areas, frontages, building heights etc (these numbers have largely been taken from development plans).
> - Subzones have been used where an area has unique characteristics that cannot be captured by a zone or overlay.
> - A number of Concept Plans (101) have also been accommodated within the Zones that set out more detailed local conditions that guide development.
> - The Historic Area Overlay and Character Area Overlay incorporate Historic Area Statement and Character Area Statements, respectively, to provide area-specific guidance regarding eras, themes and context, allotments, subdivision and built form patterns, architectural styles, detailing and built form features, building height, materials, fencing, setting, landscaping, streetscape and public realm features.
> - In addition, Representative Buildings have been identified within Historic and Character areas as a transition of Contributory Items from Development Plans. This allows these buildings which display characteristics of importance in a particular area to be considered in a planning assessment.
>
> The planning policy in the Code captures local policy variances where needed, but avoids transitioning conflicting variances from development plans where the policy seeks the same fundamental outcome.
>
> (Commission, Responses to Questions on Notice, 2)

The Committee again notes that the submissions and the majority of the evidence received was based upon the Draft Code that was released for public consultation on 1 October 2019. Since that time, the Commission has made amendments to the Code, including increasing local policy content. However, witnesses who provided evidence during and after the Revised Draft Code was released in November 2020, and even after Phase Three of the Code was implemented on 19 March 2021, indicated that the local policy content was still inadequate.

[161] Commission, *Draft Planning and Design Code Phase Three (Urban Areas) Code Amendment – Update Report* (23 December 2019) 6. See also Commission, Responses to Questions on Notice, 2.

4.4.3 Design quality policy

The importance of design standards for creating desirable planning outcomes was emphasised by the Expert Panel, section 59 (Design quality policy) of the *PDI Act* and *State Planning Policy 2: Design Quality*.[162] The LGA pointed out that the Expert Panel's original planning recommendations included Reform 9: *Build design into the way we plan*, which recommended that '[s]pecific design features should be included in the state planning code, such as protections for streetscape, townscape and landscape character.'[163] Section 59 (Design quality policy) of the *PDI Act* requires the Minister to ensure a policy is developed to specify design policies and principles, including 'specific policies and principles with respect to the universal design of buildings and places to promote best practice in access and inclusion planning.' *State Planning Policy 2 Design Quality* includes objective 2.8 to 'Recognise the unique character of areas by identifying their valued physical attributes in consultation with communities.' These objectives acknowledge that local design policy content should be included in the Code.

Ms Nicolette Di Lernia, Executive Director (SA) of the Australian Institute of Architects, described section 59 of the *PDI Act* as 'a well articulated vision...', but found that it was 'not adequately supported by the Planning and Design Code or the other supporting documents.'[164] Ms Di Lernia continued:

> If we look at design quality, which is clearly one of our key areas of interest, it says that it is important to include design quality within the planning system to address issues inherent in increased density in relation to the environmental impact of urban development, maintaining livability and supporting community wellbeing.
>
> [The *PDI* Act] stated that the objectives, the way in which that is going to be realised by the system, will be through the state planning policies—which are well written and which inform the Planning and Design Code but which have no statutory authority when it comes to the actual assessment of approvals—through design standards, which haven't been written (not one of them has been written), and local design review, which is still in draft, which has no clear mechanism for resourcing and which is going to be an opt-in, purely voluntary system that some councils may choose to deliver and which some proponents may choose to engage with, if it is available.
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2020, 20-21)

Ms Di Lernia concluded:

> There has been this huge focus on developing aspirational policies at the expense of actually developing the mechanisms for delivering and implementing the system to achieve those outcomes. We spent a lot of time reviewing good design guidelines, which have now disappeared ...
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2020, 20)

The LGA shares Ms Di Lernia's frustration that the design standards had not yet been provided, and agrees that the design policy must be included in the Code in order to be effective:

> Design Standards have not been provided for consideration together with the draft Code. Since early in the reform process, these Design Standards have been flagged as an important component of

[162] LGA, Submission 57, 13.
[163] Expert Panel, *Our Ideas for Reform* (August 2014) Reform 9, 62.
[164] Australian Institute of Architects, Committee Hansard, 13 October 2020, 20.

> bringing the new system into effect. Without them it is difficult to comment on matters such as infrastructure design and public realm.
>
> (LGA, Submission 57, 12)

> While these policies provide high-level guidance, there is concern that the policies and principles within the State Policies have not been effectively translated into the local policy contained in the Code. To be effective, these guidelines and principles should be included in the Code to enable them to form part of the assessment process.
>
> ...
>
> Good design and placemaking must be a central objective of the Code and must be enforceable in the assessment process ... The ... *Design Guidelines—Design Quality and Housing Choice* prepared by the Office for Design and Architecture and the Principles of Good Design included within the Guidelines ... should be incorporated within the Code to ensure they are enforceable during the assessment process rather than just recommended.
>
> (LGA, Responses to Questions on Notice, 6)

The City of Marion also agrees, identifying the following as a key matter that is likely to impact 'on the character and amenity of the [Marion] Council area ...':

> Implementation of rigorous urban design and local design standards, either within the Code or as a standalone statutory document, which places an emphasis on environmentally sustainable and high quality urban design. Council is uncertain whether the recently proposed Local Design Review Process will have the uptake required to result in the quality of design needed for small scale infill development.
>
> (City of Marion, Submission 21, 2)

The City of Marion also expressed concern that under the Code, the design criteria for smaller scale infill development, which is the majority of development, is diminished.

> The Planning & Design Code appears to significantly reduce the existing localized design criteria found within specific Policy Area Desired Characters and Principles of Development Control. This loss results in a system which is more high-level outcome focussed, rather than a system which ensures built form is one of high-quality design and fits or improves its locality.
>
> Council understands that there is to be a more robust design system for large scale development (including guidelines) however there does not appear to be anything similar proposed to ensure that smaller scale infill development (which is probably the largest component of new housing development) will be of an acceptable level of design.
>
> (City of Marion, Submission 21, 4)

Design standards are also an important tool to protect against climate change. The City of Marion complained that

> no provision of greater urban design standards within the Planning & Design Code that ensures the design of all built form includes environmental sustainability considerations has been included.
>
> (City of Marion, Submission 21, 4)

Ms Di Lernia of the Australian Institute of Architects expressed concern about who would be conducting design assessments. It appeared to Ms Di Lernia that the Commission's intention was to upskill planners to conduct design assessments, which she described as 'a particularly naïve approach.'

> I don't think a lot of planners feel comfortable doing complex design assessments. So we have a system that, in the Act, from that point onwards, says design quality is important and yet the mechanisms for achieving that are really unformed at this stage.
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2020, 23)

Mr Michael Lennon, then Chair of the Commission, advised the Committee that the Design Overlay will implement a design review process to support quality design outcomes.

> This is intended to be expanded in the near future to apply to the new Local Design Review Scheme. The Design Review Scheme, which enables Local Design Review Panels to be established and provide advice on planning proposals, has recently been adopted by the Minister for Planning. The Scheme will be given effect through an amendment to the Planning and Design Code.
>
> ...
>
> 'Design in Urban Areas' and 'Design' General Development Policies have been developed in the Code to integrate the Principles of Good Design into new developments. For example, the Desired Outcome of these modules specifically references the principles of contextual, durable, inclusive and sustainable. The performance outcomes, deemed-to-satisfy criteria and designated performance features of this module further reinforce these principles through provisions such as:
>
> - Context – Performance outcome requires buildings to positively contribute to the character of the local area's context.
> - Inclusive – Performance outcomes to achieve privacy, equitable access, and public safety through passive surveillance.
> - Durable – Performance outcomes encourage adaptable buildings for student accommodation, durable external materials/finishes to reduce ongoing maintenance.
> - Sustainable – Performance outcomes encourage sustainable techniques in the design and siting of development and landscaping to improve community health, urban heat, water management, environmental performance, biodiversity and local amenity and to minimise energy consumption.
>
> (Commission, Responses to Questions on Notice, Q1; Department, Responses to Questions on Notice, 15-16)

The Committee notes that PLUS released a 'Local Design Review Code Amendment' to implement the Local Design Review Scheme for consultation between 12 August 2021 and 27 September 2021. The scheme under consideration was described as follows:

> The proposed Amendment would introduce a process where a council can specify certain classes of development to be eligible for Local Design Review in their area. This process would occur when that council registers to participate in the Scheme. Proponents of the eligible classes of development will then be able to apply to that council to participate in Local Design Review and seek design advice on their development proposal.[165]

The Environmental Defenders Office recommended that referral to this Scheme be mandatory.[166] At the time of this Report, a search for 'Design Standards' on the PlanSA website still indicates 'No Design Standards have been prepared yet.'

[165] PLUS, *Planning Ahead* Newsletter (August 2021) 4.
[166] Environmental Defenders Office, Submission 94, 5.

4.5 Recommendations

The Committee heard that the majority of submitters that commented on community rights would prefer that councils have more involvement in planning policy and assessments, but find that instead the role of local government has diminished under the planning reforms. There is concern that deemed-to-satisfy development, performance assessed development, shorter assessment timeframes and deemed consents will remove much of the objective scrutiny and effective negotiation of development applications that occurred under the previous system. The public's participation in the assessment process has also reduced with fewer developments being notified and fewer third-party appeal rights. Now that the Code is fully operational, the information available to the public will need to be assessed to ensure that all requirements in the *PDI Act* are being met.

Early versions of the Code failed to transition much of the local policy that had been developed within communities over decades in order to maintain local amenity of neighbourhoods, but the Committee heard evidence that more local detail has been added in the Code as implemented across South Australia. A review of the current version of the Code will reveal whether it adequately reflects the character of local communities.

The Committee recommends that the following issues raised by submitters be considered in the review of the *PDI Act*:

- Council's role in the policy and assessment process;
- Assessment timeframes and deemed consent;
- Deemed-to-satisfy classification;
- Performance assessed classification;
- Private accredited individuals acting as Relevant Authorities;
- Public notification requirements;
- Third-party appeal rights;
- Public access to information;
- Design standards;
- Sufficiency of definitions (for example, 'substantial compliance', 'minor variation').

5 SUSTAINABILITY

PETITION PRAYER 1:

Undertake an independent review of the operation of the *Planning, Development & Infrastructure Act* to determine its impact on community rights, sustainability, heritage and environment protection

The Committee received 73 submissions emphasising the need for sustainable, environmentally and socially responsible development outcomes. These submitters raised a number of topics of concern relating to sustainability and the environment including infill density, pressures on infrastructure, climate change resilience, greenspaces and tree canopy, impacts on wildlife and biodiversity and the social implications of these factors upon the community. As noted by the Environmental Defenders Office, '... it is critical that our planning system can properly encourage sustainability in planning and protect the environment for the benefit of current and future generations.'[167]

The issues of sustainability and the environment are inextricably linked. This section of the Report focuses on the impacts of development on the sustainability of the State, but sustainability also impacts on the environment. Further consideration of the impacts of these and other aspects of planning and development on the environment, including trees and climate change, are covered in the following section *6 Environment*. Sustainability and protection of the environment are also related to heritage, which will be discussed in section *7 Heritage*.

The importance of sustainable development was recognised at the earliest stages of the planning reform process, starting with *The 30-Year Plan for Greater Adelaide*[168] ('*The 30-Year Plan*'). *The 30-Year Plan* was initially produced by the Department of Planning, Transport and Infrastructure ('DPTI') in 2010, and updated most recently in 2017. The purpose of *The 30-Year Plan* was to map out a strategy to create 'a new walkable urban form with a profound shift away from continuing our urban sprawl to building a more liveable, competitive and sustainable region.'[169]

In 2014, the Expert Panel on Planning Reform (the 'Expert Panel') released its report, *The Planning System We Want*, setting out recommendations to reform and improve the planning system in South Australia. One of the guiding principles identified by the Expert Panel for the planning system reforms was 'Renewal and resilience: A planning system able to respond and adapt to current and future challenges through innovation and the implementation of sustainable practices.'[170] The first step in creating this new planning system was for the Parliament to pass the *Planning, Development & Infrastructure Act 2016.*

5.1 The *Planning Development & Infrastructure Act 2016*

[167] Environmental Defenders Office, Submission 94, 4.
[168] DPTI, *The 30-Year Plan for Greater Adelaide – 2017 Update* (2017).
[169] Ibid, 7.
[170] Expert Panel, *The Planning System We Want* (December 2014) 16.

Sustainability is identified as one of the primary objects of the *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*'). Section 12 (Objects of Act) of the *PDI Act* states:

> (1) The primary object of this Act is to support and enhance the State's liveability and prosperity in ways that are **ecologically sustainable** and meet the needs and expectations, and reflect the diversity, of the State's communities by creating an effective, efficient and enabling planning system ... [emphasis added]

Section 13 (Promotion of objects) of the *PDI Act* directs how the objects are to be actuated: 'A person or body involved in the administration of this Act must have regard to, and seek to further, the objects established by this section.' In addition, section 14 (Principles of good planning) of the *PDI Act* sets out:

> In seeking to further the objects of this Act, regard should be given to the following principles that relate to the planning system established by this Act (insofar as may be reasonably practicable and relevant in the circumstances):
>
> (a) *long-term focus principles* as follows:
> (i) Policy frameworks should be based around long-term priorities, be **ecologically sound**, and seek to promote **equity between present and future generations;**
>
> ...
>
> (e) *sustainability principles* as follows:
> (i) Cities and towns should be **planned, designed and developed to be sustainable;**
> (ii) Particular effort should be focused on **achieving energy efficient urban environments that address the implications of climate change;**
> (iii) Policies and practices should **promote sustainable resource use, reuse and renewal** and **minimise the impact of human activities on natural systems that support life and biodiversity;** [emphasis added]

The principles that planning and development be sustainable, ecologically sound and address climate change, are prominent in the *PDI Act*, demonstrating the importance Parliament intended these factors to have in developing planning policy and planning instruments. However, submitters complained that this emphasis was not conveyed into the *Planning and Design Code* (the 'Code').

5.2 Sustainability principles in the *Planning and Design Code*

The City of Adelaide expressed the view that the objectives and principles for sustainability set out in the *PDI Act* were not met by the draft version of the Code released for consultation on 1 October 2019 (the 'Draft Code'), and that despite the urgency of climate change, substantive improvements in policy to support sustainability have not yet been developed or released.[171]

> The intent was that the new system would better provide for sustainability; however, this has not been achieved through Draft Code policy. Policies to encourage and facilitate energy efficient design as proposed in the Natural Resources and Development Discussion Paper released by the State Planning Commission in August 2018[172] have not been included within the Draft Code.

[171] City of Adelaide, Submission 64, 8.

[172] Commission, *Natural Resources and Environment Policy Discussion Paper* (August 2018).

(City of Adelaide, Submission 64, 8)

Other submissions shared the opinion that the Draft Code failed to adequately address sustainability:

> The sustainability provisions within the proposed code are non existent and I feel that the senseless loss of these beautiful old homes and accompanying established trees will continue unabated.
>
> (Alicia Siegel, Submission 45, 1)

> The new Planning and Design Code is predicated on achieving streamlined, fast tracked development applications, smaller allotments, more high rise (not merely in cities) and will effectively remove a lot more trees (including street trees) despite the plain fact that government itself has realised that we are losing our 'green canopy' and our once leafy eastern suburbs are vanishing before our eyes. That the Government also talks about the extinction rate of other species, biodiversity loss and the risk of losing pollinators from food growing areas shows a complete mismatch between planning and development goals and the reality of South Australia faces in the midst of accelerating climate change and rapid warming.
>
> (Carol Bailey, Submission 63)

The vast majority of the submissions received by the Committee that raised concerns about sustainability or the environment had specific concerns with infill development and how it impacts the amenity of their communities and the environment.

5.3 Sustainability of infill development

5.3.1 Management of infill

Fifty of the submissions received by the Committee expressed concern about the impacts of infill development on communities, and that these impacts will worsen under the new planning system. Many of these submissions stated that the Draft Code reduces the requirements for setbacks, decreases the minimum allotment size, allows increased site coverage with less permeable surface area, fails to adequately address overshadowing and privacy and does not mandate sufficient landscaping and tree planting. Many of these submitters call for infill design and impacts to be managed more thoroughly and appropriately in the Code.[173] The following are examples of some of the comments received by the Committee:

> Too many buildings are being crammed onto residential blocks in urban streets resulting in a huge loss of open space, trees and vegetation ... The number of houses crammed onto blocks needs to be reduced in keeping with assessments of parking, traffic and the need for greenery and open space to reduce the heat bank affect [sic] and the use of air conditioners to cool and heat homes.
>
> (Prospect Residents Association Inc, Submission 59, 5)

> The Code significantly changes existing zoning provisions for residential areas with increased higher densities, site coverage of buildings and reduced front set backs. The lack of policies related to shading, articulation, cross ventilation and contextual respect for existing residential character in new infill housing is noted in the draft Code.

[173] See for example LGA, Submission S7, 15.

(Dr Iris Iwanicki, Submission 37, 5)

> Residential amenity is also severely jeopardised by such things as small block sizes, little open space (a mere 8% for some sites), minimal consideration for greening, lower privacy screening (1.7m to 1.5m) and the alarming shift towards broader, more flexible land use in proposed Suburban Neighbourhood and Housing Diversity Zones (meaning a shop or Day Care Centre can now be built next to someone's residence).

(Norwood Residents Association Inc, Submission 16, 2)

> The increased level of urban consolidation will result in significantly smaller lot sizes and the loss of trees and vegetation. It will also markedly increase storm water runoff into our creeks and rivers and eventually the gulf, killing sea grasses. It is not sustainable.

(Kensington Residents Association Inc, Submission 28, 2)

> We have been subjected to considerable inconvenience by developments that have doubled, quadrupled, and in some instances increased the number of households on a block by six-fold. This pressure on infrastructure, includes a large amount of street parking, but worse still increases the heat-map footprint leading to a net increase in regional temperature, due to the reduction in green space and trees.

(Gerry Butler, Submission 1, 1)

> The key issues of **increased level of urban consolidation** (resulting in significantly smaller lot sizes), **loss of trees and vegetation** and associated increased storm water runoff into our creeks, and **loss of local heritage protection** are all of great concern.

(Léonie Ebert, Submission 68, 1)

> The Code's omission of strategic policy requiring infill housing to be built near public transport and public open space will allow more ad hoc poorly serviced infill housing.

(Evonne Moore, Submission 60, 2)

> The new Code's pro-development focus reinforced by developer lobbying to access profitable sites in desirable locations close to the CBD, now threatens the very fabric of our neighbourhood. ... Proposed new policies supporting urban infill will allow taller buildings (up to 6 storeys) and smaller block sizes (even in Character Zones currently protected by Council land division restrictions).

(Christine Francis, Submission 58, 1)

The Local Government Association (the 'LGA') described the impact poorly managed infill development has on local communities, councils and infrastructure, and called for the State Planning Commission (the 'Commission') to thoroughly consider and develop a comprehensive infill development policy and plan:

> Local government recognises the need to contain urban sprawl. However, the increased densities resulting from infill development have placed additional pressure on services and infrastructure manifesting in conflict and poor outcomes relating to traffic management, carparking, stormwater management, loss of trees, provision of open space, privacy, overshadowing and design quality.
>
> ... [T]here is no holistic policy to guide the land use planning and funding settings specific to infill development in urban areas. This policy vacuum contributes to disjointed decision making within the planning system about the intensity of development permitted within an area, and the capacity of that area to accommodate high levels of infill development.

> A better understanding is needed of the cumulative impacts of the current policies that encourage infill development, whether the areas that are identified for further infill development actually have the service and infrastructure capacity to sustain further development, the level of investment that is required to build and sustain the capacity of infill areas, and how this investment is to be prioritised and funded. These issues should be thoroughly considered and clearly articulated in a State Planning Policy on Infill Development.
>
> (LGA, Submission 57, 15-16)

The City of Marion provided an example of how the Code may impact infill development outcomes. In response to public complaints about the density of infill occurring in local neighbourhoods, the City of Marion invested the significant time and expense required to prepare an application for a Development Plan Amendment ('DPA') to address the community's concerns and reduce infill development. The Marion Council Housing Diversity DPA was approved by the Minister for Planning on 1 August 2019.[174] However, the Draft Code proposed to increase infill and density in those neighbourhoods.

> This seems to contradict one of the key objectives of the Code: to improve the design standards and associated impacts of infill development. Council sees the proposed General Neighbourhood Zone as a step backwards, as it undoes the greater protection against the impacts of infill development proposed by Council's Housing Diversity DPA.
>
> (City of Marion, Submission 21, 2-3)

The City of West Torrens noted that the Commission's forums on the topic of infill development were indefinitely postponed, and so at the time of consultation and of providing submissions to this Committee, councils had no information as to how the Code would manage infill development.[175] The Commission has prepared a Residential Infill Policy that was intended to be delivered as part of the Phase Three implementation.[176] However, this proposed policy does not appear to have been implemented at the time of this Report.

5.3.2 Infill trends

In evidence before the Committee, Mr Michael Lennon, then Chair of the Commission, noted that there has been a significant change in development patterns since *The 30-Year Plan* was published, particularly over the last decade. Over that period, the majority of infill development has shifted from occurring in greenfield sites on the urban fringe, as anticipated in *The 30-Year Plan*, to occurring on much smaller sites, including single allotments, within the Adelaide metropolitan area. Mr Lennon explained:

> So if we go back seven or eight years ago, in proportions of development defined by the use of land, roughly just under 70 per cent of new growth was occurring in greenfield sites on the urban fringe, and around 30 per cent was occurring in infill sites within the metropolitan area. Some of those infill sites are very large developments, like Cheltenham racecourse, Glenside, Lightsview and the like.
>
> In the intervening period, those proportions swapped. The year before last, of all new development, almost 70 per cent, was through infill development and 40 per cent of that was in very small sites—so

[174] City of Marion, Submission 21, 2.
[175] City of West Torrens, Submission 51, 8.
[176] Attorney-General's Department, *Raising the Bar on Residential Infill Development*, (30 September 2020).

> one allotment being divided into two or three. In our investigations, much of the community angst that you were hearing was coming from, firstly, a loss of what was seen to be the identifiable character in that area and, secondly, an unhappiness with what was being put in place in its stead.
>
> (Commission, Committee Hansard, 16 March 2021, 113)

The Commission acknowledged that it received a great deal of negative feedback throughout the consultation process relating to infill development and its impacts on local communities.[177]

5.3.3 Allotment sizes & setbacks

As noted above, submissions reflect a concern that a driving infill policy and clear design principles to guide sustainable infill are absent in the new planning system. One factor that repeatedly arose in the submissions is that the Draft Code reduced the minimum allotment sizes and setbacks for infill development. The Environmental Defenders Office advised that Adelaide had the smallest average site size in the country and, under the Draft Code, the overall minimum setback standards have been reduced.[178] Submissions expressed concern that reduced allotment sizes for infill development will increase heat island effects, parking issues and traffic congestion.[179] Submitters raised the following concerns:

> [A]cross whole suburbs they will require much reduced front setbacks (with further dispensations for porticoes, verandahs and overhanding second stories), smaller minimum allotment sizes, and lower minimum side and rear setbacks. All these will have an impact on our suburbs.
>
> (Sue Giles, Submission 80, 2)

> No side and rear setbacks for buildings (including houses) on the draft code. ... Minimum Block size of 250 square metres for residential flat buildings and 350 square metres for a detached dwelling.
>
> (Tony Di Giovanni, Submission 12, 3)

Mr Stephen English was also concerned that the Draft Code allowed for decreases in setbacks and allotment sizes, and called for these requirements to be altered to reflect the previous requirements.[180] Mr Graham Pring suggested that allotments should be a minimum of 300 square metres, frontages should be a minimum of 9 metres wide and setback requirements from the previous development plans should be maintained.[181] Mr Leith Mudge and Ms Kirrilee Boyd recommended the inclusion in the Code of the Median Rule Land Division Tool[182], which was included in the previous Adelaide Hills Council Development Plan, and serves to prevent excessive subdivision and protect the character of those neighbourhoods.[183]

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[177] Commission, Committee Hansard, 16 March 2021, 113.
[178] Environmental Defenders Office, Submission 94, 5.
[179] See for example, Helga Lemon, Submission 52, 1.
[180] Stephen English, Submission 10, 2.
[181] Graham Pring, Submission 5, 1-2.
[182] 'The Median Rule Land Division Tool limits subdivisions to no smaller than the median size of neighbouring properties within a 200m radius of the property, or to 2000 sqm (approx. ½ acre), whichever is the greatest.' Leith Mudge & Kirrilee Boyd, Submission 56, 1.
[183] The Median Rule Land Division Tool is explained in Submission 56, 2.

Setbacks and allotment sizes directly impact on the proportion of the site that is covered by buildings and landscaping, another area of concern raised in submissions.

5.3.4 Site coverage and landscaping

A direct consequence of infill development on smaller allotments with reduced setbacks is that the proportion of the property covered by buildings and impermeable surfaces will increase, and the landscaping will decrease, as noted in the following comments:

> The amount of roofed area is increasing from 50% to 60% of the site area, with private open space reducing from 20% to as little as 8%.
>
> (Alan Gilbie, Submission 18, 1)

> The Code's minimal provision for open space around new dwellings, down to 8 per cent of a site, will result in less space for trees and vegetation and urban wildlife with more heat island effect and a lower quality of life.
>
> (Evonne Moore, Submission 60, 2)

Garages

The Code has increased the permissible width of garages and carports from 30 per cent of the lot frontage to 80 per cent, resulting in garages and driveways which dominate the streetscape.[184] The LGA raised another concern with provisions permitting reduced minimum sizes for garages under the Code which may worsen existing problems of on-street parking.

> Originally the Code was looking at enlarging garages to allow things such as storage and the like so you could start parking your car in a garage in a new development. Following we believe the concerns of the housing industry, the internal dimensions of garages got reduced. We would suggest therefore that the issue of car parking and garages being used for storage and other purposes is going to remain the same. So that whole issue of where you could have got cars off streets hasn't been resolved, so garages will still be used for other purposes because they're too small for the modern car.
>
> (LGA, Committee Hansard, 16 February 2021, 135)

Landscaping

Smaller allotments and increased impermeable site coverage are leaving little room for landscaping, and lots are being completely denuded of trees and gardens in advance of development. Submissions emphasised the importance of appropriate vegetation and tree requirements in infill developments, including protecting existing established trees where possible.[185] The following submissions commented on this concern:

> Boundary to boundary development means there is little private space to accommodate even a small tree with most dwellings having small courtyards as private open space. These developments are also dominated by double width driveways. Thus, what was once a single driveway through an established garden becomes two or more driveways four metres wide, paved and with little provision for green space and no room for trees.
>
> (Helga Lemon, Submission 52, 2)

[184] Alan Gilbie, Submission 18, 1.

[185] For example, see Jane Paterson, Submission 11, 1; see also *6 Environment* section below.

> [W]e have been suffering from a steady loss of trees and other green space as more intense development has covered more and more land with hard surfaces. This is at a time when greening is all the more necessary as a means of adapting to a warmer climate. More and more reliance is being placed on our public spaces (mainly streets) to provide trees to replace those lost on private property at a time when these same streets are needed to provide for increased parking as a result of higher levels of population and activity.
>
> (Norwood Residents Association, Submission 78, 1)

The lack of permeable surfaces and landscaping on allotments will place additional pressure on local stormwater infrastructure, as is discussed in the next section.

5.3.5 Pressures on infrastructure

The Committee received submissions suggesting that infill development is placing increasing pressures on the infrastructure of local government areas including schools, water, stormwater, sewerage, waste, electricity, parking, traffic and transport.[186] Mr Tony Di Giovanni suggested that developers of infill developments should be required to cover part of the costs of the increased demands on infrastructure.[187] The Committee received submissions containing the following comments:

> Do the bureaucrats with apparently no imagination, ever consider the impacts of urban infill, and multi-storey box-like apartments, on the aging water and sewerage infrastructure and the electricity grid?
>
> (The Hodges, Linkevics and Luesby families, Submission 25)

> A decentralised opportunity for dwelling densities makes it more difficult for councils to adequately plan for community infrastructure such as stormwater upgrades and purchasing additional open space ...
>
> (City of West Torrens, Submission 51, 6)

Water Sensitive Urban Design

As noted in the above section *5.3.4 Site coveroge and landscaping*, infill development and the resulting increase of impermeable surface area magnifies pressures on stormwater infrastructure, as expressed in the following submissions:

> The other inevitable impact of urban infill is increased stormwater runoff and flood risk through large scale loss of permeable surfaces associated with hard-top development.
>
> (Carol Faulkner, Submission 70, 3)

> Stormwater is a significant issue because of the amount of hard paved areas in these areas. While there has been some reduction in the requirements for soft landscaping and the like, there is massive pressure on council infrastructure at the moment and that's only going to get worse.
>
> (LGA, Committee Hansard, 16 February 2021, 135)

Six submitters, including the Town of Gawler, recommended that Water Sensitive Urban Design ('WSUD') be required in new developments to support stormwater management.[188] WSUD 'brings

[186] For example, see Peter & Jill Allen, Submission 4; Tony Di Giovanni, Submission 12, 3.
[187] Tony Di Giovanni, Submission 12, 3.
[188] Submissions 1, 44, 49, 50, 52 and 93.

components of the water cycle together, including supply and demand, mains water, wastewater, rainfall, runoff and groundwater, and contributes to the local character, environment and community.'[189] Submitters made the following comments:

> In the consultation which closed earlier this year on the Code, I benefited from a workshop with Resilient South led by Water Sensitive SA, in which it was demonstrated that water sensitive urban design (WSUD) can be implemented on a brownfield site, providing opportunity for trees and stormwater management to be a net benefit to the local environment, I believe that this should be mandated in the Code.
>
> (Gerry Butler, Submission 1)

> In the absence of water sensitive urban design principles there will be more stormwater runoff that will create the potential for flooding in the Brownhill Creek basin area. This will also have a deleterious affect [sic] on coastal areas in terms of erosion of natural plant life both onshore and offshore. It is vital that the Code addresses the issues of long term sustainability as part of its design principles.
>
> (Helga Lemon, Submission 52, 1)

The Commission acknowledged that WSUD can be used to mitigate the impacts of climate change and develop environmentally sustainable buildings.[190] *State Planning Policy 14: Water Security and Quality* states at 14.5:

> Development should incorporate water sensitive urban design principles that contribute to the management of risks to water quality and other risks (including flooding) to help protect people, property and the environment and enhance urban amenity and livability.[191]

DPTI expected that WSUD would be incorporated into the Code:

> The Code will have an important role to play in including policy that encourages the increased uptake of WSUD performance measures related to water conservation, stormwater quality improvements and flooding control (e.g. rain gardens, swale and permeable paving).[192]

Waste

Waste collection and landfill infrastructure are also impacted by infill development. At least three submissions raised the volume of waste materials generated from demolishing old homes to build new ones, which are usually constructed from lesser quality materials. They emphasised the value in renovation over replacement as a development option:

> Overall 80% of the material going to landfill is from demolitions and this level of demolition is a problem that neither *the 30 Year Plan* nor the planning reforms have addressed. European countries have adopted a much more progressive approach to this problem ... For a range of environmental, historical, social, economic, and environmental reasons the rehabilitation of buildings rather than demolition is being strongly promoted in Europe. Here complete knockdowns and rebuilds are accepted as normal practice.
>
> (Kevin O'Leary, Submission 49, 9)

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[189] DPTI, *Natural Resources and Environment Policy Discussion Paper* (August 2018) 19.

[190] State Planning Commission, *State Planning Policies for South Australia* (23 May 2019) Policy 2.3, 31 and Policy 5.4, 39.

[191] Ibid 67.

[192] Commission, *Natural Resources and Environment Policy Discussion Paper* (August 2018) 19.

> The quality materials wasted through demolition all over South Australia are being replaced by unsustainable, mostly imported materials required for flat pack style housing that is a poor investment in our economy and future. Renovation and renewal on the other hand would put those dollars into the hands of skilled tradesman and stimulate a repair over replace economy.
>
> (Alicia Siegel, Submission 45, 2)

> The Government should encourage adaptive re-use rather than demolition of our stone, historic, character laden, houses and buildings, especially in view of Climate Change and the carbon impact and the waste of resources that demolition comports.
>
> (Laura Pieraccini, Submission 75, 2)

These submitters suggest that the Code should incentivise renovation over demolition, and thus discourage the waste associated with this practice.

5.3.6 Social impacts

The Committee also received submissions raising community amenity, liveability and other social impacts of infill development. These issues include overshadowing (building height), privacy, noise, wellbeing and mental health, affordability and access to open green space.[193] The benefits of access to open green space, particularly in the times of a global pandemic, are discussed below under *6.1.1 Environment – COVID-19*.

Overshadowing and privacy

Two submissions informed the Committee that the Code has reduced the requirement for window privacy screening (sill heights, obscured or frosted glass) on second stories and above from 1.7 metres from the finished floor to 1.5 metres. Mr Alan Gilbie noted that '[a]n average height person can see over a sill height of 1.5m with ease, effectively eliminating the effort to minimise overlooking.'[194] Mr Tony Di Giovanni recommended that the previous requirement for screening to 1.7 metres be maintained, as well as previous limits on height, minimum setback and interface requirements.[195] Other submissions also referred to concerns about increased maximum building heights, and that heights beyond these maximums are often approved despite the limits:

> [T]he height of new buildings ... should be limited to 5, or perhaps at most 6, levels, although ideally 3 or 4 levels in areas of single and two storied residential buildings and in addition should not be permitted to impact adversely on the amenity of occupants of neighbouring properties.
>
> (Dianne Gray, Submission 33, 4)

The submitters have expressed substantial concerns that the increasing density of infill development will impact on the amenity and infrastructure of their neighbourhoods, including the loss of green space that is so essential to climate change resilience, which is discussed in section *6.5 Climate change policy* in this Report. Climate change resilience can also be supported by implementing energy efficient design requirements for the planning and building of infill and other developments.

[193] Julie-Ann Bennett, Submission 50.
[194] Alan Gilbie, Submission 18, 1.
[195] Tony Di Giovanni, Submission 12, 3.

5.4 Energy efficient design

Energy efficient design and materials used in construction of buildings, infrastructure and public open spaces is also crucial to sustainability. As noted above, the *PDI Act* sets out principles of good planning, including the *sustoinability principle* that 'particular effort should be focussed on **achieving energy efficient urban environments that address the implications of climate change.**'[196] [emphasis added].

There is no State Planning Policy ('SPP') for 'energy efficient design', but the topic is mentioned in Objective 2.3 in *SPP 2: Design Quolity*: 'The development of environmentally sustainable buildings and places by applying Water Sensitive Urban Design and energy efficiency design solutions'; and in Objective 12.5 in *SPP 12: Energy*: 'Enable industries to reduce carbon emissions by supporting energy efficient urban and building designs.'[197]

The importance of the planning system's role in setting energy efficient design standards and policies to create sustainable development was also flagged in the DPTI's *Notural Resources and Environment Policy Discussion Paper*:

> The National Construction Code is an important tool in achieving energy efficient buildings. Our new planning system will work with it to play a significant role in setting policy for design tools such as allotment creation at land division stage and building orientation to ensure solar and natural light access for habitable buildings.
>
> Energy efficient design can include building orientation and design, window placement, eave width, solar access and infrastructure and materials selection.
>
> A sustainably designed development plays a fundamental role in creating sustainable and liveable urban environments. Promoting renewable energy sources and neighbourhood level alternative energy supply and storage options in new developments to reduce energy costs and carbon footprint is vital.[198]

National Trust SA suggested that, while flagged as an issue, the Draft Code fails to set or apply sufficient energy efficient design policies to achieve sustainability outcomes.[199] The following submissions suggest agreement with the notion that the Code should do more to encourage the construction of 'climate ready buildings'.[200]

> [T]he new planning code has no requirements for houses to be built in such a way that appropriate insulation and glazing obviate the need for air conditioning most of the year. Rather it allows for poorly built hot boxes, with a token tree in the garden, one that will never provide a significant canopy, and these hot boxes will require air conditioning to be run on most days of the year. This is completely unsustainable from an environmental perspective and it is irresponsible to foist the consequences of this on future generations.
>
> (Joanna Wells, Submission 29, 4)
>
> Blocks are bulldozed, canopy razed, land subdivided and crammed with the cheapest, quickest builds possible because that is what makes the most return on investment. Original houses are of solid construction, made with quality materials that have proven to last over time. They have wide eaves,

[196] *PDI Act* s14(e)(ii).
[197] Commission, *State Planning Policies for South Australia* (23 May 2019) Objectives 2.3, 31 and 12.5, 63.
[198] Commission, *Natural Resources and Environment Policy Discussion Paper* (August 2018) Theme 1.2, 20.
[199] National Trust SA, Submission 92, 7; see also Town of Gawler, Submission 93, 2.
[200] Dr Jennifer Bonham, Submission 66.

deep porches and established trees. They are cool during our hot summers. They need little air conditioning. What I see going up around the city are steel frame rendered boxes with a brick veneered 'feature wall' at best. They have literally no eaves, no porch, are surrounded by poured concrete and no deep soil space for plantings. This infill requires constant air conditioning.

(Alicia Siegel, Submission 45, 1)

[C]are needs to be taken to avoid characterless, boxlike buildings with no space for adequate greenery or provision for environmental considerations such as constructing ones which are easier to heat or cool using minimal power and ensuring that rainwater is used effectively and responsibly, not just running down the gutter and damaging our coastal vegetation and fauna.

(Elaine Dyson, Submission 73, 1)

The Town of Gawler suggests the following to improve the energy efficiency design of residential developments:

- Establishing incentives for cooler grey infrastructure (cooler roof colours, heat reflective materials, cooler road and paving materials and surfaces);
- Guiding and incentivising new housing stock (including units and apartment buildings) to incorporate more recycled materials, be energy efficient and resilient with on-site renewables and storage, to pave less but with permeable materials and to support greening and urban biodiversity

(Town of Gawler, Submission 93, 2-3)

Ms Joanna Wells suggested mandating deep eaves instead of box gutters, solar water service, larger rainwater tanks and garden areas at the front and rear of the house to improve energy efficiency.[201]

5.5 Retail and commercial

The Draft Code permits broader, more flexible land use in proposed Suburban Neighbourhood and Housing Diversity Zones than existed under the previous system, allowing non-residential uses in residential areas. As a result, a shop or Day Care Centre could be built next to someone's residence,[202] and that neighbour may not even receive any notification.[203] The following submissions objected to these provisions:

Currently in our council's residential areas, shops, offices and educational establishments are non-complying. In the new Code existing residential areas will allow these non-residential uses which will adversely impact traffic, parking, noise, neighbour's amenity and the character of our suburbs. This is unacceptable. All uses which are currently non-complying in our residential areas (eg. Office and shop) should be 'restricted development.' Alternatively, a new zone should be created purely for residential land use.

(Sacha Ure, Submission 13, 1; Gordon Ure, Submission 14, 2)

[201] Joanna Wells, Submission 29.
[202] Norwood Residents Association Inc, Submission 16, 2.
[203] Stirling Residents Association Inc, Submission 31, 7.

> The Code envisages a major expansion in size and in nature of shops and commercial development allowed in residential areas. In addition, if they are 'deemed to satisfy' (which the Code supports), means [sic] that residents will not even be notified of such developments alongside their house.
>
> (Stirling Residents Association Inc, Submission 31, 7)

> It would allow many kinds of commercial and noisy development right in the middle of residential streets.
>
> (Elaine Dyson, Submission 73, 1)

Mr Steven English shares the opinion of Mr and Mrs Ure that non-residential uses should be classified as 'restricted development' in residential areas to avoid the adverse impacts of traffic, noise and parking on the local amenity for neighbours. Mr English also stated that a 'hierarchy of centres should be maintained ...' so that small local shops are not disadvantaged by being within the same zone as large-scale centres.[204]

SA Independent Retailers ('SAIR') was also critical of 'out of centres' retail developments. SAIR noted that one of the primary arguments to allow such development was the lack of available zoned retail floor space within retail centres. However, SAIR notes the unprecedented impacts and lingering uncertainty the COVID-19 pandemic has had on the retail sector, including widespread retail closures, reduced passing traffic in centres, on-line shopping trends and widespread tenancy vacancies.[205] SAIR stated:

> 'Out of centres' development and policy that allows for the development of supermarkets and shopping centres outside of the Activity Centre, Main Street and Township Zones simply cannot be entertained and should now be strongly discouraged in light of the devastating impacts upon our retailing sector and centres as a result of Covid-19.
>
> (SAIR, Submission 84, 3)

SAIR sets out a number of recommendations for amendments to the Code to support sustainable retail and commercial development in its submission, and also supports implementing a 'net community benefit test' for new shopping centres.[206] SAIR recommends a 'performance-based' consideration of any proposed 'out of centres' development, including consideration of any detrimental impact on existing centres, and that all such proposals be publicly notified.[207]

5.6 Government response

The Commission acknowledged that in the Draft Code, the General Neighbourhood Zone was unintentionally applied to some areas, for example: where Historic Area or Character Area Overlays apply; where larger allotments with wider frontages were intended; or where the previous zoning did not seek increased diversity or density.[208] The General Neighbourhood Zone in those areas was to be

[204] Stephen English, Submission 10, 2.
[205] SAIR, Submission 84, 2-3.
[206] Ibid 3-4.
[207] Ibid 6.
[208] Commission, *Planning and Design Code Phase Three (Urban Areas) Code Amendment – Update Report* (23 December 2019) 11.

replaced with the Suburban Neighbourhood Zone from February 2020. In addition, Technical and Numerical Variations were to be included to maintain the previous maximum building height, minimum allotment size and frontage width policies.[209]

Ms Sally Smith of the Attorney-General's Department (the 'Department') advised the Committee that the Department and the Commission recognise that 'infill needs to be better'.

> So lots of listening was done in relation to loss of tree canopy, loss of car parking, lack of articulation in streetscapes. A lot of work was put into the infill policy reform, and a lot of that came directly from the public.
>
> (Department, Committee Hansard, 30 March 2021, 124)

In his evidence before the Committee, Mr Michael Lennon, then Chair of the Commission, described the process the Commission embarked upon in response to the community engagement feedback they received in relation to infill development, which raised very similar concerns to those canvassed above in this Report.

> What we then sought to do was to work with designers, architects, the housing industry, community interests and local government to say, 'Let's go through a standard typology here and try to understand what is being put forward and whether we can articulate better outcomes in terms of physical design, urban design and the integration of properties within streets and neighbourhoods.'
>
> We then produced an infill package of measures, which was part of the Phase Three consultation that was released in November, and the University of South Australia's architecture department did 3D images of these ... What we did in the end, with almost the unanimous support of councils and other interested parties, was to then identify the standards that will apply on different size allotments to deal with all those factors that I have outlined.
>
> The intention then is, when a proponent comes forward in the future, if they want to avail themselves of the efficiency of the deemed-to-satisfy provisions, they have to meet all of those standards and, if they don't meet one of those standards, they then go into a performance assessed route that has a different level of exposure and debate. I am using that as a very detailed example ... because it underlines the concerns in the petition, but in there for the first time we have mandated tree planting, vegetation, water retention on site, reduced stormwater off site, parking provisions, the presentation of garages to the street, the angle of roof structures, the relationship to neighbours and privacy, minimum standards of open space and the like.
>
> Our view is that, if we take that approach and force the debate, which is often disruptive, into an agreement about what we're trying to achieve, then the potential for this category of assessments (ie. Deemed-to-satisfy) is substantial, and I would earnestly hope that this increases substantially, and out of that we get both better certainty for those investing and developing and we get greater confidence by the community about outcomes.
>
> (Commission, Committee Hansard, 16 March 2021, 113-4)

The Commission and the Department indicated that they have heard the concerns raised in relation to sustainability and infill development and have amended the Code accordingly. A review of the results of the amended Code is required to determine whether the amendments are sufficient to meet the objects of the *PDI Act*.

[209] Ibid.

5.7 Recommendations

The Committee heard the importance of ensuring that development is done in a sustainable way. To achieve that aim, the Committee recommends that additional policies be considered for energy efficient design, residential infill and sustainable development. While a residential infill policy has been drafted and forwarded to the Minister for consideration, at the time of this Report it does not appear to have been implemented. As recognised in Recommendation 6, for policy to have an impact on development outcomes, State Planning Policies will need to be considered as part of the application assessment process.

A review of the *PDI Act,* including the amendments that have been made to the Code in relation to sustainability and infill development issues, must consider the following issues raised by submitters:

- Residential infill policy;
- Design standards that encourage environmentally sustainable design;
- Water management policy (Water Sensitive Urban Design, rainwater tanks);
- Landscaping and permeable paving materials;
- Utilisation of renewable energy, recycled materials;
- Energy efficient design (eaves, climate resilient materials);
- Referral to the Local Design Review Scheme;
- Renovation incentivised over demolition.

6 ENVIRONMENT

PETITION PRAYER 1:

Undertake an independent review of the operation of the *Planning, Development & Infrastructure Act* to determine its impact on community rights, sustainability, heritage and environment protection

The Department for Planning, Transport and Infrastructure's ('DPTI') *The 30-Year Plan for Greater Adelaide* ('*The 30-Year Plan*')[210] and the objects of the *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*') contained ambitions to facilitate development that is ecologically sustainable, as set out in the previous section *5 Sustainability*. However, submitters expressed concern that, rather than mitigating against or adapting to climate change, the new planning system may instead exacerbate climate change. Submissions raised concerns that the greenspace and tree canopy in South Australia, and Adelaide in particular, are being diminished and that this loss of vegetation will lead to reduced wildlife habitat and biodiversity, aggravation of heat island effects and acceleration of climate change. This section deals with the impacts of the *PDI Act* on the State's natural environment.

6.1 A green liveable city

Many submissions drew the Committee's attention to *The 30-Year Plan*, as discussed in the preceding section of this Report. *The 30-Year Plan* set out the Government's plan 'for how Adelaide should grow to become more liveable, competitive and sustainable.'[211] *The 30-Year Plan* established six targets, including to become a 'green liveable city'.[212] To achieve this target, *The 30-Year Plan* set a goal that '[u]rban green cover is increased by 20% in metropolitan Adelaide by 2045.'[213] The Plan noted the following economic, biophysical and social benefits of tree cover:

- maintenance of habitat for native fauna, which can include vulnerable or threatened species, in fragmented urban landscapes
- reduction of the urban heat island effect
- air quality improvements
- stormwater management improvements through reductions in the extent of impervious surfaces
- provision of spaces for interaction, amenity and recreation, which improve community health and social well-being
- increased level of neighbourhood safety
- positive visual amenity for urban residents
- productive trees that can contribute to local food security.[214]

[210] DPTI, *The 30-Year Plan for Greater Adelaide – 2017 Update*.
[211] Ibid 7.
[212] Ibid 138.
[213] Ibid 150.
[214] Ibid.

The benefits of tree cover and public greenspace are even more pronounced in the time of a global pandemic.

6.1.1 COVID-19

The Committee received 13 submissions that raised the impacts of COVID-19 on the community, including a renewed urgency to protect South Australia's natural environment. The global pandemic has increased the use and emphasised the importance of public open greenspace for mental health and wellbeing, social relationships and connection with nature. The Local Government Association (the 'LGA') stated in its submission to the Committee:

> public open space has provided opportunities to escape household confinement and enjoy a host of positive well-being effects, maintain social relationships (while maintaining physical distancing) and provided people with a sense of connection with the outside world.
>
> South Australian councils have experienced an increase in community usage of its open green spaces during the period of community isolation and social and physical distancing.
>
> (LGA, Submission 57, 9)

One of the most significant and often visited greenspaces in Adelaide is the Adelaide Park Lands.

6.1.2 Adelaide Park Lands

Two submissions raised concerns that the planning reforms and the draft *Planning and Design Code* released for consultation commencing 1 October 2019 (the 'Draft Code') failed to offer adequate protections for the Adelaide Park Lands. The Adelaide Park Lands Preservation Association ('APPA') advised that although the Park Lands are the 'only significant green canopy component of the City Plan ...', the Park Lands are not acknowledged within the Draft Code.[215] APPA notes that the Park Lands have been gradually decreasing since 1837, with the loss rate increasing over the last decade. 'The Code as drafted risks accelerating the trend.' APPA continues:

> The title of the zoning 'City Open Space' and planning policies in the draft Planning and Design Code do not acknowledge the historic and social values of Adelaide's surrounding Park Lands and Squares nor recognise the world-unique nature of this resource.
>
> (APPA, Submission 72, 3)

Ms Dianne Gray also emphasised the importance of protecting the Park Lands:

> The Parklands are a very precious public resource of beauty and environmental value that makes Adelaide a special city—possibly one that is unique. I submit that they should be preserved as open space, gardens, playgrounds for children and sporting fields for public use, and that further commercial development should not be permitted.
>
> I submit that the only types of exceptions should be a few small kiosk type buildings to serve the needs of people who are using the Parklands and small, unobtrusive, single story premises that form part of amateur sporting club storage, change room and café facilities of clubs that are open to the public to join.

[215] APPA, Submission 72, 2.

(Dianne Gray, Submission 33, 3)

APPA also points out that the Adelaide Park Lands have National Heritage status and have been recommended for recognition as a State Heritage Area, neither of which are acknowledged in the Code.[216]

6.1.3 Infill and the environment

As suggested in section *5.3 Sustainability of infill development*, one of the primary impacts of infill development that concerns submitters is that established private gardens and trees are being completely removed from an allotment, and the impact the loss of that greenspace will have on the environment. Of the 50 submissions that identified infill development as a major concern, 40 of those, or 80 per cent, raised concerns that infill is impacting on our natural environment.

The transition of development growth over the last decade from urban fringe greenfield developments to metropolitan infill on smaller lots, as described by the State Planning Commission (the 'Commission') and set out in section *5.3.2 Infill trends* above, means that much of the land area that was once private, established gardens and trees is increasingly being destroyed and replaced with housing, paving and other impermeable surfaces, as indicated by the following submitters:

> [Inappropriate infill] equates to loss of shade, loss of natural beauty, loss of intergenerational asset, loss of insect, bird life and habitat, less fresh air, less carbon sequestering from traffic fumes, less convenient local connection with nature and loss of heritage. In addition, important temperature control that trees provide results in hotter and drier conditions to the detriment of our health and the environment.
>
> (Jane Paterson, Submission 11, 1)

> Climate resilience calls for an increase in tree canopy cover, however, the draft Code works directly against this by enabling larger developments and the increased removal of trees on both private and public land. This will result in a significant reduction in canopy cover, habitat loss and climate resilience, due the [sic] increased infill development opportunities, reduction in minimum site areas, site coverage, setbacks and increased number of street crossovers.
>
> (Stephen English, Submission 10, 3; Sacha Ure, Submission 13, 1; Gordon Ure, Submission 14, 2)

> [*The 30-Year Plan*] is at odds with aspects of the Code that facilitate and ease the removal of trees on both private and public land, demonstrate an increased emphasis on urban infill, increase the potential for subdivision and intensify development.
>
> (Helga Lemon, Submission 52, 1)

The 30-Year Plan directed that '[p]articular focus will be placed on ensuring that urban infill areas maintain appropriate levels of urban greenery.'[217] Submissions received by the Committee suggest that the intentions of *The 30-Year Plan* are not being met by the Code. In order to address concerns that the tree cover is declining as a result of infill development, Mr Michael Lennon, then Chair of the Commission advised the Committee that the Code includes 'requirements for green landscaping and tree planting ...'[218] The Code proposes that on an average lot, one new tree be planted. However, a

[216] APPA, Submission 72, 3.
[217] DPTI, *The 30-Year Plan for Greater Adelaide – 2017 Update*, 7.
[218] Commission, Committee Hansard, 16 March 2021, 108.

developer can choose not to plant a tree and, instead, invoke the Urban Tree Canopy Off-set Scheme to pay a small fee.

6.2 Off-set schemes

6.2.1 Planning and Development Fund

The Planning and Development Fund (the 'Fund') is an off-set scheme established under the *Development Act 1993* and maintained under the *PDI Act*. As mentioned above under *3.2.4 Planning and Development Fund*, submitters and witnesses expressed deep concern that the Fund was inappropriately used to cover cost overruns in the implementation of the new planning system and the ePlanning portal. Those submitters suggested that that use is contrary to the intent of the Fund, and will not positively contribute to the greenspace in metropolitan Adelaide.

The Fund received money through payments made 'in lieu of open space requirements for development involving the division of land into 20 or fewer allotments and also for strata and community titles.'[219] The Fund was described by the Town of Gawler:

> Section 50 of the *Development Act* requires payment of a considerable amount (currently $7253) per additional allotment into either the State Government Fund (under 20 allotments) or Council's own fund when a land division is 20 allotments or more. Access to the Fund is complex and only available via a grant scheme which requires a contribution of 50% of the total cost of the project by Council.
>
> This only applies to Torrens Title land divisions, with Community divisions being exempt.
>
> (Town of Gawler, Submission 93, 5)

The Fund is administered by the Office for Design and Architecture SA within the Attorney-General's Department (the 'Department') and can be used by the Minister for Planning and Local Government (the 'Minister') 'to acquire, manage and develop land for open space ...' and to 'grant funding opportunities for local government through the Open Space Grant Program.'[220] The scheme provides for Open Space Grants to support planning, design and delivery of public open spaces. The purpose of the Fund is described on the PlanSA website as follows:

> The Fund allows the South Australian Government to adopt a state-wide approach to strategically implement open space and public realm projects in an objective manner. While supporting the Minister for Planning and Local Government (the Minister) to acquire manage and develop land for open space, the Fund provides grant funding opportunities for local government through the **Open Space Grant Program** (the Grant Program).[221]

The Norwood Residents Association expressed concern that the Fund was insufficient to compensate for the tree cover that would be lost during infill development:

> The Planning & Development (Open Space) Fund (comprising levies paid by developers bypassing the required 12% open space for their sites), will in no way compensate for the massive loss of gardens and

[219] PlanSA, *Planning and Development Fund* (2021).
[220] Ibid; Office for Design & Architecture SA, Attorney-General's Department, *Open Space Grant Program Guidelines* (June 2021) 4.
[221] Office for Design & Architecture SA, Attorney-General's Department, *Open Space Grant Program Guidelines* (June 2021) 4.

> street trees resulting from dense infill. Contrary to the expectation, the Fund will probably not add to greening.
>
> ... DPTI aims to tap into this resource to help finance implementation of the Code and its ePlanning system.
>
> In any case, there have been few (if any) opportunities for the NP&SP Council to buy more land for open space under the Fund. Even if such land were to come on to the market, the timing of the grant process usually precludes the opportunity to purchase.
>
> (Norwood Residents Association, Submission 78, 3)

6.2.2 *Urban Tree Canopy Off-set Scheme*

On 25 March 2021, the Minister published the *Urban Tree Canopy Off-set Scheme* established under section 197 of the *PDI Act*. The *Urban Tree Canopy Off-set Scheme* was established to 'promote development that preserves and enhances the urban tree canopy through the planting of new trees and the retention of existing trees ...'[222]

> The scheme provides that where an applicant seeks development approval for a dwelling in a location covered by the Code Urban Tree Canopy Overlay, the applicant may in specified circumstances elect to make a contribution to the fund instead of planting a tree or trees as required under the Deemed-to-Satisfy Criteria or Designated Performance Feature set out in the overlay (depending on the classification of the development).[223]

Contributions are paid into the Urban Tree Canopy Off-set Fund:

> The fund is intended to provide for the planting, establishment and maintenance of trees in the relevant area where it is not practicable or appropriate, in a particular case, to plant the trees that would otherwise be required in order to comply with the [Deemed-to-Satisfy/Designated Performance Feature] policy.[224]

The Urban Tree Canopy Off-set Fund applies within certain zones or in areas with a designated soil type, and the developer can elect whether to make a contribution in lieu of planting a tree. Where the provisions call for a small tree, a $300 contribution is to be made, $600 for a medium tree and $1200 for a large tree.[225] The Urban Tree Canopy Off-set Fund is only to be used to plant or maintain trees within public land or reserves or to purchase land for the purposes of establishing or maintaining trees.[226]

The Committee received the submissions and the majority of the evidence prior to the *Urban Tree Canopy Off-set Scheme* coming into effect on 25 March 2021. Nonetheless, the Committee heard some evidence that the off-set scheme is insufficient to protect the tree canopy in metropolitan Adelaide. In discussing policy released in advance of the activation of the *Urban Tree Canopy Off-set Scheme*, the Environmental Defenders Office expressed the opinion that the scheme and the off-set amounts were inadequate to protect Adelaide's tree canopy:

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[222] PlanSA, *Urban Tree Canopy Off-set Scheme* (March 2021) paragraph 3 (Object of scheme) 2.
[223] Ibid Introduction 1.
[224] Ibid paragraph 5(2) (Establishment of fund) 3.
[225] Ibid paragraph 6(1) (Payments into fund) 3.
[226] Ibid paragraph 9(1) (Use of money from fund) 4-5.

> We have a new infill and tree-planting policy; however, the government's own study on trees and infill notes that the difficulty with the current policy is that we are at significant risk of not reaching our own tree cover policy across metropolitan Adelaide, and that is of great concern. The current policy effectively means that the tree canopy only needs to be approximately 1 per cent of the site in order to be automatically approved. It is slightly more for larger sites.
>
> The same government document also refers to what should be an offset fee, potentially for developers if they do not wish to plant a tree. Currently, it has been mooted that the offset fee may be as low as $300 per tree, when the same report acknowledges that the benefits of trees to our community are estimated at $3435 for an average unregulated tree, so the mooted fee is in no way an adequate offset fee and must be significantly increased.
>
> (Environmental Defenders Office, Committee Hansard, 1 December 2020, 78-79)

The LGA is concerned that the low fee will discourage developers from planting trees, which will leave the much larger actual costs of planting and maintaining trees to councils, if they have sufficient land available to plant additional trees. The LGA gave the following evidence before the Committee after the *Urban Tree Canopy Off-set Scheme* commenced:

> [T]he Urban Tree Canopy Off-set Scheme ... commenced on 25 March 2021 without prior formal consultation. The LGA is concerned about the relatively low contribution amounts required to be paid to the fund—and that's between $300 and $1200, depending on the number of trees required to be planted. We are concerned as it is considered that making this once-off payment into the fund, which to our mind will become a default choice for relevant applicants, will shift the costs to local government to maintain and look after these trees, rather than it being the responsibility of the private owner or the developer.
>
> We believe this scheme will have a risk of increasing the cost to councils and ratepayers. We note that the state government's own commissioned report indicates that the cost for council to supply and maintain a tree on public land is in the vicinity of $1600. That's a significant difference from the $300 being required by an applicant.
>
> Some of our inner-city council mayors have also indicated a concern that they don't believe they have sufficient land in some of their areas to plant these trees should that be a requirement, so I am not sure where these trees will go. We do recommend that the contribution rate should be increased to better incentivise tree-planting on private land. At a minimum, the offset contribution should be commensurate with the costs incurred by councils to plant the additional trees.
>
> Given that the scheme has now been implemented, we believe that a review process needs to be undertaken at six months, 12 months and 24 months to actually look at how the scheme is working, whether the funds are being paid into the scheme fund and how it's being dispersed amongst local government.
>
> (LGA, Committee Hansard, 4 May 2021, 131)

The following are comments from other witnesses relating to the *Urban Tree Canopy Off-set Scheme*:

> We can see how certain groups within the sector have already exerted significant pressure to achieve their objectives. At the moment, there is a proposal that you can pay $300 and not have to plant any trees anywhere on your allotment. That's ridiculous.
>
> (Australian Institute of Architects, Committee Hansard, 13 October 2021, 22)
>
> I do harbour some concerns that simply paying into a fund and saying, 'It's over to you, council, to decide where to plant a tree,' may see trees planted in entirely other locations. There may or may not

be space on the verge, and you may end up with an unintended consequence of a street with no trees in it. I do understand the logic of the policy in trying to get more trees. We can do that in relatively limited spaces with clever landscape design and appropriate tree selection.

(SA Heritage Council, Committee Hansard, 17 November 2020, 52)

I think the idea of planting a tree was, I suppose, an acknowledgement that a lot of the infill development is really reducing the tree and green canopy within particularly the metropolitan area. The idea was, if you mandated planting a tree, that would compensate for that. But we know that one small tree is not going to actually compensate for a 100-year-old tree that might be removed. There are no guarantees they will be maintained. They can be ripped out within a year. I think the new policy of offsets also really diminishes any benefit of that because you are saying that you can buy your way out of it for $300, which is nothing. ... I do not think it is going to really encourage that compensation planting.

(National Trust SA, Committee Hansard, 26 November 2020, 59)

The Environmental Defenders Office advised that in order to achieve the goal outlined in *The 30-Year Plan* to increase the tree canopy in greater Adelaide by 20 per cent by 2045, 'there must be significant efforts made with respect to retention and planting of trees on private land. There is simply inadequate public open space available.'[227] Other submitters share this opinion:

Ensuring Metropolitan Adelaide maintains and increases its canopy cover ... cannot be a Council issue alone as there is not enough public land held by Councils to take this burden solely. Private landowners must shoulder part of this burden if we are to respond to the impact of climate change. Provision in the Code that values existing trees on private land and regulates for the planting of trees as part of development will be of great help to us all.

(Helga Lemon, Submission 52, 2)

There is insufficient public land on which to plant enough trees to offset the losses on private land. Therefore, without a major change in direction on private land, there is simply no chance that the extent of tree canopy cover will even hold at its current level, let alone hit an increased target as outlined in the State Planning Policies as key to adapting to climate change. At a time when adaptation to climate change must be a priority, **a key role of the Planning System must be to absolutely ensure that adequate tree canopy is guaranteed and our neighbourhoods remain liveable.**

(For the Tree Action Group and Grow Grow Grow Your Own, Submission 23, 2)

6.3 Protection of the tree canopy

As noted above, in pursuit of DPTI's target of a green liveable city, *The 30-Year Plan for Greater Adelaide – 2017 Update* confirmed the goal to increase urban green cover by 20 per cent in metropolitan Adelaide by 2045.[228] That report identified that in 2014, the average tree canopy cover across the local government areas in greater Adelaide was 27.28 per cent.[229]

[227] Environmental Defenders Office, Submission 94, 5.
[228] DPTI, *The 30-Year Plan for Greater Adelaide: 2017 Update*, 150.
[229] Ibid.

6.3.1 Benefits of tree canopy

The 30-Year Plan sets out a number of benefits of green cover as outlined above. The following submissions also emphasised that trees and landscaping contribute to the community in a variety of ways:

> The importance of trees and their benefits in reducing the urban heat island effect, contributing towards residential amenity, improving mental health, increasing property values and helping to sustain biodiversity and habitat are well documented and recognised by the government.
>
> (Tom Morrison, Submission 48, 3)

> It is a well-known fact that green space contributes directly to our health and therefore saves many dollars in health care—both individual gardens where people can gain peace while caring for their own plants and parks where people can meet others and enjoy larger tracts of green space. These are necessary elements of healthy living and contribute to lowering the temperature and helping to combat the effects of climate change.
>
> (Elaine Dyson, Submission 73, 1)

> I am a great supporter of trees for all the benefits they provide to us: shade on hot days, cooling of our streets and roads (where they overhang them), mental health, habitat for wildlife and thus the maintenance of bio-diversity ... It's obvious really, isn't it, considering all we get from trees, that blatant self-interest should see us mandating for their protection.
>
> (Joanna Wells, Submission 29, 6)

> Trees decrease psychological stress by 31% and also decrease the chance of people developing fair to poor general health by 33%. ... If we have enough canopy to keep our streets cool, people are more inclined to walk or ride when they have only a short distance to travel This has good outcomes for physical and mental well-being and also for the environment.
>
> (Environmental Defenders Office, Submission 94, 5)

> One of the key practical ways that the community can adapt to climate change is by extending the tree canopy in our community.
>
> (For the Tree Action Group and Grow Grow Grow Your Own, Submission 23, 2)

> A flourishing environment is essential for a thriving economy, has a positive impact on human health, and numerous social benefits, so protecting our trees must be a consideration within this legislative framework.
>
> (Ann Doolette, Submission 38, 2)

These benefits suggest that our green cover and tree canopy should be protected as a priority. Unfortunately, this is not the case; the tree canopy is decreasing.

6.3.2 Tree canopy in decline

Despite all the benefits of tree canopy in our neighbourhoods and the ambitions of *The 30-Year Plan* to increase the green cover, greenspace in Adelaide is the lowest in the country, and is in decline. The Environmental Defenders Office quoted a 2016 RMIT study that found 'Adelaide had the lowest

"green cover" in Australia (56.8%) and the second lowest tree cover of 19.45%.'[230] In his submission to the Committee, Mr Yuri Poetzl reported that Mr Michael Lennon, previous Chair of the Commission, acknowledged that since tree protection laws were relaxed in 2012, Adelaide has lost 30% of its urban tree canopy.[231] DPTI's *Natural Resources and Environment Policy Discussion Paper* also acknowledged that tree canopies in metropolitan Adelaide are declining:

> Recent data indicates that most metropolitan Adelaide councils have experienced a decline in canopy cover and an increase in hard surfaces such as roads. For example, a recent report found that 17 of the 19 councils had a loss of green cover over the period 2013 to 2016.[232]

Submitters are concerned that a declining tree canopy will have devastating consequences for South Australia's communities and neighbourhoods, as well as aggravating the effects of climate change generally. In addition to climate change, submissions suggested that a declining tree canopy will contribute to a decline in habitat for native fauna and biodiversity. DPTI's *Natural Resources and Environment Policy Discussion Paper* also flagged the loss of biodiversity: 'The number of threatened species is growing and today 63% of the state's mammals, 29% of birds and 23% of vascular plants are considered threatened.'[233]

Submitters also were concerned about the impact of a declining tree canopy on air quality, increased noise and energy usage. Eight submissions noted that a declining tree canopy contributes to heat island effect.[234] The following are some examples of concerns raised by submitters:

> When our trees are destroyed for built infrastructure and other competing land uses, we lose their shade, cooling effect, carbon sequestration, all of which mitigate against global warming, as well as habitats for birds and other fauna and the beauty of our majestic trees both native and introduced to enjoy as we move around our suburbs for work, leisure and daily lives. Replacement trees can take up to half a century to provide the benefits that these well-established large trees currently do.
>
> (Ann Doolette, Submission 38, 2)

> Every tree that we lose in our suburbs is an absolute abomination to me when it is clear how vital it is to preserve our canopy for cooling and air quality purposes during the ever increasing effects of climate change.
>
> (Alicia Siegel, Submission 45, 1)

> Inner suburbs are becoming 'urban heat islands' during our summers because of diminishing tree canopy, vanishing greenery and open space in general, and air conditioners on full blast for many hours every day.
>
> (Jill Amery, Submission 40, 1)

> [Loss of trees] is resulting in an increase in noise as trees no longer block the noise coming from our streets and main roads from car traffic.
>
> (Prospect Residents Association Inc, Submission 59, 5)

[230] Environmental Defenders Office, Submission 94, 5; see also Tom Morrison, Submission 48, 3 and Kevin O'Leary, Submission 49, 9.
[231] Yuri Poetzl, Submission 89, 16.
[232] DPTI, *Natural Resources and Environment Policy Discussion Paper* (August 2018) 13.
[233] Ibid.
[234] For example, Environmental Defenders Office, Submission 94, 5; Jill Amery, Submission 40, 1.

6.3.3 Protections for the tree canopy in the Code

It is clear from the objects of the *PDI Act* set out in the previous section on sustainability at *5.1 Planning, Development and Infrastructure Act 2016* that Parliament intended for the *Planning and Design Code* (the 'Code') to encourage ecologically sustainable development that would 'minimise the impact of human activities on natural systems that support life and biodiversity.'[235] However, the Town of Gawler complained that the Draft Code and regulations are inadequate to achieve the State Government's greening targets.[236] Other submitters agree:

> In Adelaide, the capital of the driest state in the driest continent on earth, facing the implications of warming associated with climate change, we should be doing everything within our power to encourage the planting and retention of vegetation and tree canopies. The proposed policies will result in a **harsh hot ugly treeless city.**
>
> (Sue Giles, Submission 80, 2)

> The lack of protection in the code for canopy providing trees, as well as for other sorts of vegetation, is irresponsible. These aspects of the code are completely at odds with the aims of the Greening Adelaide policy.
>
> (Joanna Wells, Submission 29, 4)

> We believe that the proposed Planning and Design Code must be substantially improved to provide a realistic path for Councils and the community to achieve the 2045 goal of a 20% increase in tree canopy. At present there is no such path.
>
> (For the Tree Action Group and Grow Grow Grow Your Own, Submission 23, 3)

> Critically, the new Code, combined with the existing significant and regulated tree laws are incompatible with goals set by State and Local Government.
>
> (Tom Morrison, Submission 48, 3)

> There seems to be little in the new Regulations to compel developers to incorporate existing historic vegetation as part of their plans. There is no right of appeal for the public over contentious planning decisions (even on public land), yet developers may repeatedly reapply to remove historic old growth vegetation.
>
> (Yuri Poetzl, Submission 89, 21)

> Water Sensitive SA has developed models which show how the level of pervious surfaces and deep root zones can be increased with well-designed development ... However, little of these solutions have made their way into the proposed Planning and Design Code.
>
> (For the Tree Action Group and Grow Grow Grow Your Own, Submission 23, 2)

6.3.4 Submitters' suggestions to protect the tree canopy

Submissions raised a number of ideas that could be incorporated into the planning system to help protect the tree canopy. National Trust SA recommended that 'policy should preserve whole

[235] *PDI Act* s14(e)(iii).
[236] Town of Gawler, Submission 93, 3.

landscapes not just trees.'[237] Mr Mark Ferguson suggested planting native trees and plants along median strips and verges to provide nature corridors from existing nature parks into the suburbs. This would encourage native fauna into the suburbs and provide shade, encouraging more people to walk and cycle.[238] Ms Joanna Wells suggested making the use of 'Treenet Inlets' (an aspect of WSUD) mandatory in all new developments (perhaps incorporating a government subsidy). This would ensure the survival of street trees and lessen the impact of water runoff on stormwater infrastructure.[239] Ms Wells also recommended providing bonuses to developments that retain existing trees; a deposit on trees could be refunded to the developer for trees that are still alive and healthy after five years.[240]

Another avenue of protection for the existing tree canopy in Adelaide would be to do more to protect the older growth of significant and regulated trees.

6.4 Significant and regulated trees

6.4.1 Protections have been weakened

The Code controls regulated and significant trees in metropolitan Adelaide by way of the 'Regulated Tree Overlay', which mirrors the areas covered by the previous development plan system. However, submissions claim that the planning reforms weaken the protections offered under the previous system.[241] The Environmental Defenders Office notes that under the Draft Code, '[t]he regulated tree policy appears to have been consolidated within a single Regulated Tree Overlay with no higher order of policy relating to the proposed removal of a regulated tree that is a significant tree.'[242] This is contrary to the previous system, which distinguished between regulated and significant trees and provided separate policies for each.[243] Despite claims by the Commission and the former Minister for Planning and Local Government that significant tree protection laws would not be changed, the Draft Code contained no mention of 'significant trees'.[244] The Committee acknowledges that significant trees have now been included in Part 10 of the Code as implemented on 19 March 2021 throughout South Australia.

The Committee heard that protections for regulated and significant trees have been further weakened by other provisions. Under the previous planning system, the test for 'tree damaging activity' included a requirement that 'all other reasonable remedial treatments and measures must first have been determined to be ineffective.' This criterion did not appear in the Draft Code.[245] The Environmental Defenders Office advised that the 'omission of this requirement, at least in respect of significant trees, will result in a severe weakening of the current level of protection.'[246] In addition:

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[237] National Trust SA, *Submission on the Draft Planning and Design Code*, 10 (provided as Attachment 6A of Community Alliance SA, Submission S3); Environmental Defenders Office, Submission 94, 4.
[238] Mark Ferguson, Submission 41.
[239] Joanna Wells, Submission 29, 9-10.
[240] Joanna Wells, Submission 29, 6.
[241] For example, see City of Norwood Payneham & St Peters, Submission 77, 6.
[242] Environmental Defenders Office, Submission 94, 7; see also National Trust SA, Submission 92, 8.
[243] National Trust SA, Submission 92, 8-9.
[244] Yuri Poetzl, Submission 89, 21.
[245] National Trust SA, Submission 92, 8.
[246] Environmental Defenders Office, Submission 94, 7.

> Reference has been lost to indigenous to the locality, important habitat for native fauna, part of a wildlife corridor of a remnant area of native vegetation and important to biodiversity of local area. Significant trees have a lesser assessment test for retention 'retained where they make an important visual contribution to local character and amenity' compared to [previous] 'Significant Trees should be preserved'.
>
> (Environmental Defenders Office, Submission 94, 7; see also National Trust SA, Submission 92, 8-9)

The following submissions claim the provisions under the Draft Code are insufficient to protect regulated and significant trees:

> The current tree laws state that regulated and significant trees cannot be removed, except under various circumstances and one of these is that: *Unless development that is reasonable or expected could not otherwise go ahead.*
>
> (Joanna Wells, Submission 29, 5)

> [I]f these sorts of regulations remain, Adelaide will lose and continue to lose its green heritage trees at an alarming rate. There are few significant and regulated trees on private land which have any real form of protection. We cannot simply rely on planting trees on public land. We must retain what we have on private land and we must encourage planting of trees on private land.
>
> (Environmental Defenders Office, Committee Hansard, 1 December 2020, 79)

> At this rate of tree destruction and without mass tree plantings we will have a decrease of urban green cover. We do not understand how the State Government can continue with the 'business as usual approach' that the state planning code has currently adopted. Adelaide is getting hotter and drier so the Code needs to reflect our urgent need to tackle Climate Change. It needs to be innovative, forward thinking, to value trees and to lead and educate the community and developers in the right direction.
>
> (Jane Paterson, Submission 11, 2)

Amongst calls for more stringent protections to be reinstated,[247] National Trust SA complained that the *PDI Act* has missed an opportunity to protect the environment by affording greater protection to significant and regulated trees.[248]

6.4.2 Exemptions permitting tree removal

The new planning system has retained from the previous system certain exemptions from requirements to seek approvals to damage or remove regulated or significant trees. Schedule 13 of the *Planning, Development and Infrastructure (General) Regulations 2017* (the '*PDI Regulations*'), section 2(1)(w), exempts from requirements to seek approval any activity that damages a regulated tree by development:

> (i) that is on any land—
>
> (A) on which a school, within the meaning of the *Education and Early Childhood Services (Registration and Standards) Act 2011*, is located or is proposed to be built; and
>
> (B) that is under the care, control or management of the Minister responsible for the administration of that Act; or
>
> (ii) that is on any land—

[247] City of Norwood Payneham & St Peters, Submission 77, 6.
[248] National Trust of SA, Submission 92, 8-9.

(A) on which a road is located or is proposed to be built or widened; and
(B) that is under the care, control and management of the Commissioner for Highways; or

(iii) that—
(A) is on railway land as defined in Schedule 4 clause 14(7); or
(B) is on land adjacent to railway land and is, in the opinion of the Rail Commissioner, detrimentally affecting the use of, or activities or operations on, the railway land;

...

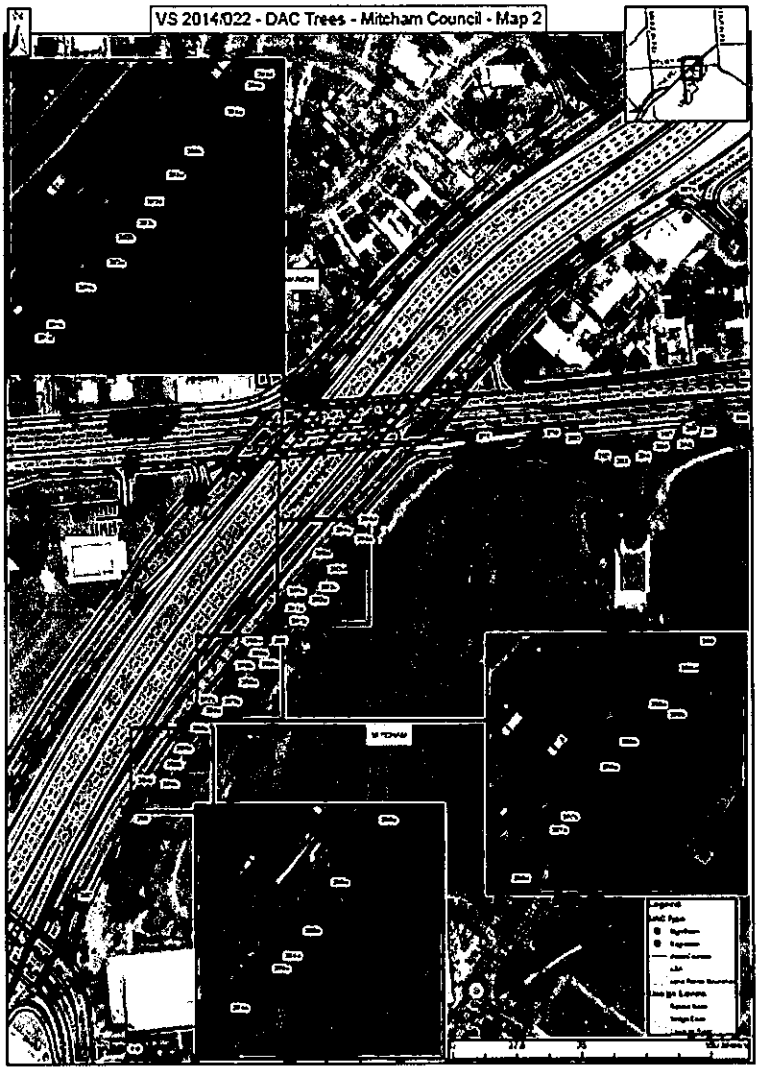
Submitters are concerned that these government agencies are exempted from requirements to obtain approvals and to consult the public prior to removing regulated and significant trees.[249] There are also exemptions from requirements to consult and seek approvals to remove exotic trees, dead trees, trees within 10 metres of buildings and pools and trees within 20 metres of buildings in a bushfire zone.[250] Mr Peter Croft of For the Tree Action Group and Grow Grow Grow Your Own, advised that these exemptions have contributed significantly to the loss of the tree canopy, including significant and regulated trees, in and around Adelaide:

> In many cases, these are trees of substantial age—many predate European settlement in Adelaide. River red gums, as an example, can be many hundreds of years old. The *Development (Regulated Trees) Variation Regulations 2011* ... do not convey protection of many significant or regulated trees within 10 meters of an existing dwelling or swimming pool. In practice, this means that Adelaide is losing its green-heritage trees at an alarming rate: there are few significant and regulated trees on private land which have any form of protection.
>
> (For the Tree Action Group and Grow Grow Grow Your Own, Submission 23, 3)

Mr Yuri Poetzl included in his submission the following image extracted from DPTI's application to remove regulated trees for the Darlington Upgrade Project. The image depicts large stands of trees that were razed during the project, despite not being in the path of the planned road-works. Mr Poetzl advised that the City of Marion was able to use this publicly available information in an argument to successfully save some centuries-old gum trees on Sturt Road from a similar fate.

However, Mr Poetzl warned that the new planning system no longer requires the Department for Infrastructure and Transit ('DIT') to make this type of documentation available to the public. Because of the exemptions in Schedule 13 of the *PDI Regulations* as set out above, DIT does not need to seek approval (as otherwise would be required by section 131 of the *PDI Act*) for tree-damaging activity to regulated trees where a road is proposed to be built or widened.[251] This exemption removes any scrutiny from decisions by the exempted departments to destroy regulated and significant trees.

[249] National Trust SA, Submission 92, 8-9; see also Environmental Defenders Office, Submission 94, 6.
[250] Environmental Defenders Office, Submission 94, 6; see also Keith Mudge & Kirrilee Boyd, Submission 56, 2.
[251] Yuri Poetzl, Submission 89, 2.



6.4.3 Call to remove exemptions

National Trust SA and the Environmental Defenders Office recommend that these exemptions be removed from the planning legislation.[252] Other submitters agreed:

> The Regulations must be changed to remove the exemptions for the 'Highways Commissioner' and any other government agency to remove trees without having to account for their removal. These exemptions allow for lazy design and encourage disregard for our trees in both urban and rural areas.
>
> (Ann Doolette, Submission 38, 2)

Ms Rowena Dunk suggested that rather than granting exemptions to facilitate new or widening existing roadways, the increased demands on our roadways should be balanced with consideration of the impacts of climate change on our population:

[252] National Trust SA, Submission 92, 8-9; Environmental Defenders Office, Submission 94, 6,

> [I]t is important that even as we widen our roads for greater traffic efficiency that we do not remove trees to the detriment of our residents. The cleaning of the air carried out by large trees cannot be underestimated ...
>
> (Rowena Dunk, Submission 42, 9)

6.4.4 Loss of significant and regulated trees

Mr Yuri Poetzl has included in his submission to the Committee an array of disturbing 'before and after' photographs providing visual imagery to demonstrate the severe impact the removal of these trees has on the environment.[253] The Environmental Defenders Office lists in its submission a number of locations were significant and/or regulated trees have been removed to make way for developments.[254] Submissions identified the following concerns:

> Significant trees in some Adelaide suburbs are disappearing at the rate of one tree a week, which adds up to 10% of tree canopy cover disappearing every five years.
>
> (Environmental Defenders Office, Submission 94, 6)

> In 2018/2019 more than 800 regulated and significant trees were removed across 15 metropolitan councils, representing in total thousands of years of growth. Such destruction cannot be remedied with the meagre provisions for tree planting proposed in the Planning and Design Code. If there is to be any chance of meeting the Government's espoused targets for urban greening, urgent action is required to protect such mature trees against loss due to new developments.
>
> (National Trust SA, Submission 92, 8).

Mr Poetzl drew the attention of the Committee to another stand of trees that were removed for road improvements:

> DPTI razed 190 Significant and Regulated trees on Golden Grove Rd, with no prior public disclosure or planning approval required. Many were Red gums with trunks of a diameter in excess of 6 meters, a few were nearly 8 metres, suggesting they were hundreds of years old, pre-settlement growth. Several of these huge irreplaceable natural assets were not in the path of road works. What was the justification for their removal?
>
> (Yuri Poetzl, Submission 89, 8, including photographs at 8 to 10)

One of the main drivers to retain and increase the tree canopy is to help counteract the effects of climate change. Climate change is a major concern raised by those who provided submissions to the Committee relating to the impacts of the *PDI Act* on environmental protection.

6.5 Climate change policy

As noted in the previous sections, a large number of submissions addressed concerns about the impact of the planning reforms on sustainability and the environment, including the loss of trees and green space and the impact those losses would have on climate change. In addition, submissions raised

[253] See submission from Yuri Poetzl, Submission 89.
[254] See Environmental Defenders Office, Submission 94, 6.

climate change implications of building design, materials and the need for energy and water efficiency. Following are some of the comments relating to climate change contained in the submissions received by the Committee:

> Development must, however, be undertaken in the context of the increasing and increasingly more urgent demands of the environmental issues—that broadly fit under the umbrella term of 'climate change'—that we as a community are facing.
>
> (Ann Doolette, Submission 38, 1)

> We wonder why in this time of anthropomorphic climate change and destruction of nature, so little protection is being given to trees that give huge environmental, human health and wellbeing benefits.
>
> (Jane Paterson, Submission 11, 1)

> We recommend that modelling and risk assessments be commissioned to determine how the proposed Planning and Design Code can be amended to ensure that there is a practical pathway to achieve an increase of 20% in tree canopy by 2045 – required to help the community adapt to climate change.
>
> (For the Tree Action Group and Grow Grow Grow Your Own, Submission 23, 3)

> I would like any such policies which cover the whole state to take into consideration the effect of climate change. This is especially necessary when such policies address infill (urban consolidation) and open space.
>
> (Léonie Ebert, Submission 68, 2)

> Under the proposed new planning code, [affordability] looks set to become worse, with the proposed new code failing to have even the most basic requirements for climate appropriate design.
>
> (Joanna Wells, Submission 29, 1)

> I learnt that heat waves kill more people than any other natural disaster and cause serious damage to our health, ecosystems, agriculture, business, infrastructure, and communities.
>
> (Julie-Ann Bennett, Submission 50)

These submitters voiced the impact that planning decisions can have on climate change, and express concern that the planning reforms in the Draft Code are not sufficiently robust to address climate change in a meaningful way.

6.5.1 Planning and climate change

Planning and development have been recognised as having a significant impact on climate change. Climate change resilience is one of the 14 policy themes to guide land use in metropolitan Adelaide set out in *The 30-Year Plan*.[255] Section 14(e) of the *PDI Act* provides *sustainability principles,* including that 'particular effort should be focussed on achieving energy efficient urban environments that address the implications of climate change ...' The Chair of the Premier's Climate Change Council (the 'PCCC') noted that 'once in place, the Code will be an incredibly important factor in our state's ability to respond and adapt to climate change.'[256]

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[255] DPTI, *The 30-Year Plan* 39 and 113.

[256] Letter from Martin Haese, Chair PCCC to Alison Collins, Project Lead, People and Neighbourhoods Discussion Paper, DPTI, dated 25 February 2002, cited by the Working Group, Submission 103, 29.

Some local government areas have taken steps independently to recognise and address climate change. The City of Adelaide initiated a climate change risk assessment, which recognised the impacts of planning on climate change, with a view to developing a 'Climate Change Adaptation Action Plan':

> The climate risk assessment has highlighted the important role planning policy plays in reducing the effect of climatic risk and has reinforced the need to progress planning policy improvement to address the issue of climate change. This should be considered as a matter of high priority in the development of a comprehensive Planning and Design Code.
>
> (City of Adelaide, Submission 64, 9)

The Town of Gawler has taken similar steps and is preparing a 'Climate Emergency Action Plan'. The team preparing this plan has identified 'the need of South Australia's Planning Framework to significantly improve the way in which developments are undertaken to improve sustainability and climate resilience.'[257]

Academic lawyers, legal practitioners and an academic planner, with shared concerns that the reforms to South Australia's planning system should address climate change, formed the Working Group on Land Use Planning and Climate Change in South Australia (the 'Working Group').[258] The Working Group provided the Committee with a submission, an interim report,[259] a final report[260] and evidence from Mr David Cole (an environmental lawyer) and Mr Michael Doherty (a planning lawyer), in relation to the impacts of planning on climate change. The Working Group operates under the auspices of the Environmental and Natural Resources Law Research Unit at the University of Adelaide Law School.

The Working Group reported that much of South Australia's greenhouse gas ('GHG') emissions are generated through land-use.[261] However, planning can also play an important role in contributing to the South Australian Government's climate change mitigation targets to reduce GHG emissions by more than 50% below 2005 levels by 2030 and achieving net zero emissions by 2050.[262] 'Land use planning has a primary role to play in adapting to the effects of climate change and developing resilient communities.'[263] Yet, the Working Group found 'there are significant limitations to the capacity of the new planning system to effectively promote climate change mitigation and adaptation.'[264]

6.5.2 The *PDI Act* and climate change

The Working Group found that the *PDI Act* 'provides ample capacity and appropriate machinery for policy makers to effectively address the pressing issue of climate change as part of the State's land use planning process.'[265] In addition to requiring that development be ecologically sustainable,[266] the

[257] Town of Gawler, Submission 93, 2.
[258] Working Group Final Report, Submission 103, 1.2, 9.
[259] Tabled before the Committee and available on the Committee's webpage.
[260] Submission 103.
[261] Ibid 28.
[262] Ibid 13, citing SA Department for Environment and Water, *Climate Smart South Australia: South Australia's greenhouse gas emissions.*
[263] Ibid 28.
[264] Working Group, Interim Report tabled on 1 December 2020, 5.
[265] Ibid 31.
[266] *PDI Act* s12(1).

PDI Act also mandates that a planning policy be developed to address climate change in section 62 (Climate change policy):

> The Minister must ensure that there is a specific state planning policy (to be called the *climate change policy*) that specifies policies and principles that are to be applied with respect to minimising adverse effects of decisions made under the Act on the climate and promoting development that is resilient to climate change.

Importantly, this provision directs that the policy address both climate change mitigation and adaptation.[267]

6.5.3 State Planning Policy 5: Climate Change

The policy developed in accordance with section 62 of the *PDI Act* is *State Planning Policy 5: Climate Change* (*'SPP 5'*), which recognises that planning policy plays a crucial role in adapting to and mitigating against the inevitable impacts of climate change on all aspects of our society.[268] The objective of *SPP 5* is to '[p]rovide for development that is climate ready so that our economy, communities and environment will be resilient to climate change impacts.'[269] *SPP 5* notes that '[t]he planning system provides a great opportunity to improve our resilience, promote mitigation, increase carbon storage and take advantage of the challenges climate change presents.'[270] *SPP 5* identifies planning approaches that will support these aims including:

- Promoting active travel, walkability and public transport use;
- Ensuring energy-efficient building design;
- Encouraging water-sensitive urban design and green infrastructure;
- Enabling green technologies and industries;
- Informing decision-making with best available climate science;
- Enabling future adaptation.[271]

In setting out the principles for developing statutory instruments, *SPP 5* states:

> **The Planning and Design Code** should include a range of overlays that identify both the hazards that need to be considered when proposing new development and the features that should be protected due to their contribution to climate resilience, e.g. coastal dunes and natural environments that store carbon.
>
> Policies should allow for innovative adaptation technologies; promote climate-resilient buildings; improve the public realm; and identify areas suitable for green industries and carbon storage.[272]

The Working Group praised the capacity and machinery for climate change policy provided in the *PDI Act*. However, the Working Group found that only modest measures to combat climate change were incorporated into *SPP 5*.[273] The Working Group found that the objective of *SPP 5* only partially captured the requirements of section 62 of the *PDI Act*, in that it required climate change *adaptation*,

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[267] Working Group, Submission 103, 24.
[268] State Planning Commission, *State Planning Policies for South* Australia (23 May 2019) 38.
[269] Ibid 39.
[270] Ibid.
[271] Ibid 38.
[272] Ibid 41.
[273] Working Group, Interim Report tabled on 1 December 2020, 7.

but failed to address climate change *mitigation*.[274] The Working Group described *mitigation* as 'measures to reduce GHG emissions to limit the severity of climate change in future' and *adaptation* as 'measures to reduce the impact of climate change on society and ecosystems'.[275]

In addition, the Working Group noted that where the *PDI Act* states that the Code *must* comply with the State Planning Principles, the Principles listed in *SPP 5* only suggest that the Code *should* include climate change considerations.[276] The Working Group questioned whether the non-mandatory language used in the principle meets the statutory requirement in the *PDI Act*.[277]

6.5.4 State Planning Policies and the Code

State Planning Policies are required to be reflected in regional plans[278] and the Code.[279] Under section 58(4) of the *PDI Act,* the state planning policies are **not** to be considered in any decision or assessment made in relation to a development application. Therefore, 'climate change will be a factor in the land use planning decisions of relevant authorities only to the extent that it is addressed by the Code.'[280] As noted by the Working Group, this provision places the burden for achieving the sustainability principles and the objects of the *PDI Act* squarely on the Code, as the vehicle by which applications are to be assessed:

> The object of sustainability, the relevant sustainability principles referring to climate change and the obligation imposed on administrators to seek to further the objects of the Act support the proposition that climate change must be addressed through planning policy and the assessment and determination of development applications.
>
> (Working Group, Submission 103, 22)

The Working Group noted that although the Code 'is the primary vehicle by which *SPP 5* is to be operationalised',[281] the term 'climate change' is only mentioned in the Code nine times and '[t]here are no overlays or general development policies specifically addressing climate change ...'[282] Nor are climate change mitigation and adaptation included in the Desired Outcomes or Performance Outcomes which are set out for each zone and sub-zone in the Code.[283] This leaves decision-makers with little guidance to address climate change in determining development applications:[284]

> There is nothing in the Code to explain how the wide range of outcomes, policies, designated performance features and other associated rules therein might relate to climate change mitigation and adaptation.

[274] Working Group, Submission 103, 24.
[275] Working Group, Interim Report tabled on 1 December 2020, 14.
[276] Ibid 5.
[277] Ibid 27.
[278] *PDI Act* s64(3) (Regional Plans): 'A regional plan must be consistent with any state planning policy ...'.
[279] *PDI Act* s66(3(f) (Key provisions about content of code): 'the Planning and Design Code must comply with any principles prescribed by the regulations or a state planning policy.'
[280] Working Group, Submission 103, 34.
[281] Ibid 31; see also *PDI Act* s58(2).
[282] Working Group, Interim Report tabled on 1 December 2020, 6.
[283] Ibid 28.
[284] Ibid 7.

> These deficiencies in the climate-related provisions of the Code limit the capacity of decision-makers to adequately assess issues concerning climate change mitigation and adaptation arising from a development proposal. There is a significant risk that climate change issues will be underrepresented in the development application assessment process and will be subordinated to other planning issues.
>
> The Code fails to provide a platform for understanding and integrating climate change considerations into the development assessment process. This is a significant omission. Embedding informed climate change thinking into these processes is essential for South Australia to achieve its emission reduction targets and develop climate-resilient communities.
>
> (Working Group, Submission 103, 6)

The Working Group is also concerned that there are no guidelines or direction as to how a decision-maker is to apply the inevitably competing interests of the various policies when assessing a development application:[285]

> How competing policies are balanced against climate change considerations, both at a policy level and during development assessment, will have significant implications for how effective *SPP 5* is in practice, and the extent to which the new planning system complements South Australian climate change policy.
>
> (Working Group, Interim Report tabled on 1 December 2020, 24)

The Working Group notes that the most common types of developments follow the 'accepted development' or 'deemed-to-satisfy development' assessment pathways, which may be regarded as not raising significant climate change issues. However,

> [s]uch developments, though individually minor, are commonly undertaken across the community. It is therefore important to consider the cumulative impacts of such development with regards to mitigation and climate resilience. This issue should be reflected in the approval criteria for Accepted or Deemed-to-Satisfy developments.
>
> (Working Group, Submission 103, 35)

The Working Group considers that the policy in *SPP 5* must be strengthened and that decision makers must be provided with clear advice as to how to resolve conflicts between competing interests and policies.[286]

In evidence before the Committee, Mr Michael Lennon, then Chair of the Commission, advised that the Commission included policies within the Code to mitigate climate change and preserve green infrastructure:

> These include: two new overlays, the State Significant Native Vegetation Overlay and the Native Vegetation Overlay, to ensure that native vegetation is well considered in the assessment process; the expansion of the Conservation Zone to cover all parks and reserves constituted under the National Parks and Wildlife Act; the introduction of an Urban Tree Canopy Overlay, which requires for the first time ever a minimum tree planting requirement of at least one tree per new dwelling plus soft landscaping to support urban green cover and climate growth; and the introduction of a detailed state planning policy on climate change.
>
> Together, these new initiatives strengthen South Australia's ability to respond to the impacts of climate change and create a more resilient economy, community and natural environment by reducing our

[285] Ibid 23.
[286] Ibid 24.

carbon emissions and encouraging new sources of power generation such as solar, battery and hydro whilst restricting their development in high-value, especially rural, landscapes.

(Commission, Committee Hansard, 16 March 2021, 109)

6.6 Recommendations

A number of suggestions made in submissions could assist in retaining and increasing the tree canopy and greenspaces in South Australia, and build climate change resilience. In particular, the Committee directs the Expert Panel, in conducting the review of the *PDI Act*, to the Final Report of the Working Group (Submission 103) and the insightful recommendations made in that report in relation to climate change.

The Committee recommends that the review of the *PDI Act* consider the following issues:

- A practical pathway to achieve an increase of 20% in tree canopy by 2045 to help the community mitigate and adapt to climate change;
- Including environmental sustainability considerations in the Code;
- Strengthening protections for regulated, significant and canopy providing trees;
- Incentives to retain and plant trees and green cover on private land;
- Requiring public notification of all tree removals;
- Removing exemptions from the requirements to seek approval for tree removal;
- Increasing payments for the Urban Tree Canopy Off-set Scheme to reflect the costs incurred by councils to plant and maintain trees.

7 HERITAGE

PETITION PRAYER 1:

Undertake an independent review of the operation of the *Planning, Development & Infrastructure Act* to determine its impact on community rights, sustainability, heritage and environment protection

Petitioners have called for an independent review of the impacts of the *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*') on heritage in South Australia. Of the 103 submissions received by the Committee on this Petition, 73 raised concerns regarding heritage management under South Australia's new planning system, making it the most frequently raised topic and demonstrating that the charm and character of South Australia's neighbourhoods is clearly of great importance to the community. The Committee heard evidence that people wanted to retain the detailed local policy that councils have painstakingly produced over the years. They sought to protect Contributory Items and did not want to see heritage assets demolished for infill developments that do not contribute to the local character of communities.

As noted previously in this Report, at the time the Committee received submissions on the Petition, the version of the *Planning and Design Code* (the 'Code') that was available to the public and therefore was referenced in those submissions, was the version that was on consultation for Phase Two between 1 October 2019 and 29 November 2019 and for Phase Three between 1 October 2019 to 28 February 2020. This version of the Code is referred to as the 'Draft Code'. The Draft Code was subsequently amended as a result of that consultation and released for a further period of consultation from 4 November 2020 to 18 December 2020. That version of the Code is referred to as the 'Revised Draft Code'. Most of the evidence received by the Committee, including on the topic of heritage, is based on the Draft Code, but the Committee also heard some evidence relating to the Revised Draft Code.

7.1 Importance of heritage and character

The Committee received submissions outlining the importance and benefits of preserving character and heritage in South Australia beyond the visual aesthetic that historic buildings provide. The following submitters noted the economic value and positive environmental impacts that heritage preservation brings:

> Protection of these character buildings and the retention of streetscapes, are essential to safeguard the uniqueness of Adelaide and South Australia. This will guarantee Adelaide's future as a tourist destination.
>
> (Laura Pieraccini, Submission 75, 1)

> I argue that our local heritage contributes significantly to our amenity, to the quality of our residential areas and to our economy. Interstate visitors have, to date, admired our ability to protect our suburbs' characters.
>
> (Sue Giles, Submission 80, 2)

[T]here's money in heritage tourism. ... We need to have more pride in, and respect for, the heritage that those who were here before us created for our benefit, the intelligence to realise its true value and the confidence to promote it to the rest of the world.

(Carole Whitelock, Submission 20, 2)

The preservation of heritage can:

- Increase urban densities at a human scale
- Help to boost local economies and stimulate jobs growth
- Meet new housing and creative office needs through the adaptive reuse of existing buildings
- Retain buildings and neighbourhoods which are more green than newer developments
- Play a key role in helping the city become more liveable without being a barrier to urban growth
- Achieve build costings that are competitive with new construction
- Assist rather than hinder the provision of affordable housing
- Generate more jobs

(Kevin O'Leary, Submission 49, 4-5)

The [North Adelaide] Society supports the retention and conservation of built form that contributes to the history, heritage and streetscape, and the feel and amenity of, the locale, precinct or area; and notes that the re-purposing, renovation and rejuvenation of old stone dwellings and buildings makes a significant contribution to the economy and the general value of other built form within the area.

(North Adelaide Society Inc, Submission 46, 4)

Heritage buildings are durable. They tend to be constructed of materials that can be repaired and recycled, and they have low recurrent embodied energy compared to newer buildings. Investment in the existing building stock reduces materials and energy consumption, emissions and waste.

(Kevin O'Leary, Submission 49, Attachment C, 8[287])

Surely it is quite clear that a city that demolishes all historic buildings becomes a cold, bland look-alike collection of uninteresting edifices. Adelaide is different from many cities because it has preserved some of its old buildings.

(Dean Harris, Submission 39)

The importance of heritage was summed up by Ms Alicia Siegel in her submission to the Committee:

Character and heritage are intimately intwined with our sense of space, they contribute to our values and provide insight into the past. *As a community we need to value the efforts of those who built these homes because they were built for a lifetime with quality construction and materials.* They were built for how we live; with deep porches and front gardens for interacting with our neighbours, for what we value; space for growing, both wildlife and families, and they tell stories of who we are, where we came from, and how we want to live.

(Alicia Siegel, Submission 45, 3)

The relevance of heritage is also demonstrated by the number of inquiries it has engendered.

[287] Quoting from Ellis Judson, *Reconciling environmental performance and heritage significance*, Historic Environment, Vol 24, No 2, 2012.

7.2 Previous heritage studies

Heritage is a topic of great significance to many South Australians, as is evidenced by the number of previous studies and reports on the subject. In 2014, the Expert Panel on Planning Reform (the 'Expert Panel') published recommendations relating to heritage in its final report titled, *The Planning System We Want* (the *'Final Report'*).[288] These recommendations were supported in principle by the Government, and prompted the Department of Planning, Transport and Infrastructure ('DPTI') to circulate a discussion paper for consultation in August of 2016, titled *Renewing Our Planning System: Placing Local Heritage on Renewed Foundations* (the *'Discussion Paper'*).[289] The *Discussion Paper*, however, only progressed some of the recommendations relating to heritage contained in the Expert Panel's *Final Report*.[290]

The consultation on DPTI's *Discussion Paper* prompted 'a widespread public outcry, a number of well-attended community meetings and more than 183 written responses.'[291] National Trust SA commissioned a study into the submissions DPTI received in response to the *Discussion Paper* and prepared a detailed report titled *2016 South Australian Community Consultation on Local Heritage*.[292]

In 2019, the Environment, Resources and Development Committee (the 'ERDC') tabled its report *An Inquiry into Heritage Reform* (the *'Heritage Report'*) in the Parliament.[293] The recommendations made in the ERDC's *Heritage Report*, and the submissions received by this Committee that support those recommendations, are discussed in more detail below under the heading *7.8 ERDC Heritage Report recommendations*.

The Prospect Residents Association Inc expressed the opinion that despite the number of heritage reviews undertaken over the last decade, these appear to have been completely ignored in the development of the Draft Code.[294] Professor Norman Etherington, Past President of National Trust SA, suggested that if DPTI had considered the National Trust SA's *2016 South Australian Community Consultation on Local Heritage*, the 'government could have avoided the embarrassment attendant on the presentation of a monster petition demanding a rethink of the highhanded and ill-thought out overthrow of the established planning system.'[295]

7.3 Previous planning system heritage protections

As noted above, several submitters expressed the view that heritage protections were more extensive, clearer and provided greater transparency and certainty in the previous development plan-

[288] Expert Panel, *The Planning System We Want* (December 2014) 64. The City of Adelaide also set out the Expert Panel's recommendations on heritage in its submission, Submission 64, 9.
[289] Professor Norman Etherington, Submission 62, 1.
[290] City of Adelaide, Submission 64, 10.
[291] Professor Norman Etherington, Submission 62, 1.
[292] National Trust SA, *2016 South Australian Community Consultation on Local Heritage* (2016).
[293] ERDC, *An Inquiry Into Heritage Reform* (30 April 2019) (House of Assembly SA).
[294] Prospect Residents Association Inc, Submission 59, 6.
[295] Professor Norman Etherington, Submission 62, 2.

based planning system than under the Draft Code. Nonetheless, the Committee acknowledges that several complaints it received related to heritage loss that had already occurred prior to the implementation of the planning reforms that prompted this Petition. Dissatisfaction with the previous heritage protections is reflected in the ERDC's *Heritage Report* and acknowledged in submissions received by this Committee including:

> We are all appalled at the loss of heritage buildings and a mish mash of developments ranging from individual houses to hotels and public buildings. The charm of Adelaide is being destroyed by this process despite strident, sincere requests from citizens to stop and review what is happening.
>
> (Elizabeth McLeay, Submission 26)

> Already the State government's reluctance to further list any buildings since 2012, has seen the gradual disappearance of many beautiful structures.
>
> (Christine Francis, Submission 58, 1)

> SECRA [South East City Residents Association] would like heritage protection offered to more properties in the south-eastern sector of Adelaide to support and continue the 'village' character of the area which is so highly desired by developers, businesses, residents and tourists alike. SECRA supports an examination of the previously excluded sites of heritage value and where appropriate establishing their heritage status as soon as possible.
>
> (South East City Residents Association, Submission 32, 2)

The State Commission Assessment Panel ('SCAP') noted that the planning reforms were undertaken in order to resolve some of the problems that existed under the previous system. SCAP advised that council development plans in the previous system 'applied an inconsistent approach to heritage protection ...' whereas the Code 'introduces a new and consistent policy framework and strengthens the overall approach to heritage protection.'[296]

7.4 New planning system heritage protections

While criticisms about heritage management under the previous planning system called for increased protections, most submitters and witnesses that commented on heritage were of the view that heritage protections have been eroded under the reforms to the planning system, including the Draft Code.[297] The following sentiments expressed by National Trust SA in their submission to the Committee were echoed by many other submissions on the Petition:

> Of major concern is the fact that there is no integrated approach to heritage protection in the planning system and the proposed heritage provisions within the Code are weak and easy to circumvent. To ensure an adequate level of robust protection is afforded to our heritage assets we need to rethink our planning system with respect to development control processes, key planning strategies, public consultation processes and the role of our decision makers. Unless effective action is taken now to strengthen planning controls protecting our heritage places and areas, the unique character and amenity of South Australia, which is recognised internationally, is likely to be lost forever.

[296] SCAP, Responses to Questions on Notice, 3.

[297] For examples see Jill Amery, Submission 40, 1; Prospect Residents Association Inc, Submission 59, 2; Ros Islip, Submission 61; Professor Norman Etherington, Submission 62, 1; Léonie Ebert, Submission 68, 2.

(National Trust SA, Submission 92, 10)

7.4.1 *State Planning Policy 7: Cultural Heritage*

The State Planning Commission (the 'Commission') recognised the benefits of heritage by creating *State Planning Policy 7: Cultural Heritage* (*'SPP 7'*). Section 58 (Preparation of state planning policies) of the *PDI Act* provides for the Commission to 'set out the State's overarching goals or requirements for the planning system ...' in state planning policies.[298]

The purpose of *SPP 7* is identified as follows: 'South Australia's cultural heritage reflects the diversity, unique features and key moments in our state's history and contributes to our community's understanding of its sense of place and identity.'[299] The objective of *SPP 7* is '[t]o protect and conserve heritage places and areas for the benefit of our present and future generations.'[300] The Policies include at 7.7 to '[p]rovide certainty to landowners and the community about the planning process for heritage identification, conservation and protection.'[301] In addition, *SPP 7* sets out how the Code is to implement this policy:

> **The Planning and Design Code** should implement State Planning Policies by identifying areas and places of national, state and local heritage value and may include the identification of places, including the extent of their cultural heritage significance. The first version of the Code will incorporate the existing state and local heritage places currently listed in Development Plans.[302]

This implementation strategy reflects the Commission's stated intent to transition existing heritage policy into the Draft Code. However, submitters report that this like-for-like transition of policy did not occur.

7.4.2 Draft Planning and Design Code

The majority of the submissions that discussed heritage expressed the opinion that the Draft Code has eroded heritage protections, that protections that existed in council development plans should be retained and that development decision-makers must give greater emphasis to the preservation and protection of heritage.

The Committee also received the following comments regarding heritage under the Draft Code:

> Our heritage buildings across the greater Adelaide metropolitan area [are] not adequately protected by this legislative framework. Our history is being destroyed and we are failing to pass on the legacy of our historic buildings to future generations. The Planning and Design Code must be amended to provide state and local governments' planning processes to adequately protect our historic infrastructure from being destroyed.
>
> (Anne Doolette, Submission 38, 2)

> The Code contains numerous provisions that will erode our built heritage and will be detrimental to the character and amenity of urban areas and historic towns.

[298] *PDI Act* s58(2).
[299] Commission, *State Planning Policies for South Austrolio* (23 May 2019) 46.
[300] Ibid 47.
[301] Ibid.
[302] Ibid.

(History Council of SA, Submission 55, 1-2)

> Heritage provisions within the draft Code have proved to be inadequate and unsuitable for the purpose of protecting heritage assets whilst lacking desired future guidance on future reuse and appropriate additions and alterations options to listed local heritage places.

(Dr Iris Iwanicki, Submission 37, 9)

> I conducted extensive research to test the claim made by the State Planning Commission that properties 'will continue to be protected, as they currently are in Historic Conservation zones'. I can say with certainty that is not the case.

(Carol Faulkner, Submission 70, 5)

> How much more of this infill will be approved before the suburbs within the heritage and character overlays cease to have any character or heritage left? The code needs to be clear and specific in regards to the preservation of character and heritage areas, at present it does not provide appropriate protection.

(Alicia Siegel, Submission 45, 1)

> The PDI Act and the Planning and Design Code do not go far enough to protect heritage. ... [U]rban infill has encroached into Heritage Conservation Areas and Residential Character Zones. Under the original *30-Year Plan*, this was never meant to happen.

(Carol Faulkner, Submission 70, 3)

> Heritage listings should not be able to be put aside in the name of designs being 'merit based'. There should be a stronger protection which should include protection for buildings contributing to a heritage streetscape or precinct as otherwise these buildings will be whittled away one by one until there is no heritage left to protect and South Australia will be the poorer for it. Our heritage buildings attract a great deal of tourism, with many visitors regretting the loss of heritage buildings in their own towns, both in Australia and overseas.

(Elaine Dyson, Submission 73, 1)

The National Trust had an opportunity to review the Revised Draft Code and provide a further submission to the Commission on that version of the Code as part of the final round of consultation from 4 November 2020 to 18 December 2020. National Trust SA advised:

> Where amendments have been made to the Revised Code they are insufficient to allay the Trust's concerns that heritage will not be adequately safeguarded by the Revised Code and that the Code will, more broadly, adversely impact the built and natural environment of our State.

(National Trust SA, Responses to Questions on Notice, 8)

Thus, the amendments to the Draft Code, and the resulting Revised Draft Code, have not resolved the Petitioner's concerns about heritage.

7.4.3 Local policy content in the Code

The Committee has heard that the exclusion from the Draft Code of detailed and nuanced local policy, that previously existed under the council development plans, has weakened heritage protections. National Trust SA expressed concern that the Commission's failure to transition those carefully drafted

policies into the Draft Code may result in uncertainty and the loss of significant heritage places.[303] The following submissions objected to the omission of local policy from the Code:

> [T]he draft State Heritage Areas Overlay [in the Code] is generic across all listed Areas within the State and does not take into account that individual Heritage Listed Areas often have very different and distinctive characteristics. There are significantly less prescriptive requirements than in current Development Plans, signifying less rigorous and well-defined protections. In addition, requirements for assessment are unclear. As development is no longer defined as non-complying there is now no ability for an early rejection of a development proposal, creating greater uncertainty.
>
> (Environmental Defenders Office, Submission 94, 8-9)

> While it is understood that the draft Code intends to provide for flexibility of design response for development that impacts on heritage places, the loss of detailed development guidance currently contained in many development Plans has the potential to result in more development proposals that fail to have appropriate regard to heritage significance and value. The policies as expressed in the draft Code further have the potential to slow down the development assessment process and result in more refusals of development applications.
>
> (LGA, Submission 57, 14)

> Local councils should be given the opportunity to include specific restrictions relating to infill development in their designated 'conservation zones', given residents have bought properties with these issues clearly set out in relevant Development Plans at the time of purchase.
>
> It is a costly and highly emotional outcome if the Code does not protect these zones and consolidating 33 local council development plans into one over-arching code will not address specific local characteristics, which local residents want.
>
> (Peter & Chris Holmes, Submission 47, 2)

Ms Janet Scott explained to the Committee why the new generic State Heritage Area Overlay is not sufficiently specific to adequately protect her Colonel Light Gardens neighbourhood:

> There's no requirement to say what the heritage values are for anything or how to protect them. Gawler, Penola, Colonel Light Gardens, Belair National Park all have State Heritage Areas for completely different reasons. A 'one size fits all' is not going to work. Heritage architects do not have the necessary expertise to manage these—that's the staff at Heritage SA—without a consistent guiding document for each area.
>
> (Janet Scott, Committee Hansard, 26 November 2020, 66)

In her evidence before the Committee, Professor Elizabeth Vines OAM, on behalf of Community Alliance SA, explained that local policies had been developed, consulted upon and amended over many years to suit local character and neighbourhoods, much of which has now been lost:

> Development Plans reflect[ed] policy development by individual councils, which [had] been generated over time in response to a logical government framework of having these policies on exhibition, having schedules of places on exhibition, being processed and going through a whole process of public consultation into the development plan as we [saw] it.
>
> (Community Alliance SA, Committee Hansard, 22 September 2020, 10)

[303] National Trust SA, Submission 92, 20.

Professor Vines OAM noted that many councils 'intentionally developed locally relevant policy, reflective of local circumstances and community expectations ...' in order to protect the character that was specific to their locality.[304] One of the complaints received relating to the lack of local policy is that it was contrary to the promised 'like-for-like' transition of policy into the new planning system.

7.4.4 Like-for-like

Prior to the planning reforms coming into effect, the Commission reassured the community that under the new Code, 'heritage protection will be exactly the same ...' as under the previous planning system.[305] As discussed in more detail above in section *4.4.1 Local policy content,* the Commission foreshadowed a like-for-like transition of heritage and other policy, from the previous development plan-based system into the Draft Code. However, much of the detailed, nuanced local heritage policy that existed within the various local development plans was omitted from the Draft Code.

Community Alliance SA compared the frameworks for heritage consideration under the previous planning system and the Draft Code:[306]

Table 4: Community Alliance SA comparison of heritage policy

	[Previous] Development Plan Framework	**[Draft] Code Framework**
State Heritage Places	Identified in Council Development Plan Tables and spatially identified in maps Policy applied to development directly affecting a State Heritage Place Different policies applied to a proposed development adjacent to a State Heritage Place Demolition sometimes listed as non-complying	Spatially identified in State Heritage Places Overlay Adjacent properties located with separate Heritage Adjacency Overlay – no policy difference Demolition permitted on merit (performance assessed) No third-party appeal rights
Local Heritage Places	Policies apply to development directly affecting a Local Heritage Place Different policies applied for adjacent development Demolition is non-complying in some zones	Spatially identified in Local Heritage Place Overlay Adjacent properties also located in the overlay with no policy distinction Demolition on merit (performance assessed)

[304] Community Alliance SA, Submission 53, Response to Questions on Notice, 2.
[305] See Community Alliance SA, Submission 53, Attachment 7, radio interview with Alan Holmes on 5 February 2020.
[306] Community Alliance SA, Submission 53, Response to Questions on Notice, Part B, 2-4.

	Specific policy about how new development affecting a Local Heritage Place can occur (in many Councils)	
Historic Areas	Residential Historic (Conservation) Zone or Mixed Use Historic (Conservation) Zone or Historic Conservation Area (overlay) Detailed policies including Desired Future Character statements provide framework for councils Zone and policy area boundaries shown in Development Plan maps and heritage figure maps	Historic Area Overlay, which sits above a Zone Historic Area Statements underpin protection of heritage character (not finalised – no opportunity for sufficiently consultation) No Desired Future Character policies to protect heritage character in these areas

Professor Vines OAM commented that the changes made to heritage protections were not explained to the public:

> Demolition of a State Heritage Place is now on-merit (performance assessed) decision and no third party appeal rights apply. The changes proposed in the Code remove the certainty of protection that has been provided for many of our most highly valued heritage buildings for no clear reason.
>
> (Community Alliance SA, Responses to Questions on Notice, 3)

History Council SA also raised that there was no reasoning provided for why the Commission made the changes to heritage protection:

> The SPC [Commission] has failed to make the case for the changes it is advocating. Nor has it properly assessed the risks and potential negative impacts of the proposed changes. The HCSA [History Council of SA] perceives substantial risks to our remaining heritage if these proposals are adopted. We question who will ultimately gain from this extraordinary assault on heritage buildings in the City of Adelaide and suburbs (Phase 3) and rural towns (Phase 2).
>
> (History Council of SA, Submission 55, 1-2)

The Committee notes this again raises the utility of a risk assessment process that could identify heritage items that may be in jeopardy under the new planning system, but as this process has not been undertaken, it is not clear what impacts may occur. Based on the evidence heard, however, it appears to the Committee that the lack of detail and local policy in the Draft Code could lead to uncertainty for homeowners, potential purchasers and decision-makers. This uncertainty could result in increased delays and costs as homeowners and purchasers would be required to hire consultants to determine the development pathway, options and requirements. It could also lead to poor development outcomes as decision-makers do not have clear direction to guide their determinations.

7.4.5 Other concerns

Other issues raised in submissions include the haste with which the Commission appears to have produced heritage policy and materials, the lack of consultation on those materials and concern that

heritage protection under the planning system may be more complicated and less efficient than the previous system. Community Alliance SA contrasted the detailed work done over years by local communities in developing heritage protections with the seemingly rushed policy process for the Draft Code:

> On 31 July [2020, the day Phase Two of the Code went live], DPTI's Manager of Planning Reform indicated that it may be possible to ensure that 'sub-zone' provisions could provide additional local heritage policy provisions for a number of zones. Surely this is planning policy on the run – at the eleventh hour, with scrutiny of proposals not possible by experts and community groups who have fought so hard for heritage protection in this State. It is necessary to **carefully and systematically** address heritage issues in totality, not issuing separate sections of Code policy as it is being developed.
>
> (Community Alliance SA, Submission 53, 3-4.)

Professor Elizabeth Vines OAM of Community Alliance SA reported to the Committee that on the Thursday prior to giving her evidence (22 September 2020, after Phase Two of the Code had been implemented in Rural Areas), the Commission published an agenda for its upcoming meeting on its website. The Agenda included 'Historic and character area advisory guidelines,' marked 'Confidential'. Professor Vines OAM noted that the public and local councils had not seen these draft guidelines, indicating that the Commission was not seeking input from those at the coalface of implementing these policies.[307]

SA Heritage Council noted that the process under the *PDI Act* to nominate, assess and list places and areas as having State or Local heritage value is more complicated and potentially lengthy than that under the previous planning system.[308] Witnesses suggested that heritage management under the Draft Code is lacking considered policy development and implementation that could improve and strengthen heritage protections in South Australia.

Under the previous development plan system, different policies applied to development proposed on or a site adjacent to a State or Local Heritage Place; demolition adjacent to a Heritage Place was often classified as non-complying.[309] Under the Draft Code, State and Local Heritage Places Overlays also included land adjacent to a listed place. Feedback to the Code consultation complained that this imposed the same restrictions on adjacent properties as to listed properties, and therefore impacted development on the adjacent land.[310] In response to the Phase 2 consultation, the Commission recommended that a Heritage Adjacency Overlay be introduced to guide development adjacent to heritage properties.[311] This has now been implemented.

The evidence suggested that the planning reforms, particularly as they relate to heritage, have been rushed. The Commission has made some changes to the Code to address some of the shortcomings and to add more local detail. One way the Commission intends to provide more localised detail in the assessment process is through Historic Area Statements and Character Area Statements.

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[307] Community Alliance SA, Committee Hansard, 22 September 2020, 9.
[308] SA Heritage Council, Submission 69, 1.
[309] Community Alliance SA, Responses to Questions on Notice, 2-3.
[310] Commission, *Planning and Design Code Phase Three (Urban Areas) Code Amendment – Update Report* (23 December 2019) ('*Update Report*') 13.
[311] *Phase Two What we have heard* 9-10.

7.5 Historic Area Statements and Character Area Statements

The Commission stated that Historic Area Statements and Character Area Statements would 'be based on existing policy content ...' and replace the previous Desired Character Statements in areas covered by Historic Area Overlays and Character Area Overlays.[312] These Statements are intended to 'clearly identify and articulate the key elements of historic importance in a particular area.'[313] Statements covering 39 Phase Three councils were available for public consultation from 23 December 2019 to 28 February 2020, with feedback promised to 'inform refinement of Historic Area Statements across the state.'[314]

7.5.1 Feedback from the Draft Code consultation

Under the Code, Historic and Character Area Statements are intended to form the basis of effective protection for heritage.[315] Despite the importance of these Statements to the heritage scheme, the draft Historic and Character Area Statements were not released for consultation until almost two months after the Draft Code was released for consultation on 1 October 2019.[316] The Code was implemented in Phase Two (Rural Areas) on 31 July 2020 with, according to Community Alliance SA, 'entirely inadequate statements that don't provide effective protection.'[317] Community Alliance SA also advised that the supporting Historic Area Overlay policies were not provided, making the Historic Area Statements impossible to evaluate.[318]

The Australian Institute of Architects complained that the Historic Area Statements contained 'only broad statements of the character and characteristics of the area ...' and did not 'include a level of detail required to provide applicants with a clear understanding of the parameters for compliant development, or planners the ability to make consistent and defensible assessment decisions.'[319] Professor Elizabeth Vines OAM of Community Alliance SA stated in evidence before the Committee (prior to the implementation of Phase Three):

> Likewise for Phase Three, these statements are still being prepared. They are being rushed in their presentation and it's impossible to evaluate the effectiveness of these Historic Area Statements without access to the revised Historic Area Overlay umbrella policies. Forward-facing policies—that means policies that will guide what happens in these areas and guide new development—currently exist in development plans and are being excluded from statements and not allowed.
>
> (Community Alliance SA, Committee Hansard, 22 September 2020, 9)

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[312] *Update Report*, 13.
[313] Commission, *Historic Area Statements and Character Area Statements Proposal to Amend Phase 3 (Urban Areas) Planning and Design Code Amendment*, (Undated), 5.
[314] Ibid.
[315] Community Alliance SA, Responses to Questions on Notice, 4; Environmental Defenders Office, Submission 94, 9; Kensington Residents Association, Submission 28, 3.
[316] National Trust of SA, *Submission on Draft Planning and Design Code*, 7 (Attachment 6A to Community Alliance SA, Submission S3); see also City of Adelaide, Submission 64, 12.
[317] Community Alliance SA, Committee Hansard, 22 September 2020, 9.
[318] Community Alliance SA, Submission 53, 3.
[319] Australian Institute of Architects, Submission 79, Attachment: *Submission – Droft Planning and Design Code, Phase 3*, 1; see also Kensington Residents Association, Submission 28, 3; Kevin O'Leary, Submission 49, 4.

The Committee received other submissions critical of the Historic and Character Area Statements:

> The details provided in the Commission's draft Historic Area Statements, released on 23 December 2019 approximately 2 months after the Draft Code was released for consultation, did not include important detail provided by Council to identify the key characteristics and elements of importance that determine the prevailing styles and patterns of development in our areas.
>
> (City of Adelaide, Submission 64, 12)

> The draft Historic Area Statements ... are for the most part completely inadequate, appear to follow no consistent standard of format, and are not backed by any clear policy intent. The Statements require complete redrafting, editing and rewriting to expand the content and incorporate necessary additional information in order to form a robust and unambiguous statements [sic] which can be used to protect what is valued in these areas and to guide appropriate development. The Statements are too loose and poorly defined to protect the historic values of these areas.
>
> (National Trust SA, Submission 92, 21)

> Draft [Historic Area Statements] prepared for Phase 2 of the Code, now implemented, are inadequate. Previous development plan provisions, prepared by local councils, provided localised and detailed guidance. However, they have been deleted and replaced with weak generic provisions which can easily be manipulated by developers.
>
> (History Council of SA, Submission 55, 2)

> The proposed historic area statements in the planning and design code are completely inadequate. They are too broad and vague with little detail. They fail to adequately detail the character of each zone. They should be updated with the detailed character statements that already exist in council development plans where years of careful planning work have gone into developing them to specifically describe the different zones and the characters of their history.
>
> (Prospect Residents Association Inc, Submission 59, 11)

> We fear that the current detailed statements will be lost in the transition to the Code, and replaced with more generic, watered down, ambiguous and inaccurate descriptors in the new Code.
>
> (Norwood Residents Association, Submission 78, 3)

> [B]rief, generic Historic Area Overlay statements, do not equate to the detail currently existing in Council Development Plans, to adequately guide/inform policy on valuable heritage. For example, more than 1000 words on themes, architectural features, materials and fencing etc by the Norwood, Payneham & St Peters Council, are compacted to around 250 words in the Code.
>
> (Norwood Residents Association Inc, Submission 16, 2)

> The Historic Area Overlay has the potential to protect heritage but only if the Historic Area Statements adequately encapsulate local policies which many Councils currently do in their existing development plans with detailed policy statements for particular local areas.
>
> (Environmental Defenders Office, Submission 94, 10)

> It appeared that the purpose of these statements was to provide guidance for future development in areas covered by the Historic Area Overlay and to describe local characteristics of a particular area, its local history, built form and include specific planning requirements relating to set backs, heights, building materials, design, etc. However they were completely deficient in all these areas. The generic introductions made no reference to the specific Historic Area Overlay being described, so that no

> context is set regarding historic background, development pattern or heritage values of the particular Historic Area.
>
> (Environmental Defenders Office, Submission 94, 9)

The Kensington Residents Association agreed with the Environmental Defenders Office that the Historic and Character Area Statements should include important details that are missing in the Statements provided by the Commission, including 'minimum allotment sizes, minimum street frontages, the historical era that applies, materials to be used in new buildings or additions, the scale of built form, fencing styles and roof pitches ...'[320] The Local Government Association (the 'LGA') also noted the absence of 'clear guidance as to the design elements new development should incorporate ...' in the Historic Area Statements.[321]

Planning Institute Australia acknowledged the difficulty of streamlining the development assessment process, and did not advocate the re-introduction of 'desired character statements as these are much narrower in scope than what is required to tell the story of how a local area will plan to grow and change in line with State Strategy.' Nonetheless, Planning Institute Australia warned that the 'decade's worth of policy content ...' from local government should not be abandoned.[322]

7.5.2 Improvements in the Revised Draft Code

On 23 December 2019, the Commission published the *Planning and Design Code Phase Three (Urban Areas) Code Amendment – Update Report* (the '*Update Report*') which stated:

> Councils were invited to draft their own [Historic Area and Character Area] statements based on development plan policy and many have participated in the process. The statements will be used to determine the prevailing styles and patterns of development within the overlays. Councils will also be able to evolve these statements over time.[323]

The Commission advised that it would continue to work with councils to develop statements 'which clearly identify and articulate key elements of historic / character importance in an area ...'[324]

The Australian Institute of Architects acknowledged that the amended Historic Area Statements in the Revised Draft Code, released for further consultation from 4 November 2020 to 18 December 2020, were improved from the statements provided in the initial consultation:[325]

> However, from our preliminary review, we note that information provided in many of the Statements remains very generic, providing little detail against which to assess the suitability of proposed development. Some criteria, such as materials, have largely been left blank by some jurisdictions ...
>
> (Australian Institute of Architects, Responses to Questions on Notice, 5)

Ms Melissa Ballantyne, providing evidence on behalf of the Environmental Defenders Office, also recognised that the Historic Area Statements in the Revised Draft Code were improved over the

[320] Kensington Residents Association, Submission 28, 3-4.
[321] LGA, Submission 57, 15.
[322] Planning Institute of Australia, Submission 96, 3-4.
[323] Ibid.
[324] *Update Report* 12.
[325] Australian Institute of Architects, Responses to Questions on Notice, 5.

previous iteration, but argued 'there is still more work that could be done on these, and this must be done before full implementation of the Code.'[326]

National Trust SA agreed that the Historic and Character Area Statements in the Revised Draft Code were much improved, but still complained that the Statements have been done in an ad hoc way, without standards or guidelines, and that many are still inadequate.[327] National Trust SA also found that the updated Historic Area Statements are 'inadequate in guiding new development as they lack forward facing policy such as was contained in the Desired Character Statements of Development Plans.'[328]

National Trust SA noted that guidelines are being prepared to supplement the Historic Area Statements; however, it is unclear whether the relevant authorities can consider such guidelines in making determinations on development assessments.[329] National Trust SA recommends that regulations be made to prescribe that these guidelines form part of the planning rules to be considered in the assessment process.[330]

The most recent version of the Historic and Character Area Statements that accompanied the activation of the Code for Phase Three on 19 March 2021 were also criticised. The LGA described these Statements as 'broad and non-specific ...' and lamented that the Statements represented 'a significant loss of policy details in council code provisions ...' that would fail 'to meaningfully inform new developments that protect and enhance the components of built form and streetscapes that make up historic character.'[331]

The Committee has heard that the Historic and Character Area Statements remain inadequate to protect historic sites and the character of areas in the Historic Area Overlays and Character Area Overlays. Another tool to retain local policy and the historic character of an area under the previous planning system, that was not transitioned into the Draft Code, was protections for Contributory Items.

7.6 Contributory Items / Representative Buildings

One of the most contentious issues raised in submissions relating to heritage was the decision to exclude 'Contributory Items' from the Draft Code. Contributory Items are 'buildings which make a valuable contribution to the heritage character of an area.'[332] Professor Elizabeth Vines OAM of Community Alliance SA defined Contributory Items as 'surviving examples of the particular period and its character.'[333] The Environmental Defenders Office described Contributory Items as buildings that demonstrate 'important historic values'.[334]

[326] Environmental Defenders Office, Committee Hansard, 1 December 2020, 79.
[327] National Trust SA, Committee Hansard, 26 November 2020, 61 and Responses to Questions on Notice, 11.
[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] LGA, Committee Hansard, 4 May 2021, 130.
[332] National Trust SA, Submission 92, 12.
[333] Community Alliance SA, Committee Hansard, 22 September 2020, 11.
[334] Environmental Defenders Office, Submission 94, 11.

Approximately 12 000 Contributory Items have been identified in South Australia and listed in a number of council development plans.[335] Contributory Items were identified through lengthy review processes and policy decisions as contributing to the heritage values of historic areas or zones.[336] In most council areas, under the previous planning system, Contributory Items could only be demolished where a suitably qualified expert determined that the structure was in a state of disrepair and unsound.[337] The listing of these buildings as Contributory Items has largely protected them from demolition.[338]

Contributory Items did not have fixed, state-wide criteria and were not identified in the *Development Act 1993* or the *PDI Act*.[339] It was due to this absence of 'legislative criteria' that the Commission opted not to include Contributory Items in the Draft Code, and advised that these items would instead be protected under the Historic Area Overlay policy.[340] However, the Commission subsequently announced on 29 October 2020, that Contributory Items would be transitioned into the Revised Draft Code as 'Representative Buildings'.[341] Given the importance of this issue to the submitters and witnesses, the evidence received in relation to contributory items is nonetheless canvassed in this section of the Report.

The Committee received at least 24 submissions that very strongly suggested that Contributory Items should be retained in the Code.[342] Ms Elizabeth Crisp, President of the Prospect Resident's Association, expressed concern

> about the weakening of demolition controls for heritage and the push by developers to get rid of contributory items so that they can destroy historical conservation zones. If we don't take care of our heritage we will lose much of the character of our inner suburbs and country towns which will have disastrous consequences for South Australia.
>
> (Elizabeth Crisp, Submission 15, 1-2)

The submitters who commented on Contributory Items emphasised the many benefits of retaining these historic assets for future generations.

7.6.1 Importance of Contributory Items

National Trust SA commented that protecting Contributory Items can increase property values, as people who buy property in historic areas can be confident that their neighbours cannot demolish their historic homes and that the character of the streetscape will be maintained.[343] This benefit is borne out by a survey by Norwood Payneham & St Peters Council which found 80% of residents were

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[335] National Trust SA, Submission 92, 13; Commission, *People and Neighbourhoods Policy Discussion Paper* (September 2019) 51.
[336] National Trust SA, Submission 92, 13.
[337] Environmental Defenders Office, Submission 94, 11.
[338] National Trust SA, Submission 92, 13; Kevin O'Leary, Submission 49, 4.
[339] Commission, *People and Neighbourhoods Policy Discussian Paper* (September 2019) S3.
[340] Ibid.
[341] Attorney-General's Department, Media Release: *Contributory Items will count* (29 October 2020) 1.
[342] See for example Stephen English, Submission 10, 2; Kensington Residents Association, Submission 28, 2; City of West Torrens, Submission 51, 5; City of Norwood Payneham & St Peters, Submission 77, 2; and Town of Gawler, Submission 93, 4.
[343] National Trust SA, Submission 92, 13.

either accepting or supportive of having their properties listed as Contributory Items.[344] Listing Contributory Items in the Code provides a higher degree of certainty, clarity and transparency for both owners and potential buyers.[345] The following are examples of comments from submissions on the importance of retaining Contributory Items:

> Contributory items are critical to maintaining character and must be part of the criteria for heritage listing. Examples of particular forms of development representing a defined period and its built form character must be maintained in order to preserve local heritage.
>
> (Prospect Residents Association Inc, Submission 59, 7)

> Many people are fearful of losing existing character through the demolition of buildings which contribute to the streetscape. This is especially so in heritage conservation zones. Additionally, many Contributory items are on large allotments with well established gardens that include mature trees. Existing protections and identification of Contributory items should be maintained.
>
> (Helga Lemon, Submission 52, 2)

The ERDC's *Heritage Repart* also called for Contributory Items to be transitioned into the new planning system in Recommendation 1(a)(i), which recommended that:

a. Any reforms that are adopted must result in:
   i. The protection and future management of heritage and historic places and areas that are important to people (including initially transferring all items that are registered on existing heritage and planning databases to the Planning and Design Code).

The Committee applauds the Commission's decision to transition previously identified Contributory Items into the Code.

7.6.2 Draft Code treatment of Contributory Items

As noted above, the Draft Code, at the time submissions were received, did not recognise Contributory Items, with the areas containing Contributory Items instead being captured in the Historic Area Overlay and supported by Historic Area Statements.[346] The Town of Gawler suggested that buildings within an Historic Area Overlay would have been subject to a more onerous and costly development assessment pathway under the Draft Code, requiring the heritage value of a building to be evaluated as part of the assessment process.[347] However, many Contributory Items might not have met the threshold for protection under this assessment process and as such might have been approved for demolition.[348]

The Environmental Defenders Office advised that designation of Contributory Items provides 'clarity, certainty and transparency to current and future owners.'[349] Conversely, the Environmental Defenders Office suggested that a failure to transition Contributory Items to the Code could produce negative consequences: 'potential buyers and Council staff will be engaged in a longer, more costly assessment

[344] Ibid 14.
[345] Ibid 17.
[346] Town of Gawler, Submission 93, 3.
[347] Ibid 4.
[348] Community Alliance SA, Submission 58, 2.
[349] Environmental Defenders Office, Submission 94, 11; see also Evonne Moore, Submission 60, 2.

process which could lead to more litigation.'[350] The Prospect Residents Association Inc agreed, and explained the complications that could have arisen under the Draft Code:

> [I]f Contributory Items are not to be identified in Historic Conservation Zones in the new Planning and Design Code, an individual heritage assessment would need to be undertaken to evaluate the historic value of a property whenever an owner or potential purchaser were to consider demolishing the building. They would need to engage a heritage consultant to perform the task and, in their opinion the assessment may be that the property does not contribute to the historic character of the area. This may be in disagreement with a long-standing assessment resulting from a Heritage Survey of the whole Historic Conservation Zone, and expensive legal action may ensue to resolve the issue. Herein lies the widespread concern about the lack of certainty impacting a whole range of people with an interest in the zone. The retention of Contributory Items in the new Planning and Design Code would overcome this loss of certainty.
>
> (Prospect Residents Association Inc, Submission 59, 11-12)

The Commission suggested that Contributory Items could be upgraded to Local Heritage Places under the Draft Code to provide them with heritage protection, and in May 2019 invited Councils to make applications for Development Plan Amendments ('DPAs') to transition those Items.[351] Mr Michael Lennon, then Chair of the Commission, discussed this option in his evidence before the Committee:

> For councils that were of the view that contributory items should have been listed as local heritage, we opened a process and invited all councils to go through a fast-track process to list those contributory items as local heritage through Development Plan Amendments (DPAs). Three councils have taken that up, and we are in the process of finalising those now. In the future, as is now, these matters will be protected not by them being Representative Buildings but by the zoning, by the overlay and by the character statements that are made around them. That is where the legal authority lies.
>
> (Commission, Committee Hansard, 16 March 2021, 117)

Community Alliance SA advised the Committee that most Contributory Items would not meet the Local Heritage criteria, as they are 'typical examples of historic buildings, not exceptional ...'[352] The City of Norwood Payneham & St Peters was also of the opinion that this process was inappropriate for Contributory Items. It advised:

> The Council determined not to proceed with preparing a DPA to review and potentially transition its 1464 Contributory Items [to Local Heritage Places] for a number of reasons, but of key importance were:
>
> - The improper timing and use of resources of such an enormous project at a critical stage of planning reform;
> - That the legislative criteria for Local Heritage Places had not changed since the Council's Contributory Items were first identified (i.e. for the most part, if the building didn't warrant Local Heritage status at the time, it would not now); and
> - The draft Code had not yet been released so it was unclear whether the new policy framework would appropriate [sic] protect buildings within a historic area.
>
> (City of Norwood Payneham & St Peters, Submission 77, 10)

[350] Environmental Defenders Office, Submission 94, 11.
[351] City of Norwood Payneham & St Peters, Submission 77, 10.
[352] Community Alliance SA, Submission 58, 2.

Mr Lennon explained in his evidence before the Committee that Contributory Items were excluded from earlier versions of the Code due to the varied processes used by different councils to list Contributory Items and the lack of legislative criteria to designate Contributory Items:

> On the issue of contributory items, can I just say that this grew up over a 10 or perhaps 12-year period. Nearly 1000 to 2000 items have been listed as contributory items. In some cases councils did go through a review process and did go through an examination of their historical status, and they were then processed and listed in the Development Plan.
>
> In many other cases, that didn't take place. Owners were barely notified, and when they were listed in the Plan, remembering that the Development Plan is subordinate legislation that relies on head powers in an Act, there are no references either in the *Development Act* or in the *PDI Act* to allow that kind of listing. They are and have always been illustrative.
>
> (Commission, Committee Hansard, 16 March 2021, 117)

The Kensington Residents Association noted the reluctance of the Commission to retain Contributory Items in the new planning system:

> The State Planning Commission and DPTI have refused to acknowledge the importance of Contributory Items and that they have any legal status under the existing Development Plans and, despite significant lobbying from Local Government and the community, refuses to consider retaining them under the Planning and Design Code. They insist that Crown Law opinion states that schedules of places are not legal or possible.
>
> (Kensington Residents Association, Submission 28, 3)

The City of Norwood Payneham & St Peters Council was 'outraged and indeed frustrated' at the Commission's refusal to transition Contributory Items into the Code.[353] As a result, in November 2019, subsequent to discussions with the Commission, the Council engaged Norman Waterhouse Lawyers 'to draft a legislative definition for Contributory Items for consideration by the Commission to include in the Code or legislation.'[354] At the request of Mayor Robert Bria, Mr Gavin Leydon, Principal of Norman Waterhouse Lawyers, provided a legal opinion dated 29 November 2019.[355] Mr Leydon found that the demolition policy in the draft Code for these buildings

> will impose an evidentiary burden on an applicant seeking demolition to prepare a Historic Area Impact Statement that demonstrates that their place does not contribute to the historic character of the area. Such an outcome gives rise to ambiguity, rather than certainty, and a process that is potentially disproportionately time consuming and costly.
>
> (Community Alliance SA, Submission 53, Attachment 1, Letter from Norman Waterhouse, 1)

Contrary to the Commissioner's and Crown Law's positions, Mr Leydon's legal opinion concluded that Contributory Items could be transferred to the Code. Eventually, the Commission and the Attorney-General and Minister for Planning and Local Government (the 'Minister') agreed.

[353] City of Norwood Payneham & St Peters, Submission 77, 5.
[354] Ibid.
[355] The legal opinion was provided by Community Alliance SA, Submission 53, Attachment 1.

7.6.3 Representative Buildings in the Revised Draft Code

In response to the feedback from the community, the Commission and the Minister reversed the position on Contributory Items. On 29 October 2020, the Minister announced in a Media Release that the vast majority of existing Contributory Items would be transitioned into the Revised Draft Code that was released for an additional six weeks of public consultation from 4 November 2020 to 18 December 2020. The items would be individually identified under a new category of 'Representative Buildings'. The Minister noted that Councils 'and the community have been united in their call to have them included in the Code – as concerns were raised that the existing protection of these items would be diminished.'[356]

The Minister also stated in the Media Release:

> I believe it is important that many decades of local council efforts in assessing and acknowledging the values that contributory items offer to the local character of an area should be preserved.
>
> Both as local MP and in my new role as Minister for Planning and Local Government, I am aware of concerns from local councils and others in the community about removing all references to contributory items in the new planning system.
>
> I'm pleased to see the State Planning Commission has acted on those concerns and agreed to reflect contributory items in the draft code.[357]

The decision to transition Contributory Items into the Code was welcomed by numerous members of the community who value heritage. However, the Committee has heard in evidence that there is still some concern that the definition of 'Representative Buildings' is ambiguous, flawed and may not maintain the same value in the buildings.[358] Dr Darren Peacock, CEO of National Trust SA, queried why the name was changed, when the terminology 'Contributory Items' is used interstate, and anticipated that the name change may lead to loopholes in heritage protection.[359] Ms Melissa Ballantyne of the Environmental Defenders Office also expressed concern that the definition of Representative Buildings lacks clarity and that policy had not yet been provided.[360]

National Trust SA noted:

> Although Contributory Items have now been introduced into the Revised Planning and Design Code as 'Representative Buildings' the Revised Code is inadequate in providing reliable protection for these places, and the proposed change of names obscures and potentially distorts the basis for their protection and retention. The change in terminology from Contributory Items to Representative Buildings does not accord with the purpose of the Code in standardising planning policy given its long-standing use in South Australia as well as other jurisdictions such as in New South Wales and Victoria. Moreover, labelling these buildings 'Representative Buildings' belies their importance. The value of these buildings does not lie in their individual representation of any particular architectural style but in their collective contribution to the significance of the Historic Area. The concept of 'representativeness' first emerged as a demolition criteria in the 'Practitioner Overview of Heritage and Character in the

[356] Attorney-General's Department, Media Release: *Contributory Items will count* (29 October 2020) 1.
[357] Ibid 2.
[358] National Trust, Committee Hansard, 26 November 2020, 60.
[359] Ibid.
[360] Environmental Defenders Office, Committee Hansard, 1 December 2020, 79.

> New Planning System' produced by the State Planning Commission. That document stated that demolition approval within the Historic Area Overlay would require consideration of 'how well the theme is represented'. This suggests that if there is already representation of a particular style of building or type that it may not be necessary to keep all representations.
>
> The use of the term 'representative buildings' in place of the established 'Contributory items' undermines the original purpose of protecting the contribution of particular buildings to the historic character of an area. It suggests a slide in terminology towards the 'representative' concept that would weaken protection for individual buildings. The policy objective is therefore confused by the unnecessary and misleading change in nomenclature.
>
> (National Trust SA, Responses to Questions on Notice, 8-9)

National Trust SA also pointed out that 'Representative Buildings' had not, at the time of the release of the Revised Draft Code, been referred to in any policies or maps, making it difficult to determine how adequate the protections of this heritage would be.[361] Protection of Representative Buildings and other historic and heritage buildings is dependent upon the strength of the demolition controls in the Code.

7.7 Demolition controls

The Committee accepts the evidence of National Trust SA that a 'high bar must be set before demolition of heritage is allowed.'[362] Under the previous planning system of council development plans, demolition within Historic Conservation Zones was permitted 'on merit'.[363] Many councils had adopted the South Australian Planning Policy Library ('SAPPL') policy on demolition within Heritage Conservation Zones, in which demolition of Contributory Items is usually only considered where the building is in a state of disrepair and proven by a qualified expert to be unsound.[364] In the view of National Trust SA, the Historic Area Overlay in the Draft Code reduced the protections against demolition of heritage items.[365]

Professor Elizabeth Vines OAM of Community Alliance SA advised that the detailed policy that existed in the development plans of the previous planning system protected heritage buildings from demolition. Professor Vines OAM is concerned the same level of protection would not be offered under the Draft Code:

> What the [development plan] policy does is that it provides control over demolition, with some exceptions to do with poor condition and also whether, on the basis of poor condition, new development is respectful and the replacement is appropriate. ... These policies don't stop development: they ensure that development is appropriate for those areas, with the emphasis on conserving existing character. What is shifting is that Historic Area Statements—once again, we haven't seen them—are going to provide and describe the general character of the areas and that is it.
>
> (Community Alliance SA, Committee Hansard, 22 September 2020, 10)

[361] National Trust SA, Responses to Questions on Notice, 11.
[362] National Trust SA, Submission 92, 11.
[363] Ibid.
[364] Ibid 18; Environmental Defenders Office, Submission 94, 11.
[365] National Trust SA, Submission 92, 18.

7.7.1 Demolition controls under the Draft Code

National Trust SA stated that the proposed demolition policies 'are clearly at odds with the many statements by the State Planning Commission claiming that there is no change to policy protection.'[366] National Trust SA provided the following table to illustrate the differences between the previous planning system and the Draft Code:[367]

Table 5: National Trust SA comparison of demolition controls

Old system (SAPPL – most councils)	Proposed [Draft] Planning and Design Code
Buildings and structures should not be demolished in whole or in part, unless they are: (a) Structurally unsafe and/or unsound and cannot reasonably be rehabilitated (b) Inconsistent with the desired character for the policy area (c) Associated with a proposed development that supports the desired character for the policy area.	Buildings and structures that demonstrate the historic characteristics as expressed in the Historic Area Statement are not demolished, unless: (a) The front elevation of the building has been substantially altered and cannot be reasonably, economically restored in a manner consistent with the building's original style; or (b) The building façade does not contribute to the historic character of the streetscape; or (c) The structural integrity or condition of the building is beyond economic repair

The City of Adelaide is concerned that there is a higher risk under the Draft Code that historic properties, including in the Park Lands, may be demolished:[368]

> It is ... concerning that the draft policies contained within the State Heritage Place Overlay, Local Heritage Place Overlay and Historic Area Overlay do not comprehensively ensure the future protection of these unique and important Heritage Places and Historic Areas.
>
> (City of Adelaide, Submission 64, 11)

The City of Norwood Payneham & St Peters refutes the Commission's claims that the new planning system seeks to 'strengthen and transition current demolition controls', instead suggesting that the Draft Code policies will increase expense and remove the certainty provided under the previous system.[369] The City of Norwood Payneham & St Peters claims the Draft Code policies would

> require a case-by-case assessment of the demolition of any and all buildings within a Historic Area Overlay. This negates the thorough heritage surveys which were previously undertaken (and the

[366] National Trust SA, Submission 92, 19.
[367] Ibid; see also Environmental Defenders Office, Submission 94, 12
[368] City of Adelaide, Submission 64, 11.
[369] City of Norwood Payneham & St Peters, Submission 77, 9.

considerable resources used to formulate them) and will consume additional and unnecessary resources in reassessing many of these buildings and create greater uncertainty for property owners ...

(City of Norwood Payneham & St Peters, Submission 77, 9)

Professor Elizabeth Vines OAM of Community Alliance SA provided the following example to illustrate concerns that the Draft Code would lead to complexity and uncertainty. A potential purchaser of a property at an upcoming auction would be unable to find a definitive answer from the appropriate council as to whether they can demolish the building. Instead, where there is an Historic Overlay, the potential purchaser would be directed to the Historic Area Statement and would need to provide an historic impact statement prepared by a professional to demonstrate whether it should be demolished based on some criteria.[370] This is a lengthy and expensive process for a potential purchaser to complete in order to know what restrictions apply, and one unlikely to be resolved in advance of the auction.[371] Professor Vines argued that the new system removes the certainty that existed in the previous planning system, where the councils would simply need to look up a schedule to see whether the property is protected. 'My concern is that there will be a lack of certainty, there will be confusion and there will be people like me whose opinion who can be bought and not be impartial.'[372]

The following submissions agreed that the Draft Code provisions would weaken protections for demolition of heritage buildings and lead to uncertainty:

> Under the new Code each application for demolition will need to consider the historic contribution of the building on a case-by-case basis (via an Historic Area Impact Assessment prepared by a consultant) without the ability to refer to an existing schedule. This will add costs and uncertainty to the process. We believe that this is contrary to the stated objectives of the PDI Act, namely, to provide certainty, clarity and confidence in the planning system.
>
> (Australian Institute of Architects, Submission 79, Attachment: *Submission – Draft Planning and Design Code, Phase 3*, 2)

> Statements relating to heritage and demolition of heritage in the code are vague, absent, ambiguous and open to interpretation which leaves a grey area and does not provide the same protection the current system provides therefore their protection is weakened which will most likely result in losing heritage places that are unique and irreplaceable.
>
> (Tony Di Giovanni, Submission 12, 3)

> Heritage protection is severely compromised, despite assertions made publicly to the contrary by Mr Michael Lennon. For instance, new demolition controls applying to historic buildings, would allow irreplaceable structures to be demolished if they are economically (not structurally) unviable, have substantially altered façades or are deemed not to contribute to the historic character of the streetscape. There is a great deal of emphasis on cost and visibility to determine the outcome, with obvious scope for interpretation, litigation and abuse.
>
> (Norwood Residents Association Inc, Submission 16, 1)

> Unless a building is protected by a State heritage order or lies under the Local Heritage Provisions as were enacted under the previous City of Norwood and Kensington Incorporated, a request for demolition can be applied for. One building lacking a heritage listing in the middle of a row is allowed

[370] Community Alliance SA, Committee Hansard, 22 September 2020, 10.
[371] Ibid.
[372] Ibid.

> to be demolished and whither the Victorian street? **Greater clarity needs to be handed down about such residences and their place in a Local Heritage Conservation Zone, together with demolition controls and rights.**
>
> (Rowena Dunk, Submission 42, 6)

> Softer demolition controls and less detailed/more generic guidelines applied to our Historic Conservation Zones, will in turn put the integrity of these areas at risk.
>
> (Christine Francis, Submission 58, 1)

Some other submitters had more specific concerns with the Draft Code provisions relating to demolition of heritage properties:

> For me, it is a significant oversight and or a massive problem that the public is required to be notified of conservation work on a heritage place but not of its total demolition.
>
> (Alicia Siegel, Submission 45, 1)

> Most alarmingly, under the Character Overlay 'demolition will be classified as accepted development and therefore will not need planning consent.'
>
> (Norwood Residents Association, Submission 78, 3)

SCAP advised that under the Code the powers of the Minister responsible for Heritage are strengthened, in that that Minister can now *direct* decisions about State Heritage Areas where previously the Minister responsible for Heritage could only provide *advice*.[373] SCAP also stated that demolition controls under the Code are consistent for State and Local Heritage Place Overlays and that '[d]emolition within Historic Areas will be assessed against the building's historic characteristics and whether the proposal is reasonable.'[374] In addition, SCAP advised that '[w]here buildings had demolition control prior to the Code, they will continue to have demolition Control under the Code.'[375]

7.7.2 Economic viability test

Some of the evidence received by the Committee in relation to heritage included complaints that a heritage property could be demolished under the Draft Code if it is not economically viable to repair or restore the building.[376] In response to feedback received during the consultation process, the Commission has now altered this test to whether the property is beyond 'reasonable' repair, as discussed below under *7.7.5 Revised Draft Code*. The 'reasonable' test is an improvement upon the economic test, which the Australian Institute of Architects noted could lead to owners intentionally allowing historic or character buildings to deteriorate in order to gain approval to demolish the property.[377] Other submissions expressed agreement with this concern:

[373] SCAP, Responses to Questions on Notice, 3.
[374] Ibid 5.
[375] Ibid.
[376] See for example, Charlotte Hutchesson, Submission 30, 1; Norwood Residents Association, Submission 78, 3.
[377] Australian Institute of Architects, Submission 79, Attachment: *Submission – Draft Planning and Design Cade, Phase 3*, 2.

> The Heritage Council is concerned that, in the absence of enforcement powers relating to wilful neglect, this may lead to some landowners neglecting their properties to the point that they are irredeemably beyond repair and that this is used as justification for demolition.
>
> (SA Heritage Council, Committee Hansard, 17 November 2020, 51)

> There is currently an issue that arises from the high value of large allotments in the City of Burnside where developers are rewarded by allowing Contributory items to deteriorate to the extent that renovation is deemed significantly expensive. In effect, this rewards owners by allowing them to maximize their investment through subdivision by allowing any existing dwelling to deteriorate significantly.
>
> (Helga Lemon, Submission 52, 2)

National Trust SA described the distinction between the economic viability test and the previous system:

> The greater emphasis on economic viability of repair proposed in the Code is out of kilter broadly with current policies for CIs [Contributory Items] (or similar buildings). These typically refer to whether the building can be 'economically rehabilitated' (in 3 Development Plans) or 'reasonably be rehabilitated' (in 17 Development Plans), the latter normally taking into consideration much more than just the cost of repairs including consideration of the historic value of the building, the likelihood the issues will reoccur once repaired and the cause of the issue. The test regarding economic viability in relation to heritage places is open to wide interpretation. For example, a developer could argue that the owner of a CI cannot afford to repair the verandah so the home is economically unviable to retain. By inserting 'or' after criteria (a) demolition could be approved simply on the narrow test of economic repair rather than as a result of carrying out a comprehensive review of the value of the building and the nature of the repairs needed.
>
> (National Trust SA, Submission 92, 20)

National Trust SA used an example of a similar policy found in the Unley Council's Development Plan which resulted in over 50 historic homes being demolished over the past five years, and compared that to stronger policies, including listing and map designation, in the Norwood Payneham & St Peters Council development plan where only 10 contributory items were demolished in the last 10 years.[378]

As noted, as a result of feedback such as that set out above, the test for demolition has been altered from an 'economic' test to one that considers the 'reasonableness' of repairs. However, the LGA advised the Committee that this change is not sufficient to allay its concerns:

> The suggestion that the 'economic' test for demolition in the Historic Area Overlay, has been removed and replaced by a 'reasonableness' test is somewhat misleading as the end result is the same, i.e. whether it is reasonable to demolish a place as an alternative to restoring it will still inevitably centre around economic considerations. There is a concern that without a Practice Direction to provide guidance, relevant authorities and the Courts will continue to rely on the economic test in their decision making.
>
> (LGA, Responses to Questions on Notice 1, 3)

[378] National Trust SA, Submission 92, 20.

As well as the economic viability test, another concerning aspect of the test for demolition that was raised in some submissions was the emphasis within the Draft Code on the street presence of the building being assessed.

7.7.3 Street presence test

The Draft Code allowed demolition of historic buildings that did not contribute to the to the historic character of the streetscape, focusing only on the historic aspect that is visible from the street.[379] This excluded from heritage scrutiny developments affecting buildings obscured from view by landscaping or walls and the portions of buildings beyond the façade. The emphasis on street presence and front elevations also devalued the significance of buildings as three-dimensional structures.[380] This test has also now been altered in response to consultation feedback (see *7.7.5 Revised Draft Code* below). The following explains the risk of a test that emphasises street presence:

> An undue focus on the façade as the measure of heritage value would risk the loss of historic homes in good condition simply because of superficial, out of character alterations. Similarly, overemphasis on streetscape character opens up the possibility that a sound historic home could be demolished if it is obscured to the street by a high fence and/or vegetation.
>
> (National Trust of SA, Submission 92, 19-20; Environmental Defenders Office, Submission 94, 12)

Professor Warren Jones AO of Protect our Heritage Alliance shared this concern, noting 'that these criteria are all qualified and made flexible so that the interpretation of them, we believe, is going to be open slather ...' allowing developers to 'get around these seemingly protective mechanisms.'[381]

The amendments to these provisions in the Code relating to economic viability and street presence will protect some heritage assets from demolition. However, it is unclear whether the new provisions will satisfy the Petitioners' concerns.

7.7.4 High-rise development

A few of the submissions received expressed specific concern about approvals for demolition of heritage buildings in order to construct high-rise developments within the city of Adelaide. National Trust SA expressed the view that large developers who undertake this type of project are afforded more freedom to demolish heritage buildings than adjacent landowners on smaller lots.[382] National Trust SA stated in its submission:

> This is both unfair and undemocratic. Random spot rezoning for major developments currently undermines more visionary strategic planning processes and local planning outcomes. Instead of spot rezoning, a more comprehensive master planning approach is required where a wider range of economic, social and environmental factors are taken into account in the valuation of major development proposals.
>
> (National Trust SA, Submission 94, 10).

[379] Australian Institute of Architects, Submission 79, Attachment: *Submission – Draft Planning and Design Code, Phase 3*, 2.
[380] Ibid.
[381] Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 16.
[382] National Trust SA, Submission 94, 10.

Mr Kevin O'Leary provided some examples of 'spot rezoning' in Attachment B to his submission.[383] Mr O'Leary and the following other submitters expressed concern about this practice and the heights of buildings that are being approved:

> In more recent times the state government has been resorting to what effectively are spot rezonings which are an anathema to good planning practice because they are not being examined in a wider strategic planning context. These spot rezonings are either occurring because of very liberal interpretations being made of policies contained in existing development plans or through development plan amendments which are very site specific and where broader strategic planning objectives are not considered.
>
> (Kevin O'Leary, Submission 49, 5)

> In my submission, the height of new buildings in predominantly residential and small business areas in both the City of Adelaide and metropolitan Adelaide should be limited to 5, or perhaps at most 6, levels, although ideally 3 or 4 levels in areas of single and two storied residential buildings and in addition should not be permitted to impact adversely on the amenity of occupants of neighbouring properties. Buildings that are taller than this should be confined to the few streets that comprise the main business centre of the Adelaide City Council area.
>
> (Dianne Gray, Submission 33, 4)

> Another extreme concern is the high-rise buildings in and near the city which are placed close to or immediately behind heritage and/or character housing. Why do they need to be so dominantly high, ruining the streetscape they now occupy and spoil?- they are a slur on responsible urban planning.
>
> (Jill Amery, Submission 40, 1)

> Zoning should restrict developments adjacent to local heritage conservation zones to a maximum of '2-storeys', not 3-storeys and definitely not 6-storeys, and with increased setback. You cannot screen a structure 3-storeys or more high!
>
> (Peter & Chris Holmes, Submission 47, 2)

Submitters are concerned that dominantly tall buildings will detract from the streetscape and impact of historic buildings and façades.

7.7.5 Revised Draft Code

As noted above, the Commission has made revisions to the Draft Code since the Committee received submissions. Some witnesses who appeared before the Committee and provided responses to the Committee's questions on notice reflected on these revisions. National Trust SA had made the following remarks in relation to demolition controls in the Revised Draft Code:

> Whilst the Trust is supportive of changes made to demolition controls in the Historic Area Overlay, these do not go far enough. The removal of the proposed 'economic test' from Performance Outcome 7.1(a) and the removal entirely of Performance Outcome 7.1(b) leave demolition controls improved over previous iterations of the Code, although inferior to what currently exists in many areas. However, the demolition controls in the Revised Code apply indiscriminately to all buildings within the Overlay and are therefore still weaker than they ought to be and weaker than those currently in place in several development plans. The Norwood, Payneham and St Peters Development Plan ('NPSP Development

[383] Kevin O'Leary, Submission 49, Attachment B.

> Plan') for example makes specific provision for demolition control of Contributory Items ... which as it relates to Contributory Items is more appropriate and has been proven to limit the loss of these buildings.
>
> (National Trust SA, Responses to Questions on Notice, 8-9)

National Trust SA also noted that the Revised Draft Code continues to make 'preservation of the entire building contingent upon the condition of the front elevation of the building.' The NPSP Development Plan, conversely, protects the entire building from demolition, without the focus on streetscape evident the Revised Draft Code.[384] In addition, National Trust SA stated:

> The demolition policy contained within the NPSP Development Plan also makes demolition approval contingent on a development proposal for the site or building that would contribute to an equal or greater extent to the historic character of the zone as the part to be demolished did. This one-to-one comparison ensures that the historic character of these areas is not slowly eroded over time as it might be under the Revised Code.
>
> (National Trust SA, Responses to Questions on Notice, 10)

The Committee heard that both the Draft Code and the Revised Draft Code offer less protection from demolition for historic buildings that would have been protected under the previous system in some council areas. Submitters stress that it is important that the planning system get these protections right before irreplaceable heritage is lost.

7.8 ERDC *Heritage Report* recommendations

As discussed at the beginning of this section of the Report, the ERDC conducted an Inquiry into Heritage and published the *Heritage Report* on 30 April 2019. In that report, the ERDC recommended that:

1. State government commences a statewide, collaborative and strategic approach to heritage reform through development of a staged process; commencing in 2019 and reporting to the Houses with a plan on how a staged approach might work in early 2020;

    a. Any reforms that are adopted must result in:
        i. The protection and future management of heritage and historic places and areas that are important to people (including initially transferring all items that are registered on existing heritage and planning databases to the Planning and Design Code);
        ii. Simple, efficient and responsive processes for the nomination, assessment and listing of local and state heritage places and state heritage areas, which arise from a single piece of 'heritage' legislation, in accordance with the authority of one 'heritage' Minister (including the provision of interim protection during the nomination and assessment stages);
        iii. Nominations of local heritage places or areas being initiated by local councils, property owners, state heritage bodies or non-government organisations. The ability to nominate places or areas for heritage listing should be widely advertised;

[384] Responses to Questions on Notice, National Trust SA, 9.

iv. New heritage legislation operating in an aligned and streamlined manner with planning and development legislation allowing timeliness and cost efficiencies in processing applications for development of heritage places and areas;
v. Consistency, transparency and accountability in decisions that are made relating to heritage listing from a single, expert, independent decision maker (or body of decision makers), with transparent and accountable Ministerial oversight of decisions;
vi. Certainty in outcomes with respect to heritage listings, development and planning;
vii. Better clarity and consistency of heritage terminology used across planning and heritage, including that criteria for local and state heritage are aligned with differences in respect of thresholds against which heritage is assessed; and
viii. Better community involvement in the decisions that affect them; facilitated by earlier consultation with community, as well as the provision of interim protection for local and state heritage during the nomination and assessment phases;

b. That the model for assessment, listing and management of state and local heritage that is proposed by government takes into consideration the expectations of the community, as raised by this report, and also the reforms that are already in process as part of the broader state planning reforms; and

c. That state agencies and local government work on inter-agency instruments to streamline processes for nomination, listing, assessment and regulation of compliance as part of the staged approach for the implementation of reforms;

2. A statewide, strategic approach to identifying heritage of local and state significance, involving the community and interested stakeholders, be appropriately funded by state government, developed and commenced in the year 2020;

3. An audit or review be undertaken of local and state heritage places and contributory items to commence in the year 2020, with the aim of working collaboratively with community and local government, on:

a. Providing information on the heritage values of currently listed places to be captured into a publicly-searchable database;

b. Assessing places listed prior to 1993 that may require re-attributing from state to local significance (providing this does not reduce their heritage protection);

c. Reviewing protected local items and zones or areas that were transferred to the Planning and Design Code against new local heritage criteria;

d. Reviewing, against new local heritage criteria, places that were recommended for inclusion as local heritage places in development plans, but weren't; and

e. That such projects be appropriately funded by state government;

4. A suitable long term funding base (that incentivises management for heritage and disincentivises deliberate neglect of heritage) for the management of heritage be identified by state government, in collaboration with local government and other stakeholders, and secured, in recognition of the value that heritage provides to the community, and to reduce the financial burden on owners maintaining and managing heritage properties; and

5. Sub-sections 67 (4) & (5) of the Planning Development and Infrastructure Act 2016 should be repealed in order to ensure that planning policy is determined by proper planning principles through broad community consultation, rather than through a selective vote of property owners.

In response to the ERDC *Heritage Report*, the Hon David Spiers MP, Minister for Environment and Water, and the Hon Stephan Knoll MP, then Minister for Planning, undertook to 'establish a Panel comprising persons of appropriate expertise, including representation from the Commission, Heritage Council, Local Government and relevant Government agencies to prepare a roadmap for a staged approach to heritage reform to be presented to Parliament in mid 2020.'[385] The timing of the establishment of a Panel was intended to follow full implementation of the Code, which was then expected to be operational throughout the State by July of 2020.[386]

On 12 March 2021, one week prior to Phase Three of the Code going live, the Minister assembled a Heritage Reform Advisory Panel (the 'Panel') to review the recommendations made by the ERDC in its *Heritage Report* and to 'prepare a roadmap for a staged approach to heritage reform ...'[387] as recommended in that *Report*. The Panel includes representatives from the Commission, SA Heritage Council, National Trust SA and the State Government.[388] Contrary to statements in the Ministers' letter to the ERDC in response to the *Heritage Report*, a representative of Local Government was not appointed to that Panel. The LGA highlighted this omission:

> While we note that some members of the panel have extensive experience working in the local government sector, these panel members now represent the interests of the state government and the State Planning Commission and are unlikely to represent the interests and views of local government.
>
> The panel would benefit from having local government representation as heritage is both a state and local government responsibility and council should have its own seat at the table when significant heritage reforms are being discussed.
>
> (LGA, Committee Hansard, 4 May 2021, 131)

The Committee recognises that in forming the Panel, the Department is endeavouring to comply with recommendation 1 in the ERDC's *Heritage Report*. The Committee received submissions supporting nearly all the recommendations made in the *Heritage Report*, as is set out below.

7.8.1 Contributory Items

In its *Heritage Report*, the ERDC set out in Recommendation 1(a)(i) that all existing registered items should be transferred into the Code, which includes Contributory Items. The Submissions received on this subject are set out above under *7.6 Contributory Items / Representative Buildings*. The Committee agrees with and endorses this recommendation.

[385] Letter from the Office of the Minister for Environment and Water to Mr Adrian Pederick MP, Presiding Member of the ERDC, dated 5 September 2019, 3, available on the ERDC webpage.
[386] Ibid 1.
[387] Commission, Responses to Questions on Notice, 8.
[388] Ibid.

7.8.2 Simplify heritage processes

Recommendation 1(a)(ii) in the ERDC's *Heritage Report* advised that reforms must result in heritage processes that are simple and efficient, and guided by a single legislation under the authority of one Minister. Recommendation 1(a)(v) sets out the importance of decisions being made by 'a single, expert, independent decision maker (or body of decisions makers) ...' to ensure 'consistency, transparency and accountability ...' in the heritage system.

The Kensington Residents Association agreed that simpler heritage processes should be introduced:

> If Contributory Item status is to be retained it needs a simple process to review the appropriateness of Contributory Item listing and to upgrade from Contributory Item to Local Heritage status without going through the complex and time consuming Development Plan Amendment (DPA) process. The same applies for the nomination of items for either Local Heritage or Contributory status. We need a simple nomination process that any member of the public or organisation can use.
>
> (Kensington Residents Association, Submission 28, 3)

Like the ERDC's *Heritage Report*, the Expert Panel also concluded in its *Final Report* that heritage laws need to be consolidated into one integrated statute with a single statutory body responsible for heritage management and a single register of heritage sites.[389] The Committee received submissions that supported the *Heritage Report*'s call for an 'integrated approach to heritage protection in the planning system ...':[390]

> The [SA Heritage] Council supports a single integrated system/legislation for the identification and listing of places and areas that are of State or Local heritage value. The *PDI Act* does not manage heritage listing in this manner.
>
> (SA Heritage Council, Submission 69, 1)

> [W]e have inherited an ad hoc system of State and Local heritage that is the responsibility of two Ministers, under two Acts administered by two Departments. All heritage is South Australian heritage. There may be different levels of significance, state, regional or local but should that necessitate different statutory controls?
>
> (Dr Carolyn Wigg, Submission 71, 1)

> The Trust supports the recommendation of the Expert Panel on Planning Reform that heritage laws should be consolidated into one statute. This statute should be separate from the planning legislation but with clear linkages and should include the listing of local heritage places and representative buildings, which are currently dealt with in planning instruments. Likewise, ... the establishment of one integrated statutory body to replace existing multiple heritage authorities.
>
> (National Trust SA, Responses to Questions on Notice, 11)

SA Heritage Council ('SAHC') suggested that the body responsible for making heritage decisions must have heritage expertise:

> The Council suggests that a body like the SAHC (with heritage expertise and an established policy framework) should be responsible for all listing of Places and Areas and the State Planning Commission

[389] Expert Panel, *The Planning System We Want* (December 2014) 64 and 67.
[390] National Trust SA, Submission 92, 10.

> be responsible for the creation of development assessment policy. The *PDI Act* gives the State Planning Commission power to determine Local Heritage listings.
>
> (SA Heritage Council, Submission 69, 1)

National Trust SA agrees that heritage determinations should be made by a body with heritage expertise, suggesting

> legislation should establish an independent heritage body, along the lines of the Environment Protection Authority, with regulatory powers, to provide the certainty and independence required to ensure reliable protection for our heritage and maximise the benefits of its retention.
>
> (National Trust SA, Responses to Questions on Notice, 11)

The Committee agrees that a simplification of the processes for heritage listing is necessary, and that having heritage managed under a single Act and Minister would help achieve that aim.

7.8.3 Heritage nominations

Recommendation 1(a)(iii) in the ERDC's *Heritage Report* suggested that councils, property owners, state heritage bodies or non-government organisations must be enabled to nominate Local Heritage Places or Local Heritage Areas. Prospect Residents Association Inc and the Kensington Residents Association also suggest that councils and individuals should be involved in local heritage decisions.

> Local Heritage decisions need to stay with local councils and must not be overruled by the Minister. We also support individuals being able to initiate Local Heritage nominations in addition to the nominations raised during periodic heritage surveys. We do not support court-based reviews. ... An independent body like the State Heritage Council is a better option.
>
> (Prospect Residents Association Inc, Submission 59, 8)

> It is a serious anomaly that anyone can nominate an item for State Heritage listing but the public is unable to nominate an item for either Local Heritage or Contributory status.
>
> (Kensington Residents Association, Submission 28, 3)

The Committee agrees that local councils and property owners should be entitled to nominate local heritage. The Committee supports this recommendation.

7.8.4 Clear, consistent terminology

The EDRC's Recommendation 1(a)(vii) called for clear and consistent terminology to be used in heritage planning, particularly between state and local heritage. This issue was also raised in submissions received by the Committee, including:

- Clear definitions should be included for terms such as heritage and character; the term 'historic' should not be used as it can be confusing;[391]

[391] SAHC, Submission 69, 4; see also Expert Panel, *Heritage and Character in the Planning and Design Code* (December 2019) 4.3 (Heritage and Character Policies) point 4.

- A clear definition and/or guidelines to determine what constitutes a development that is 'minor in nature' (and therefore does not warrant a referral to the 'heritage' Minister);[392]
- A clear definition and/or guidelines (possibly including tests) to determine what constitutes a building that is 'irredeemably beyond repair' in demolition controls.[393]

Jeff Smith noted in his evidence that a failure to correct some of the errors, and in particular to clarify definitions of some of the terms used in the Code, 'will inevitably lead to challenges in the legal system, delays in assessment, costs to the community and consequent impact on the economy.'[394]

The Committee agrees that terminology used in heritage provisions must be clear and consistent, and endorses this recommendation by the ERDC.

7.8.5 Heritage Audit

The ERDC *Heritage Report* recommended that an audit be undertaken of all local and state heritage and contributory items (now Representative Buildings) (Recommendation 3). SAHC supported this recommendation, suggesting that an audit of existing heritage listings should contain an accurate description of their heritage attributes.[395] The Committee supports this recommendation.

7.8.6 Resources

In Recommendation 4 of its *Heritage Report*, the ERDC stated that:

> A suitable long term funding base (that incentivises management for heritage and disincentivises deliberate neglect of heritage) for the management of heritage be identified by state government, in collaboration with local government and other stakeholders, and secured, in recognition of the value that heritage provides to the community, and to reduce the financial burden on owners maintaining and managing heritage properties;

The Expert Panel also called for legislation to establish a long-term, stable revenue stream for heritage, including tax discounts for owners who enter into heritage management agreements and grants provided by way of a heritage lottery.[396] The importance of adequate resources was also raised in submissions received by the Committee, as was the absence of any funding scheme in the planning reforms.

SAHC suggested that government funding be provided to support State and Local Heritage advisers to provide professional advice to property owners and assessors, particularly in relation to State Heritage Places.[397] SAHC also noted that the planning legislation does not provide a long-term funding base for heritage management.

The Committee endorses this recommendation.

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[392] National Trust SA, Submission 92, 10-11; SAHC, Submission 69, 3.
[393] SAHC, Submission 69, 3.
[394] Jeff Smith, Committee Hansard, 10 November 2020, 32.
[395] SAHC, Submission 69, 4.
[396] Expert Panel, *The Planning System We Want* (December 2014) 64, 66 and 67.
[397] SAHC, Submission 69, 5.

7.8.7 Repeal subsections 67(4) and (5) of the *PDI Act*

Sections 67(4) and (5) (Local heritage) of the *PDI Act* have not yet been commenced. These sections state:

> (4) In addition, an area cannot be designated under an amendment to the Planning and Design Code as constituting a heritage character or preservation zone or subzone unless the amendment has been approved by persons who, at the time that consultation in relation to the proposed amendment is initiated under the Community Engagement Charter, constitute at least the prescribed percentage of owners of allotments within the relevant area (on the basis of 1 owner per allotment being counted under a scheme prescribed by the regulations).
>
> (5) In this section— prescribed percentage means 51% of relevant owners of allotments within a relevant area.

The ERDC recommended that these provisions be repealed (Recommendation 5). This Committee also received evidence requesting that these subsections be removed from the *PDI Act*, suggesting that it is not good policy to base historic conservation on a vote.[398] The following comments were made in submissions received by the Committee:

> The Act provides that 51% of affected property owners must agree to a new Zone. The EDO [Environmental Defenders Office] submits that planning policy should only be made if in the public interest not on the basis of a vote. No other policies are made on this basis and therefore this provision is inappropriate and should be repealed.
>
> (Environmental Defenders Office, Submission 94, 8)

> It is highly irregular for a planning system to allow zoning to be determined in this way, by popular vote. We believe decisions about heritage and character zones should be made in the same way that every other type of zone is determined, and that is by weighing up the evidence—including, of course, the views of the community that are expressed during a robust consultation and engagement process. The LGA has strongly recommended that these provisions of the Act be removed.
>
> (LGA, Committee Hansard, 16 February 2021, 91)

> This is a curious and unusual requirement for planning policy. Although consultation is typically required for proposed re-zonings, it is up to the designated decision makers (e.g. the Council or the Minister) to review all of the comments which were received during consultation and make a strategic and objective determination. There are no other examples of planning policy 'by popular vote', particularly one which is limited to property owners and not the community more generally. Heritage and historic area designations are a key issue for property owners and the community, but there are several other examples of policies which control the development potential of a property, such as minimum allotment sizes which affect subdivision potential. It is not logical or equitable for the 'majority vote' test to only apply to historic areas, but in any case is an inappropriate method for applying any type of planning policy.
>
> (City of Norwood Payneham & St Peters, Submission 77, 5)

This Committee agrees with the ERDC's recommendation and also recommends that sub-sections 67(4) and (5) of the *PDI Act* be repealed.

[398] See for example Environmental Defenders Office, Submission 94, 13.

7.9 Government position

Mr Michael Lennon, then Chair of the Commission, expressed the view that many of the concerns raised by the Petition identified as heritage had 'more to do with character and people's sense of a loss of what was occurring within the neighbourhoods ...' as a result of infill development.[399] Mr Lennon disagreed with Petitioner's claims that heritage protections have been weakened under the *PDI Act*. Mr Lennon stated in his evidence before the Committee:

> there is, in our submission, no evidence to support the petitioners' claims that heritage is being diminished under the new planning system. On the contrary, the Commission has strengthened the status of heritage in the new Planning and Design Code.
>
> (Commission, Committee Hansard, 16 March 2021, 108)

Mr Lennon advised that the Expert Panel found that heritage treatment under the previous planning system was too complex and fragmented, and explained how, in his opinion, the new planning system addressed those difficulties and strengthened heritage:

> The Commission set out to fix contradictions to create one overarching, predictable model for protecting South Australia's heritage. The Planning and Design Code contains a clear pathway for items to be listed as heritage according to agreed criteria. The Code preserves demolition controls and strengthens them in certain cases. The new planning system also provides greater powers for the Minister responsible for heritage. To suggest that the Commission is derelict in its duty of care for heritage is either based on misunderstandings of the policies within the Code or is based on something emotive.
>
> To be specific, the Code will for the first time accurately map all places of significance, that being state heritage, local heritage and representative buildings, in a way that is transparent and accessible to all. It will consistently apply demolition controls in a way that is consistent, equitable and fair for everyone. It will apply policy consistently to divide development adjacent to a heritage place. It will elevate the role of the Minister in state heritage planning decisions. It will build in local policy that reflects the character of an area through the use of historic area and character area statements. Lastly, it aims to provide clear and easy to read historic area statements that describe what is significant in an area to identify and what elements should be protected or complemented.
>
> (Commission, Committee Hansard, 16 March 2021, 108)

7.10 Recommendations

The Committee recognises that improvements to heritage protection have been made in the Code as now implemented throughout South Australia. However, the Committee is still concerned that heritage may not be adequately protected under the planning reforms.

The Committee recognises that the Historic Area Statements and Character Area Statements are works in progress that are being refined on an ongoing basis, but may still be lacking in adequate detail and local policy. The decision to retain Contributory Items is welcomed, but the review should consider whether all items will be incorporated in the Code, whether 'Representative Buildings' will be offered

[399] Commission, Committee Hansard, 16 March 2021, 113.

the same protections as existed for Contributory Items and whether the guidelines that will support Representative Buildings will be adequate to preserve the character of those areas.

The Committee has also heard evidence that the demolition controls in the Code may be weaker in some council areas than they were previously. The lack of detailed, local policy in the heritage protections may lead to increased demolition of heritage buildings, delayed and more costly assessments and poor development outcomes. The potential for uncertainty and delays, requirements to hire consultants to provide heritage assessments and costly litigation are anathema to the stated goals of the planning reforms.

Heritage provides the community with a sense of history and brings amenity and character to South Australia's neighbourhoods. The impacts of the Code and supporting instruments must be monitored and evaluated to ensure that our heritage is protected by our planning and heritage systems.

The Legislative Review Committee recommends that:

Recommendation 10

7.1 The Minister for Planning and Local Government implement each of the recommendations made by the Environment, Resources and Development Committee in its *Inquiry into Heritage Reform* (2019) as a matter of priority.

Recommendation 11

7.2 The Minister for Planning and Local Government appoint a representative from local government, nominated by the Local Government Association of SA, to assist on the recently appointed Heritage Reform Advisory Panel to represent the interests of local councils.

Recommendation 12

7.3 The Minister for Planning and Local Government add to the terms of reference for the Heritage Reform Advisory Panel's Heritage Reform Review, a review into demolition controls under the *Planning and Design Code* to advise on the impact of the Code on approvals for demolition of heritage assets.

Recommendation 13

7.4 The Minister for Planning and Local Government add to the terms of reference for the Heritage Reform Advisory Panel's Heritage Reform Review, a review into the outcomes for 'Representative Buildings' and whether the protections provided under the *Planning and Design Code* and its supporting instruments are sufficient to protect Representative Buildings and retain the character of neighbourhoods.

8 STATE PLANNING COMMISSION and the STATE COMMISSION ASSESSMENT PANEL

PETITION PRAYER 2:

Undertake an independent review of the governance and operation of the State Planning Commission and the State Commission Assessment Panel

Petitioners have requested that Parliament undertake an independent review of the governance and operation of the State Planning Commission (the 'Commission') and the State Commission Assessment Panel ('SCAP'). The Committee heard evidence that submitters are concerned that the Commission and SCAP are dominated by members with interests in the development industry, are not sufficiently transparent or accountable to the public and are not satisfactorily carrying out their functions.

National Trust SA suggested that now is an appropriate time for a review of the governance and operation of the Commission and SCAP, given that these bodies have been in operation for more than three years:

> It is the operation of these bodies as well as the emerging Planning and Design Code that the petitioners wish to be reviewed independently due to the lack of parliamentary oversight of these bodies and the policies and decisions they make. Significant governance and integrity issues have been raised in respect of these bodies and their operating processes which the petitioners wish the Parliament to address as a matter of urgency ... It is clear that neither the planning bodies or the Planning and Design Code established under the Act fulfill the objects of the Act or meet the community's expectations.
>
> (National Trust SA, Responses to Questions, 1)

This Report first considers the statutory framework within the *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*') under which these bodies were created.

8.1 Establishment of the Commission and SCAP

Part 3 (Administration), Division 1 (State Planning Commission) of the *PDI Act*, as set out in the *Legislative framework* section of this Report, established the Commission as a body corporate and an instrumentality of the Crown. The Commission is subject to the general control and direction of the Minister for Planning and Local Government, which presently is the Attorney-General (the 'Minister').[400]

Section 18 (Constitution of the Commission) of the *PDI Act* directs that the Commission shall consist of between four and six persons, appointed by the Governor on the nomination of the Minister, and a public sector employee (other than the Chief Executive) who is responsible for assisting in the administration of the *PDI Act*. Section 18(2) of the *PDI Act* sets out that those appointed to the

[400] *PDI Act* s17.

Commission must collectively, as far as practicable, have qualifications, expertise, experience and knowledge in the following areas:

(a) economics, commerce or finance;
(b) planning, urban design or architecture;
(c) development or building construction;
(d) the provision of or management of infrastructure or transport systems;
(e) social or environmental policy or science;
(f) local government, public administration or law.

The Commission may appoint one or two additional members, to be selected from a list established by the Minister.[401] Members are appointed for a term not to exceed three years, and are eligible for reappointment.[402]

The *PDI Act* sets out the functions and powers of the Commission, which include acting as the State's principal planning advisory and development assessment body.[403] The Commission is also to support the Minister in the administration of the *PDI Act*, to work with the Chief Executive in connection with implementing planning policies under the *PDI Act*, to provide agencies and councils with information and training and to provide advice on the making of instruments under the *PDI Act*.[404]

The Commission must establish one or more committees, to be known as Commission Assessment Panels.[405] The Commission must delegate its powers to determine planning applications to an assessment panel or a person occupying a particular position.[406] It is under this power that the Commission established SCAP, which assumed the functions of the former Development Assessment Commission on 1 August 2017.[407] The Commission appoints the six members of SCAP, whose role is to independently assess and determine development applications in South Australia including:

- Certain developments of significant regional impact (landfill facilities, railway infrastructure, commercial forestry);
- Certain developments in key areas of the State (ie the River Murray Flood Zone, the Adelaide Park Lands, Adelaide Hills water catchments);
- Most Housing SA applications;
- Restricted development or performance assessed development where a third-party request is to be heard by SCAP;
- Certain developments by councils or involving council land;
- Developments exceeding four stories within the Inner Metropolitan Area;
- Applications where council requests SCAP to be the assessing authority;
- Developments over $10 million within the City of Adelaide; and

[401] *PDI Act* s19 (Special provisions relating to constitution of Commission).
[402] *PDI Act* s20(1).
[403] *PDI Act* Part 3 (Administration), Division 1 (State Planning Commission), Subdivision 2 (Functions and powers).
[404] *PDI Act* s22(1) and (2).
[405] *PDI Act* s29 (Committees), s3.
[406] *PDI Act* s30(3) to (5).
[407] SCAP Website – Welcome https://www.saplanningcommission.sa.gov.au/scap [accessed July 2021].

- Applications for Crown development and public infrastructure development (although the final decision rests with Minister).[408]

SCAP will also assess Major Development applications where the Minister is the decision-maker and provide advice to the Minister, or act as the decision-maker if requested by the Minister.[409]

8.2 Petitioners' concerns

Submitters have advised that '[i]t is vitally important the Commission and SCAP follow the highest levels possible of transparency, accountability and accessibility of information ...'[410] and expressed concern that the 'Commission hasn't heard what it is that the community wants ...'[411] Concerns about the governance and operation of the Commission and SCAP communicated in the submissions to the Committee include:

- Membership is weighted towards development with little representation from local council, community, heritage or environmental groups;
- There should be greater public and parliamentary accountability and oversight;
- Meetings and deliberations should be more transparent;
- Justification for decisions should be provided;
- The public should have a right of appeal against decisions, other than through (expensive) judicial review.

Several submitters expressed concern that membership of both the Commission and SCAP are heavily weighted towards the interests of property developers, and do not represent the diverse interests of community members.[412] Dr Darren Peacock, CEO of National Trust SA, advised that the governance of these two bodies needs to be looked at closely:

> I think anyone looking at those two bodies from a governance point of view would have serious concerns. It is an amazing centralisation of power with very little accountability to the Parliament. They seem to be self-regulating in terms of their own governance too. I know they did a governance review of the [Commission], but I do not think you should do your own governance review. I think there are many levels of governance that really need to be examined more closely and Parliament needs to have a greater role.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 59).
>
> Neither body has any legislated accountability to the public even though they are responsible for determining the rules of the planning system and assessing all major developments in the state. The Planning Minister is ultimately responsible for all appointments to these bodies with no mandated parliamentary oversight.
>
> (National Trust SA, Submission 92, 24)

[408] SCAP Website – About SCAP https://www.saplanningcommission.sa.gov.au/scap/about_scap [accessed July 2021].
[409] Ibid.
[410] Environmental Defenders Office, Submission 94, 13.
[411] Community Alliance SA, Committee Hansard, 22 September 2020, 10.
[412] See for example Joanna Wells, Submission 29, 5; LGA, Responses to Questions on Notice 1, 4 March 2021, 4.

These concerns were raised in relation to both the Commission and SCAP. More detailed consideration of each of those bodies follows.

8.3 State Planning Commission

8.3.1 Membership

Professor Warren Jones AO of Protect Our Heritage Alliance noted that, at the time of giving his evidence before the Committee, three out of four of the members of the Commission 'have strong links to the development industry.'[413] Professor Jones continued:

> Understandably, there is an inherent public perception of conflict of interest where developers dictate and monitor planning policy that has such wide implications for the wellbeing and amenity of all South Australians.
>
> (Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 13)

Some submitters who are not involved in the development sector indicated that they struggled to engage with the Commission during the reform process.[414] This is in contrast to the experience of industry groups such as the Urban Development Institute of Australia (the 'UDIA') who advised that they worked closely with the Department for Planning, Transport and Infrastructure ('DPTI') and later the Attorney-General's Department (jointly, the 'Department') throughout the development of the reforms, and continued to 'meet even weekly with departmental officials to talk through some of the challenges that exist.'[415] The Local Government Association (the 'LGA') expressed appreciation that the Commission made itself available to the LGA and councils, however suggested there be a

> formal requirement to include contemporary local government experience and provide the opportunity for the LGA to nominate a person with local government experience onto the Commission (as is the case with a broad range of other State Government boards and committees).
>
> Given the importance of planning to local communities and the significant impacts the PDI Act will have on local government; a member of the Commission with contemporary local government experience is necessary in assisting the Commission to understand and manage these impacts while re-confirming local government's important role in the new planning system.
>
> (LGA, Submission S7, 11)

Ms Sally Smith, Executive Director of Planning and Land Use Services ('PLUS'), provided evidence before the Committee on behalf of the Department and agreed that local government experience would be useful, 'provided they actually came to the debate with expertise in planning or land economics or social and environmental policy.'[416]

In response to the Petitioners' concern that the Commission membership is weighted towards property development interests, Mr Michael Lennon, then Chair of the Commission, provided

[413] Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 13.
[414] See for example SA Independent Retailers, Committee Hansard, 13 October 2020, 27 and Australian Institute of Architects, Committee Hansard, 13 October 2020, 23.
[415] UDIA, Committee Hansard, 16 February 2021, 84.
[416] Department, Committee Hansard, 30 March 2021, 123.

evidence to the Committee that he is the CEO of a national affordable and social housing provider (not-for-profit).[417] Ms Smith advised:

> Obviously, the composition of the Commission is chosen by the government, but, having said that, I don't believe there is a bias towards the development sector on the current Commission. Mr Holmes is an environmental expert; he has been a chief executive in government for many, many years and has a very strong social justice background. Helen Dyer was a chief executive of two local government authorities and is a qualified town planner. Michael Lennon runs a social housing organisation, and Craig Holden, whilst he is a developer, is also an architect.
>
> So I think it's a balance, and it sort of meets the intent of the Act in that we do need a range of different expertise on the State Planning Commission. I am the ex officio on that group, so I get to engage in lively debates with the Commission on a regular basis, and there's definitely not a bias in that room. It feels like a very balanced debate.
>
> (Department, Committee Hansard, 30 March 2021, 122)

SCAP advised that that the Commission's primary role is the preparation of statutory instruments, and those instruments must be approved by the Minister and are reviewable by the Environment, Resources and Development Committee of Parliament.[418] A corollary to having Commission members with interests in the development industry is that those members will sometimes have conflicts of interest with matters that come before the Commission.

8.3.2 Conflicts of interest

Professor Warren Jones AO of Protect Our Heritage Alliance advised that the members of the Commission frequently declared conflicts of interest with matters before the Commission:

> It is of interest that in a total of 64 meetings of the [Commission] to June of this year [2020], there were 41 instances of a declared conflict of interest of members.
>
> (Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 13)

National Trust SA also suggested that the frequent declarations of conflicts of interest made by members of the Commission are detrimental to the perceived integrity of the Commission:

> [N]umerous conflicts of interest have been reported by [Commission] members. In 2019, 18 conflicts of interest were reported by members of the Commission. One member alone has reported 23 conflicts of interest in three years. We appreciate that policies and procedures are in place to document these conflicts, but the frequency of such conflicts and the fact members of the Commission are privately engaged in commercial development activities with government agencies raises concerns about risks to perceptions of the integrity and independence of the Commission's decision-making.
>
> (National Trust SA, Submission 92, 25)

The Commission pointed out that the *PDI Act* anticipates that members of the Commission will have pecuniary interests in matters that may come before it.[419] Schedule 1 of the *PDI Act* addresses

[417] SCAP, Committee Hansard, 2 March 2021, 102.
[418] SCAP, Responses to Questions on Notice, 3.
[419] Commission, Responses to Questions on Notice, 4.

'Disclosure of financial interests' and the Commission has a *Conflicts of Interest Policy*.[420] The Commission advised the Committee:

> The number and rate of declaration of conflicts of interests is not considered unusual or detrimental to the operations of the State Planning Commission or the SCAP. The reality is, members of both the Commission and the SCAP are professionals and specialists who collectively hold a broad range of experience relevant to the functions of those bodies.
>
> Many members are actively involved with and practicing within their respective areas of expertise, which means they are able to maintain current and contemporary knowledge and skills in those areas. However, as a result, conflicts of interest will inevitably arise. What is important is that those conflicts of interest are proactively identified and appropriately managed when they do arise.
>
> The rate of conflicts being declared is not considered detrimental to the integrity of the Commission or SCAP. In fact, declaration of those conflicts of interests indicates that those matters are being addressed in an appropriate manner, and actively considered, monitored and managed as necessary by effected members. Members who have an actual or perceived conflict of interest declare that interest, and excuse themselves from consideration of the relevant matter. This process preserves the integrity of the Commission and the SCAP, rather than detracting from it.
>
> (Commission, Responses to Questions on Notice, 5)

Nonetheless, the Committee heard that the number of conflicts of interest being declared undermines the public trust in the Commission, as does the lack of transparency of the Commission's operations.

8.3.3 Transparency

Several submissions and witnesses complained that the Commission meetings and processes lacked transparency, particularly in the frequency with which agenda items are identified as confidential.

> [T]he Commission has adopted a very secretive approach to decision making. For example, many agenda items are marked confidential and minutes lack details of discussions by Commission members and the decisions they make. There is also no public access to meetings except via invitation.
>
> (Environmental Defenders Office, Submission 94, 14)

> [T]he State Planning Commission, continues its track record of secrecy and non-disclosure, with six out of seven items at its latest meeting being treated as confidential. This default position of secrecy by the Commission is seriously undermining public confidence and trust in our State's planning system.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 56).

Professor Warren Jones of Protect Our Heritage Alliance calculated that under the first Chair of the Commission, up to August 2018, 17 per cent of items on the Commission agenda were designated confidential. However,

> [u]nder [Chair Michael Lennon], the figure is 50 per cent including 63 per cent this year [2020]. It is possible that two-thirds of the [Commission] business is commercially confidential, but if that is the case it raises questions about the emphasis on private development and commercial interests in the planning system at the expense of the rights of the community at large.

[420] State Planning Commission *Code of Conduct* (13 May 2021) Version 1.1.

(Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 14).

National Trust SA also expressed concerns that the Commission is increasingly identifying items as confidential and cited similar figures, adding that '[a]t the latest State Planning Commission meeting in September 2020, ALL matters for decision were designated as confidential.'[421] Professor Elizabeth Vines OAM of Community Alliance SA advised that Commission agenda items such as 'Historic and Character Area Advisory Guidelines' were identified as confidential.[422] Treating such items as confidential appears contradictory to the principle in the Act to engage the community at the early stages of policy development. National Trust SA argued:

> Public confidence in the transparency and integrity of this body is seriously undermined by a persistent and growing tendency to secrecy that denies the community access to information about deliberations and decisions that have significant impacts upon them. It is completely at odds with the object of the Act to provide for 'community participation in the relation to the initiation and development of planning policies and strategies' and the Community Engagement Charter, the purpose of which is to ensure the community has 'reasonable, timely, meaningful and ongoing opportunities to gain access to information about proposals and introduce or change planning policies and to participate in relevant planning processes' (s 44(3)(a)).
>
> (National Trust SA, Submission 92, 2S)

In evidence before the Committee, Ms Melissa Ballantyne of the Environmental Defenders Office made the following recommendation:

> [T]he State Planning Commission has a manual regarding their policies and procedures and I think that needs to be reviewed to clarify what should be confidential in their discussions. It should open up the detail which is to be found in their agendas and minutes, potentially allow the public to attend meetings.
>
> (Environmental Defenders Office, Committee Hansard, 1 December 2020, 79)

The Committee heard from submitters and witnesses a deep concern about the lack of transparency of what occurs at Commission meetings, particularly given the perceived pro-development make-up of the membership of the Commission. The Commission claimed that these concerns are unfounded. Mr Michael Lennon commented on steps he has taken while Chair of the Commission to

> improve the transparency around its own meetings and decision-making processes. As part of our 2020-21 work program, we have reviewed our policies regarding the publication of the Commission's agendas and minutes as well as our meetings and procedures.
>
> We have written to the Minister for Planning and advised that we intend to implement new procedures this year whereby the starting point will be that all agendas, minutes, decisions and agenda reports will be available to the public, excepting those where there are sound reasons for not releasing or for delaying the release of those items. Items which do not fall within the specified criteria of 'confidential' or 'delayed release' will be treated as non-confidential by default, and released immediately to the public.
>
> The issue of transparency is a complex one, and needs to take into account the need for candid debate in reaching a decision balanced with protecting people's privacy, whilst meeting the community's expectations to be kept informed. I respectfully submit to the committee that we have made significant

[421] National Trust SA, Submission 92, 2S.

[422] Community Alliance SA, Committee Hansard, 22 September 2020, 8; see also Commission Agenda, Meeting No. 73, 17 September 2020.

steps in improving the access to and understanding of how decisions are made both by SCAP and the Commission during my term as Chair.

(Commission, Committee Hansard, 16 March 2021, 110)

The Commission advised that under the Commission's new policy, matters would be considered confidential if they fall under the following categories:

- Cabinet in Confidence
- Legal Obligations
- Legal Advice or Litigation
- Complaints
- Security and Safety
- Personal Information
- Commercial in Confidence

Internal Working Items may also be maintained in confidence while the matter or advice is pending a decision. However, these items are intended to be published following a decision being made or a project being completed.

(Commission, Responses to Questions on Notice, 4)

The Commission stated in its Responses to Questions on Notice, received by the Committee on 21 April 2021, that the measures outlined above are 'intended to take effect in the coming months.' The Commission's intention is that these measures will 'result in fewer matters being identified as confidential, and a greater level of detail being disclosed for non-confidential items.'[423] However, a brief review of the July 2021 agendas illustrates that a large proportion of matters (more than half of the agenda items for the 22 July 2021 meeting) are still marked as 'Confidential' and five out of the eleven matters marked 'Not Confidential' are marked 'Release Delayed'. Items marked 'Release Delayed' relate to the Commission, the Minister or the Chief Executive's decision-making functions, and will be published once a decision is made or a matter is concluded.[424]

In response to claims that the Commission meetings are closed to the public, the Commission intends to increase public participation by developing procedures to allow for:

- Deputations from members of the public; and
- Regional forums and meetings of the Commission.[425]

The Commission stated that it has 'prioritised in its 20/2021 Strategic Plan to improve the transparency of its procedures.'[426] That Strategic Plan includes, as Priority 3(5) to 'Improve the transparency of the Commission' with no further detail.[427]

The Committee applauds the Commission's stance on increasing the transparency of its work, and the improvement in the reporting of the Commission's work in its agendas and minutes. It is unclear to the Committee why transparency policies and procedures were not implemented from the

[423] Commission, Responses to Questions on Notice, 4.
[424] Commission, *State Planning Commission Governance Manual* (undated) 9.
[425] Ibid.
[426] Ibid 3.
[427] Commission, *Strotegic Plan 2021-2022* (5 August 2021) 6.

Commission's inception and why a large proportion of the Commission's activities to date have been deemed confidential or 'release delayed'. The Committee has similar concerns with SCAP.

8.4 State Commission Assessment Panel

8.4.1 Membership

As noted above, several submissions commented that SCAP membership is heavily weighted towards the development sector, and that community, environmental and heritage groups are underrepresented or not represented at all on SCAP. The LGA noted that local councils are not represented or able to provide sufficient input into SCAP decisions:

> The LGA considers the SCAP lacks local expertise due to the limited panel size and there being no requirement for a Council nominee to sit on the Panel when applications are being considered for their council area.
>
> (LGA, Submission 57, 11)

The LGA recommended that it nominate a representative as a member of SCAP or, in the alternative, proposed that

> local knowledge of planning proposals could be improved if the SCAP was able to seek advice from the council on an application it was considering. The current provisions in the regulations restrict a council to the information it can provide on an application, and the CEO is required to respond to significant proposals within 15 days, which is a barrier to local input and local knowledge on planning applications.
>
> (LGA, Committee Hansard, 16 February 2021, 91)

SCAP argued that its current Presiding Member, Ms Rebecca Thomas, has extensive local government experience. SCAP also advised that SCAP does receive input from councils:

> Advice and feedback from local Council representatives is valued and informs the planning assessment process for proposals before they are presented to ... SCAP. The existing Application referral process enables all Councils the opportunity to provide comment and information in relation to development applications proposed in their local areas. Further, Council representatives are invited to attend and speak at SCAP meetings to further inform the SCAP members on their deliberations.
>
> (SCAP, Responses to Questions on Notice, 1)

The Commission advised that the membership of SCAP currently 'includes professionals with extensive experience in the areas of urban and regional planning, local government, natural and environmental resources management, architecture and design, property and development and law.'[428] SCAP further advised that the Commission can appoint Occasional Members to SCAP when specialist skills and experience are necessary to consider particular applications and that the Commission is open to consider candidates with local government experience in the future.[429] The Commission pointed out that the *PDI Act* provisions on the composition of the Commission and SCAP were carefully considered and debated by Parliament.[430]

[428] Commission, Responses to Questions on Notice, S.
[429] SCAP, Responses to Questions on Notice, 1.
[430] Commission, Responses to Questions on Notice, 7.

The LGA also argued that SCAP members, who determine the developments with the largest impact on the community, should have the same accreditation requirements as do Council Assessment Panel members.[431] The Commission advised that each Council determines the expertise of Council Assessment Panels in appointing its Panel, the composition of which is not mandated in the *PDI Act*. However, section 83(1)(c) of the *PDI Act* requires that a member appointed to a Council Assessment Panel must be an Accredited Professional (as provided under Part 6 (Relevant authorities), Division 4 (Accredited professionals) of the Act). Although there is no similar requirement in the *PDI Act* for members of SCAP to be Accredited Professionals, the Commission advised that it has resolved that they will be.[432] SCAP confirmed that all of its members are Accredited as Planning Professionals under the *PDI Act*, consistent with members of Council Assessment Panels.[433] The Committee notes that the Commission very recently adopted *SCAP Practice and Operating Directions* which stipulate that SCAP members 'must be registered under the *PDI Act* as an Accredited Professional Level 2 – Planning to ensure they have expertise relevant to development assessment.'[434] SCAP notes:

> The Commission has endeavoured to provide a broad cross-section of skills, experience and expertise relevant to State-significant development assessment on the current and former compositions of the SCAP.
>
> (SCAP, Responses to Questions on Notice, 2)

8.4.2 Accountability

National Trust SA reported that a number of recent approvals by SCAP have been in direct contravention of the Council Development Plans which were then in place, including on issues such as height restrictions and local heritage designations.[435] National Trust SA argues that SCAP should be subject to an independent review to increase public confidence in its decision-making.[436] Professor Warren Jones of Protect Our Heritage Alliance also raised in his evidence before the Committee that SCAP has approved some developments that have 'overridden reasonable provisions in council statutes with appalling results.'[437]

The Stirling District Residents Association raised a concern in its submission that SCAP has ignored provisions in Part 7 (Development assessment—general scheme), Division 2 (Planning consent), Subdivision 3 (Code assessed development) of the *PDI Act* that state 'decision makers cannot grant a planning consent if a development proposal is **seriously at variance** with the Planning and Design Code (disregarding minor variations).' [emphasis added][438] As is discussed in this Report at *4.3 Performance assessed development*, some submitters expressed the view that SCAP has interpreted the phrase 'seriously at variance' very narrowly. The following submitters shared the concern that decisions made by SCAP appear to be contrary to the planning provisions, thus warranting an independent review of its operation:

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[431] LGA, Submission 57, 11.
[432] Commission, Responses to Questions on Notice, 6.
[433] SCAP, Responses to Questions on Notice, 2.
[434] Commission, *State Commission Assessment Panel (SCAP) Practice and Operating Directions* (18 October 2021) 3.2, 2.
[435] National Trust SA, Submission 92, 26.
[436] Ibid.
[437] Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 16.
[438] Stirling District Residents Association, Submission 31, 5.

> [SCAP] continues to build its reputation as a development rubber stamp with some 98 per cent of applications approved, even when flying in the face of current development plans or established heritage protections. Without any guaranteed community representation on this body, and limited rights of review for its decisions, the operation of SCAP exemplifies the removal of community rights to participate in the most significant development decisions under the new system.
>
> (National Trust SA, Committee Hansard, 26 November 2020, 57)

> [M]any high profile decisions made of late which appear to be completely at variance with planning policy have been made by the SCAP. These decisions have eroded community confidence and in response the EDO [Environmental Defenders Office] recommends an audit of all SCAP decisions and a complete review of the policies and procedures used by the Commission and SCAP.
>
> (Environmental Defenders Office, Submission 94, 14)

> SCAP has made several recent decisions regarding developments on heritage sites in the city which not only do not follow current planning guidelines but have been widely and publicly criticized by architectural and heritage experts as well as the wider community.
>
> (George Hobbs, Submission 76)

SCAP argued that an independent review of the Commission and SCAP is unnecessary because its decisions are reviewable by the Courts and

> the State Planning Commission is subject to the general control and direction of the Minister for Planning and Local Government, who is in turn then accountable to the Parliament. The SCAP is accountable to the State Planning Commission as its parent body.
>
> (SCAP, Responses to Questions on Notice, 2; Commission, 7)

In response to claims that SCAP approves a very high proportion of applications before it, Mr Michael Lennon, then Chair of the Commission, advised:

> Can I just say you would expect that a high proportion would be approved, given the time and cost in doing it and the assessments that go through private consulting and other expertise through to the point where it is being assessed by government officials through to a decision. In all of those stages, proposals that aren't going to be successful are progressively being weeded out, so you would expect that by the time you get to the end of the process it's only those that have a reasonable prospect of success that can be reviewed.
>
> Ms THOMAS: Yes, that's true. Most proponents who have been advised they are going to get a recommendation for refusal withdraw their application and amend it until they have the support of staff.
>
> (SCAP, Committee Hansard, 2 March 2021, 106)

In addition to concerns about the accountability of SCAP, Petitioners also complained that the public trust in SCAP and its decisions requires that its operations are more transparent.

8.4.3 Transparency

SCAP hearings are open to the public, and agendas and minutes are available online, excluding legal opinion, commercially confidential information and papers relating to Crown Development or mining

proposals.[439] Nonetheless, submitters expressed the following concerns about the transparency of SCAP:

> Whilst SCAP meetings are more open [than Commission meetings,] SCAP can decide to determine matters in camera. Whilst this may be appropriate in certain situations the position should be that meetings are open except in specified circumstances. The EDO [Environmental Defenders Office] is also concerned that minutes lack detail and do not detail opposition by members.
>
> (Environmental Defenders Office, Submission 94, 14)

> [U]nlike Council Assessment Panels, [SCAP] decisions are made in private after hearing applicants, representors and Council planning staff. This practice, in our opinion does little to establish transparency and promote public confidence.
>
> (Planning Institute of Australia, Responses to Questions on Notice, 2 February 2021, 4)

> I think there could also be more detail in their agendas and minutes, but also, as I mentioned, the views of dissenters should be recorded. Currently, there's no indication of any dissenting views nor details of that person or persons views in those minutes.
>
> (Environmental Defenders Office, Committee Hansard, 1 December 2020, 79-80)

The LGA argued that SCAP, which determines the developments with the largest impact on the community, should have the same requirements for transparency and meeting procedures as Council Assessment Panels.[440] The Commission advised that SCAP's procedural matters are similar to those of Council Assessment Panels: the public is generally welcome to attend hearings before either panel, and both 'may exclude the public from the panel's discussion or determination of a development application.'[441] However, the evidence suggests that Council Assessment Panels rarely deliberate in camera while this is the default practice for SCAP. The *SCAP Practice and Operating Directions* state that '[t]he SCAP decision making process includes an allocation of time to allow for honest, open and robust debate of applications and associated impact issues. This will occur in confidence ...'[442] The Commission noted that while meeting procedures for Council Assessment Panels are set out in Part 3 (Administration) of the *PDI Act*, the procedures for SCAP are left to the Commission.[443]

Commission Review of SCAP

Ms Sally Smith of PLUS, providing evidence to the Committee on behalf of the Department, advised that the Commission made some changes to increase the transparency of SCAP in 2018.[444] These changes resulted from a review of the transparency and composition of SCAP conducted by the Commission (the 'Review'). The Commission prepared a report titled *Review of the State Commission Assessment Panel (SCAP) by the State Planning Commission*[445] and made recommendations to improve

[439] See SCAP Website – Procedures at https://www.saplanningcommission.sa.gov.au/scap/about_scap/procedures [accessed July 2021]
[440] LGA, Submission 57, 11.
[441] SCAP, Responses to Questions on Notice, 2.
[442] Commission, *State Commission Assessment Panel (SCAP) Practice and Operating Directions* (18 October 2021) 10.2, 4.
[443] Commission, Responses to Questions on Notice, 6.
[444] Attorney-General's Department, Committee Hansard, 30 March 2021, 123.
[445] Commission, *Review of the State Commission Assessment Panel (SCAP) by the State Planning Commission* (November 2018).

the transparency of SCAP. Ms Rebecca Thomas, Presiding Member of SCAP, described those recommendations to the Committee.

> These included the principle that all matters should be public unless there were specific reasons for them to be otherwise; secondly, that all items on an agenda should be visible to the public beforehand so that people could know what was being discussed; and, thirdly, that meetings should be open, unless there were specific reasons why, for some stated reason, people should be excluded. That has gone some way to making a substantial difference to the visibility of the decisions.
>
> (SCAP, Committee Hansard, 2 March 2021, 103)

The Commission advised that as a result of the Review, all development applications will now appear on the public agenda for SCAP meetings, with the exception of legal matters. Ms Smith acknowledged that SCAP could provide more background information about decisions made in the minutes.[446] The public may attend meetings in person or remotely. Decisions will be published the following day; however, deliberations will continue to be in camera.[447]

Deliberations

Ms Thomas of SCAP defended the decision to continue deliberations in private, despite the findings of the Review:

> I would make the observation that these bodies are not elected bodies, they are appointed by governments and parliaments to do a particular job. In this respect, having allowed everyone to see what is being discussed and debated, the view is that, at the point at which there needs to be an exchange of free and frank information in order to reach a decision, that should be allowed to be done in private. In doing that, we took advice on a number of related institutions in government to establish their practice, and this was the consistent view.
>
> (SCAP, Committee Hansard, 2 March 2021, 103)

Ms Smith of the Department agreed and supported the in camera deliberations process:

> I think you can have more robust and frank discussions in camera, and it becomes more of a focus on the SCAP decision, rather than whether member X or Y thought this or that. I do think that, if you are in the public eye, there is a risk of it more becoming about individuals rather than the SCAP making a collective decision on a matter.
>
> (Department, Committee Hansard, 30 March 2021, 123)

The Commission also supported SCAP making determinations and decisions in camera:

> The rationale for deliberations and decisions of assessment panels being held and made in-camera is to ensure that panel members are able to freely engage in full, frank and robust discussions on all aspects of development proposals.
>
> The advantage of private deliberations is that panel members are able to individually interrogate the issues, discuss these in full but reach a consensus decision, which is presented back to the community through documented minutes. Decision making by consensus is a strong governance model, and results

[446] Department, Committee Hansard, 30 March 2021, 123.
[447] Commission, Responses to Questions on Notice, 7.

in reduced focus on individual members and their views and a greater focus on the assessment panel as a decision making body making a statutory decision.

(Commission, Responses to Questions on Notice, 6)

Ms Thomas agreed:

> The nature of the applications that come before the SCAP are significant, often of state significance. As I mentioned, the deliberations are quite lengthy. Having sat on a council panel as well as the SCAP, the nature of the proposals that we are dealing with necessitate, in my view, that we give a particularly robust review and thorough discussion.
>
> The ability to do that and have frank and fearless discussion and debate and be in a position to confidently change your mind midway through a discussion when you have thought of other points, question, untangle particular issues, discuss with staff their interpretation of matters, as I said, that's often quite a lengthy process. To do that in a public forum, in my view, having sat on both, would be more challenging and I don't agree—I don't think it would provide for better decision-making. I think the ability to have those kinds of robust debates in camera and not feel intimidated by a public gallery, to get to the bottom of and investigate all the various issues that we need to touch on is best achieved in camera, in my view.
>
> (SCAP, Committee Hansard, 2 March 2021, 102)

8.4.4 Public access to application documents

The Environmental Defenders Office complained that once an application has been determined by SCAP, the application and supporting documents are no longer available to the public, and can only be accessed by way of a time-consuming Freedom of Information request. The Environmental Defenders Office argued:

> The retention of these documents is very important for public interest reasons including to assist civil enforcement action [under Part 18 (Enforcement), Division 1 (Civil enforcement) of the *PDI Act*] if there has been a failure to comply with the consent. Frequently the conditions will say that development take place in accordance with the approved plans and the application documents. There is often a great deal of information in those documents about how the development will take place that is important. If those documents are not available then it is difficult to ascertain whether or not a developer is in breach of their obligations. Where documents are submitted with the application (such as noise reports which contain recommended approaches) are not easily available this represents a significant hurdle to civil enforcement. Therefore we strongly recommend that it is in the public interest to enable the permanent publication of all supporting documents and materials with development applications.
>
> (Environmental Defenders Office, Submission 94, 14)

In response to claims that the application documents should be available to the public after SCAP has made its determination on the application, Ms Thomas, the Presiding Member of SCAP, commented that there was no utility in these documents being available 'ongoing forever' to the public.

> At some point in time, particularly if someone is constructing a dwelling and their floor plans are available forever and a day online, you might say that that is not necessarily a desirable outcome for that particular person either, so I think it's a balance of accessibility and transparency versus people's privacy and rights to build on their property and not necessarily have all of that detail available forever in the public space.

(SCAP, Committee Hansard, 2 March 2021, 101)

The Department noted that Parliament prescribed in the *PDI Act* a framework for publishing development application documents:

> Publication of development application documentation outside of, or in addition to, the framework set by parliament should be undertaken with care. This requires balancing the various interests at play, including the benefits of public participation and involvement in the planning system, with other matters, such as privacy and confidentiality. Publication of development application documentation may disclose information which is personal in nature (including floor plans and drawings which may show the location of private spaces such as bedrooms and bathrooms, as well as doors or windows to those spaces).
>
> ...
>
> Considering the various elements of the planning system which facilitate community participation and engagement, as well as the framework for public notification and involvement in the development assessment process, it is considered that long-term or permanent publication of all supporting documents and materials with development applications is not, on balance, in the public interest.
>
> (Department, Responses to Questions on Notice, 7-8)

However, in its Review, the Commission recommended as Action 3 that '[a]n accessible public register should be maintained of all formal development applications and associated documentation.'[448] The Department commented that this documentation is published on the SCAP website while an application is being considered, but is removed after a decision has been made. Despite the Commission's recommendation in its Review of SCAP, the Department contends that 'long-term or permanent publication of all supporting documents and materials with development applications (in addition to the DNF [Decision Notification Form]) is, on balance, not considered to be in the public interest.'[449] The Department added:

> It is considered that the development application register (including the DNF) will provide sufficient information to enable members of the public to be properly informed of developments that may impact them, and in order to initiate discussions with local councils (if necessary) on any enforcement issues.
>
> (AGD, Responses to Questions on Notice, 9)

The Committee appreciates that having plans available to the public indefinitely may not be in the public interest. However, the Committee would consider that retaining public access to the materials until such a time as construction is completed, or for a designated period of time after the application has been considered, would be a compromise that would address the competing concerns expressed by witnesses.

8.5 Recommendations

[448] Commission, *Review of the State Commission Assessment Panel (SCAP) by the State Planning Commission* (November 2018) 5.
[449] AGD, Responses to Questions on Notice, 8.

Submitters expressed the view that the Commission and SCAP are both dominated by property development interests and do not adequately represent the views of the community. While an internal (Commission) review has been conducted of SCAP, the submitters have called for an independent review of both the Commission and SCAP. The Committee agrees that the public trust in the planning system requires that these bodies act and be seen to act with integrity, objectivity and transparency. The Committee supports an independent review of the governance and operation of the Commission and SCAP to consider the process for managing conflicts of interest, membership, meeting procedures and public access to information for these bodies. As the Commission is a statutory authority, and SCAP is created by the Commission, the Statutory Authorities Review Committee would be an appropriate body to conduct this review.

The Legislative Review Committee recommends that:

Recommendation 14

8.1 The Statutory Authorities Review Committee conduct an inquiry into the governance and operation of the State Planning Commission and the State Commission Assessment Panel under section 15C(a) of the *Parliamentary Committees Act 1991*, including a review of:

- Membership, including consideration of representation from local government;
- Codes of Conduct;
- Management of conflicts of interest;
- Transparency, accountability and public access to information;
- Meeting procedures;
- State Planning Commission Governance Manual.

9 LEGISLATE TO BAN POLITICAL DONATIONS FROM DEVELOPERS

PETITION PRAYER 4:

Legislate to ban donations to political parties from developers similar to laws in Queensland and NSW

Petitioners urge that donations to political parties from developers be banned by legislation similar to that which has been enacted in New South Wales and Queensland. The Committee received 43 submissions on the Petition which informed the Committee that public trust in the planning system is at risk because of the perception that political donations from property developers may lead to political favours. Political donations fall under the purview of the Attorney-General, as the Minister responsible for the *Electoral Act 1985*, and the Minister for Planning and Local Government (who is also the Attorney-General) (the 'Minister'), as the Minister responsible for the *Local Government (Elections) Act 1999*.

All submissions received that addressed prayer 4 of the Petition expressed support for legislation banning property developers from making political donations. Most were concerned that political donations from property developers create conflicts of interest that may improperly impact, or may be perceived to improperly impact, on planning decisions. Submitters suggest that banning political donations will increase transparency, integrity and trust in the planning system.

There is a perception amongst submitters that representatives of the development and building industries have played a major role in determining the policy, structure and content of the *Planning and Design Code* (the 'Code') and other reforms to the planning system, at the expense of local communities, members of the public and groups representing the environment, heritage and other community interests. As evidence of this influence, submitters point to the UK Study Tour and the Minister's Liaison Group, both of which are discussed below.

The Committee received submissions containing the following comments:

> Planning regulation has been a focus of particular concern across Australia as it is considered and has been revealed to be one of the areas most at risk of corruption tied to political donations.
>
> (National Trust SA, Submission 92, 37)

> CASA [Community Alliance SA] supports community concern that donations to political parties from developers result in undue influence and the adoption of policies that favour those who make these donations.
>
> (Community Alliance SA, Committee Hansard, 22 September 2020, 9)

> A number of developments and recent events have led to a perception that donations by developers provides access to political favours. This perception reduces public trust and faith in the legislative system.
>
> (Dr Iris Iwanicki, Submission 37, 13)

> Donations from developers to political parties may create an environment that could be exploited with interests of a few being elevated above that of others. Transparency is sought.

(City of West Torrens, Submission 51, 11)

> It has long been the belief of many in the community that developers get undue influence and favour in the planning system and it is as a result of donations to the political parties whether they be money, or in kind such as gifts, travel, meals etc. To eradicate this belief banning any kind of donation to political parties will immediately fix this problem and also ensure there are less dodgy approvals given to developers ...

(Prospect Residents Association, Submission 59, 14)

These submitters are all in support of legislation banning political donations in South Australia similar to the legislation that now exists in New South Wales and Queensland. This Report first considers the current political donation legislation in South Australia.

9.1 South Australia

Professor Warren Jones AO of Protect Our Heritage Alliance suggested in his submission that South Australia has the laxest political donation laws in the country.[450] There have not been any investigations in South Australia into corruption related to political donations from property developers comparable to investigations that have occurred in New South Wales and Queensland.[451] However, concern about this issue was raised in the South Australian Parliament by the Hon Mark Parnell MLC of the Greens in 2007.[452]

The Hon Mark Parnell MLC questioned the award of several development contracts by the then Labor Government to Makris Corporation, which had made substantial political donations to that party. While no misconduct was identified, the developer acknowledged that, as a donor, they 'want to be looked after ...' and that 'that's a part of the way the system—you know, politics—works here ...'[453] The Environmental Defenders Office stated '[a] case such as this certainly shows the potential risk of corruption and has the potential to decrease public confidence in the integrity of electoral and development processes.'[454]

9.1.1 Development industry involvement in planning reforms

As is mentioned elsewhere in this Report, several submissions suggested that members of the development industry had more access and influence to drive the planning reforms than did individual members of the community or other interest groups such as heritage or environmental groups. Professor Jones AO noted:

> The need for reform in South Australia is heightened by the inordinate influence of the development industry on the content and implementation of the Planning and Design Code. New South Wales and

[450] Protect our Heritage Alliance, Submission 27, 1.
[451] Environmental Defenders Office, Submission 94, 21.
[452] Ibid, citing Hansard, Legislative Council, 2 May 2007, 63, Hon Mark Parnell MLC.
[453] Hansard, Legislative Council, 2 May 2007, 63, Hon Mark Parnell MLC.
[454] Environmental Defenders Office, Submission 94, 21.

> Queensland have banned donations to political parties from developers and development industry bodies. South Australia now needs to consider doing likewise.[455]

The following submissions indicated a sense that the process of reforming the planning system was heavily weighted in favour of the development industry:

> The development industry had the chance to give the government its shopping list for the new code, yet the only chance for involvement afforded to community was the opportunity to wade through thousands of error-filled documents. This is inequitable.
>
> (Joanna Wells, Submission 29, 2)

> There is great concern that the whole Planning Act and the soon to be Planning and Design Code is completely biased towards developers to the detriment of the local community who have been steadily taken out of having any say in relation to where they live and where their major asset is.
>
> (Prospect Residents Association Inc, Submission 59, 2)

> There is certainly a perception that the construction and development industries wield enormous power within the state.
>
> (Joanna Wells, Submission 29, 6)

> Key property Development lobby groups like the Property Council and Urban Development Institute of Australia have direct access to the State Planning Commissioner and organise conferences promoting development and intensive infill and then invite State Government Planning Officials to attend. But residents associations do not get the same access. They get lectured not consulted by the State Planning Commission and so far, all decisions seem to be favouring the lobby groups. The lobby groups have paid staff dedicated to this purpose and are able to make large donations to State Political Parties giving them significant advantage over largely not for profit run by amateur residents groups.
>
> (Janet Scott, Submission 65, 3)

An example of this disproportionate influence by development bodies referenced in submissions is the study tour to the United Kingdom arranged by the Urban Development Institute of Australia.

9.1.2 United Kingdom Study Tour

In April of 2019, the South Australian branch of the Urban Development Institute of Australia (the 'UDIA') organised a Study Tour to the United Kingdom (the 'Study Tour'). The UDIA SA website provided this description of the Study Tour:[456]

> **2019 Study Tour**
> **Glasgow, London and Manchester**
>
> The purpose of the UDIA study tour was to gain knowledge and learn lessons from practical world leading examples, to help address the challenges that confront South Australia's urban development future. This particular tour was timely given the planning policy reforms, to demonstrate how South Australia could be a world leader in urban liveability as well as provide an opportunity to examine projects in a similar context. The study tour saw 29 delegates examine London, Manchester and Glasgow cities which have faced similar economic transitions, with proud industrial legacies, specifically

[455] Protect Our Heritage Alliance, Committee Hansard, 22 September 2020, 14.
[456] UDIA Website at https://www.udiasa.com.au/professional-development/study-tours/.

to understand what each city has learnt in its growth journey. The themes of the tour were, housing affordability and choice, infrastructure funding and delivery, identity, transitioning economies, seamless transit and population and well-being.

Melissa Ballantyne of the Environmental Defenders Office perceived the Study Tour as follows:

> An example of the close relationship between industry and key Government planning authorities and the Minister, was a Study Tour to London, Manchester and Glasgow brokered and organised by the UDIA. The members of the Tour Group, who spent eight days travelling, meeting, dining and sightseeing together in April 2019 comprised the Minister, the Chair of the SPC [State Planning Commission (the 'Commission')], senior DPTI [Department for Planning, Transport and Infrastructure] officials and a cross section of industry representatives. There was a notable absence of advocates for the environment, heritage and the community. The close relationship between the property, building and development sectors and the Government and its planning agencies, clearly explains the bias in the Planning and Design Code towards unrestrained development at the expense of community concerns about the future of our built and natural environment.
>
> (Environmental Defenders Office, Submission 94, 22)

The Committee invited Mr Pat Gerace, Chief Executive Officer, to provide evidence on behalf of the UDIA. Mr Gerace said the following about the Study Tour:

> The UDIA, like the other states' UDIA offices across the country, have conducted I think about six study tours over the last probably 12 years, or certainly for quite some time. These study tours are available for members to participate in. They pay their own airfares and they pay for their own accommodation, and the government did the same—it was the government and the opposition. There have also been representatives of local government. What we do is travel and look at what happens around the world; for example, the Atlanta BeltLine. We looked at how they took parklands and did place making there to make them attractive.
>
> We have looked at places like Pittsburgh, where we had old manufacturing sites because it was a steel city. We took people to have a look at what can be done. We actually think it's a good thing that both the government and the opposition, together in a bipartisan way, come along and look at how other things are done around the globe, to improve Adelaide. I do not accept that any of the Planning and Design Code was shaped because of our study tour.
>
> (UDIA, Committee Hansard, 16 February 2021, 87)

9.1.3 Minister's Liaison Group

The Minister's Liaison Group was identified by submitters as another example of the influence asserted by the development industry upon the planning reforms. The former Minister for Planning and Local Government, the Hon Stephan Knoll MP (the 'former Minister'), convened a 'peak body' to provide the former Minister with advice on the development of the Code. This group was comprised of representatives from the Department of Planning, Transport and Infrastructure ('DPTI'), the Commission, the Local Government Association (the 'LGA'), the UDIA, the Property Council, the Housing Institute of Australia, the Master Builders Association and developers Hot Property Group, Metricon and Greenhill Investment Bankers. 'There is no evidence of representation in this Group

from heritage, environment or community interest or bodies.'[457] Other submitters also felt that the public was excluded from this group.[458]

The LGA, which represents local government and councils, confirmed that two of its representatives participated in the Minister's Liaison Group since its inception. The objectives of the Group were to:

- Provide high level advice on industry and sector-specific aspects of the Planning Reform Project.
- Work collaboratively with the Minister for Planning and DPTI on the Planning Reform Project.
- Provide a platform for information to be tabled efficiently and transparently with the three Advisory Committees to be established under Section 244 of the *Planning, Development and Infrastructure Act*.
- Provide guidance and support, as appropriate, to the Advisory Committees in their respective roles in the implementation of the Act.

(LGA, Responses to Questions on Notice, 2)

According to Protect Our Heritage Alliance, the UDIA was invited to contribute

> significant input into the Code and implementation plans. This included: the wording of provisions; suggested content, particularly with regard to Contributory Items, open space and landscaping requirements; advice on the assessment of development applications, and the triggers for referral to relevant Agencies; and privileged access to infill test case studies and e-planning testing.

(Protect our Heritage Alliance, Submission 19, 3)

The Committee notes that whilst the LGA participated in the Minister's Liaison Group, thereby providing a voice for local councils, it appears from the list of contributors to have been a single voice representing the largest stakeholder (the public) versus the overwhelming influence of building and development industry voices.

9.2 The impact of political donations

9.2.1 Public confidence

The Commission identified that the *Community Engagement Charter* would, among other things, 'establish trust in the planning process'.[459] The Australian Institute of Architects noted that cultivation of the public's confidence in the planning system was a very important goal of the planning reform process:[460] Despite the aim of improving community confidence, Ms Deborah Morgan, President of the National Trust of SA, observed:

> As we have submitted, the new planning system under the Code has done little to rebuild public confidence and trust in planning. We see the more subjective performance-based measures of compliance, proposed increase in private certification to support development while in recent times, as my colleague has said, the state planning bodies have had a strong tendency to secrecy, with a lack of transparency in their decision-making.

[457] Protect our Heritage Alliance, Submission 19, 3.
[458] For example, see Jane Paterson, Submission 11.
[459] Commission, *Community Engagement Charter* (April 2018) 3.
[460] Australian Institute of Architects, Committee Hansard, 20.

(National Trust SA, Committee Hansard, 58)

National Trust SA discussed in its submission to the Committee a survey indicating that 42.4 percent of those surveyed viewed the most problematic type of corruption in government to be 'undue influence of government (bribery, donations, lobbying, business)'.[461] This supports the Australian Institute of Architects' view that banning political donations from members of the development industry would improve public confidence:

> Banning donations to political parties from developers is a clear way of eliminating any perceived influence that developers may have over the planning process.
>
> (Australian Institute of Architects, Submission 79, 2)

9.2.2 Transparency

Despite requirements to disclose political donation information, research demonstrates that it is very difficult to accurately assess the number and value of donations made to federal political parties and the sources of those donations.[462] Professor Jones AO of Protect Our Heritage Alliance suggested:

> The regulations are manipulated and flaunted particularly by large development corporations. There is often a credibility gap between the actual scope and source of donations and what is reported to the State Electoral Commission.
>
> (Protect Our Heritage Alliance, Submission 27, 1)

Research supports Professor Jones' scepticism. The Environmental Defenders Office noted a study in its submission that indicates 'transparent donations only account for 12-15% of political parties incomes.'[463] The Environmental Defenders Office was referring to an article by Lindy Edwards published in the *Australian Journal of Public Administration* which found:

> Less than 15% of the major parties' incomes are attributable to disclosed political donations. A further 35% of their incomes are coming through third-party fundraisers, or through the murky 'other receipts' category. At least 50% of their income is going entirely undisclosed.[464]

This is likely why Gageler J in *McCloy v New South Wales* [2015] HCA 34 ('*McCloy v NSW*'), discussed in more detail below, stated that it is not 'plausible to think that the mischief of inequality of access based on money could be addressed only through the promotion of transparency.'[465]

9.2.3 Influence and corruption

The Environmental Defenders Office advised that

> donations can be seen as a method for accessing decision-making rather than purchasing a direct influence in it. This is further evidenced by research showing big business had a tendency to split

[461] National Trust SA, Submission 92, 42.
[462] See Lindy Edwards, 'Political Donations in Australia: what the Australian Electoral Commission disclosures reveal and what they don't' (2017) 77:3 *Australian Journal of Public Administration* ('*Political Donations in Australia*') 392.
[463] Environmental Defenders Office, Submission 94, 19.
[464] Lindy Edwards, *Political Donations in Australia*, 402.
[465] [2015] HCA 34 [187].

> donations between the ALP and LNP 50:50 when the ALP was in power, or on the verge of, but when the LNP was in power the donations skewed to 90:10 in the LNP's favour.[466]

The research cited by the Environmental Defenders Office above was done in 2008 by Ian McMenamin, who concluded that 'this giving pattern reflected that donations were driven in part by paying for access to power, hence their preparedness to pay Labor when they were in power.'[467] In considering Mr McMenamin's research, Lindy Edwards stated in her article:

> [The data] suggests that rusted on supporters of the parties' ideological cause make up only about half of the parties [sic] income, with union payments to Labor mirroring business donations to the Liberals. The other half of the successful parties' income is by McMenamin's analysis, likely to be payments for access to influence.[468]

The High Court described different types of corruption in *McCloy v NSW* at [36]-[37]:

> There are different kinds of corruption. A candidate for office may be tempted to bargain with a wealthy donor to exercise his or her power in office for the benefit of the donor in return for financial assistance with the election campaign. This kind of corruption has been described as 'quid pro quo' corruption. Another, more subtle, kind of corruption concerns 'the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder'. This kind of corruption is described as 'clientelism'. It arises from an office-holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest. The particular concern is that reliance by political candidates on private patronage may, over time, become so necessary as to sap the vitality, as well as the integrity, of the political branches of government.
>
> It has been said of the nature of the risk of clientelism that:
>
> > unlike straight cash-for-votes transaction, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and remove the temptation.[469]

Gageler J also commented at [165]:

> the basic human tendency towards reciprocity means that payments all too readily tend to result in favours. Whether the casual sequence is that of payment for favours or that of favours for payment, the corrupting influence on the system of government is little different.[470]

The Committee accepts that there are different ways that political donations can influence decision-making. The following is a consideration of the unique potential for influence of donations from property developers.

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[466] Environmental Defenders Office, Submission 94, 19, citing Lindy Edwards, *Political Donations in Australia*, 399. For a more thorough analysis of the research relating to corruption and political donations, please see the submission of the Environmental Defenders Office, Submission 94, 17-22.

[467] Lindy Edwards, *Political Donations in Australia*, 399; discussing Ian McMenamin, 'Business, Politics and Money in Australia: Testing Economic, Political and Ideological Explanations' 43(3) *Australian Journal of Political Science* 377, 393.

[468] Lindy Edwards, *Political Donations in Australia*, 399.

[469] Internal footnotes omitted, as quoted by the National Trust SA, Submission 92, 38.

[470] National Trust SA, Submission 92, 38; *McCloy v NSW*.

9.2.4 Property developers and political influence

A few submissions[471] raised the case of *McCloy v NSW* as evidence that property developers are recognised as being in a position that is particularly susceptible to corruption. The majority of the High Court accepted the following submission by the defendant in that case, New South Wales, at [49]:

> Property developers are sufficiently distinct to warrant specific regulation in light of the nature of their business activities and the nature of the public powers which they might seek to influence in their self-interest, as history in New South Wales shows.

Gageler J stated at [193]:

> What it is that relevantly differentiates corporate property developers from the mainstream of political donors is the nature of the business in which they are engaged. By definition, it is a profit-making business which is dependent on the exercise of statutory discretions by public officials. It is the nature of their business that gives corporate property developers a particular incentive to exploit such avenues of influence as are available to them, irrespective of how limited those avenues of influence might be.[472]

In October 2017, the Queensland Crime and Corruption Commission published the Report *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (the 'QCCC Report') which found that the public held 'a suspicion that some council decisions were being made not to serve the public interest, but to further the private interests of donors.'[473] The report found that the risk of corruption is increased where donors have a business interest that can be severely impacted by government decisions, such as zoning, development applications or other planning and development decisions.[474] Corruption may be a direct influence of decision-making, or a perceived influence of decision-making, establishing a 'relationship of reciprocity', or it may be providing a donor with 'a seat at the table' with the decision-makers.[475] The QCCC Report also recognised different levels of corruption:

> [O]pportunities for networking and lobbying flow from these connections, and it is these mechanisms that have the greatest influence in allowing people to secure favourable decisions in relation to land rezoning and similar matters. Donations may therefore not necessarily lead directly to donors receiving special benefits, but they can ensure that donors are better positioned than others to further their business interests.[476]

Aside from any actual corruption that may or may not occur in relation to political donations made by property developers, the QCCC Report emphasised that the public perception and suspicion that such corruption exists also has pernicious impacts:

> This highlights a critical point – regardless of the actual influence of donations on government processes and decision-making, there will always be a perception that donors expect to and do receive something in return for having supported a councillor's election campaign. The fact that allegations of this nature have been repeatedly examined in major inquiries in Queensland and other Australian jurisdictions over the last 25 years highlights the inherent potential of donations to lead to perceptions of corruption.

[471] See for example Submissions 92, 94, 38 and National Trust SA, Committee Hansard, 26 November 2020, 57.
[472] Cited by National Trust SA, Submission 92, 38.
[473] QCCC Report, 76.
[474] Ibid.
[475] Ibid.
[476] Ibid 76-7.

> These perceptions alone are enough to damage public confidence in the integrity of local government.[477]

Similar concerns about the development industry have been raised in South Australia. In 2012 there was concern about staff of Renewal SA, which was in charge of selling and developing State land, accepting gifts 'provided by major development companies, including firms seeking to develop State land that is under consideration for rezoning.'[478]

> In 2016, Renewal SA was found to have committed breaches dating back to 2012 of a policy on gifts and benefits. A spokesman for Renewal SA 'insisted accepting food, drink and entertainment is "widely accepted in property and related industries" and could be considered "part of normal professional networking"'. This emerged following a finding by the SA ICAC that Renewal SA had engaged in maladministration over its sale of land at Gillman.[479]

The previous evidence received by the Committee supports the assertion that political donations from developers can have an impact on the public confidence in the political system as well as the planning system. This Report now considers the development of legislation banning political donations from property developers in New South Wales and Queensland.

9.3 Other jurisdictions

The Committee received submissions that pointed to the scandals in other states as cause for concern in South Australia, particularly given that, in the opinion of Professor Warren Jones AO noted above, South Australia has the laxest political donation laws in Australia.[480] The following submitters made these comments:

> There is nothing in the water that makes South Australians less prone to being biased by undue influence that [sic] their counterparts in other States.
>
> (Norwood Residents Association, Submission 78, 6)

> Vested interests must be examined closely for their proposed and actual interference in the assembly and interpretation of new legislation. Recent scandals in other Australian states should be taken as exemplary lessons of what can happen and what must be avoided.
>
> (Jim Stratmann, Submission 22)

The legislation banning political donations in place in both New South Wales and Queensland were made in response to investigations and reports prepared by their respective corruption watchdogs. The QCCC recommended that property developers be banned from making political donations,[481] as did the Australian Senate Select Committee into the Political Influence of Donations.[482] In considering

[477] Ibid 77.
[478] Daniel Wills, 'Gift Horse brings a bad look to key SA agency' *The Advertiser* (12 January 2016) 1-2.
[479] National Trust SA, Submission 92, 38; quoting Daniel Wills, 'Renewal SA staff scolded for breaking departments gifts and benefits policy', *The Advertiser* (online, 11 January 2016).
[480] Protect Our Heritage Alliance, Submission 27, 1.
[481] QCCC Report, Recommendation 20, xvi and 78.
[482] Senate Select Committee into the Political Influence of Donations, *Political Influence of Donations*, 2018, vi, Recommendation 9.

bans on political donations from property developers and other industries, that Senate Select Committee concluded '[o]n balance, the committee is of the view industry-specific bans are required to enhance the perceived integrity of a revised finance regime.'[483] Professor Warren Jones AO of Protect Our Heritage Alliance recommended an investigation into political donations from property developers by the South Australia Independent Commissioner Against Corruption to provide insight into the influence such donations may have in our State.[484]

9.3.1 New South Wales corruption investigations

The New South Wales Independent Commission Against Corruption (the 'NSW ICAC') released a report in February 2012 (the 'NSW ICAC Report') on its investigation into corruption allegations relating to property development.[485] The NSW ICAC Report noted that the NSW ICAC regularly received complaints related to the planning system:

> The [NSW ICAC] has had a long history of involvement with exposing likely and actual corrupt conduct in the NSW planning system. Since it commenced operations on 13 March 1989, the [NSW ICAC] has produced 30 reports exposing likely and actual corrupt conduct involving the NSW Planning system.[486]

The majority of the Court in *McCloy v NSW* acknowledged at [51] the depth of the problem of corruption in the NSW development industry:

> The Independent Commission Against Corruption ('ICAC') and other bodies have published eight adverse reports since 1990 concerning land development applications. Given the difficulties associated with uncovering and prosecuting corruption of this kind, the production of eight adverse reports in this time brings to light the reality of the risk of corruption and the loss of public confidence which accompanies the exposure of acts of corruption. In ICAC's *Report on Investigation into North Coast Land Development*,[487] the report author, Mr Roden QC, said that:
>
> > A lot of money can depend on the success or failure of a lobbyist's representations to Government. Grant or refusal of a rezoning application, acceptance or rejection of a tender, even delay in processing an application that must eventually succeed, can make or break a developer. And decisions on the really mammoth projects can create fortunes for those who succeed. The temptation to offer inducements must be considerable.

The NSW ICAC Report outlined six key safeguards to reduce the frequency of corruption in the NSW planning system:

1. Providing certainty: the Report noted the departure from having clearly identified requirements and move towards increased discretion to approve projects 'creates a corruption risk and community perception of lack of appropriate boundaries.'
2. Balancing competing public interests: legislation should clearly identify public interests such as environmental, social and economic outcomes, and clearly articulate any preferences between these interests.
3. Ensuring transparency: 'A transparent planning system ensures the public has meaningful information about decision-making processes as well as being informed about the basis for decisions.'

[483] Ibid 91 [6.55].
[484] Protect our Heritage Alliance, Submission 27, 2.
[485] NSW ICAC Report, *Anti-Corruption Safeguards and the NSW Planning System* (February 2012).
[486] Ibid 4.
[487] NSW ICAC, *Report on Investigation into North Coast Land Development* (1990) 15 652-653.

4. Reducing complexity: clearly defined and understood processes reduce the risk of error and make it easier to detect corrupt conduct.
5. Meaningful community participation and consultation: 'Meaningful community participation in planning decisions is essential to ensuring public confidence in the integrity of the system.'
6. Expanding the scope of third-party merit appeals: 'Merit appeals provide a safeguard against biased decision-making by consent authorities and enhance the accountability of these authorities.'

The Committee notes that each of these safeguards has also been advocated for in the submissions and the evidence received by the Committee in relation to this Petition.

9.3.2 New South Wales legislation

Between 2008 and 2012, the New South Wales Government enacted legislation to alter political finance laws including prohibiting political donations from property developers.[488] The *Electoral Funding Act 2018* (NSW) makes it unlawful for a property developer, or any industry representative organisation of which a majority of its members are property developers, to make political donations.[489] For the purposes of this legislation, 'property developer' is defined in section 53(1) of that Act as:

> (a) An individual or corporation if—
> (i) The individual or a corporation carries on a business mainly concerned with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit, and
> (ii) In the course of that business—
> (A) 1 relevant planning application has been made by or on behalf of the individual or corporation and is pending, or
> (B) 3 or more relevant planning applications made by or on behalf of the individual or corporation have been determined within the preceding 7 years,
>
> (b) A person who is a close associate of an individual or a corporation referred to in paragraph (a).

The legislation not only bans property developers from making donations, but also bans anyone from making a donation on behalf of a property developer or for a property developer or someone acting on a property developer's behalf to solicit another person to make a political donation. It is also unlawful to accept a political donation from or on behalf of a property developer.[490] The New South Wales legislation was subsequently amended to close a loophole. The amendment added a provision that a person who becomes a property developer within 12 months of making a political donation must pay double the value of that donation to the State Electoral Commission.[491]

The High Court upheld the constitutional validity of these provisions in the case of *McCloy v NSW*, as discussed above, and found that the implied right to political freedom was not impermissibly burdened by the legislation.

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[488] Environmental Defenders Office, Submission 92, 17.
[489] See Part 3, Division 7, ss51 and 52.
[490] *Electoral Funding Act 2018* (NSW) s52.
[491] Protect our Heritage Alliance, Submission 27, 2; *Electoral Funding Act 2018* (NSW) s58(3).

A subsequent study on the 'impacts of the NSW legislation on political donations found quantifiable and significant decrease in the volume and value of political donations as a consequence of the laws.'[492] This study included a raft of legislation restricting political donations, including consideration of the New South Wales legislation banning political donations from property developers.

9.3.3 Queensland corruption investigation

The QCCC Report discussed above made recommendations aimed to provide a more stringent regulatory framework for local government elections and decision-making, although the report noted that '[t]he Queensland Government may consider it appropriate to also adopt these recommendations at the state government level.'[493]

Recommendation 20 of the QCCC Report suggested that the acts relevant to local government elections be amended to prohibit political donations and gifts from property developers. The recommendation suggested that the legislation reflect the provisions in the New South Wales legislation, including the definition of 'property developer'.[494] The QCCC noted that 'the current New South Wales provisions are an example of good practice on which to model the Queensland provisions.'[495]

9.3.4 Queensland Legislation

Following the release of the QCCC Report, amendments were made to the *Local Government Electoral Act 2011* (Qld) in 2018 to ban political donations from property developers. Section 275 of the *Electoral Act 1992* (Qld)[496] makes it unlawful for prohibited donors, or a person on behalf of a prohibited donor, to make political donations. It is also unlawful for a person to accept a political donation from or on behalf of a prohibited donor, or for a prohibited donor or another on a prohibited donor's behalf to solicit another person to make a political donation. This section reads:

273 Meaning of prohibited donor

(1) For this subdivision, prohibited donor—
- (a) means—
  - (i) a property developer; or
  - (ii) an industry representative organisation, a majority of whose members are property developers; but
- (b) does not include an entity for whom a determination is in effect under section 277.

(2) For subsection (1)(a), each of the following persons is a property developer—
- (a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation—
  - (i) in connection with the residential or commercial development of land; and
  - (ii) with the ultimate purpose of the sale or lease of the land for profit;

[492] Environmental Defenders Office, Submission 94, 18, citing Malcom Anderson et al., 'Less Money, Fewer Donations: The impact of New South Wales political finance laws on private funding of political parties' (2018) 77:4 *Australian Journal of Public Administration*, 797.

[493] QCCC Report, p xii.

[494] Ibid Recommendation 20, xvi, 78.

[495] Ibid 78.

[496] See Part 11, Division 8, Subdivision 4 (Political donations from property developers).

(b) a close associate of a corporation mentioned in paragraph (a).

(3) For deciding whether a corporation is a corporation mentioned in subsection (2)(a), any activity engaged in by the corporation for the dominant purpose of providing commercial premises at which the corporation, or a related body corporate of the corporation, will carry on business is to be disregarded, unless the business involves the sale or leasing of a substantial part of the premises.

...

'Political donation' is defined in section 274 (Meaning of *political donation*) of the *Electoral Act 1992* (Qld) as a gift, loan or fundraising contribution made to benefit a political party or a candidate in an election, directly or indirectly.

Like the legislation in NSW, the legislative scheme of Queensland has been tested in the courts and found to be constitutionally valid and to not breach the implied freedom of political communication nor intergovernmental immunity.[497]

9.4 Planning reforms in South Australia

A ban of political donations from property developers, in line with what is in place in New South Wales and Queensland, and recommended by the Senate Select Committee into the Political Influence of Donations, would 'result in higher levels of fairness, impartiality and integrity whilst decreasing risks of corruption by ensuring the interests of the public are served over the private interest of donors and supporting democracy.'[498]

National Trust SA advised that the risks of corruption in property development have increased under the new planning system and that under the *PDI Act*, the Minister now has vast discretionary powers.[499] National Trust SA stated:

> The Act also includes features determined by the NSW ICAC to be contrary to safeguarding against corruption and the perception thereof;[500] eg the rights of third parties to participate in development assessment processes are significantly curtailed by the new planning system when compared to that which applied under the *Development Act 1993* (SA).
>
> Furthermore, the Act also fails to assign priority over the competing objectives of facilitating development in ways that increase the liveability of the State and are ecologically sustainable. As the NSW ICAC remarked:
>
> > It is important that planning legislation addresses this issue by recognising and providing guidance on the weight to be given to competing public interests. Disregarding or placing undue weight on relevant public interest objectives leads to perceptions of bias and corruption, which undermine the integrity of the planning system.[501]

[497] See *Spence v State of Queensland* [2019] HCA 15 Trans 045.
[498] Environmental Defenders Office, Submission 94, 22.
[499] See National Trust SA, Submission 92, 39.
[500] See the NSW ICAC Report, 14 and 19. The safeguards are also set out in section 9.3.1 of this Report.
[501] NSW ICAC Report, 13.

> This is a corollary of the adage that 'not only must justice be done; it must be seen to be done'. Even if undue influence is never brought to bear over planning decisions, it should not be seen for this to be possible. Trust in government decision-making is essential to public confidence in government and representative democracy.
>
> ... What we have seen since the passage of the *Planning, Development and Infrastructure Act* is a growing concentration of decision making in fewer and fewer hands, diminished community participation and the curtailment of rights in planning and decision making and the emergence of new planning bodies with limited public accountability and a strong tendency to secrecy and a lack of transparency in decision making.
>
> Key aspects of the Planning and Design Code namely: the use of less rigorous and more subjective 'performance based' measures of compliance, an increase in the use of private certification to support development assessment and a repeated failure to meet the standards of community consultation outlined in the Act's *Community Engagement Chorter* all suggest that corruption risk has increased rather than been reduced since the passage of the Act.
>
> (National Trust SA, Submission 92, 39-40)

The Committee agrees that perceived risk of corruption is important to public trust in the planning system. While a review of property developers' donations to political parties and the impacts on the integrity of the planning system by South Australia's ICAC would be helpful, it is unlikely that the ICAC would have jurisdiction for such an inquiry, particularly after the recent amendments to the ICAC Act. Alternatively, an independent panel could be established to conduct an inquiry.

CONCLUSION

Petition No 2 of 2020 – Planning Reform was based on planning reforms that began with *Planning, Development and Infrastructure Act 2016* (the '*PDI Act*') and culminated with the implementation of the *Planning and Design Code* (the 'Code') throughout South Australia on 19 March 2021. The Committee heard that the *PDI Act* generally succeeded in setting out objectives and guiding principles that should form the foundation for informed, efficient, effective, ecologically sustainable planning reforms. However, the Code and other documents drafted under the *PDI Act* failed to achieve these ideals. Most of the Petitioners' complaints stem from the State Planning Commission (the 'Commission') and the Attorney-General's Department, which oversees the Planning and Local Government portfolio, (the 'Department') pursuance of unrealistic timeframes by which to implement the three phases of the Code.

As noted elsewhere in this Report, one of the difficulties faced by the Committee was that the call for submissions in relation to this Petition occurred prior to the release of Phase Two of the Code on 31 July 2020. The version of the Code on which the Petition and the submissions were based was the version that was on consultation between 1 October 2019 and 28 February 2020, known as the 'Draft Code'. Subsequently, there were further iterations of the Code: one presented for further consultation from 4 November 2020 to 18 December 2020 (the 'Revised Draft Code'), and amendments to that version that was released when Phase Three went live on 19 March 2021. In addition, throughout the Committee's inquiry, other materials were periodically being produced, published and amended such as statements, policies and regulations.

As a result, some of the concerns relating to the planning reforms raised in the submissions may have already been addressed, or partially addressed, in the further iterations of the Code or other documents. The Committee has not reviewed the latest Code and documents in sufficient detail to draw conclusions on each of the complaints made. Nonetheless, the few witnesses that the Committee heard from subsequent to full implementation of the Code on 19 March 2021 suggested that criticisms raised in submissions had not yet been sufficiently addressed to allay those concerns.

The Committee heard that members of the public were not satisfied with the consultation on the planning reforms and that the Government did not adhere to the *Community Engagement Charter* in the consultation process. The Commission assured the Committee that the engagement was 'both a thorough and honestly a genuine effort by the Commission to engage widely with the South Australian community about our new planning system.'[502] Nonetheless, submitters complained about the timing and methodology of the consultation. The materials provided for consultation were described as incomplete and riddled with errors. Submitters indicated that they felt dictated to rather than consulted and that the time allotted for consultation was insufficient, as was the time to review the amendments made to the Code prior to implementation.

In addition, the Petitioners called for independent modelling and risk assessment to be carried out to protect against poor development outcomes. Although a standard aspect of project management, adequate risk assessments were not undertaken to identify the potential risks in relation to the planning reforms. The evidence received by the Committee has borne out the Petitioner's request for a review of the *PDI Act*. The evidence suggests that community rights, the sustainability of

[502] State Planning Commission, Committee Hansard, 16 March 2021, 109.

development, the environment and heritage may all be negatively impacted under the *PDI Act* and resulting instruments, including the Code. A review may provide a further opportunity to achieve some of the aims of the planning reforms that may have been lost due to the haste with which the reforms have been progressed.

It is noteworthy that the Committee has only recently been referred a Petition seeking a declaration that we are facing a Climate Emergency, indicating the prominence and urgency of climate change to the community. Yet, the Committee heard that opportunities have been missed with these planning reforms to encourage sustainable and energy efficient building practices and materials, protect and increase the tree canopy and incentivise re-purposing heritage buildings rather than demolishing them. Planning is recognised as a contributing factor to mitigate against and adapt to climate change.

Evidence received by the Committee also supports a review of the governance and operations of the Commission and State Commission Assessment Panel ('SCAP') with a view to improving the transparency and accountability of these bodies. These bodies, would benefit from a review or inquiry into their governance, membership and operations. South Australia would also benefit from a review of political donation legislation similar to legislation in New South Wales and Queensland.

Mr Michael Lennon, former Chair of the Commission, advised that he 'reflected substantially and carefully about the number of people who signed a petition to parliament. I am affected by the seriousness of that and have weighed on it ...'[503] Mr Lennon described the Petition as 'unbalanced and in certain respects unfair. It seeks to put the Planning Commission on public trial for doing what was asked of it—to deliver a new planning system for South Australia—a decision which was made by Parliament in 2016.'[504] The Committee disagrees with this characterisation of the Petition, and instead views the Petition as a democratic expression by concerned citizens seeking to protect the amenity, history, environment and liveability of South Australia.

The Committee concluded that one of the primary factors driving community disapproval of the planning reforms, which in turn led to this Petition, was the Government's rush to effect these reforms. The Committee understands the desire to progress changes, but reforms of this magnitude should not be rushed at the expense of fulsome community consultation and thorough modelling and risk assessment of the impacts of the new legislation on community rights, heritage, sustainability and protection of the environment. The Committee applauds the Minister for delaying the implementation of Phase Three and providing an opportunity for further consultation.

The Committee recognised the complexity of the task of aligning a number of competing and at times contradictory interests in creating a new planning system. There are the interests of developers, who in the Petitioners' view, have an unfair influence through their representation on the Commission, SCAP and through political donations. The Committee heard that developers' interests can at times conflict with the interests of community, heritage and environmental groups seeking to preserve the character, tree cover and amenity of their neighbourhoods. In addition, the Commission was tasked with amalgamating policy from an array of development plans to create a single, simple, accessible Code that provides consistent outcomes, but is also expected to retain local policy details and character of individual neighbourhoods. The Commission acknowledged the competing interests it faced:

[503] SCAP, Committee Hansard, 2 March 2021, 105.
[504] Commission, Committee Hansard, 16 March 2021, 107.

> One of the challenges for the Commission in making its recommendations on the Code is the need to balance a wide range of interests in a policy document that can impact on the lives of all South Australians. ... [T]he Commission has sought to achieve an appropriate balance between these views, as well as the necessary transition of existing development plan content versus genuine policy reform.[505]

The Committee appreciates, as stated by the Planning Institute Australia, that the planning reform process undertaken by the Department 'is a mammoth task, at the scale at which has not been undertaken in our South Australian planning history to date ...' and that as such there is expected to be a 'teething period'.[506] The Committee also acknowledges that the Code will be an evolving document that will need to adjust and change over time. As was noted by Mr Lennon, then Chair of the Commission and largely responsible for ushering in the planning reforms, the planning reforms must take into consideration the changing needs of citizens:

> The complexities of the planning system means it has to align itself with contemporary standards, which means it is organic, it constantly will change, as the nature of households change and people's tastes change ... and demand patterns change.
>
> (Commission, Committee Hansard, 16 March 2021, 114)

The Committee shares the optimism of the Local Government Association that once the errors are corrected, processes and procedures improved, training completed and amendments made, South Australia's planning system could be vastly improved:

> We reaffirm our sector's position that councils will be able to deliver a high-quality development assessment service when the errors and omissions raised during consultation on phases 2 and 3 of the Code have been addressed or can be identified and addressed quickly following the implementation of the Code, and when ongoing support, training and information is provided to all councils and community and industry have a well-formed understanding of the code and the e-planning lodgement system.
>
> (Local Government Association, Committee Hansard, 16 February 2021, 92)

However, the Committee also recognises the importance of getting planning reforms right, as the results of poor planning decisions could irreparably damage South Australia's neighbourhoods. The paramountcy of the Code in driving the planning reforms was articulated by Mr Tom Morrison in his submission to the Committee:

> The new Planning and Design Code will play a key role in retaining the liveability of South Australia, impacting our lives for decades to come. The outcome of this once in a generation reform must result in a new Code that respects the character of our suburbs, allows for sustainable and innovative urban infill while addressing the concerns of the broader community in areas like retaining our tree canopy coverage. There is a lot more at stake than poorly designed houses, but also the attractiveness of Adelaide as a place to live and work along with our urban environment. These reforms should not be rushed.
>
> (Tom Morrison, Submission 48, 4)

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[505] Commission, *Phase Three Engagement Plan – Chair's Fareword*, (tabled with the evidence of Mr Michael Lennon, Chair, and available on the Committee's webpage) 2.
[506] Planning Institute Australia, Submission 96, 3.

The Committee commends the Petitioners for pursuing this Petition, one of the fundamental vehicles of democracy, to bring their concerns before the Parliament. In addition, the Committee would like to thank all those who made submissions and provided evidence in relation to the matters raised in the Petition for the assistance their knowledge, expertise and experiences have provided in this inquiry. The Committee also advises any Committee or other body undertaking a review or assessment under the Committee's Recommendations in this Report to also consider the considered and detailed suggestions and recommendations made by those who provided submissions to this Committee.

The Committee makes the Recommendations set out herein.

The Committee resolved to table this Report in both Houses.

Dated: 17 November 2021

Hon. N. J. Centofanti MLC

PRESIDING MEMBER

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APPENDIX A – Letter to the Hon Stephan Knoll MP

LEGISLATIVE REVIEW COMMITTEE
PARLIAMENT OF SOUTH AUSTRALIA

PARLIAMENT HOUSE
NORTH TERRACE
ADELAIDE SA 5000

Hon. Stephan Knoll MP
Minister for Planning
(by email)

2 July 2020

Dear Minister,

Re: Petition No. 2 of 2020 – Planning Reform

The Legislative Review Committee ('the Committee') is inquiring into the above Petition, which was tabled in the Legislative Council by the Hon. M. C. Parnell MLC on Thursday 30 April 2020. The Petition reads as follows:

> 'By the Hon. M.C. Parnell from 13,928 residents of South Australia, concerning Planning Reform. The Petitioners pray that this Honourable House will:
>
> 1. Undertake an independent review of the operation of the Planning, Development & Infrastructure Act to determine its impact on community rights, sustainability, heritage and environment protection;
>
> 2. Undertake an independent review of the governance and operation of the State Planning Commission and the State Commission Assessment Panel;
>
> 3. Urge the Government to defer the further implementation of the Planning and Design Code until:
>   a. a genuine process of public participation has been undertaken; and
>   b. a thorough and independent modelling and risk assessment process is undertaken;
>
> 4. Legislate to ban donations to political parties from developers similar to laws in Queensland and NSW.'

The Hon. Mark Parnell MLC presented evidence to the Committee on Wednesday 3 June 2020 in relation to this Petition. I attach a copy of the Hansard Report of the Hon. Mark Parnell MLC's evidence to the Committee for your information. I also attach a list of questions tabled by the Hon. Mark Parnell MLC.

The Committee would appreciate your response to the matters raised by the Petition, the evidence presented to the Committee by the Hon. Mark Parnell MLC and to the list

Correspondence to: Parliament House, North Terrace, Adelaide SA 5000
08 8237 9418 or Free Call 1800 182 007 (SA Country Only)
www.parliament.sa.gov.au/lrc.htm

of questions attached to this correspondence on or before Thursday 30 July 2020. Once the Committee has reviewed your response, the Committee may request that you appear before it in person to provide additional evidence.

Yours sincerely,

Hon. Nicola Centofanti MLC
PRESIDING MEMBER

APPENDIX B – Letter from the Hon Vickie Chapman MP

The Hon Vickie Chapman MP

Government of South Australia

Deputy Premier

Attorney-General

Minister for Planning and Local Government

GPO Exchange
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20MLP0575

Hon Nicola Centofanti MLC
Presiding Member
Legislative Review Committee
Parliament House
North Terrace
ADELAIDE SA 500

Dear Ms Centofanti

Thank you for your letter regarding Petition No.2 of 2020 – Planning Reform.

It is premature to hold an independent review of the operation of the *Planning Development and Infrastructure Act 2016*, given that it is not yet fully operational and the advantages of the new system have not yet been fully realised.

In preparing the Code, the State Planning Commission (the Commission) has focused on improving the design of residential infill development. The Commission has also responded to community concerns in the Code by introducing draft policy which provides greater consistency and clarity about tree planting and landscaping for infill development, as well as improved policies around water sensitive urban design. An overview of these improvements can be found in the Commission's People and Neighbourhoods Discussion Paper.

I am aware the management of heritage in the Code is a key area of interest in the community, and is also an important element of the reform program to ensure the ongoing protection of our valued heritage places and areas.

The South Australian Government is wholly committed to the promotion and protection of heritage places in South Australia. Since March 2018 there have been 208 new local heritage places approved throughout the State, specifically in the Mid Murray, the City of Charles Sturt and the Adelaide Hills council areas.

All of those existing heritage places and areas are proposed to be transitioned into the Code as follows:

- State Heritage Places will transition to the State Heritage Place overlay;
- State Heritage Areas will transition into the State Heritage Area overlay;
- Local Heritage Places will transition into the Local Heritage Place overlay; and
- Historic Conservation Zones in like areas, plus the existing 11,810 Contributory Items within those zones or areas, will come under the Historic Area Overlay. The Historic Area Overlay is underpinned by

specific Historic Area Statements, which help to clearly identify and articulate the key elements of historic importance in a particular area.

By identifying these places and areas as an overlay, their status is immediately elevated within the Code. The overlays contain policies which seek to protect heritage values through demolition control (performance assessed), heritage assessment and promotion of adaptive reuse. Furthermore, in relation to State Heritage, the Minister for Environment and Water will not have the power to direct decisions, further strengthening controls over State Heritage Places and Areas.

In addition to these, there will also be a Character Area Overlay (and Character Area Statements), which seeks to provide a level of protection for areas of valued streetscape character.

The proposed policy framework is to provide clarity and certainty around when demolition can be contemplated, and to ensure the assessments are fair and consistent across the State so when applications are received they undergo thorough consideration.

To address community concern over the protection of heritage and character within the new planning system, the independent Expert Panel on Planning Reform (Panel) to reconvene to review the treatment of heritage and character in the Code. This advice has been received and is available on the SA Planning portal at www.saplanningportal.com.au.

I am reassured by the Panel's assessment that heritage and character protection under the new Code will be more robust and will provide greater consistency and certainty than the current planning system.

Central to the new planning legislation was the establishment of the State Planning Commission (the Commission). The Commission is an independent body providing advice and leadership on all aspects of planning and development throughout our State. The Commission provides direct advice on a range of policy and statutory matters on a regular basis. The Commission is also the State's principal development assessment and planning advisory body. Its assessment functions are delegated to the State Commission Assessment Panel (SCAP). To improve the transparency of SCAP, the Commission implemented procedural changes that allowed for the opening up of meetings to the general public, and they receive regular reports about the performance of the system.

The Commission has demonstrated a strong commitment to increased transparency and ongoing improvements to processes and procedures to continue to build confidence in the planning system. In undertaking their independent functions, the Commission has sought independent and expert governance and legal advice. They are also supported by a dedicated governance unit, made up of legal and administrative experts who advise on probity and transparency. The Commission has a track record of engaging widely with multiple stakeholders, including the community and has achieved positive outcomes for SA.

In light of the above, I consider an independent review of the State Planning Commission and SCAP not warranted.

I am advised by the Department that public consultation for the draft Code began on 1 October 2019, with Phase Two closing eight weeks later on 29 November 2019. Phase Three of the Code was open for public consultation for 22 weeks, closing on 28 February 2020.

During these consultations, the State Planning Commission (the Commission) held more than 200 Phase Two and Phase Three consultation events for a broad range of stakeholders including councils, industry and community groups. More than 1350 items of feedback were also received through different methods including a dedicated 1800 Hotline, the Planning and Engagement email accounts as well as the Government 'YourSay' website.

The significant amount of feedback was in addition to more than 2000 written Phase Two and Three Code submissions received from councils, industry and community, and has given the Commission a strong insight into the changes required for both rural and urban areas of the state to inform the final version of the Code.

Access to the latest version of the planning system and a suite of training material is also currently being provided to local councils and covers the operations of the SA Planning Portal modules. The learning program will be released in stages with the first component being a group of instructional videos (on Vimeo), which will be supported by webinars and a series of guides to assist professionals in preparing for the new system.

Consultation on the Code has now concluded and the Commission has released a 'What We Have Heard' report detailing the feedback and comments received on the draft Code (Phase 3) and outlining recommendations for changes to the Code. The Commission will now prepare an Engagement Report outlining the Code amendment recommendations for my consideration.

The implementation of the Planning and Design Code along with the ePlanning platform will establish a new planning system for South Australia which will help shape the communities we want to live and work in, both now and into the future. Once the new system is in place, it will continue to evolve in response to ongoing feedback from the community, key stakeholders and local councils.

I trust this information is of assistance.

Yours sincerely

HON VICKIE CHAPMAN
MINISTER FOR PLANNING AND LOCAL GOVERNMENT
31.7.20

APPENDIX C – List of Submissions

LEGISLATIVE REVIEW COMMITTEE

Petition No. 2 of 2020 – Planning Reform

LIST OF SUBMISSIONS

Updated 10 August 2021

No.	NAME	DATE RECEIVED	LRC MEETING DATE TABLED
1	Butler, Gerry	26/05/20	22/07/20
2	Morgan, Deborah – President, National Trust of South Australia	26/05/20	3/06/20
3	Wharton, Anne	26/05/20	3/06/20
4	Allen, Peter & Jill	29/05/20	17/06/20
5	Pring, Graham	31/05/20	1/07/20
6	Rumbold, Mary	31/05/20	3/06/20
7	Harris, Dean	25/06/20	1/07/20
8	Wing, Lindon & Barbara	28/06/20	22/07/20
9	Dean, Rod	29/06/20	22/07/20
10	English, Stephen	29/06/20	9/09/20
11	Preston, Jane	30/06/20	22/07/20
*12	Di Giovanni, Tony	2/07/20	9/09/20

13	Ure, Sacha	2/07/20	22/07/20
14	Ure, Gordon	2/07/20	22/07/20
15	Crisp, Elizabeth – President, Prospect Resident's Association	8/07/20	22/07/20
16	Francis, Christine – President & Tom Smith – Secretary, Norwood Residents Association Inc.	21/07/20	22/07/20
17	Henschke, Philip	17/08/20	9/09/20
18	Gilbie, Alan	18/08/20	9/09/20
*19	Jones, Warren – Convenor, Protect our Heritage Alliance	19/08/20	9/09/20
20	Whitelock, Carole – Protect our Heritage Alliance	20/08/20	9/09/20
21	City of Marion	28/08/20	9/09/20
22	Stratmann, Jim	21/08/20	9/09/20
*23	Croft, Peter – For the Tree Action Group & Grow Grow Grow Your Own	31/08/20	9/09/20
24	Magor, Colleen	5/09/20	9/09/20
25	The Hodges, Linkevics and Luesby families	6/09/20	9/09/20
26	McLeay, Elizabeth	7/09/20	9/09/20
27	Jones, Warren – Protect our Heritage Alliance	8/09/20	9/09/20
*28	Dyson, Andrew – Kensington Residents' Association Inc	10/09/20	23/09/20
29	Wells, Joanna	11/09/20	23/09/20

30	Hutchesson, Charlotte	11/09/20	23/09/20
31	Hill, John – Stirling District Residents Association Inc.	10/09/20	23/09/20
32	Rushbrook, Elizabeth – South-East City Residents Association Inc	11/09/20	23/09/20
33	Gray, Dianne	11/09/20	23/09/20
*34	Freeman, Guy	11/09/20	23/09/20
35	Fennell, Etiennette – Member of National Trust	12/09/20	23/09/20
36	Hardy, C R (Rick)	12/09/20	23/09/20
*37	Iwanicki, Iris – Planning and Heritage Services	12/09/20	23/09/20
38	Doolette, Ann	13/09/20	23/09/20
39	Harris, Dean	13/09/20	23/09/20
40	Amery, Jill	13/09/20	23/09/20
41	Ferguson, Mark	13/09/20	23/09/20
42	Dunk, Rowena – Member of Norwood Residents' Association	13/09/20	23/09/20
43	Dunk, Rowena (2) – Member of Norwood Residents' Association	14/09/20	23/09/20
*44	Butler, Gerry	13/09/20	23/09/20
*45	Siegel, Alicia	13/09/20	23/09/20
*46	Goode, Geoff – The North Adelaide Society Inc.	14/09/20	23/09/20

47	Holmes, Peter & Chris	14/09/20	23/09/20
48	Morrison, Tom	14/09/20	23/09/20
49	O'Leary, Kevin	14/09/20	23/09/20
50	Bennett, Julie-Ann	14/09/20	23/09/20
51	Buss, Terry – City of West Torrens	14/09/20	23/09/20
52	Lemon, Helga – City of Burnside, Ward Councillor Eastwood & Glenunga	14/09/20	23/09/20
*53	Mex, Christel (Dr) and Prof Elizabeth Vines OAM – Community Alliance SA	14/09/20	23/09/20
54	Collins, Susan – South West City Community Association Inc	14/09/20	23/09/20
55	Krichauff, Skye (Dr) – President, History Council of SA	14/09/20	23/09/20
56	Mudge, Leith & Boyd, Kirrilee	14/09/20	23/09/20
**57	Smith, Stephen – Local Government Association	14/09/20	23/09/20
58	Francis, Christine	14/09/20	23/09/20
59	Crisp, Elizabeth – President, Prospect Residents Association	14/09/20	23/09/20
60	Moore, Evonne (Councillor) – Norwood Payneham & St. Peters Council	14/09/20	23/09/20
61	Islip, Ros	14/09/20	23/09/20
62	Etherington, Norman (Professor) – Past President of the National Trust of SA	14/09/20	23/09/20

63	Bailey, Carol (Councillor)	14/09/20	23/09/20
64	Goldstone, Mark – CEO City of Adelaide	14/09/20	23/09/20
*65	Scott, Janet – Past President of Colonel Light Gardens Residents Association	14/09/20	23/09/20
66	Bonham, Jennifer (Dr)	14/09/20	23/09/20
*67	Shackley, Adrian	14/09/20	23/09/20
68	Ebert, Leonie (Former Adelaide Councillor)	14/09/20	23/09/20
**69	Conlon, Keith – Chair, SA Heritage Council	14/09/20	23/09/20
70	Faulkner, Carol	14/09/20	23/09/20
*71	Wigg, Carolyn (Dr) – Heritage Consultant	14/09/20	23/09/20
*72	Sody, Shane – President, Adelaide Park Lands Preservation Association	14/09/20	23/09/20
73	Dyson, Elaine	14/09/20	23/09/20
74	Wilkinson, Sandy – Alexander Wilkinson Design	14/09/20	23/09/20
75	Pieraccini, Laura	14/09/20	23/09/20
76	Hobbs, George	14/09/20	23/09/20
77	Barone, Mario – CEO City of Norwood Payneham & St Peters	14/09/20	23/09/20
78	Radbone, Ian (Dr) – President, Norwood Residents Association	14/09/20	23/09/20
**79	Di Lernia, Nicolette – EDSA, Australian Institute of Architects	14/09/20	23/09/20

80	Giles, Sue	14/09/20	23/09/20
81	Butcher, Margaret	14/09/20	23/09/20
82	Gill, Ros	14/09/20	23/09/20
83	Johnston, Jayne	14/09/20	23/09/20
**84	Shearing, Colin – CEO SA Independent Retailers	15/09/20	23/09/20
85	Rohrlach, Danny	15/09/20	23/09/20
*86	Haberfeld, Penelope		
*87	Bailey, David – Registered Planner	16/09/20	23/09/20
*88	Cole, David – Cole Solicitors Environmental Lawyers	18/09/20	23/09/20
89	Poetzl, Yuri	18/09/20	23/09/20
90	Rumbold, Mary (2)	20/09/20	23/09/20
91	Painter, Ann	22/09/20	14/10/20
*92	Peacock, Darren (Dr) – National Trust of South Australia	25/09/20	14/10/20
93	Redman, Karen – Mayor, Town of Gawler	25/09/20	14/10/20
*94	Ballantyne, Melissa – Environmental Defenders Office	25/09/20	14/10/20
*95	Smith, Jeff – Consultant, Planning Chambers	25/09/20	14/10/20
*96	Walker, Elinor – SA President, Planning Institute Australia	2/10/20	14/10/20

97	Tonkin, Beverley & Endersby, Phillip	18/09/20	14/10/20
98	Wyndram, Lesley	28/09/20	14/10/20
99	Dyson, Anthony	24/01/21	03/02/21
100	Chiveralls, Keith	26/02/21	03/02/21
101	Patton, Jeff & Dorothy	28/01/21	03/02/21
102	Garrett, Rob & Adair	03/02/21	17/02/21
103	Working Group on Planning and Climate Change	25/05/21	26/05/21

* **Requested to be heard before the Committee (21)**

** **Committee invited to give evidence (but submitter did not request to be heard) (4)**

APPENDIX D – List of Witnesses

LEGISLATIVE REVIEW COMMITTEE
Petition No. 2 of 2020 – Planning Reform

WITNESS LIST

Submission No.	NAME	ORGANISATION	DATE
	Hon Mark Parnell MLC	Legislative Council of South Australia	03.06.20 10.00
53	Dr Elizbeth Vines AOM	Community Alliance South Australia	22.09.20 12.00
19 & 27	Dr Warren Jones AO	Protect Our Heritage Alliance	22.09.20 12.30
79	Nicolette Di Lernia & Mario Dreosti	Executive Director SA, Australian Institute of Architects / Proske Brown	13.10.20 12.00
84	Colin Shearing	CEO, South Australia Independent Retailers	13.10.20 12.30
95	Jeff Smith	Consultant, Planning Chambers	10.11.20 12.00
34	Guy Freeman	Owner of regional property	10.11.20 12.30
96	Elinor Walker, President SA Division	Planning Institute Australia	17.11.20 12.00
69	Keith Conlon & Marcus Rolfe	Chair, SA Heritage Council	17.11.20 12.30
92	Dr Darren Peacock, CEO & Ms Deborah Morgan, President	National Trust of South Australia	26.11.20 12.00
65	Janet Scott	Past President of Colonel Light Gardens Residents Association	26.11.20 12.30
88 & 103	David Cole Michael Doherty	Cole Solicitors Environment Lawyers	01.12.20 12.00
94	Melissa Ballantyne	Environmental Defenders Office	1.12.20 12.30

	Pat Gerace, CEO & Richard Dwyer, Chair UDIA (SA) Planning Committee & Member of the Executive Council	Urban Development Institute of Australia (UDIA)	16.02.21 12.00
57	Stephen Smith, Planning Reform Partner & Lisa Teburea, Executive Director Public Affairs	Local Government Association	16.02.21 12.30
	Rebecca Thomas, Presiding Member & Michael Lennon, Chair, State Planning Commission	State Commission Assessment Panel	02.03.21 12.00
	Michael Lennon, Chair,	State Planning Commission	16.03.21 12.00
	Sally Smith, Executive Director, Planning and Land Use Services & Anita Allen, Director, Planning and Development	Department of Planning Transport and Infrastructure	30.03.21 12-1.00

APPENDIX E – Minority Report of the Hon Connie Bonaros MLC

Minority Report

SA-BEST endorsed the Legislative Review Committee's Planning Reform Majority Report and its recommendations which were developed with the cooperation of all its Members.

Disappointingly, both Liberal and Labor Members of the Committee failed to go as far as recommending changes to the current laws governing political donations.

As noted on the Majority Report:

Petitioners urge that donations to political parties from developers be banned by legislation similar to that which has been enacted in New South Wales and Queensland. The Committee received 43 submissions on the Petition which informed the Committee that public trust in the planning system is at risk because of the perception that political donations from property developers may lead to political favours. Political donations fall under the purview of the Attorney-General, as the Minister responsible for the Electoral Act 1985, and the Minister for Planning and Local Government (who is also the Attorney-General) (the 'Minister'), as the Minister responsible for the Local Government (Elections) Act 1999.

Further, it noted:

All submissions received that addressed prayer 4 of the Petition expressed support for legislation banning property developers from making political donations. Most were concerned that political donations from property developers create conflicts of interest that may improperly impact, or may be perceived to improperly impact, on planning decisions. Submitters suggest that banning political donations will increase transparency, integrity and trust in the planning system.

And also:

There is a perception amongst submitters that representatives of the development and building industries have played a major role in determining the policy, structure and content of the Planning and Design Code (the 'Code') and other reforms to the planning system, at the expense of local communities, members of the public and groups representing the environment, heritage and other community interests. As evidence of this influence, submitters point to the UK Study Tour and the Minister's Lioison Group ...

There is ample precedent for South Australia to amend its legislation to prohibit political donations from property developers, in line with other Australian jurisdictions.

As noted by the Majority, the perceived risk of corruption is important to public trust in the planning system. SA-BEST also recognises that the planning reforms have potentially compromised the six key safeguards reflected in the NSW ICAC Report set out in the majority Report.

While a review of property developers' donations to political parties and the impacts on the integrity of the planning system by South Australia's ICAC would be helpful, it is unlikely that the ICAC would have jurisdiction for such an inquiry, particularly after the recent amendments to the ICAC Act.

However, a select committee could be established by the Parliament to consider the corruption risks associated with political donations from property developers. Alternatively, an independent panel should be appointed to conduct the inquiry.

SA-BEST therefore strongly recommends:

- The Attorney-General introduce amendments to the *Electoral Act 1985*, and the *Local Government (Elections) Act 1999* to prohibit donations and gifts to local government or state political candidates from property developers similar to laws in Queensland and New South Wales.

- The appointment of a Parliamentary Committee, based on the Senate Select Committee inquiry into the *Political Influence of Donations* (2018), to assess the corruption risks associated with political donations from property developers or otherwise related to the planning and development system.

Dated: 17 November 2021

Hon Connie Bonaros MLC

Attachment 2

Recommendations of the Legislative Review Committee of Parliament - Report on Legislative Council Petition No2 of 2020 - Planning Reform

The Legislative Review Committee recommends that:

Recommendation 1

1.1 The State Planning Commission review the comments of the submitters included in this Report with a view to improving the engagement processes for future revisions to the Planning and Design Code and other planning instruments. This includes a focus on genuine community engagement. Further, the Legislative Review Committee recommends that the State Planning Commission collaborate and engage closely with the Local Government Association of SA and councils on all revisions to the Planning and Design Code and associated planning instruments. In addition, future engagement must allow sufficient time for councils, the Local Government Association of SA, the public and other stakeholders to familiarise themselves with the impacts of the new policies, procedures and amendments before providing feedback. The stakeholders must be given adequate time to review and understand any proposed revisions before they are implemented.

Recommendation 2

1.2 A further period of consultation of not less than 12 weeks be afforded to the public and stakeholders to provide feedback on the Planning and Design Code and the ePlanning system as implemented in South Australia.

Recommendation 3

2.1 The Minister for Planning and Local Government instigate an annual independent risk assessment of the Planning and Design Code to identify the potential risks resulting from planning policy, procedures and the operation of the ePlanning system. The Committee recommends that a report of the findings of the risk assessments and the Minister's responses be provided to the Environment, Resources and Development Committee for review.

Recommendation 4

2.2 The Minister for Planning and Local Government introduce amendments to the Planning, Development and Infrastructure Act 2016 requiring the Environment, Resources and Development Committee to monitor annual risk assessment reports of the Planning and Design Code. The Committee recommends that reports on these assessments, the Minister's responses and any action taken be tabled in both Houses of Parliament.

Recommendation 5

3.1 The Minister for Planning and Local Government establish an independent review of the Planning, Development and Infrastructure Act 2016 and the implementation of the Planning and Design Code to determine its impacts on community rights, sustainability and protection of the environment as identified in this Report. A review would also include the fees, charges and costs to councils of operating the new planning system. The Committee also recommends that the report resulting from the review be tabled in both Houses of Parliament by the close of 2022.

The independent review should be undertaken by the Expert Panel on Planning Reform, or a panel of similarly qualified professionals, and must include consultation with community representatives.

Recommendation 6

3.2 As part of the review of the Planning, Development and Infrastructure Act 2016 in Recommendation 5, the reviewing body assess whether State Planning Policies should be incorporated into the Planning and Design Code in order to ensure that policy matters are considered by the Relevant Authorities in determination of development applications.

Recommendation 7

3.3 The Economic and Finance Committee undertake an inquiry, under section 6 of the Parliamentary Committees Act 1991, into the cost overruns, financing and use of funds from the Planning and Development Fund for the planning system reforms, including the implementation of the Planning and Design Code and the ePlanning system.

Recommendation 8

3.4 The Minister for Planning and Local Government introduce amendments to the Planning, Development and Infrastructure Act 2016 to restrict the use of the Planning and Development Fund or the Urban Tree Canopy Off-set Fund to creating and developing open and green space.

Recommendation 9

3.5 To avoid regulations being repeatedly remade immediately after being disallowed by Parliament, the Attorney-General introduce amendments to the Subordinate Legislation Act 1978 to prohibit the re-introduction of a regulation that is the same in substance as one that has been disallowed by Parliament, for six months from the date of disallowance. The amendment should permit Parliament, by resolution, to permit the making of the new regulation within the six-month period.

Recommendation 10

7.1 The Minister for Planning and Local Government implement each of the recommendations made by the Environment, Resources and Development Committee in its Inquiry into Heritage Reform (2019) as a matter of priority.

Recommendation 11

7.2 The Minister for Planning and Local Government appoint a representative from local government, nominated by the Local Government Association of SA, to assist on the recently appointed Heritage Reform Advisory Panel to represent the interests of local councils.

Recommendation 12

7.3 The Minister for Planning and Local Government add to the terms of reference for the Heritage Reform Advisory Panel's Heritage Reform Review, a review into demolition controls under the Planning and Design Code to advise on the impact of the Code on approvals for demolition of heritage assets.

Recommendation 13

7.4 The Minister for Planning and Local Government add to the terms of reference for the Heritage Reform Advisory Panel's Heritage Reform Review, a review into the outcomes for 'Representative Buildings' and whether the protections provided under the Planning and Design Code and its

supporting instruments are sufficient to protect Representative Buildings and retain the character of neighbourhoods.

Recommendation 14

8.1 The Statutory Authorities Review Committee conduct an inquiry into the governance and operation of the State Planning Commission and the State Commission Assessment Panel under section lSC(a) of the Parliamentary Committees Act 1991, including a review of:

- Membership, including consideration of representation from local government
- Codes of Conduct
- Management of conflicts of interest
- Transparency, accountability and public access to information
- Meeting procedures
- State Planning Commission Governance Manual

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3 March 2022

Hon Nicola Centofanti MLC
Presiding Member
Legislative Review Committee
Parliament of South Australia

By email: seclrc@parliament.sa.gov.au

Dear Presiding Member

Legislative Council Petition No 2 of 2020 – Planning Reform

Thank you for your letter of 24 November 2021 regarding the *Legislative Council Petition No 2 of 2020 – Planning Reform* report (the Report) which was tabled by the Legislative Review Committee (the Committee) on 17 November 2021.

On behalf of the State Planning Commission (the Commission), I can advise that the Commission has given consideration to recommendations 1 and 2, as suggested in your letter.

As you know, the Planning and Design Code (the Code) is now fully operational. The Commission is aware that at the time of the petition being circulated in the community (early 2020), there was a level of uncertainty about the level of changes being advocated in the Code compared to existing Development Plan policies. That uncertainty was largely coupled with concern in some sectors of the community that that there was insufficient consultation being undertaken.

With regard to these recommendations, the Commission considers that the consultation undertaken was broad and far-reaching, and much greater than any previous engagement that occurred in relation to Development Plans.

Specifically, the Phase Three (Urban Areas) Code Amendment was originally released for public consultation for five months from 1 October 2019 to 28 February 2020. During this consultation period, 1,790 written submissions were received. Substantial changes were proposed to be made to the Amendment in response to this initial five-month consultation period. A further six weeks of public consultation was undertaken from 4 November 2020 to 18 December 2020. This additional consultation period allowed the public to use the Code in its online and electronic form for the first time.

It should also be noted that since the introduction of the Code in full, there have been significant learnings with regard to both the level and type of consultation on Code Amendments. These are matters that are constantly evolving to suit the specific circumstances of each Amendment. For example, where traditionally consultation on Amendments to council Development Plans largely involved notices in newspapers and occasionally, targeted mail outs, we are now seeing the use of social media and online or face-to-face forums as a further means to inform the community of proposed Code Amendments.

The Commission is confident that these changes are leading to a greater level of community engagement and awareness. Notwithstanding that, there is continual review of consultation on Code Amendments, particularly through the Code Amendment Engagement Report, as set out in the Commission's *Practice Direction 2 – Preparation and Amendment of Designated Instruments* and under section 73(7) of the *Planning, Development and Infrastructure Act 2016*. The learnings from those reports is used to ensure that consultation is targeted, appropriate and meets community expectations.

I trust the above information addresses the matters raised in the Committee's Report with regard to recommendations 1 and 2.

Yours sincerely

Craig Holden
Chair