Dr Stephen Rowley, Adjunct Senior Lecturer, Department of Architecture, Monash University

Planning system

What are the key objectives of the Victorian planning system? Do you consider these objectives are being met?

It is worth noting that there is a legislation-based answer to this question as the *Planning & Environment Act 1987* has defined objectives for planning in Victoria, and of the planning system itself, at s 4.

The legislated answer to this question is as follows:

(1) The objectives of planning in Victoria are—

- (a) to provide for the fair, orderly, economic and sustainable use, and development of land;
- (b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;
- (c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;
- (d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
- (e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;
- (f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);
- (fa) to facilitate the provision of affordable housing in Victoria;
- (g) to balance the present and future interests of all Victorians.

(2) The objectives of the planning framework established by this Act are—

- (a) to ensure sound, strategic planning and co-ordinated action at State, regional and municipal levels;
- (b) to establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land;
- (c) to enable land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels;
- (d) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land;
- (e) to facilitate development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes;
- (f) to provide for a single authority to issue permits for land use or development and related matters, and to co-ordinate the issue of permits with related approvals;
- (g) to encourage the achievement of planning objectives through positive actions by responsible authorities and planning authorities;
- (h) to establish a clear procedure for amending planning schemes, with appropriate public participation in decision making;
- (i) to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice;
- (j) to provide an accessible process for just and timely review of decisions without unnecessary formality;

(k) to provide for effective enforcement procedures to achieve compliance with planning schemes, permits and agreements;
(l) to provide for compensation when land is set aside for public purposes and in other circumstances.

That's the legislated answer. However I think a more useful answer to this question can perhaps be attained by looking at the role of the Victorian planning system in the overall discipline of planning.

Broadly considered, urban planning can be defined as the management of human settlement to achieve economic, social and environmental outcomes that would not be achieved if that settlement were allowed to develop in a laisses-faire or unplanned way. Once the desired outcomes are agreed, those interventions take two main forms. The first is direct investment in community infrastructure and facilities by government: public transport, roads, parks, schools, medical services, social housing, and the like.

The second main intervention method is regulatory control, and this is often what people mean when they talk about 'the planning system'. This involves placing limits and restrictions around the way land is used or developed, in order to achieve the desired social, economic, and environmental outcomes. While this regulatory planning system also binds government, it is notable that this is the main mechanism for directing and controlling the enormous amount of private sector construction and land-use.

The *Planning & Environment Act 1987* is the main component of that system in Victoria. It outlines the land use and development planning system, which is the main component of this regulatory side of planning. However other legislation is also part of that system, notably the *Environment Effects Act 1978* (which provides an environmental impact assessment regime of sorts) and *the Environment Protection Act 1987* (which provides specific environmental regulation).[1]

The *Planning Environment Act*'s role in this process is to:

- Set up a regime of planning schemes, which both record the policy objectives that planners seek to achieve through their interventions (partly in their own policy clauses, and partly through cross-referencing other government policies and strategies) and which codify rules about land use and development to achieve those objectives.
- Outline a process by which schemes are amended.
- Outline the process for seeking permission for use and development.

The question of whether those objectives are being met is hard to answer in simple terms; the system's performance is variable with regards to different measures, and different policy challenges.[2]

However my broad summation would be that *the overall system is 'high footprint and low impact.'* Ideally a regulatory system should maximise its policy impact while minimising its regulatory footprint. The Victorian planning system leans towards the other tendency: it creates quite a large regulatory burden while not being very effective at achieving policy goals. The reasons for this are complex but broadly relate to a reliance on very broad discretion (i.e triggering many planning permit assessments) without sufficiently resolved or directive policy.[3]

[1] For more discussion of other relevant legislation see *The Victorian Planning System: Practice, Problems, and Prospects* (Sydney: Federation Press, 2017), 19–21.
[2] Rowley, 279–86.
[3] I expand on this view in Stephen Rowley, 'Victorian Planning: Re-Thinking the Model,' *VPELA Revue*, October 2019, 41–43.

Broadly I think the *Planning and Environment Act* is sound; my main concerns about the system relate to the way planning controls are formulated, and policy guidance expressed, in the Victoria Planning Provision-based system of planning schemes under the Act. I believe the conventional drafting approaches actively encouraged in Victoria encourage imprecise and unresolved policy. This creates problems in terms of system efficiency, efficacy and integrity.

How should the planning scheme (including precinct structure plans) be used to guide decision making processes at the council level in Victoria?

A planning scheme consists of both regulatory controls (rules) and policy statements (decision-making guidance), the latter most notably in the Planning Policy Framework, although there are statements of policy scattered throughout the scheme.[4]

In a perfect world the rules would be tailored to perfectly enable desired outcomes and prevent undesired ones: undesirable outcomes would simply not be allowed, and desirable outcomes could occur with no permission required. In practice however it is unfeasibly complex to try to anticipate and codify every outcome, and the inevitable failures of a purely rule-based structure would prevent desirable outcomes and restrict flexibility and innovation. Discretion is therefore important in making sure the system is workable.

The role of the policy/decision-making guidance in decision-making is therefore to provide some measure of clarity and predictability even in these uncodified situations.

I would argue the policy guidance in schemes should:

- Proceed from clear statement of its purpose.
- Progress to decision-making guidance that describes typical outcomes wherever possible.
- Be resolved in spatial terms as much as possible (in simple terms, clearly saying 'what goes where').
- Be resolved in policy terms as much as possible (so avoiding simply listing competing imperatives and not explaining how they should be resolved).
- Include benchmark standards/performance measures of desired outcomes that are *quantitative/objective* and *performance-based* if possible.[5]

The overarching purpose here is to give *clarity*. Policy should strive to be the clearest expression it can be of what will be approved and why.

Decision-makers should then follow that guidance unless clear reasons exist to divert from its guidance in individual circumstances. Ideally, then, clear benchmarks and guidance would exist under policy, and when variations from those baselines occurred, there would be a clearly documented thought process explaining why the policy was diverted from in a particular situation.

Is there too much discretion at the council level in planning decision making? If so, how can this be addressed and how could this improve the integrity of planning decision making?

I have two main concerns about the extent of discretion in the system:

[4] The PPF was previously split into two parts, the State and Local Planning Policy Frameworks; this SPPF/LPPF structure will linger for some time as schemes are translated into the new structure.

[5] Using the terms as used in *The Victorian Planning System: Practice, Problems, and Prospects*, 101–5. Note the term 'performance-based' is very often misused in Victorian practice to mean something closer to 'qualitative/subjective' or 'policy-driven.'

- There is too little attempt to refine and narrow the rules in the system to be selective about when permission is required.
- When permission is required, the scheme guidance is very often not clear enough, leaving the scope of plausibly 'correct' decisions too wide.

The first issue is more a workload problem than an integrity issue – though I do believe that when planning departments are overworked this can lead to downstream integrity problems, as the pressure on the system creates incentives to cut corners (at the decision-making level) or wind-back important system safeguards like third-party involvement (at the system-level) .

The second point is more central to integrity issues. In my view the unresolved nature of planning guidance creates a situation where discretion is too unbounded.

There is an enormous volume of applications where the use of discretion is inevitable, since it will never be possible to fully codify black-letter law rules about them.[6] For these the issue is not so much that there is too much discretion, but that the discretion ends up being exercised in a situation where the guidance is not clear enough.

Broadly, the way schemes are written in Victoria creates several problems in this regard:

- They frequently endorse competing imperatives without clarifying how these should be resolved (e.g. endorsing both additional housing supply and protection of neighbourhood character without being clear enough about what forms of housing are seen to strike that balance).
- They frequently re-express overarching goals as a substitute for policy resolution.[7]
- Where specific guidance and controls are provided, there is often confusion about how they are applied (for example, deemed-to-comply controls, benchmark standards, and maximum limits are often misapplied, or even applied without clarity as to which is which).
- They frequently create discretionary standards (such as height controls) so that it becomes expected will routinely be varied; routine variation of discretionary standards is a recognised integrity risk (discussed below).

Unfortunately the current 'Smart Planning' reforms (introduced in July 2016) have not, in my view, adequately interrogated and reviewed current drafting practice in Victoria. This means that the opportunity represented by the current restructure of policy frameworks (a subset of the Smart Planning Reforms) is being squandered.

Can you briefly explain the process to be followed if a party wishes to amend a precinct structure plan (PSP)?

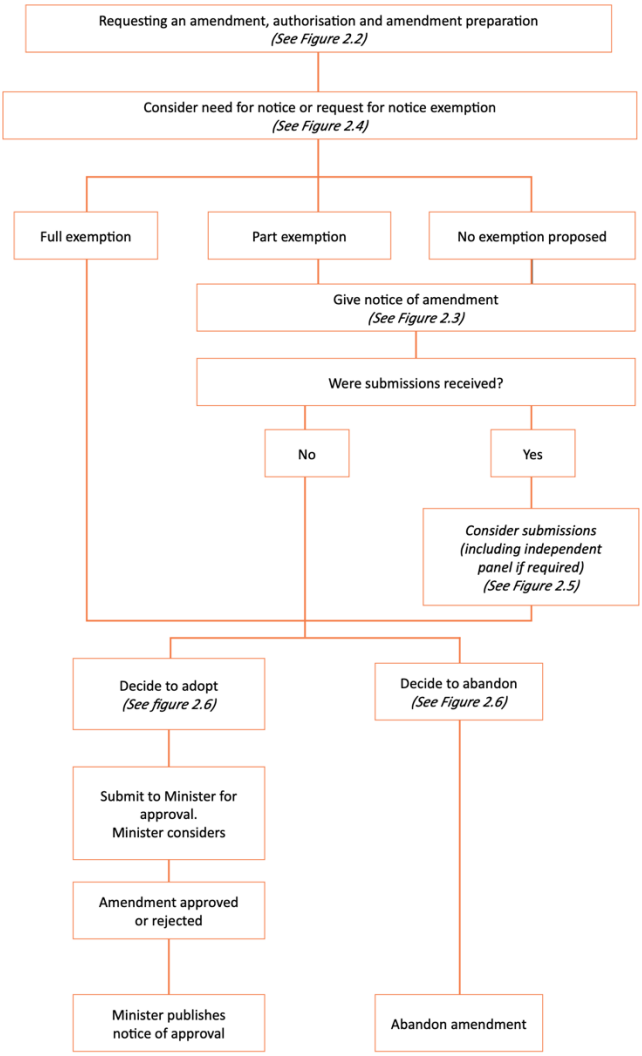
- **How is an amendment initiated?**
- **Who are the key decision makers?**
- **What controls are in place to ensure decisions to amend PSPs, which have the potential to involve substantial financial gains, are subject to appropriate scrutiny?**

As incorporated documents, Precinct Structure Plans are treated as part of the planning scheme itself. The process to change one is therefore the planning scheme amendment process. The steps for that process are outlined in detail in chapter 2 of the Departmental publication *Using Victoria's Planning System* and in chapter 6 of my book *The Victorian Planning System*. Figure 2.1 of *Using Victoria's Planning System*, reproduced below, gives a good overall outline.

[6] This is the fat part of the bell curve I describe in 'Victorian Planning: Re-Thinking the Model.'

[7] For more on what I mean by this see *The Victorian Planning System: Practice, Problems, and Prospects*, 107–8.

Figure 2.1: Outline of the planning scheme amendment process



Answers to the more specific questions posed are as follows.

How is an amendment initiated?

Formally, amendments initiate with a planning authority (such as the council, Minister for Planning, or – occasionally – another public authority) choosing to pursue a change to the scheme and, if the initiation is not by the Minister, requesting authorisation from the Minister to proceed with one.

The Act doesn't make allowance for an application process, as such, for third parties to initiate an amendment process. However it is recognised that in practice amendments will be initiated based on a request from third parties – for example The *Planning & Environment Act 1987*, s 203(1)(c) allows for fees to be charged to consider a proposal for an amendment, and the combined permit/amendment process allowed for in ss 96A to 96N explicitly acknowledges such requests. *Using Victoria's Planning System* notes as follows (at s 2.2.1):

> It is a well-established practice that any person or body can request that the planning authority (usually a council) prepare an amendment. The Act does not include a procedure for making a request to a council for an amendment. If the council agrees to the request, it must apply to the Minister for authorisation to prepare the amendment.

If the council declines to pursue the amendment when asked, there is no recourse, other than to try to persuade the Minister to pursue it.

It is occasionally suggested that there should be an appeal mechanism against a refusal to pursue an amendment. When the Act was reviewed in 2009, the Department at the time noted the conceptual difficulty of such a concept:

> At present, there is no way for a proponent to seek a review of a refusal [to pursue an amendment], or to obtain an independent assessment of how these differences should be decided. A formal mechanism for this could be introduced, however, it must be recognised that the process for 'changing the rules' is a governance process which is different from a review of whether 'the rules' have been complied with, as occurs at VCAT.[8]

This passage, I believe, correctly identifies the fundamental governance problem with allowing an appeals mechanism. Planning schemes are a form of subordinate legislation, and the power to amend them is appropriately vested in government. An appeals mechanism to VCAT, or similar body, would create a separation of powers problem and fundamentally erode the certainty of the system (since in a system where proponents can appeal to get the scheme changed, nothing is ever truly prohibited). While not formally an appeals mechanism, it should also be noted that the existence of an alternative initiation pathway (through the Minister) does create some limited recourse akin to an appeal process.

This means that while the council's degree of control of the initiation of an amendment creates some challenges, including from an integrity perspective, it has a basis in sound governance principles.

Who are the key decision makers if a precinct structure plan is amended?

Essentially the amendment process involves the input of three key decision-makers:

- The council, as planning authority.
- The Minister (with much of the leg-work in practice done on his/her behalf by the Department) as the ultimate decision-maker.
- A planning panel (if submissions are received) which makes advisory comment on the amendment in response to submissions.

The Victorian Planning Authority doesn't formally have a role. However the VPA acts as planning authority when PSPs are initially prepared.

This raises the question as how much 'ownership' the VPA take of the document over its life; and whether they either seek to make comments, or are liaised with by the council and Department, when an amendment to a PSP is sought. I would expect if they did, those comments would be given some weight. However I have not had enough exposure to the workings of growth area councils and the PSPs to make informed comment on this.

What controls are in place to ensure decisions to amend PSPs, which have the potential to involve substantial financial gains, are subject to appropriate scrutiny?

There are two key lines of protection in the amendment process.

These are:

[8] Department of Planning and Community Development, 'Modernising Victoria's Planning Act: A Discussion Paper on Opportunities to Improve the Planning & Environment Act 1987' (Victorian Government, March 2009), 32.

- The processes of consultation and review during the amendment process in the *Planning and Environment Act 1987.*
- The governance systems established under the *Local Government Act 1989 and the current Local Government Act 2020*.

The amendment processes includes scrutiny by the public (through the public notice phase of the process) and by bodies external through council (through the involvement of planning panels – if submissions are received – and the Minister/Department). I discuss the adequacy of the latter in my overarching answers regarding integrity below.

I am not an expert on the provisions of the *Local Government Act*. However I would observe that the *Local Government Act* does seem to generally set out quite a sound governance framework; my experience has been that local government operates in more transparent manner than state government (I discuss this further below). However clearly there remain vulnerabilities, and I suspect at a day-to-day level staff are often not as familiar with the *Local Government Act* as they should be. Others would be much better placed than myself to discuss vulnerabilities in, and potential improvements to, the *Local Government Act* framework.

Can you briefly explain the process to be followed if a party wishes to amend a planning permit?

Who are the key decision makers?

Amending a planning permit is allowed for under the *Planning & Environment Act 1987* pursuant to ss 72 to 76D. This allows for a process similar to that used for making planning applications to modify permits. Indeed this amendment process simply cross-references the relevant sections of the Act relating to permit applications, and indicates that they should be applied as if the request for the amendment were an application to a permit.

This means that an application made under s 72 of the Act has the same checks and balances that apply to the initial permit application. Notably that includes public notice and appeal rights (unless exempted by the provisions of the scheme).

The decision-maker for an amendment to a permit is therefore set the same way it is in the permit process: it is whoever is nominated as the 'responsible authority' in the planning scheme. For most applications this is the local council. However it is sometimes the Minister. This can be set on a site-by-site basis, or may be based on rules – for example, in the City of Melbourne, the Minister is responsible authority for development above a specified floorspace threshold.

In practice many day-to-day applications are delegated to officer level. However the protocols and policies around delegation are under the control of individual councils, and ultimately it remains possible for the council itself to insist on deciding on certain applications, even if they would normally be delegated. (The exception is VicSmart applications – an application class intended to be used for simple applications – where the responsible authority is the CEO of council; the intent here is to effectively force these applications to be treated as if they were delegated to officers.)

Another avenue to amend a permit is the so-called 'secondary consent' process. This is a process created by discretion in a permit – i.e. the permit includes a condition allowing itself to be altered. VCAT has held such amendments do not get assessed according to the process in the Act that applies to a s 72 application. While it is generally considered that the use of secondary consent should not be

used where notice of an application would be required if the application were made under s 72, no such restriction actually exists (if the secondary consent approach is recognised as legitimate).[9]

My view has long been that the secondary consent process is an improper circumvention of the Act, and that a request to change the permit, even where contemplated in a condition in the permit, should appropriately be considered using the process allowed in the Act. In my view the need for an alternate process disappeared when the Act's provisions about amendments to permits took their modern form in 2005. This was seemingly accepted by the Department during the 2009 – 2010 Act review, which proposed to eliminate secondary consent. However that change was never actioned.[10]

It should be noted in passing that there are also other avenues for amending permits, of more limited application – see ss 87 and 87A of the Act.[11]

What controls are in place to ensure these decisions are subject to appropriate scrutiny?

The key scrutiny with regards to permit amendment decisions under s 72 is that public notice should occur in accordance with s 52 of the Act, and that appeal rights to VCAT exist.

I note one of my concerns about the use of secondary consent is that it allows some circumvention of these mechanisms – as noted above, once secondary consent is accepted as legitimate, council is no longer bound by the notice requirements of the Act.

Could a less complex regulatory structure which is more easily understood reduce the risk of corruption? What changes could be made to reduce the risk of corruption?

I think caution should be exercised in framing the issue of corruption as caused by complexity in the system. Procedural checks and balances are a form of complexity, but clearly are very important in protecting the integrity of the system. Conversely, a system in which unbounded discretion sits with an individual decision-maker (or a council) would be very simple but clearly present integrity risks.

It is certainly true that lack of *clarity* in planning system and process documents creates integrity risks. That lack of clarity can be a product of regulatory complexity. However this is far from a simple correlation. For example inclusion of detailed guidelines in planning documents may increase the complexity of regulation, while adding a great deal of clarity about what outcomes are expected. Simplicity in planning document can be the result of a lack of detail, which opens up scope for integrity problems.

However I certainly agree that it is important that planning documents be easily understood, and that this would reduce the risk of corruption. I think that includes not just that those documents be worded in simple terms, but that the *implications* of planning documents be clearly explained – for example through clear resolution of what on-the-ground outcomes look like. This is the thrust of my concern with the way planning documents are often written in Victoria.

I think the keys to reducing the risk of corruption include:

- Making sure policy is clearly expressed.
- Making sure policy-setting is evidence-based and well explained.

---

[9] This was made clear in the VCAT *case Tarwin Valley Coastal Guardians Inc v Minister for Planning & Anor* (includes Summary) (Red Dot) [2010] VCAT 1226.

[10] I explain my concerns about secondary consent at *The Victorian Planning System: Practice, Problems, and Prospects*, 154–58.

[11] For more detail see 153–54; Helen Gibson, 'Managing Changes via Sections 72, 87, 87A of the Planning & Environment Act 1987 & Secondary Consents,' *Planning News* 34, no. 8 (September 2008): 9–14.

- Making sure decision-making is clearly aligned with policy, and that variations from the policy are clearly explained.
- Making sure there is scrutiny and transparency throughout the process of policy-setting and decision-making, especially through public notice and appeal rights.
- Maintaining adequate governance arrangements throughout the process.

The key throughout is to recognise the vulnerability of any given decision-making model and design safeguards accordingly, rather than to overreact to a past integrity problem and creating a new issue. For example it can be easy to react to abuse of power by councillors by moving to expert-driven decision-making. However placing increased power with unelected officials raises its own integrity concerns.

I would argue that the system needs a balance of elected and unelected officials set up in tension with each other (which the Act already does to large degree), and that integrity protections need to be tailored to the type of vulnerability that occurs at each point. So for elected officials this means measures such as ensuring they respond to sound recommendations within a clear framework; whereas where unelected experts (such as VCAT and panel members, and also the public service) are involved, issues such as security of tenure and political independence become important.

What are the key points in the planning process that involve community consultation?

The key points that involve community consultation are the formal notice and objection/submission processes that are included in the planning permit and scheme amendment processes. Related to these are the processes for review and independent hearings that exist. For example, third-party review rights allow the community to seek review of council decisions in the permit process; and the panel process allows the community to have a second round of input through a planning panel during the scheme amendment process.

Informal consultation does occur outside of these processes. For example, many councils will include some kind of community consultation session as a prelude to a planning application being considered by council, after the formal notice process has been completed.

What is the primary objective of community consultation?

Planning is an activity properly understood to be undertaken on behalf of the community, and constrained by democratic processes. While this does not mean that planners should simply reflect the wishes of the community in a direct way – since they should use their expertise to ensure that outcomes reflect larger social and goals including the protection of interests (such as future generations, and the environment) not well represented through direct democracy – it does mean that community consultation is a vital input to the process.

Community consultation allows planners to test the alignment of their views and values against those of the community. It is important in allowing the community to fact-check decision-making and inform councils of things that they may have overlooked.

In my experience as a planner, the two most powerful things that affected my decision-making were the knowledge that it would be subject to scrutiny by the public, and the knowledge that it would be subject to scrutiny by VCAT.

In your view, how can the corruption risks associated with community consultation be mitigated?

I struggle with the premise of this question as I don't think, as a general principle, community consultation carries particular corruption risks (or, at least, that any risks are far outweighed by integrity benefits).

I understand that there is a risk community consultation processes may be manipulated through the use of contrived community groups – the practice sometimes referred to as 'astro-turfing' (i.e. faking a grassroots campaign).

However I think it is important to acknowledge that generally the community consultation process operates to increase integrity in the process. Community consultation increases the clarity of decision-making and scrutiny upon decision-makers. These are strong protection against corruption. Indeed, I think the strength of third-party notice and review rights is one thing that has kept the Victorian relatively clean. If anything, there is a risk that the amount of oversight in our system has mean that we have become complacent about other risks in the system that have been masked by the extent of community involvement and scrutiny, and that would become more severe if those third-party rights were rolled back.

There is constant pressure to weaken third-party review rights from the development sector, as they are seen (validly) as imposing costs through delay and reduced uncertainty. These pressures are currently gaining new traction as part of the push for economic stimulus in the wake of COVID-19. I think there is a real risk that these oversight and consultation mechanisms will be wound back and that this will increase corruption risks.

I think the best mitigation is to make sure community consultation is deep and genuine. If the process is engaging properly with the community – for example, with transparent sharing of information and ample time for the community to make submissions – then 'astro-turfed' groups should have less purchase in the process because they will be balanced by genuine grassroots groups.

However it seems likely that the risk of astro-turfed groups does increase in situations where genuine community groups are not as engaged or organised; or are hard to reach. This may be seen, for example, in newly established communities where groups are still coalescing, or those of lower socioeconomic status.

I would also say that stronger strategic justification would also weaken the impact of such strategies. While community consultation is vital, at the end of the process the decision-making should ultimately return to the merits. If the decision-making is sound and evidence-based, the participation of mischievous groups in the process should not in itself pose a grave risk to the integrity of the system.

Integrity risks in the planning process

In your view, what are the key strengths and weaknesses in the governance around planning decisions at the local government and state government level?

In the wake of the NSW ICAC's Operation Atlas which investigated a number of planning decisions at Wollongong City Council[12] Jerrold Cripps, the then Commissioner of the NSW ICAC published an article about corruption risks that we republished in *Planning News* when I was co-editor.[13] It identified a number of lessons regarding corruption that I think are very relevant to the Victorian system, notably (and I am paraphrasing these somewhat):

- *Out-of-date planning instruments represent an integrity risk*. This is because an out-of-date instrument is more likely to be routinely disregarded or departed from in decision-making, which creates a lack of transparency. The length and difficulty of the amendment process, lack

[12] NSW ICAC, *Report on an investigation into corruption allegations affecting Wollongong City Council*, October 2008.

[13] Jerrold Cripps, 'Lessons for Councils from the Wollongong Corruption Investigation,' *Planning News* 35, no. 6 (July 2009): 8–9, 30.

of strategic resources, and misdirection of resources (for example on the current Planning Policy Framework rewrite) increases this risk.

- *Excessively discretionary development standards represent an integrity risk*. This is because routine variations to standards can erode the clarity about what is an acceptable decision and what is questionable. This is at the heart of my concerns in these answers about the culture of vague drafting that prevails in Victorian practice.
- *Government should make documents public where appropriate*. Information not in the public realm creates the risk of people profiteering off confidential knowledge. There are some good measures in the Victorian system relating to this, such as the obligation on councils to release panel reports within 28 days of receipt. However there are many instances of other situations, especially at state government level, where major reviews (including things such as Advisory Committee reports) are 'sat on' for extended periods of time, or major decisions like rezonings or changes to the Victoria Planning Provisions (VPPs), appear suddenly without notice or any visible process of policy development. The secrecy that surrounds such processes is an integrity risk.

I think the matters raised by the current inquiry also highlight the particular vulnerabilities of the scheme amendment process. As I have already noted, there are sound governance reasons for rezoning to be a politically vested power, as it is a form of legislating. However there are considerable risks associated with this, not least because zoning creates such windfall gains in property values.

There has long been an assumption in Victorian practice that it is inappropriate to capture this value for public purposes, premised partly on the assumption that we do not (normally) compensate for loss of value caused by planning controls.[14] However I think the time has come to revisit that approach, both to deal with certain emerging policy challenges (notably climate change) and also to reduce the corruption risks associated with rezoning. The latter point has been well made by Marcus Spiller.[15]

I don't think there is a 'magic bullet' to solving the vulnerability of the amendment process – even value capture simply reduces the windfall, it doesn't eliminate it. However there is a need to be very attentive to the governance processes around amendments and a widespread understanding of what the weaknesses are. Some of these issues relating to the planning legislation specifically are identified below; it is also I think requires stronger attention to some of the overarching governance principles under the *Local Government Act*.

The following list covers what I consider to be some of the key integrity risks in the planning system.

Amendment Processes

As has been discussed, the amendment process inherently invests a lot of discretion with elected decision-makers (both council and the Minister). As I have already stated, I don't think there is a simple fix for that issue as I think it is appropriate that planning discretion, especially at the rule-making level, is politically vested.

However one aspect of the amendment process that I think creates concerns is the diffuse responsibility that is created by the process. A typical council amendment is effectively handed back

[14] This point is well explained in Des Eccles and Tannetje L. Bryant, *Statutory Planning in Victoria*, 4th ed. (Sydney: Federation Press, 2011), 230–32.

[15] Marcus Spiller, 'The Corruption Honey Pot: An Economic Fix for Planning Scandals,' text/html, SGS Economics & Planning, February 21, 2020, https://www.sgsep.com.au/publications/insights/the-corruption-honey-pot-an-economic-fix-for-planning-scandals?utm_medium=email&utm_campaign=SGS+Newsletter+February+2020&utm_content=SGS+Newsletter+February+2020+CID_59cdbbb370ce0556dd055e6cc1286c05&utm_source=Email+marketing+software&utm_term=READ+ARTICLE.

and forth between council, planning panels and DELWP (handling it on behalf of the Minister). Ideally this results in increased scrutiny, but sometimes I believe it can result in a dissolution of responsibility for an amendment, with each body assuming the others will provide scrutiny. For example, council officers may assume that flaws in an amendment will be picked up by panel and DELWP, while an overworked officer at DELWP might take false comfort from the considerations of panel and council. This will then be exacerbated if the strategic justification for the amendment is opaque or misleading (see below).

It should also be noted that the step at which there is ultimate responsibility – the final Ministerial decision – represents such a bottleneck in the process that it is difficult to reasonably expect real scrutiny at that level. There are so many amendments to be approved that the Minister simply has to have faith in DELWP's management of the process on his or her behalf.

There is no simple resolution to this problem, though I think attention to the matters raised below and elsewhere in these answers would be helpful.

Lack of Strategic Justification for Amendments

There is, theoretically, a long list of justification that needs to be provided in the explanatory report for a scheme amendment. However amendments do not need to undertake a Regulatory Impact Statement (RIS) process. While I think it would be impractical to apply the RIS process to planning scheme amendments, I also think that the prevailing culture of strategic justification of amendments has become quite slapdash. Strategic justification is often dealt with in a series of largely boilerplate statements, and there is frequently little attempt to quantify environmental, social and economic impacts in any rigorous way. This is especially concerning on state-wide amendments with far reaching implications.[16]

Apart from the obvious implications in terms of quality decision-making, this creates integrity risks because the difference between a good idea and a bad idea becomes harder for those providing oversight (such as planning panels and DELWP) to discern. If all amendments – including sensible evidence-based changes, politically driven bad ideas, and those pursued for corrupt reasons – all arrived wrapped in the same vague assertions of strategic appropriateness, then oversight by both the public and review bodies risks breaking down.

Wind-back of Third-Party Notice and Review Rights

As discussed above, third-party review rights are under constant political pressure, and this is likely to intensify in times of economic stress such as the current Covid-19 crisis. I believe that the breadth of Victoria's third-party notice and review rights has been a key integrity protection in our system, especially at the planning permit assessment stage. The scrutiny of the system provided by this framework at permit assessment stage, and the reduced incentive to distort council decisions (since they are usually subject to an appeal right anyway) has in my view helped keep our permit assessment process relatively 'clean' in this state.

This has been something of a double-edged sword, however, as I think this may have encouraged a somewhat complacent view with regards to integrity issues. I worry that wind-back of third-party rights, if pursued, would expose some of the structural vulnerabilities talked about above, such as dated and vague planning instruments.

[16] I talk more about this issue at *The Victorian Planning System: Practice, Problems, and Prospects*, 185–86.

Governance at State Government Level

The *Local Government Act* places many constraints around local government practices, and this means that, for example, councillor discretion is at least framed in a process whereby the council administration places (usually) publicly available reports before elected decision-makers which are then voted upon in a transparent way.

Where in local government the assumption tends to be that information and decision-making processes should be public unless there is a particular reason for it to be concealed, in my experience state government operates on the reverse assumption – things are secret unless there is some reason to make them public. This means that the model of elected officials responding in a transparent manner to recommendations from their officials does not function at state government. The Ventnor matter highlighted the danger that Departmental recommendations could be altered to accord with the wishes of the Minister, in a manner that would seemingly contravene s 76(E)(2)(d) of the *Local Government Act 1989* if it occurred at a council.[17] While hopefully those practices have since improved, it certainly remains the case that the Department's processes are largely opaque and do not afford the same transparency that would occur at local government.

More generally, decision-making and policy development at Departmental level seem, to an outside observer, excessively devoted to managing political risk through the maintenance of secrecy.[18] Major planning mechanism changes are frequently announced that emerge as complete surprises to industry and councils, and which would have benefitted from consultation during the process. The secrecy that surrounds such changes creates integrity risks along the lines described by Jerrold Cripps above about access to information. This risk is exacerbated by the increased use of planning consultancies in executing key reforms such as the Smart Planning agenda, which increases the number of people outside of the Department who are aware of information about upcoming reforms that is not in the public domain.

The secrecy and lack of transparent justification around Ministerial decisions is a particular risk given the huge discretion available to the Minister at many points in the process. I think it is appropriate that the Minister has broad discretion to change planning schemes, if only to avoid situations where a planning problem becomes irresolvable. However broad discretion needs to be constrained by a rigour of process and transparency of decision-making that in my view does not currently exist.

Planning Panels Structure and Operation

I have touched upon the important role played by Planning Panels Victoria (PPV) at several points in the process. Planning Panels provide crucial oversight of the scheme amendment process.

I stress I do not do enough amendment work to make informed comment about how PPV undertake these tasks. It would be interesting to know how adequately resourced PPV considers itself to be to undertake this important role. However I would make a couple of in-principle observations about the current arrangements.

The first is that the role of panels in the amendment process is somewhat ill-defined. Panels are charged under the Act specifically with responding to submissions; but at the same time they are provided wide scope to make findings as they see fit (see the *Planning and Environment Act* ss 24, 25, and 25A). This somewhat mixed signalling under the Act, I think, creates confusion about the level of

[17] Victorian Ombudsman, 'Investigation into Advice Provided to the Office of the Minister for Planning by The Department of Planning and Community Development in Relation to Land Development at Phillip Island' (Victorian Government, March 2014). The observation about the *Local Government Act* is mine, not the Ombudsman's.
[18] I last worked at the Department in 2010.

scrutiny panels should provide; this feeds into the issues I have mentioned about diffusion of responsibility in the amendment process.

I also have reservations about the structural governance of PPV. PPV is managed from within the Department, as distinct from the much more arms-length model that applies to VCAT (which is managed through the Department of Justice). It is also heavily reliant on sessional panel members. Given the critical role panels play, especially in relation to environment effects enquiries,[19] on highly sensitive government projects, I do not think that this arrangement provides enough structural protection to ensure the independence of panel members. It is too plausible, for example, that a panel member might expect an adverse finding on a high profile government project would affect their future employment.

Again, this is not to offer any comment on the actual performance of panels; my comment is about the governance arrangements that apply and their theoretical suitability.

Combined Permit and Amendment Process

I have commented about the broad discretion provided to the Minister at several points in these responses. In general I have defended broad discretion and argued that it should be surrounded by clearer justification and better processes. However I do think the combined permit and amendment process, under s 96A of the Act, warrants some comment. In their book about the system Des Eccles and Tannatje Bryant say the following about the process:

> We have grave concerns about the combined process. It provides almost unlimited potential to by-pass what most would consider to be an acceptable level of community consultation and participation in both scheme amendment and permit granting processes … The overriding concern from a public policy point of view is that, in the absence of any real brake or fetter on the powers available to the Minister in the combined process, decisions may be made on the basis of political expediency and / or to assist powerful friends of the government, whatever its party political hue, rather than on planning merits.[20]

I share these concerns. The rolling together of a decision-making process made against the rules of the system, with a process of simultaneously changing the rules of the system, represents an inappropriate conflation of two distinct governance processes. This is especially concerning given the breadth of discretion available to the Minister.

Documents Cited

Cripps, Jerrold. 'Lessons for Councils from the Wollongong Corruption Investigation.' *Planning News* 35, no. 6 (July 2009): 8–9, 30.

Department of Planning and Community Development. 'Modernising Victoria's Planning Act: A Discussion Paper on Opportunities to Improve the Planning & Environment Act 1987.' Victorian Government, March 2009.

Eccles, Des, and Tannetje L. Bryant. *Statutory Planning in Victoria*. 4th ed. Sydney: Federation Press, 2011.

Environment and Natural Resources Committee. 'Inquiry into the Environment Effects Statement Process in Victoria.' Parliament of Victoria, September 2011.

Gibson, Helen. 'Managing Changes via Sections 72, 87, 87A of the Planning & Environment Act 1987 & Secondary Consents.' *Planning News* 34, no. 8 (September 2008): 9–14.

[19] Pursuant to the *Environment Effects Act 1978* which is Victoria's environmental impact assessment regime, and provides an especially clear example of a system that places few boundaries around Ministerial discretion.
[20] Eccles and Bryant, *Statutory Planning in Victoria*, 98.

Rao, Samitha. ‘Reforming the Environment Assessment Process in Victoria.’ *National Environmental Law Review*, no. 1 (2010): 34–44.

Rowley, Stephen. *The Victorian Planning System: Practice, Problems, and Prospects*. Sydney: Federation Press, 2017.

———. ‘Victorian Planning: Re-Thinking the Model.’ *VPELA Revue*, October 2019, 41–43.

Spiller, Marcus. ‘The Corruption Honey Pot: An Economic Fix for Planning Scandals.’ Text/html. SGS Economics & Planning, February 21, 2020. https://www.sgsep.com.au/publications/insights/the-corruption-honey-pot-an-economic-fix-for-planning-scandals?utm_medium=email&utm_campaign=SGS+Newsletter+February+2020&utm_content=SGS+Newsletter+February+2020+CID_59cdbbb370ce0556dd055e6cc1286c05&utm_source=Email+marketing+software&utm_term=READ+ARTICLE.

Victorian Ombudsman. ‘Investigation into Advice Provided to the Office of the Minister for Planning by The Department of Planning and Community Development in Relation to Land Development at Phillip Island.’ Victorian Government, March 2014.