C O R R E C T E D V E R S I O N

STANDING COMMITTEE ON ENVIRONMENT AND PLANNING

LEGISLATION COMMITTEE

Inquiry into the regulatory impact statement process

Melbourne — 12 June 2013

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Mr J. Ginivan, acting executive director, state planning, building systems and strategy, Department of Planning and Community Development.

The CHAIR — I declare open the Legislative Council Environment and Planning Legislation Committee public hearing. The hearing is in relation to the inquiry into the regulatory impact statement process. I welcome Mr John Ginivan. What is the department called this week? It is changing soon, isn't it?

Mr GINIVAN — I am the acting executive director of state planning, building systems and strategy, in the Department of Transport, Planning and Local Infrastructure.

The CHAIR — That is why I did not even attempt it. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council standing orders. Therefore you are protected against any action based on what you say here today, but if you go outside and repeat the same things, these comments may not be protected by this privilege. All evidence is being recorded and you will be provided with a proof version of the transcript in the next couple of days. You have been allowed half an hour for this session, with 5 minutes for your introductory remarks. We ask that those opening comments be kept to a minimum. You have already introduced yourself. I ask you to provide a business mailing address so we can send you a copy of the transcript, Mr Ginivan.

Mr GINIVAN — The address is level 10, 1 Spring Street. The committee has the submission made by what was formerly the Department of Planning and Community Development. We have had a name change in the intervening period. In terms of the core points that that submission made, our department's view is that the RIS process should not apply to amendments to planning schemes as it is unnecessary. We say that because our view is that the planning scheme amendment process is already a rigorous process; it has numerous checks and balances in it. In many cases matters that find their way into the planning system are a result of other public policy processes that have occurred, usually involving extensive engagement, consultation and assessment of merit. It is at the end of that process that they are then implemented into the state planning policy framework. It seems superfluous to then even contemplate doing another assessment of merit when you have already done it the first time. Our view is that if the amendment process needs to be strengthened or improved, that should occur through the existing mechanisms in the Planning and Environment Act.

Our practical experience with the RIS process — and we are by no means saying that the RIS process is not beneficial or that it does not add value to policy development — is that it is often complex, time-consuming and costly. I will talk to that very briefly. We also have had experience where the need to undertake an RIS process has delayed the effective implementation of policy decisions that government has made — for example, in the context of recommendations of the royal commission post the bushfires.

We have also had experience where there are matters of public policy related to life safety where interim regulations can be made for up to 12 months, but often that 12-month period is not, in fact, sufficient time to test and gather new evidence based on the effective application of those regulations before you get caught up in a cycle of trying to argue a case to extend them for another short period while you continue that evidence-gathering process. Our comment in the submission was to the effect that a longer time period for interim regulations is necessary because there are some life policy issues that have emerged that ought to be addressed in a broader time frame.

In terms of the time, again coming back to our experience and the time taken to prepare an RIS, our experience generally with the four we have prepared over the last three and a half or four years is that it has taken about 12 months, not the 3 months or thereabouts that the guidelines foreshadow. That may well be because we have not been that good at preparing them. I am not sure, but the fact is that for all of them it has taken about the same amount of time using different consultants with different people involved in their development, which suggests that the 12 months is about the practical time that it takes for this process to be stepped through.

In terms of our experience with external consultants we have found generally that we struggle to find really capable consultants who can undertake this work. Usually it involves the department doing a significant amount of hand-holding to guide the consultant through the process of developing the RIS, and that is often because they have limited exposure to the policy settings in which the regulations that they are seeking to assess are being framed. Again, we have had variable experiences with different consultants, but in general we have not been able to find consultants who work in this field and who are exceptionally good at undertaking this task. It is costing us a significant amount to engage the consultants, and it is costing just as significant an amount in terms of staff resources to hand-hold a consultant in the process.

We are coming to a view, I think, that there is potentially some benefit in central agency and in the Department of Treasury and Finance being a bit of a clearing house, if you like, for helping agencies that do not prepare RISs all the time to scope out the approach to the RIS to get that right very early in the process. That may well in fact help on that front.

I spoke briefly to the interim recommendations question. Currently we can create interim regulations for 12 months. It was interesting in the experience post the Victorian bushfires royal commission where we had very clear recommendations from the royal commission that said the government of the day should do this. They were quite explicitly drafted. The government of the day said, 'Yes, we will implement all of those recommendations', and in some of the cases we then went through a process of preparing a regulatory impact statement to give effect to something where there had been exhaustive, comprehensive assessment through a royal commission with the government endorsing an action. In our case it cost us about $100 000 to do that. It did not value-add at all to the end result, which was that regulations consistent with what the royal commission recommended were implemented. It consumed time and resources to do that.

By no means is the department saying that the regulatory impact statement does not have value. We think it does, but I think we are suggesting to the committee that there is probably some scope to finetune the pragmatic use of the process and its application — where it really adds value and where it is not going to add value — particularly in cases where governments have made clear policy decisions to do something. In those cases it does not add value to the outcome at the end of the day. I might stop there, Chair, and I am happy to take any questions in relation to the content of the submission.

The CHAIR — Thank you. I appreciate your keeping it brief. Obviously we have heard evidence from other witnesses who have indicated that there is the expertise externally and that often they find they are — and these are not their words — holding the hand of the department as they go through the RIS process. I was interested firstly in your statement that it is counter to the evidence we have heard from others. The second point, which probably goes more to my main question, is that currently the subordinate legislation expressly exempts planning schemes and the VPP from requiring an RIS. In April 2011 VCEC recommended changing the Act to remove this exemption. It argued that the scrutiny applied to planning scheme amendments in the VPP was less rigorous than the RIS process. You are saying — not in these words — that your process is just as rigorous as the RIS, yet VCEC seems to indicate they are less rigorous. Do you want to explain how your application of scrutiny to planning scheme amendments is more rigorous than what is being suggested by VCEC?

Mr GINIVAN — In terms of the planning scheme amendment process for complex amendments — and I will make a distinction between these and planning scheme amendments which are administrative in their nature — for things which create new policy direction, as I indicated before, generally if they are initiated by the Department of Planning and Community Development, they will in all cases follow a comprehensive and normally public process of policy development. If they are matters that have been initiated by another portfolio — the Department of Environment and Primary Industries is a case in point, with native vegetation controls — then the process that led to the policy development in all cases will have worked through an exhaustive public testing, usually with its own form of RIS anyway early in that process.

Our experience is that for most matters that find their way into the planning scheme they have been tested pretty comprehensively through both the process of developing the policy but also exhibition usually of any amendment that is proposed to be made. In most cases amendments that have any technical content to them are tested through a specialist panel that is appointed by the minister to assess submissions. There is a submission process where anyone can engage and test the validity, merit and impact of what is proposed. The advice of that advisory committee is received by the minister along with the views of the planning authority that is proposing it and any other evidence that is available. Our assessment is that the end result of that is a pretty exhaustive airing of any issues and an exhaustive airing of any consequence of what is proposed, and it is rare in our experience that all of the issues are not well ventilated before a minister makes a decision to approve a planning scheme amendment.

Mr LEANE — You stated, Mr Ginivan, that you have done four RISs in the last period. How long was it? You had four that took about 12 months and cost a fair bit of money in the last — how many years was it?

Mr GINIVAN — It was three and a half years.

Mr LEANE — In three and a half years. Taking into account the time it took and the cost, do you think it was a beneficial process in each one that was undertaken?

Mr GINIVAN — In general they do assist in the development of policy because it is a rigourous process of testing the merit of what is proposed. In our case the sorts of things that RISs were prepared for were in relation to caravan parks and movable dwelling regulations and in relation to regulations for bushfire protection for vulnerable use buildings, which was an amendment to the building regulations — so they are principally in the building space. We had another one in respect of fees that are proposed under the Planning and Environment Act for planning permit fees and amendment fees.

Some of those added value; some did not. As I indicated, the regulations for bushfire protection for vulnerable use buildings did not fundamentally change at the end of the day what the government is implementing. It cost us $99 000 to work through it and the time and human resources to prepare it, which was a human resource that probably could have been effectively implementing other bits of bushfire royal commission recommendations at the same time as it was doing and hand-holding this regulatory impact statement. So I think it varies, which is why our comment is that we possibly need to get to a model where the application of the RIS process is better targeted to where it will really add value rather than applying a process for the sake of having a process.

Mr LEANE — How do we come up with a recommendation that is the target for that process? Are you saying it should be targeted? How would it be identified that this is where it needs to be targeted?

Mr GINIVAN — One way you could do that is to put in place a model where there are some improved criteria around instances where a regulatory impact statement is required. Where there has been a demonstrable decision in public policy terms to do something for the public interest, then why would you go through this process a second time — for example, in instances around royal commission recommendations or matters of public safety where from time to time governments need to move quickly to resolve a gap in regulation?

This process does not stop them from doing that, because clearly you can establish regulation on a 12-month basis; but our experience again with most regulatory processes in government is that 12 months is a very short time and it does not in fact provide sufficient scope of time for any effective evidence about the consequence of that change to be structured in a way where you can determine that what the government did was the right thing to do, or whether you in fact need to modify it for further application into the future. Again we are not saying that you apply an RIS process in that instance, but we are suggesting in our submission that you would create a longer window of opportunity where interim regulation can apply, where it creates a sufficient window of opportunity to gather the evidence properly, to test it and to inform government about whether what it decided to do — even if it is in the light of a royal commission — was the right thing to do.

Mr ONDARCHIE — I just want to pick up the point the Chair was making with you about the RIS process and the use of consultants. I think you were suggesting to us that you were having end-to-end problems with consultants — they cannot take you all the way through — and that it was draining some resource time within the department to make sure you complete the task. Is that what you were telling us?

Mr GINIVAN — Yes.

Mr ONDARCHIE — Are you telling me there are no consultants out there that can do the end-to-end process for the department?

Mr GINIVAN — In any of the business that we have prepared we have not had an experience where it has not required significant hand-holding and process management by our staff.

Mr ONDARCHIE — It must be just about the only process in Victoria that a consultant cannot do.

Mr GINIVAN — No, we are not saying they cannot do it; we are suggesting that it takes longer than the guidelines would suggest to do this well.

Mr ONDARCHIE — What is the gap?

Mr GINIVAN — In our experience each of the RISs that we have prepared over the last three and a half years has taken about 12 months end to end.

The CHAIR — If I may continue on the extent to which the guidelines have been developed, they were initially about 20 pages in the 1990s, and I think I read today that they are now in excess of 90 pages plus another 114 pages of appendices. Is it the fact that you are trying to comply with overly prescriptive guidelines?

Mr GINIVAN — It is partially that, I suspect. In our case in some instances it is because the evidence is not necessarily readily available, so there is a complex process that the consultants will work through to try to come up with surrogate measures and surrogate indicators in order to prepare the RIS. That is particularly the case where governments have needed to create regulation because there has been some public safety or other issue where you do not necessarily have a body of evidence, so it is difficult then for a consultant to simply lay their hand on evidence to deliver the case when the statistics are not necessarily there. That comes back to our principal comment — that is, in those instances you probably need a longer window of opportunity to in fact gather the right evidence to test the validity and veracity of what has been implemented properly.

The CHAIR — Are you saying that because of the uniqueness of what you are doing there is not that competency to be able to undertake a RIS process? Is that what you are saying?

Mr GINIVAN — What I am saying is that in some cases there is not a body of data and evidence readily available on which to do RIS analysis. That makes the task for the consultant very difficult, which is why it takes longer to try to undertake that task.

Mr ONDARCHIE — So you would rather do it in house; is that what you are saying?

Mr GINIVAN — No, we are not suggesting we do it in house. What we are seeing in our practical experience is that in some of our cases we have not had the body of evidence to prove a case one way or the other, even though a government is in the position where, for whatever public safety reason, it has needed to move on something reasonably smartly.

Ms PENNICUIK — I just found that conversation curious because most of the other evidence we have heard is that — I will say from consultants anyway — they are the experts and there is not much expertise in the departments. It is interesting. I just want to pick up — —

Mr GINIVAN — Can I just respond to that? We would not be in a position to undertake all of the elements that we would engage a consultant to undertake. We use consultants every time; we do not have in-house skills or resources to do that, so I am not saying that it is a task that we would ideally do in house. What I am simply saying to you is that we still find, even using PricewaterhouseCoopers and a range of other consultants — I should not mention any particular companies — that there is still a very significant task for us in engaging with the consultant around how they might find the evidence: where you might get the data from where the data does not necessarily exist; how can you create information that does not necessarily fall readily to hand? That is the sort of practical experience we have had.

The CHAIR — Which gets back to my original point. Is it because the guidelines are too prescriptive that they require evidence when there may not be evidence? Are they applying the guidelines to the point that the guidelines are not compatible with what you are seeking?

Mr GINIVAN — We are presuming that is the primary driver of that.

The CHAIR — Some of the other evidence, whilst I am on that, supports a two-stage RIS process. Are you aware of that? If so, do you have any comment on it?

Mr GINIVAN — We would certainly support that, because again our practical experience is that a two-stage type of process allows an initial testing of merit. It allows potentially some opportunity, through interim regulation or otherwise, for the evidence to be properly gathered and tested to the point where you can then do a proper legitimate analysis when you have got the evidence at hand.

Ms PENNICUIK — My question really was following up something you were saying about royal commissions. I was not sure whether you were saying that if a royal commission has made recommendations about a particular issue recommending the government take certain actions, you would not need to then go through a regulatory impact statement or assessment, because that has already happened during the royal commission. Are you sort of implying that a royal commission does the same job?

Mr GINIVAN — No, I am not. What I am saying is that usually in the case of royal commission-type incidents — there is usually a very exhaustive testing of matters that emerged as a result of the royal commission. There are often very explicit recommendations that are made. Usually it is of the greatest consequence and significance if it is a matter that did come before a royal commission, and governments usually need to move promptly once they commit to implementing recommendations of a royal commission to give effect to what the royal commission said should happen. What I am suggesting is that where royal commissions have made explicit recommendations, there is little value-adding in doing another merits test of whether or not you should proceed to implement what the government has already said should be implemented when a royal commission has determined that something should happen. It does not change fundamentally the outcome, which is that a recommendation they made will be implemented.

Mr SCHEFFER — You said a bit earlier on that if the technical expertise did not exist in the department, then it made sense to use consultants to do particular work around RISs. Can I ask you: are there accountability or technical reasons why RISs should be outsourced?

Mr GINIVAN — The primary reason is that in our case we would not have the in-house accounting and modelling skills necessary to do it with the quality that you would get through a large consulting firm that has those in-house skills. We just do not deploy them enough to warrant having those skills on the payroll day in, day out. Some other entities may. If they are making a sufficient number of regulatory impact statements, they may well make the choice to have those skills in house. I suspect it would be horses for courses. In our case we do not.

Mr ONDARCHIE — John, I just want to pursue that issue I was talking to you about earlier. Could you give us, in your view, your estimation of the percentage gap between what the consultants can do and the end product that needs to be topped up by the department?

Mr GINIVAN — I would be hazarding a guess, but it is probably about 40 per cent.

Ms TIERNEY — Two questions. You mentioned right at the beginning that one option might be for Treasury to have a greater input at the beginning of the process. What would that look like, and would those people have specific skills that would be similar to the base skills of the consultancy that you would employ?

Mr GINIVAN — I think what I am hinting at is partially what the Chair hinted at in terms of a potential two-stage process where you would have, I guess, a bringing together of knowledge. We certainly engage with VCEC and with Treasury in any RIS process that we are running anyway. We do that to ensure that we can gather as much intelligence early in the process around shaping what we are doing — the approach, et cetera. My sense with this, though, is it is a fairly complex thing. It is expensive if you do not get it right first time, so wherever there are opportunities to improve the flow of knowledge and sharing of experience around what has worked well, to potentially focus in on the actual approach to the RIS, the potential staging of that, whether you use it to eliminate some options through the process of development of the RIS — I think there are some opportunities for improvement there. That is principally what we are saying.

Ms TIERNEY — Just another question on a completely different topic, and it is to do with local government. The MAV provided evidence to the committee in relation to their view of departments and agencies failing to properly consult with them when new regulations are being developed. Of course that has a significant impact, given that they are largely the bodies or are often the ones that have the burden of administration and enforcement. What is your view in respect of what the MAV has asserted?

Mr GINIVAN — Certainly in some cases, depending on what the policy matter is, governments will need to establish regulation, or, in the case of the planning system, make changes to the planning system, depending on what the substance of that is. There will be detailed engagement with the relevant local government, if it is a small impact. For matters that have broad, statewide consequence — and I will use the bushfire experience, because that is a topical one. That raised matters that needed to be implemented across the state in a timely manner. It lifted the bar significantly in terms of the expectation in terms of, in that case, the planning system and planning decisions around use and development in high fire-risk areas. It certainly was contentious. It will remain contentious, because it has fundamentally shifted public policy around how the Victorian community deals with risk.

In those instances some councils would probably feel aggrieved by that; others would see it as a positive step forward. There is always going to be a reality, I suspect, where governments need to make and apply changes that affect the whole of the state.

Ms PENNICUIK — I will just follow up again, if I may, on the subject of the royal commissions, focusing not just on the bushfires royal commission but on the idea of a royal commission in general, which usually has distinctive terms of reference that can be quite narrow. When I raised that with you before, you gave me your view. The next question was about skills and expertise in the department, and you answered that by saying that you did not have in-house accounting and those types of skills that would be needed for an RIS. I would suggest that perhaps a royal commission does not have those skills either. So — and I am just talking generally — things coming out of a royal commission might not necessarily have canvassed all the impacts of a possible regulatory instrument. I am just exploring the idea that just because a royal commission has come up with a recommendation does not mean it has looked at it from all the angles that a regulatory impact assessment would.

Mr GINIVAN — Yes, I would accept that. Again, my comment on that would be that it will depend on what the substance of the royal commission is and what it is dealing with. In instances where you have had a royal commission that has dealt with particular matters — in this case what is the building standard for buildings that you put in kids, elderly people or otherwise — and it has focused in on those specific questions with experts round the building system, builders, designers and others, and tested what would work and what would not work, then in those instances where a specific focus and evidence has been brought around a particular matter it has probably come to the right conclusion. I would accept what you are saying — that is, that a royal commission that did not actually delve into the specifics that the regulation was dealing with may not in fact be qualified and you may well end up with a bad policy outcome.

Again, I think there needs to be an approach that reflects the pragmatic real-world circumstances. If there is detailed evidence that is relevant to the substance of the regulations you are dealing with and a clear articulation of all the consequences of that, then it would probably be superfluous to go through that process a second time.

Ms PENNICUIK — I have one more question, and that goes to the statement you made in your remarks at the beginning and also in your submission, where you say:

> The department considers that the impact assessment undertaken for significant planning scheme amendments is already comprehensive and rigorous. However, if this needs to be strengthened, it should be done using the tools already available under the PE act, rather than by applying a new process.

Before that there was a lot of talk about streamlining et cetera. I am just taking this from the point of view of members of the public, not necessarily local government, who do not necessarily see themselves as having an equal role or an accessible role in the planning process and can sometimes feel left out of it. Particularly when they see words like 'streamlining' and you talk about business opportunities — and there is nothing wrong with those — often members of the public can see that that means something is going to go ahead despite other values that they may have. So I was wondering whether you see the Planning and Environment Act as perfect or you think it needs some tinkering or changes to make it better in terms of public engagement, because there is certainly a lot of dissatisfaction from the public.

Mr GINIVAN — I will answer that by saying that the department is currently implementing for the government one of the biggest reforms of the planning system in a long time. It is doing that because over time the planning system has become more complex. And that is probably quite legitimate, because more and more issues have emerged in public policy that are now expressed through the planning system. But there is very clear evidence that the structure of the planning system could be improved in terms of legibility, the ability to apply it and the ability to understand what it actually means for different areas of the state, so that is the key focus there. There are opportunities which are now being acted on to improve how planning permits for low-impact decisions are dealt with, and there is legislation now in place to provide for that. Where there are known consequences that are low risk and low impact, these things ought to be dealt with quickly; it should not take people months and months to work through a tortuous permit process.

In terms of the process for planning scheme amendments, again one of the reforms has been to speed up the ability to deal with administrative amendments. So where the name of something changes, for example, and it has been referenced in the planning scheme, an amendment process is needed to actually change and refer to the new name of the document. That has been quite resource-intensive. There is an improved process that allows

those sorts of low-impact, low-risk things to happen much more quickly in terms of amendments that have an external consequence.

The processes that are currently in place, I think, are pretty comprehensive in that the majority of amendments are exhibited and there is opportunity for public comment. For those that run through a panel process, my experience with panels is that they will ensure that the legal fraternity does not dominate that process at the expense of the average citizen being able to express their view, because one individual's view might be the right view and it might well be that all the lawyers in the room have the wrong view. Again, my experience is that panels and chairs of panels in those instances focus absolutely on ensuring that the process does not lock people out of it. Whether people feel comfortable in engaging in any form of a quasi-legal process I guess is a matter for individuals to judge, but my sense is it is a pretty transparent, pretty open process currently, with ample opportunity for people to engage in it if they choose to.

Ms PENNICUIK — Thank you for that answer, but I still think we all know there is a lot of dissatisfaction in the community with the process, so I am interested in your views on that.

Mr DALLA-RIVA — Thank you for that statement at the end, Ms Pennicuik.

Ms PENNICUIK — You are welcome, Chair.

Mr DALLA-RIVA — I am conscious of the time; the other witness is waiting. There was just one clarification needed for Hansard: your estimation of the percentage of the gap between what the consultants can do and the end product that needs to be tapped in — was it 40 per cent?

Mr GINIVAN — Yes.

The CHAIR — Thank you. It is 40 per cent, for Hansard. Mr Ginivan, thank you very much. We will now conclude your evidence. You will receive a copy of the proof version of the transcript in the next couple of days, as I have outlined. After you have reviewed it, it will be placed on the public record and be part of our consideration for the final report, due by the end of the year. Thank you very much.

Witness withdrew.