

Review of Victoria's Public Land Legislation

Submission by the Centre for Urban Research, RMIT University

Introduction

We welcome the opportunity to contribute to this very important review of public land across all sectors, a matter that has profound consequences for all Victorians now and into the future.

We wish to highlight the importance of carefully navigating between the *rhetoric* of more efficiency for the benefit of all and the *realization* of the loss of net public benefit that can occur when necessary checks and balances are removed, and parts of the public estate are sold inappropriately, commercialised or compromised.

This submission has been prepared by senior research staff at the Centre for Urban Research (CUR) at RMIT University, who lead research on climate change, housing, planning, transport, urban cultures and governance. We provide comments and recommendations on key matters set out in sections below as follows: relationship to Treaty obligations; the definition and framing of public land; governance of public land; use and disposal of public land; and the process of this review. We provide a series of recommendations based on these points.

Treaty and sovereignty

The emphasis, and foregrounding, on supporting Traditional Owners' self-determination in relation to public land is welcome and long overdue. Given the history of colonisation and dispossession in Victoria, and the very few and highly narrow means of redress for Traditional Owners and the wider Aboriginal community, the governance, use and management of public land is a matter of great significance.

However, there is a tension in the document between acknowledgement of Traditional Owner rights with the framing of public land governance and management through a colonial structure. Public land is also the unceded sovereign land of First Nations peoples across Victoria. It is long past time that this foundational fact was recognised and codified into the public land governance and management framework in Victoria.

This requires recognition of the ongoing sovereignty of Traditional Owners over all public land, regardless of any other context or the extent to which there is formal recognition, formal incorporation or similar of any particular Traditional Owner community. This relationship should be framed as one of co-existing entities, as a Treaty process demands. First Nations peoples are not merely a 'stakeholder' to be consulted by government. The State should be working towards a sharing of power, responsibility and authority on First Nations peoples' terms. This would help toward reconciling the colonial structure and framing of public land and actual meaningful recognition of Traditional Owner rights and responsibilities.

A meaningful step in this direction would be to frame the review of public land within the context of the Treaty process in Victoria. It is concerning that the review supporting document ‘Realising the value of Victoria’s public land’ is entirely silent on the relationship between this review and the Treaty process. The Treaty process clearly obliges the State of Victoria, and all non-Indigenous people in Victoria as represented through the State Parliament, to treat honestly and openly with First Nations peoples. A key concern must be access to, governance of, and management of land – how, on whose terms and under what conditions. The question of public land is therefore a material matter for the Treaty process. The current review process appears to fail to meet the obligations of the State and of non-Indigenous Victorians whom the State represents at the Treaty table in relation to these matters. The review process as documented also appears to fail the basic principles of Free, Prior and Informed Consent, as required by the UN Declaration on the Rights of Indigenous Peoples. We urge consideration of these matters and a reframing of public land itself, and the review process, to deliver the State’s obligation to Traditional Owners and Aboriginal communities across Victoria.

Framing and definition of public land and the need for review

The way that public land is framed in the discussion paper seriously understates its importance now and into the future. The review document frames public land in general terms as ‘state property’ yet lacks clarity and specificity about what land is included. Does the review pertain to all publicly owned land in Victoria? How and in what ways? We agree that there is a need to clarify many of the complexities of public land governance and management in Victoria. Beyond ‘complexity’, however, the review document is not at all clear on what problems will be resolved through legislative reform. A clearer framework that places collective and public interest at the centre of the idea of public land is urgently needed. It is vital that public land is not misrepresented as merely private property owned by the state. The state is the custodian of land for the public, in co-existence with First Nations custodianship, and this is fundamentally different from thinking of land in private property terms.

We note there is also relatively little attention and only superficial engagement with terms such as ‘value’. Of value to whom, how and according to whom is value decided? What criteria guides the understanding and determination of value? Although the dominant neoclassic economic model reduces value to market price, all land, and public land in particular, has far wider value, including intrinsic value. In the opening paragraphs of both the Minister’s foreword and the section ‘Renewing Victoria’s public land legislation’, public land is framed purely in terms of its ‘value’ to humans, with no consideration of its ‘intrinsic value’. This is a serious omission, given that natural values are listed as one of the proposed values of public land (Appendix A). More broadly, there is a lack of due consideration given to the contribution that public land makes to Victoria’s ecology and environmental health and to the potential to respond to climate change.

The review document contains an overreliance on concepts such as ‘realising value’, ‘assets’, ‘management’, and ‘managers’ which detracts from broader more encompassing connections

with land. Framing the people with day-to-day responsibilities for public land as ‘custodians’ or ‘stewards’ would establish a different relation to public land and a stronger sense of responsibility to ensure that public land is passed onto future generations in good condition. Such a perspective could be used to re-imagine the proposed objectives and activities outlined in Appendix A.

The review document (in Appendix B) proposes new public land categories. Articulating a cohesive and comprehensive set of public land categories requires very careful consideration. As it stands, the review document explains only ‘typical features’ and that the categories ‘are not intended to prescribe all permitted land uses for a particular category’. This would appear to leave a lot of wriggle room for undue discretion whereby land managers will be empowered to ‘consider other factors when making management decisions, including the nature of individual reserves, community views and expectations, and regulations applying to the land’. There is little point having a taxonomy of public land categories and associated purposes if land managers have the discretion to arbitrarily re-interpret these categories.

Governance and new legislation

Effective public land stewardship requires a strong legislative foundation, that both enables and constrains use and management. There are clearly complexities and barriers in the current legislative framework. However, it is vital that any new legislation and governance arrangements do not tip in the direction of ‘growth and development’ at the cost of the environmental and socially just outcomes that underpin community values of public land and our Treaty obligations to First Nations peoples. Moves to reduce regulation are often geared toward easing perceived pressure on business and enable the fast-track of major development. Fast approvals deliver poor quality, high risk or unsustainable development that is not in the public interest and a clear breach of free, prior and informed consent in relation to Traditional Owner rights and sovereignty.

Modernising legislation may actually serve to undermine effective public land stewardship, through the removal or weakening of controls for the sake of management efficiency. Some of the examples used in the discussion paper may have far reaching consequences, most notably ‘changing the use of land that is permanently reserved requires an Act of parliament’. If a piece of land was permanently reserved for a particular purpose, then safeguards must be in place to ensure that the use of such land is not changed without due process and very careful consideration in the public interest.

While it is imperative that responsible authorities have the necessary powers to effectively respond to emergencies, it is also imperative that such powers do not impose unduly upon peoples’ democratic and human rights. Legislative powers which enable ‘land managers’ to close public land ‘in times of emergency and other crises’ need to be very carefully considered, in order to be deemed absolutely necessary, and should include mechanisms to ensure transparency, accountability, proportionality, and appeal.

The provision of increased powers to enable Ministers to ‘oversee, direct, and support public land managers’ also need to be very carefully considered in order to be deemed acceptable. If such powers were to be granted then mechanisms would need to be established to ensure transparency, accountability, proportionality, include avenues for appeal, and that Ministerial interventions do not undermine the stewardship of public land. The discussion paper is silent on such processes, criteria and checks and balances.

The proposed framework lacks any real sense of what the new Act might contain, as does the proposal to modernise the National Parks Act. There needs to be much more detailed information made available so that informed consultation can occur. Greater clarity and precision about transitional arrangements is also needed. The review discussion paper is completely silent on these matters.

The proposed framework lacks any development or discussion of an appropriate mechanism for Traditional Owner expression and practice of political authority, on terms designed by and serving Traditional Owner rights and interests. This is a governance matter that needs urgent attention in the review process.

Use and disposal of public land

The review does not appear to consider the very serious concern about loss of public land through disposal and sale. We remain very concerned about the existing system of Treasury setting revenue and ‘surplus’ targets for Departments in relation to their land holdings. Such a mechanism encourages agencies to focus on narrowly defined criteria when making decisions about land in their portfolio that is deemed ‘surplus’. The Department of Education and Training, for example is one of Victoria’s major public land managers but is barely mentioned in the consultation paper. The Department focuses narrowly on school demographics in determining the future of valuable and often well-located school sites, rather than taking a wider view of the potential of such sites to help meet the life-long educational or other social needs of communities, with a view to repurposing facilities. There are excellent examples of school site re-use and re-purposing to provide shared facilities and community hubs, but policy and budget settings are generally not favourable to such an outcome.

It is very significant concern that public land is continuously being deemed surplus to use without being considered in a much broader public value framework. The hierarchical schema set out in the Victorian Government’s Strategic Crown Land Assessment Policy and Guidelines (2016), which assigns a “low” public land value to “land which is important to the local community or municipality” (p. 6) is fundamentally damaging to realising public value from public land.

The discussion paper focusses on non-metropolitan public land holdings. We argue there are a significant and distinctive set of issues that require analysis and wide discussion regarding urban public land holdings. Foremost of these is the disposal question. This is particularly concerning in relation to housing, we also note this is a matter of deep concern in regional

centres and rural areas. Victoria has a growing housing crisis and a shrinking supply of public housing. The current housing policy agenda of renewal and shifting to community housing providers does not meet community standards of equity and fairness and good public value for investment. The result is a very significant loss of public housing land to the private market in a context of deepening housing inequality and stress. At the same time, public lands are continuously being sold that would make excellent sites for public housing development to immediately address housing need. Direct delivery by Government of public housing on public land is well established as the most cost effective, fair and sustainable method for addressing homelessness and housing-related stress.¹ No public land should be disposed of in Victoria without being seriously considered as to its feasibility for the direct delivery of public housing.

The quasi-market system that operates in Victoria is deeply damaging in this regard and should be reformed urgently. The current system of right of first refusal of public land offered to other departments or local authorities “on the basis of the current market value based on the highest and best use of the land as determined by VGV” [Valuer General Victoria] (Dept of Environment, Land, Water and Planning: Victorian Government Land Transactions Policy and Guidelines, 2016, p. 13) is fundamentally broken. Many government departments and local authorities have limited budget capacity to take up such opportunities. A needs-based approach with a strong public value framework where sale of public land is the absolute last resort would be a better mechanism for assisting the transfer of public land within government toward better utilisation.

The fallacy of disposing of public land deemed ‘surplus’ is exposed in recent negotiations by the Victorian Government to purchase a number of sites in inner Melbourne for new schools. This need arises after a trend of disposing of key inner Melbourne school sites in the past 20 years, which is precisely the reason the government is now not well positioned to respond to new educational and social service demands of a changing population geography. Similarly in relation to housing, when public land is no longer available, the prospect of providing well-located public housing becomes much harder and more expensive. These significant barriers similarly exist in relation to the need for land to ensure urban wildlife corridors and refuge habitats. All of these matters make it of urgent importance and public value for preserving existing public land holdings by placing a moratorium on all future public land sales and instituting a clear and transparent public value framework for the use and repurposing of public land. A good place to start would be the 2017 Land Use Victoria (DELWP) report *Victorian Government Land Use Policy and Guidelines: Unlocking Public Value from Public Land* which sets out a holistic public value framework recognising environmental, social economic and inter-generational values of public land.

Linked to these matters of public value on use and disposal is the lack of existing available data on public land holdings creating a poor basis for communities to make informed decisions about public land holdings. As a group of professional researchers, we have difficulty with data discoverability in this area on matters of vital public concern. A key consequence is the lack of

data to support proper analysis of the cumulative impact of decision-making about use or disposal of public land, to assess local social and ecological impacts. In this regard, we endorse the objectives of the proposed Public Land Act under the theme Care of the Public Land Estate, in having regard for incrementalism.

Process of this review

We wish to note a series of issues that together suggest this public land reform consultation process has been unduly circumscribed. These limits to genuine consultation are concerning given the gravity of the reforms proposed and their consequences for all Victorians.

The review document ‘Realising the value of Victoria’s public land’ was released on 8th April 2021, with concerned parties given 37 days to respond. This consultation timeline has been unduly brief. Given the very broad and complex implications of land legislation and the diverse stakeholder groups involved, we deem this timeframe unrealistic and suggest it falls well short of best practice timeframes that support genuine consultation amongst all stakeholder groups.

The review document states that ‘feedback will be used to address the new legislation, along with ongoing discussions with Traditional Owners and targeted consultation with various stakeholders of detailed aspects of the new legislation of key relevance to them (e.g. current public land managers).’ (p7.) However, the document also sets forth a pre-formulated New Public Land Act, as part of an apparent rationalization of current land administration processes. The details of this new Act appear already fleshed out, inasmuch as a new Public Land Act is proposed and a new framework for the Act is established, involving consolidating current public land legislation, the Crown Land (Reserves) Act, Forests Act and Land Act (p6).

This strongly suggests an untenable degree of policy resolution in advance of this consultation process, on how DEWLP intends to ‘realize the value of public land’. This apparent premature decision-making raises questions about the objectives of this consultation process. This raises doubts about the level of public participation on offer through this process and the extent to which feedback provided by ourselves and others will be incorporated to improve decision-making around the future legislative treatment of public land.

Details of the proposed transition to this new legislation are very vague; the review document suggests only that the transition period will involve ‘appropriate transitional arrangements’ and appears to seek to reassure by emphasizing that this legislation will not change *current* arrangements with regards to *current* accepted land uses, *current* protections afforded to protected areas, *current* protections afforded to Traditional Owners’ rights and interests, and *current* tenures. We are concerned with what is left unsaid by the emphasis on ‘current’ status, and what this means for future contestations around these processes.

We note multiple concerns with the content of this consultation, some set out above, including lack of adequate detail on the processes involved to date (eg how have Traditional Owners been engaged), and lack of background to contextualize the proposed reform. We especially

note DEWLP's failure to set out a clearly defined policy problem in the review documentation. This deepens our doubts that this consultation represents post-decision consultation rather than a genuine participatory process.

Recommendations

1. A moratorium on public land sales to ensure obligations to Treaty negotiations are upheld finalised
2. Reform of existing market-based approaches and Treasury targets about land deemed surplus to particular Departmental or Agency requirements to be replaced with a more transparent process of decision-making about the future of public land based on a strong public value framework for qualitatively assessing the utilisation of public land to address community, Treaty, social and ecological values
3. Provision of a much greater level of publicly-accessible data and information about Victoria's public land holdings;
4. That exposure drafts of any new public land legislation are provided with adequate time for stakeholder engagement and consultation.
5. Establishment and implementation of a proactive, transparent and inclusive process for the further consideration of any proposed reforms to Victoria's public land legislation including longer consultation periods for all future engagement
6. Reframe the proposals for new public land legislation with a more encompassing conception of public land based on public value and the principle of custodianship/stewardship as foundational concepts.
7. Consider how accepted principles of good environmental governance could be more fully incorporated into the 'land management principles' set out in Appendix A
8. Reconsider the approach to the mandatory tenure proposals set out in Appendix C of the review document. These have potentially profound implications and require extensive public consultation and consideration.

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ⁱ Lawson, J., Pawson, H., Troy, L., van den Nouwelant, R. and Hamilton, C. (2018) *Social housing as infrastructure: an investment pathway*, AHURI Final Report 306, Australian Housing and Urban Research Institute Limited, Melbourne, <http://www.ahuri.edu.au/research/final-reports/306>, doi:10.18408/ahuri-5314301.