



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING, TRANSPORT, AND CITY SERVICES
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Submission Cover Sheet

Inquiry into the Territory Plan and other associated documents

Submission Number: 022

Date Authorised for Publication: 14 December 2023



28 November 2023

The Secretary
Standing Committee on Planning, Transport and City Services
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SUBMISSION TO THE INQUIRY INTO THE TERRITORY PLAN & OTHER “ASSOCIATED DOCUMENTS”¹

1. This submission to the Standing Committee on Planning Transport and City Services (SCPTCS) is made in response to its media release 2 of 13 October 2023 and in the expectation that it will appear on the inquiry website as a submission.

2. Media release 2 invited members of the public to provide “anything additional that was not covered in an earlier submission to the ACT government.” The media release appears under “Other Documents” on the inquiry website, together with 24 Expressions of Interest (EOIs) that were submitted in response to media release 1. Submissions to the Committee appear under “Submissions.” Some members of the public believed they must submit 2-page EOIs, while others thought they could make normal submissions, and some did both, causing unfairness and confusion.

3. The Territory Plan (NI 2023-540)² and “associated documents” have been released since earlier submissions were made. Other developments since those submissions include:

- The hottest year on record with climate change becoming more of an existential threat, and
- Over forty Notifiable Instruments (NIs) on planning have been signed by the Chief Planner and are subject to amendment by him and very limited scrutiny,³ and
- Training has occurred on the new system that further exposes the extent of the discretions and the Chief Planner’s powers, and
- More control is being sought over the National Capital Authority (NCA), that acts as a partial counterbalance to the monopolisation of power over ACT planning with insufficient scrutiny.
- The EPSDD 2022-23 *Annual Report* shows that the body that is being given greater discretion has a high overturn rate of 46% of the DAs being reviewed at ACAT (p.385).
- The foreshadowed governance review has occurred with only the governors and not the governed being consulted.
- The heritage review has reported without adequate reference to stakeholders and the impact of the planning changes on heritage.

¹ “Associated documents” is interpreted in accordance with its general meaning and not the meaning ascribed to it in the *Planning Act 2023* s.501. That section defines associated documents as including various documents associated with development applications such as environmental impact statements. The Committee is examining supporting documents of the Territory Plan that are referred to in the Plan (see Part A on Administration and Governance).

² Made pursuant to the *Planning Act 2023* s.45.

³ 42 NIs on planning were notified during the three-week period from 11 September to 3 October. That is 14 NIs per calendar week or two per day. Most of these are “associated” or supporting documents.

4. In these circumstances the danger of granting wide discretion on planning decisions is even more apparent and I attach a risk warning (Attachment A) recommending more risk mitigation controls.

5. In summary, my answers to the questions the Committee asks are:

a) *What the policy goals are for the new system and whether the new system is able to meet these goals.*

The policy goal of the new system is outcomes-based decision making to give flexibility and allow a more responsive planning system to meet the needs of a growing city. The new system largely removes rule-based decision making and replaces it with discretionary decision making. Experience and research show that this will not produce a system that is able to meet the needs of the city, particularly at a time of climate change.

b) *How Variation 369 and the ACT Government's commitments to Living Infrastructure targets are embedded in the Territory Plan, as per the Committee's earlier commitment to inquire into its implementation within 12-18 months of its commencement.*

Variation 369 and the living infrastructure targets are not "embedded" in the Plan in a meaningful way. They are essentially considerations to be taken into account when undertaking discretionary decision making and are unenforceable under the current framework.

ATTACHMENT A – RISK WARNING ABOUT THE TERRITORY PLAN AND ASSOCIATED DOCUMENTS.

A1. There are well known risks from using discretion rather than rules in decision making and there is widespread discretion in the documents under review. There is also a systemic risk from climate change. If this Committee accepts these risks it should recommend risk mitigation strategies including immediate tracking and evaluation systems.

Discretion versus rules

A2. Legislators and administrators frequently grapple with the rules versus discretion debate.ⁱ Here, the claims of flexibility and "trust the decision makers" have prevailed. Furthermore, and surprisingly, in light of current knowledge, there are few curbs on discretion in the new framework. More attention should be given to accountability, transparency and fairness.

A3. The risks of discretionary decision making are as follows:

Corruption and carelessness Discretion is power and power can corrupt. Discretion and money and secrecy is a recipe for corruption. Power produces carelessness in dealing with people's lives. Motives and discretion interact to influence actions that impact on justice. By comparison, rules are more public than private discretions.

Irrelevant considerations Discretion makes it easier for decision makers to apply irrelevant, illegitimate considerations to their decisions. It is easier to make mistakes when applying discretions and there is more limited review of decisions, leading to less accountability and loss of confidence in the system.

Trust Deficit Discretion involves trust and the more a person or organisation is trusted, the more discretion they are given. There is insufficient evidence to justify the high level of trust in the TPA. When misplacement of trust becomes obvious, confidence in a system is undermined.

Horizontal equity unprotected While discretion allows for attention on an individual case, rules provide for attention to broader needs. Like cases should be treated alike. Discretion reduces equity and consistency which undermines confidence in the system.

Legitimacy undermined Discretionary decisions can be seen as reflecting personal and arbitrary preferences and showing untoward favouritism for the winner or prejudice against the loser. This reduces confidence in the system. Also, people need to know in advance how a case will be decided so they can plan. Rules provide a standard against which action can be judged and a guide to how to behave.


Efficiency reduced The flexibility that discretions allow has the disadvantage of creating less certainty. By comparison, rules distil experience of how a case should be handled. Inevitably, with discretions, practices develop as informal “rules” to structure discretion. Monitoring is needed.

Review of decisions reduced The right to seek correction of a decision is an important safeguard for accountability and fairness. Review of the exercise of a discretion is limited and this reduces accountability and leads to loss of confidence in the system.

Risk mitigation controls

A4. Decision making processes are complex and impact on the broader community. Attention must be paid to each step. Firstly, procedural safeguards that should be embedded include: the right to be heard before a decision is made affecting interests; the ability to seek to correct a decision; and consistent treatment of like cases. Secondly, decision makers being trusted with discretions must be properly selected, trained, managed and monitored. Thirdly, decision making must be seen as part of a continuum that includes quality assurance of decisions to assess how well decisions work. Results can be fed back into controls so future decisions can respond.

A5. Accountability for the exercise of discretion is crucial in achieving an effective system and the legislature should demand it on behalf of its electors. Attention should be paid to reporting on decisions, reviews of decisions, quality assurance and climate impact. Individual patterns of decision making should be tracked. Integrity measures and whistle-blower protections should be implemented. Complaints should be gathered and assessed. Systems should be put in place to closely monitor the new system to see the effects of widespread discretion.


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ⁱ e.g. Keith Hawkins ed *The Uses of Discretion* Clarendon Press 1992, Carl E Schneider Ch 2 *Discretion and Rules: A Lawyer's View* https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1244&context=book_chapters; Dr Julia Black 'Managing Discretions' ALRC conference 2001 <https://www.lse.ac.uk/law/people/academic-staff/julia-black/Documents/black21.pdf>; Anna Pratt & Lorne Sossin (2009) 'A Brief Introduction to the Puzzle of Discretion' *Canadian Journal of Law and Society* 24(3), 301-312.