LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

COMMITTEE SUPPORT

QToN No. 06

Standing Committee on Planning, Transport and City Services

Inquiry into Planning Bill 2022
ANSWER TO QUESTION TAKEN ON NOTICE

Asked by Ms Suzanne Orr MLA on 7 December 2022: Environmental Defenders Office took on notice the following question(s):

Reference: Hansard uncorrected proof transcript 7 December 2022, page 6

In relation to: thresholds and tests to make the system less susceptible to vexatious litigants.

MS ORR: I am interested then to get a better understanding of the thresholds and the tests you would see as reasonable—you would see as reasonable that could be in place to make the system, I guess, less susceptible to vexatious claims.

Ms Montalban: Yes, I cannot actually recall the test for show cause hearings, can you, Francis?

Ms Bradshaw: No, I would have to take that on notice if you wanted me to look that up.

Environmental Defenders Office: The answer to the Member's question is as follows:–

In response to this question, we confirm that we maintain the view in our first submission of 17 June 2022 (Attachment A of our submission to this Committee of 10 November 2022) that it is not appropriate for the Bill to restrict the types of people who are entitled to seek review of planning decisions, or the types of planning decisions that are capable of review. Instead, we maintain the recommendations made in our submission, namely:

- the Bill should include open standing provisions allowing any person to seek review of government decisions (Recommendation 31);
- all key planning decisions in the ACAT should be reviewable (Recommendation 32); and
- there should be no limits on the matters upon which a planning decision can be challenged (Recommendation 35).

We also maintain the view expressed during the hearing that the benefits of having open standing provisions outweigh any detriment caused by vexatious claims. This is because:

- courts and tribunals in the ACT already have procedures in place to prevent vexatious claims from proceeding;

- there is insufficient evidence of vexatious claims being brought in respect of planning decisions in the ACT; and
- open standing provisions are consistent with the right to a healthy environment and the objects of the Bill, and can also lead to improvements in the law including by leading to contributions to jurisprudence and improvements in government decision-making.

1 - Procedures to prevent vexatious claims

When we refer to 'vexatious' claims, both during the hearing and in this response to the question on notice, we are referring to claims that are not able to be supported in law, that disclose no grounds of action or are groundless, or are not brought in good faith.

(a) Federal Court of Australia: summary dismissal

During the hearing, we referred to procedures that can be put in place to vet applications that are made to a tribunal or a court to prevent vexatious claims and used the example of 'show cause' hearings in the Federal Court of Australia (**Federal Court**). We understand that the practice of 'show cause' hearings has been abolished. However, the Federal Court has retained the power under r 26.01(1) of the *Federal Court Rules 2011* (Cth) to order, on application by a party, a summary judgment against the other party on the following grounds:

(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or
(b) the proceeding is frivolous or vexatious; or
(c) no reasonable cause of action is disclosed; or
(d) the proceeding is an abuse of the process of the Court; or
(e) the respondent has no reasonable prospect of successfully defending the proceeding or part of the proceeding.

If the Federal Court makes an order under r 26.01(1), the proceedings are stayed and are not permitted to continue.

Similar procedures also exist in the ACT.

(b) ACT Civil and Administrative Tribunal: dismissal or striking out applications

The ACT Civil and Administrative Tribunal (**ACAT**) has the power under s 32(2) of the *ACT Civil and Administrative Tribunal 2008* (ACT) (**ACAT Act**) to refuse to hear or dismiss or strike out applications that it deems to be frivolous or vexatious, lacking in substance, an abuse of process, or are made by a person who has previously been dealt with by a court or tribunal in Australia as frivolous or vexatious. The ACAT can also direct that the person who made the application not make a subsequent application to the ACAT within a stated period of time or without the leave of ACAT (s 32(2)(c)). ACAT may make an order under s 32(2) on its own initiative or on application by a party (s 32(3)).

(c) Supreme Court of the ACT: striking out pleadings and summary dismissal

Similarly, the Supreme Court of the ACT (**Supreme Court**) has the power under r 425(1) of the *Court Procedures Rules 2006* (ACT) (**CPRs**) to, at any stage of a proceeding, strike out pleadings that disclose no reasonable cause of action or defence appropriate to the nature of the pleading, may tend to prejudice, embarrass or delay the fair trial of the proceeding, are frivolous, scandalous, unnecessary or vexatious, or are otherwise an abuse of the process of the Supreme Court. The Supreme Court can also, on application by a defendant, order summary judgment against a plaintiff including on the

ground that the claim is frivolous or vexatious (r 1147(2)(a)). The Supreme Court may also, at any time and by application by a party or on its own initiative, stay or dismiss judicial review applications including on the grounds that it would be inappropriate for the proceeding to be continued, or the application is incompetent, or there is no reasonable basis for the application or claim, or the application or claim is frivolous or vexatious, or the application or claim is an abuse of the Supreme Court's process (r 3566(1)).

In circumstances where procedures already exist in ACAT and the Supreme Court to prevent vexatious claims from proceeding, we submit that the Bill should not include provisions that restrict the types of people who can seek review of planning decisions or the types of planning decisions that can be reviewed. There is no need – and it is not appropriate – for the Bill to foreshadow vexatious litigation by including such provisions when such matters can be dealt with through the proper procedures that already exist in the ACT's courts and tribunals.

In providing this response, we note that it is not the case that we necessarily endorse the tests and procedures for preventing vexatious claims. We are merely stating that such procedures already exist, and we have set out the relevant tests and procedures that exist to clarify the statements we made during the hearing and to assist the Committee to prepare its report.

2 - Evidence of vexatious claims

During the hearing, we stated that we had conducted some research into how many decisions are actually appealed under the ACT's current planning system, and that the results of this research showed that the number of such decisions were minimal.

This research is included in our submission to the ACT Government on including the right to a healthy environment in the *Human Rights Act 2004* (ACT) dated 31 August 2022.[1] In these submissions, we submitted that including the right to a healthy environment will not open the floodgates for vexatious litigation (p 15). In support of this statement, we provided the following information from the Environment, Planning and Sustainable Development Directorate's (**EPSDD**) Annual Report for 2020-2021:[2]

- in 2020-21, EPSDD made 1,678 development application (**DA**) decisions in the merit track (including decisions to determine DAs, DA amendment applications, and applications to satisfy conditions of approval), in addition to decisions on DA exemption applications and decisions to determine DAs in the impact track (pp 66-67);
- however, during that year, only 20 planning matters were decided before the ACAT (p 297).

As stated in that submission, this means that only around 1.2% of decisions were reviewed by the ACAT.

We consider this supports our statement that only a minimal number of decisions are appealed to the ACAT under the ACT's current planning system. We submit that this evidence tends to contradict the evidence we understand the Committee has received about the extent to which vexatious claims are being brought in respect of planning decisions in the ACT, which appear to be insignificant yet overstated.

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[1] Environmental Defenders Office, *Submission on the Right to a Healthy Environment*, Submission to the Justice and Community Safety Directorate (31 August 2022) available online at <https://www.edo.org.au/publication/edo-submission-on-the-right-to-a-healthy-environment/>.

[2] Environment, Planning and Sustainable Development Directorate, *Annual Report 2020-2021* (2021) available online at <https://www.planning.act.gov.au/__data/assets/pdf_file/0020/1910603/2020-21-EPSDD-Annual-Report.pdf>.

3 - Individual perspectives vs. vexatious litigation

During the hearing of this Inquiry, Ms Orr stated that people have different thresholds for what they see as vexatious, and that legal action to prosecute individual perspectives may also be viewed as vexatious. With respect to Ms Orr, we strongly disagree with this view. We consider that even if an individual person has a view that is contrary to the view of the greater public, that person is still entitled to have their views heard and is entitled to access justice with respect to their individual legal rights or interests. If that person's claim is in fact frivolous or vexatious, then as noted earlier in this response, there are procedures that are in place in the ACT's courts or tribunals that will prevent such a claim from proceeding.

4 - Benefits of open standing provisions

By including open standing provisions, the Bill will better promote access to justice, which is one of the procedural elements of the right to a healthy environment. Open standing provisions are also consistent with the objects of the Bill, which include providing a scheme for community participation Bill, s 7(1)(c)).

To the extent that open standing provisions may lead to increased litigation (which, as noted above, there appears to be no evidence for), court and tribunal proceedings play an important role in upholding the rule of law, increasing government accountability, improving the quality and outcomes of government decision-making, and making a positive contribution to jurisprudence on a wide range of legal issues, and may also lead to positive law reform.

Approved for circulation to the Standing Committee on Planning, Transport and City Services

Signature:  Date: 20 December 2022

By Melanie Montalban, Managing Lawyer ACT, Environmental Defenders Office