**Additional comments from Jo Clay**

The ACT Government has embarked on a big project to reform our Planning system in the ACT and will do so in three stages. The first stage is through the reform of planning legislation with the introduction of the Planning Bill. The Planning Bill provides the necessary framework through which all planning decisions are made. The committee agreed on 49 recommendations to improve the Planning Bill to make it more transparent, more accountable, improve consultation, improve environmental protection and improve governance. However, members of the Committee could not agree on some areas of key concern raised by the community. These are significant and so I want to make additional comments about them.

**Appeal Rights**

Appeal rights in planning are complex. I note comments made by Ms le Couteur on appeal rights in the inquiry she chaired into development application processes in the ACT from 2018-2020. The issues she raised have not been remedied by this Bill and in fact, many of the issues she described have become more acute.

The right to review government decisions is a basic element of democratic systems. Our committee heard from residents, industry, environmental and other organisations about appeal rights on planning decisions. Views differed widely.

Our Committee heard concerns about the risk of vexatious litigants appealing government decisions, particularly around public housing developments. We heard concerns that appeals would mean urgent problems, like housing affordability and homelessness, could not be addressed.

I'm not sure if witnesses used the term 'vexatious litigation' in accordance with its legal meaning. Section 32 of the *Australian Capital Territory Civil and Administrative Tribunal Act (2008)* (the ACAT Act) allows the ACT Civil and Administrative Tribunal (ACAT) to dismiss or strike out an application that is vexatious. ACAT can strike a matter out if ACAT considers the application frivolous or vexatious, lacking in substance, an abuse of process or made by a person who has been dealt with by a court or tribunal in Australia as frivolous or vexatious.

I heard little evidence and can find little evidence that ACAT has found that many planning matters brought in recent years were 'vexatious'. I heard evidence from the Environmental Defenders Office showing a low level of 'vexatious' matters.

Many witnesses who said they were concerned about 'vexatious' litigation spoke about the length of time involved in ACAT appeals and whether ACAT decision-makers had the time and relevant expertise to hear planning matters. These are genuine issues and they relate to resourcing for ACAT. They can be addressed with better resourcing and do not need a fundamental restriction of rights. Our Committee has made a recommendation that ACAT be appropriately resourced and I believe this is a better approach.

Our Committee also heard concerns about losing rights to appeal, particularly on environmental grounds. Under the current *Planning and Development Act*, third parties can only appeal in limited circumstances. They must have lodged a submission during consultation and they must also prove they may suffer a material detriment from the development. We also heard about other non-legislative barriers, such as having the time and expertise to run an appeal and having the funds to pay the application fees.

The Planning Bill preserves some areas of appeal. It makes at least one significant reduction in appeal rights. Schedule 7 sets out when third parties are exempt from appealing matters in ACAT for merits review. Schedule 7 has removed the right for third parties to appeal an Estate Development Plan in a greenfields area. The consultation draft of the Planning Bill allowed rights of appeal on Estate Development Plans in greenfields areas, but the tabled version of the Planning Bill has removed it.

ACT Government has made certain commitments to limit urban sprawl. The ACT Greens have made a stronger commitment because we want to ensure that at least 80% of new development will be infill, with a view to no more urban sprawl. Both policies recognise that greenfields areas of Canberra are precious. They are often in or near remnant or critically endangered natural temperate grasslands and woodlands and they often provide habitat for plants and animals, including threatened species. They are also often wildlife corridors. They also often contain areas of significant cultural value.

I am concerned that removing this right of appeal means no one can speak up for the environment or for First Nations cultural rights in greenfields areas. I am also concerned that this right has been removed without an explicit conversation. I note that our Committee made no recommendations about appeal rights and this complex area needs further work.

**Territory Priority Projects**

Under the current *Planning and Development Act,* the Minister can call in a project if it meets certain public interest tests and if there has been sufficient consultation on the project. The Minister need not tell the community or stakeholders that a project may be called in. It comes as a surprise to the community. There are no rights to appeal a call-in to ACAT.

The Planning Bill removes call-in powers and instead introduces Territory Priority Projects. Call-in powers are controversial and I am glad to see that this process has been removed. However, the Bill has not yet struck the right balance on accountability for the new process.

The Territory Priority Project process in the Bill allows Ministers to declare a project via a notifiable instrument, rather than a disallowable instrument. This means it is not subject to Legislative Assembly scrutiny and the Assembly cannot be held to account for it. Given that Territory Priority Projects cannot be appealed via ACAT, political accountability is required to ensure there is some accountability on these rare and major decisions.

The Bill does not require that sufficient consultation has occurred on the project. This provides less protection than what is in the current *Planning and Development Act*, which requires the Minister to assess the quality and sufficiency of consultation before a project can be called in. That protection was added to call-in powers after the ACT Green led amendments in 2018 to the *Planning and Development Act 2007* to ensure there was sufficient community consultation prior to the use of on call-in powers. The Bill has chosen to drop this requirement.

The Bill sets out three key public interest tests but says a Territory Priority Project need only meet one of three tests. The tests are that a project must achieve a major government policy outcome of significant benefit to the people of the ACT OR substantially facilitate a future planning outcome in relevant policy OR be a significant infrastructure project of significant benefit to the people of the ACT. These are good public interest tests and I cannot imagine a territory priority that doesn't meet all three. The earlier consultation draft of the Bill set out three public interest tests and required that

all three public interest tests be met, in addition to the need for sufficient community consultation. The Bill should apply all three tests.

The Bill allows Territory Priority Projects to be public or private projects. Our Committee heard some evidence on this. The only convincing evidence I heard for a private project that had sufficient public interest was for community housing.

Our Committee made recommendations that a Territory Priority Project declaration should be a disallowable instrument and that it should not be made unless sufficient consultation has occurred. I stand by those Committee recommendations. However, I add two more to the list. Territory Priority Projects should be limited to public projects and community housing and should meet all three public interest tests.

**Management of Public Land**

Our Committee heard evidence on the management of public land during hearings. In particular, there is interest in the management and use of public land, and the need for greater public involvement in decisions for the management of public land.

This issue comes up frequently for this Committee. The management objectives for our public spaces, nature reserves and lakes are out of date. They have not changed in the last 15 years. Our environment is facing different and complex challenges. The ACT Government declared a climate emergency in 2019. We are experiencing a biodiversity extinction crisis. We must manage our public land with a view to ensuring its conservation and improvement.

**General Comment**

This is the biggest piece of legislation that will go through this Assembly in this term. The Committee had an extremely limited amount of time to go through the Planning Bill. Our secretariat staff did an amazing job and worked extended hours to get this report finished. Stakeholders and the community voiced significant concern that they did not have enough time to consider the Bill properly. I remain concerned that neither the Bill nor our Committee inquiry have covered everything in adequate detail. I am, however, reassured by the amount and quality of submissions to our inquiry and I thank the secretariat, the participants and my colleagues for their work.

**Additional Recommendations**

I support all Committee recommendations. In addition, I make five further recommendations.

A. **That ACT Government should amend the Bill to restore the current right to appeal a development approval in greenfields areas.**
B. **That ACT Government should review rights of appeal in the Bill and preserve current rights of appeal.**
C. **That ACT Government should amend section 215 of the Bill to ensure that a Territory Priority Project must meet all three public interest tests.**
D. **That ACT Government should amend section 215 of the Bill so that only public projects and community housing can be declared as Territory Priority Projects.**
E. **That ACT Government should review and update the management objectives of public land so they are fit for purpose in the current climate.**
F. **That the Assembly only pass the Bill with significant amendments that address the recommendations and concerns raised in this inquiry.**

Jo Clay
21 December 2022