Legislative Assembly for the ACT

STANDING COMMITTEE ON PLANNING AND ENVIRONMENT

EXPOSURE DRAFT PLANNING AND DEVELOPMENT BILL 2006

OCTOBER 2006

Report 22

Committee membership

Chair	Mr Mick Gentleman MLA
Deputy Chair	Mr Zed Seselja MLA
	Ms Mary Porter AM MLA

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Resolution of appointment

On 7 December 2004 the ACT Legislative Assembly agreed to establish general purpose standing committees. The Assembly resolved that:

> (1) The following general purpose standing committees be established and each committee to inquire into and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community:
>
> …
>
> (e) a Standing Committee on Planning and Environment to examine matters related to planning, public works and land management, conservation and heritage, transport services, and environment and ecological sustainability.
>
> …

The Assembly also agreed that if the Assembly is not sitting when the Standing Committee on Planning and Environment had completed consideration of a report on draft plan variations or draft plans of management referred to the Committee by the Minister under the *Land (Planning and Environment) Act 1991*, the Committee may send its report to the Speaker, or, in the absence of the Speaker to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.[1]

Terms of reference

On 13 July 2006 the Committee resolved that it would inquire into the Exposure Draft Planning and Development Bill 2006.

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[1] Legislative Assembly of the ACT, *Minutes of Proceedings*, No. 2–7 December 2004, pp12–16

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SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

1.34 The Committee recommends that the draft bill be amended to require the Minister to report to the Assembly on the issues raised during the revision of the Territory Plan and its component parts.

RECOMMENDATION 2

1.53 The Committee recommends that the Minister ensure that all codes and guidelines under the Act explicitly address the social aspects of sustainable development.

RECOMMENDATION 3

1.54 The Committee recommends that the proposed legislation refer to ‘ecologically sustainable development’ rather than ‘sustainable development’, in each instance, for consistency across ACT legislation.

RECOMMENDATION 4

1.55 The Committee recommends that clauses 6 and 97 be amended to omit reference to the ‘social, environmental and economic aspirations of the people of the ACT’.

RECOMMENDATION 5

1.56 The Committee recommends that paragraph 11(3)(a) be amended to require the Planning and Land Authority to exercise its functions in a way that ‘gives effect to sustainable development’, rather than ‘has regard to sustainable development’ as currently proposed.

RECOMMENDATION 6

1.57 The Committee recommends that sub-clause 42(2) be amended to require the Minister to ensure that the Land Agency Board has membership that demonstrates expertise in landscape architecture and ecologically sustainable development.

RECOMMENDATION 7

1.58 The Committee recommends that clause 86 be amended to require that estate development plans demonstrate ecologically sustainable development.

RECOMMENDATION 8

1.59 The Committee recommends that 'the landscape setting and biodiversity corridors' be inserted before 'infrastructure works' in paragraph 86(3)(b).

RECOMMENDATION 9

1.60 The Committee recommends that decisions on merit track and impact track assessments be required to demonstrate or address consistency with ecologically sustainable development, through amendments to clause 111, 112 and 120.

RECOMMENDATION 10

1.61 The Committee recommends that where an approval would be inconsistent with an entity's advice the Minister should be required to make the decision and provide a response to the entity as to why the entity's advice is not being followed. The Minister's response should also be tabled in the Legislative Assembly.

RECOMMENDATION 11

2.21 The Committee recommends that clause 71 be clarified so that if the Committee has resolved to inquire into a draft plan variation the Minister must not make a decision about the variation until the Committee has reported.

RECOMMENDATION 12

2.25 The Committee recommends that a new sub-clause be inserted in clause 67 requiring the Minister to provide a set of the documents referred to in sub-clause 67(2) to the appropriate Assembly committee, and the note to clause 67 omitted.

RECOMMENDATION 13

2.26 The Committee recommends that the draft bill be amended to enable the Legislative Assembly to extend the time available to an Assembly committee for inquiry and report on a draft plan variation beyond six months.

RECOMMENDATION 14

2.27 The Committee recommends that paragraph 147(2)(e) be amended to require the Minister's statement to address how the principles of ecologically sustainable development influenced the decision under section 148.

RECOMMENDATION 15

2.28 The Committee recommends that clause 14 be amended so that if the Legislative Assembly has resolved that the Minister should give the Planning and Land Authority a direction, and the Minister declines to do this, the Minister is required to explain his or her reasons for not doing so to the Assembly.

RECOMMENDATION 16

2.29 The Committee recommends the draft bill be amended to require intra-governmental consultation in relation to instruments made under sub-clause 82(1)(b), 261(4), 263 and 278. Parliamentary Counsel and the Assembly should also consider whether these provisions and clauses 89 and 93 represent an inappropriate delegation of legislative power to the Executive.

RECOMMENDATION 17

2.40 The Committee recommends that the Minister consider whether the Authority's role and functions are appropriately defined.

RECOMMENDATION 18

2.63 The Committee recommends that the ACT Government review Part 3.4 of the exposure draft bill with a view to making its provisions consistent with those applicable to other ACT public service chief executives under the *Public Sector Management Act 1994* (ACT).

RECOMMENDATION 19

2.64 If the government does not agree with the recommendation above, the Committee recommends that the rules of natural justice and other due process procedural safeguards be required to be afforded the Chief Planning Executive when the Executive considers the suspension or termination of his or her employment, and when the matter comes before the Assembly. Similar safeguards should be inserted in other legislation providing for the suspension or removal of independent office holders.

RECOMMENDATION 20

2.65 The Committee recommends that the Government respond to the Standing Committee on Public Accounts' *Review of Auditor-General's Report No 2 of 2005*: *Development Application and Approval Process: Report 7* at the same time as it responds to the recommendations of this report.

RECOMMENDATION 21

2.74 The Committee recommends that the short timeframes highlighted by the Committee be reconsidered in view of the ACT Government's *Community Engagement Manual*.

RECOMMENDATION 22

2.87 The Committee recommends that consideration be given to moving sub-clauses 142(2)–(4) and Part 7.4 into Chapter 11 to co-locate the offence and civil liability provisions.

RECOMMENDATION 23

2.95 The Committee recommends that the bill be amended to require the Planning and Land Authority to consult with the Conservator of Flora and Fauna and the Environment Protection Authority when compiling the list of consultants under clause 197, and when drafting regulations under the Act.

RECOMMENDATION 24

2.96 The Committee recommends that the operation and wording of clause 197 be clarified following further consultation with the Department of Treasury, with a view to ensuring consistency with the aims of the ACT Government's procurement framework even if that framework is not directly applicable.

RECOMMENDATION 25

2.97 The Committee recommends that the Authority be required to review the list of consultants referred to in clause 197 every three years through a public and transparent process.

RECOMMENDATION 26

2.103 The Committee recommends that the bill be amended to require that the custodian of public land not be the same person or entity as the Conservator of Flora and Fauna.

RECOMMENDATION 27

2.108 The Committee recommends that the exposure draft bill be clarified with respect to the role of the Public Advocate in relation to controlled activity orders.

RECOMMENDATION 28

2.146 The Committee recommends that sub-clause 374(1)(a) be amended to replace the word 'the' before 'land' with 'their'.

RECOMMENDATION 29

3.25 The Committee recommends that sub-clause 50(2) be amended to require the Territory Plan to include future urban areas and reserved areas of public land.

RECOMMENDATION 30

3.26 The Committee recommends that the draft bill require a transparent consultative process, with a report to the Legislative Assembly, concerning the development of the new Territory Plan and its component parts.

RECOMMENDATION 31

3.27 The Committee recommends that the draft bill be amended to require the components of the Territory Plan to be reviewed after 30 months of operation initially, and five-yearly thereafter, unless the Minister requires an earlier review.

RECOMMENDATION 32

3.35 The Committee recommends that 'planning report' be better defined in the draft bill.

RECOMMENDATION 33

3.43 The Committee recommends that the function of the Statement of Planning Intent and the Statement of Strategic Directions be combined and the Statement of Planning Intent omitted.

RECOMMENDATION 34

3.44 The Committee recommends that the relationship between the Planning Strategy and the Statement of Strategic Directions be clarified.

RECOMMENDATION 35

3.45 The Committee recommends that sub-clause 101(4)(a) be clarified so that it is more consistent with the human rights of freedom of thought and expression.

RECOMMENDATION 36

3.46 The Committee recommends that sub-clause 86(2) be amended to require an estate development plan to recognise and respond to the landscape setting in which the proposed estate would be located.

RECOMMENDATION 37

3.70 The Committee recommends that the draft bill require public notification and a reasonable consultation period for strategic environmental assessments and environmental impact assessments, both before and after their preparation, and before submission to the Minister.

RECOMMENDATION 38

3.71 The Committee recommends that planning reports, environmental impact assessments and strategic environmental assessments be made notifiable instruments.

RECOMMENDATION 39

3.72 The Committee recommends that consideration be given to whether Part 5.6 of the Bill, 'Planning reports and strategic environmental assessments' should be moved into Chapter 8, and be titled more broadly, such as 'Sustainability assessments and inquiries'.

RECOMMENDATION 40

3.85 The Committee recommends that the exposure draft bill be amended to allay the concerns raised by the ACT Law Society and other stakeholders in relation to use as development.

RECOMMENDATION 41

3.102 The Committee recommends that clauses 224 and/or 225 be amended to require the Authority to consult with other agencies before granting a concessional lease.

RECOMMENDATION 42

3.103 The Committee recommends that the ACT Government review clause 259 with a view to amending it to ensure that everyday transactions are not deemed unlawful.

RECOMMENDATION 43

3.132 The Committee recommends that the draft bill provide for developments to be moved between tracks where appropriate.

RECOMMENDATION 44

3.133 The Committee recommends that sub-clause 148(3) be amended so that the Authority cannot amend a tree management plan unless this is consistent with the advice of the Conservator of Flora and Fauna (as under sub-clause 119(3)).

RECOMMENDATION 45

4.10 The Committee recommends that the custodianship map created and maintained by the Planning and Land Authority which gives administrative responsibility for unleased land and public land in the Territory be approved by the Chief Minister when first made, and that the Chief Minister approves significant amendments to it.

RECOMMENDATION 46

4.11 The Committee recommends that the custodianship map recognise and represent in broad terms the spatial range of stewardship responsibilities assumed by not-for-profit organisations in relation to unleased land and public land, and that the map acknowledge the ongoing associations with Territory land expressed and valued by Indigenous Australians in the Territory. The need for disclaimers preventing any legal consequences from this 'informational' recognition should be considered.

RECOMMENDATION 47

4.19 The Committee recommends that the management objectives referred to in clauses 278 and 280 and Schedule 3 of the draft bill be amended to better accord with the general principles developed by the National Reserve System Task Group to implement the National Resource Management Council's *Directions for the National Reserve System – A Partnership Approach* (2005), and that plans of management are consistent with these when and if the principles are endorsed by the relevant Ministerial Council.

RECOMMENDATION 48

5.5 The Committee recommends that the need for the relatively minor and technical amendments in Table 1 be considered.

1 INTRODUCTION

1.1 This report on the Exposure Draft Planning and Development Bill 2006[2] is the outcome of an inquiry by the ACT Legislative Assembly's Standing Committee on Planning and Environment. An additional and dissenting comment from Mr Zed Seselja MLA is at <u>Appendix A.</u>

1.2 The Committee thanks the Minister for Planning, Mr Simon Corbell MLA, and the senior ACT planning officials and stakeholders who assisted the Committee during the course of this inquiry. Contributors who made submissions and attended public hearings or private meetings are listed in <u>Appendices B and C</u>. The Committee appreciates the substantial amounts of time and effort that were expended to produce detailed submissions within a short period of time. The Committee derived considerable assistance from the high quality submissions.

1.3 The Assembly's committee system is an important component of the Territory's system of governance. It encourages broad-ranging participation in the development of law and policy recommendations to the Assembly. Committee reports and statements inform the political and legislative process and contribute to the important external scrutiny of the activities of the ACT Executive (i.e. the Chief Minister and such other Ministers as he or she appoints)[3] and the ACT public service. The Assembly's committees are not just another stakeholder entity that provides input to the Executive's consultative processes.[4] The Assembly is the Territory's Parliament, to which the Executive and ACT government entities are responsible and accountable. Assembly

[2] The exposure draft bill is accessible on the ACT Legislation Register at <http://www.legislation.act.gov.au/ed/default.asp>. An explanatory statement was not provided with the Bill

[3] see *Australian Capital Territory (Self-Government) Act 1988 (Cwlth)* Part V and the *Legislation Act 2001* (ACT) dictionary and section 253

[4] Contrast references to the Planning and Environment Committee being a stakeholder in: Planning and Land Authority (2006), *Annual Report 2005–06*, Canberra, pp6, 47, 70. The Chief Minister's Annual Report Directions recognise that Legislative Assembly committee reports are a component of external scrutiny

committees make recommendations to the Assembly with a view to ensuring that that responsibility and accountability is maintained.

1.4 Due to the short time available for this inquiry, this report only discusses selected issues, and does not summarise all the provisions of the proposed legislation, nor all the issues raised in exhibits. It does however respond to most of the issues raised in submissions to the Committee. Other inquiries have, and will be examining some of the issues that arise in this inquiry, and may arise in future. These include:

- The Standing Committee on Legal Affairs' inquiry into strict liability offences in the ACT;
- the review of the Planning and Development Bill 2006 by the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) after the bill has been introduced to the Assembly, which is expected to be in November 2006;
- the ACT Auditor-General's 2005 report on the development application and approval process[5]; and
- the ACT Legislative Assembly Public Accounts Committee's review of the Auditor-General's report.[6]

1.5 For the information of stakeholders who may wish to read a plain English introduction to the legislation, the Planning and Land Authority's Planning System Reform Project has produced a *Guide to the ACT Government's Proposed Planning Laws* (2006). The Authority has also produced a series of documents to describe the proposed reforms to the planning system. These are accessible on the Authority's website.[7] The Minister for Planning will also table an explanatory statement with the bill when it is introduced to the Assembly,

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5 ACT Auditor-General's *Report No 2 of 2005 Development Application and Approval Process*, Canberra.

6 ACT Legislative Assembly, Standing Committee on Public Accounts (2006), *Review of Auditor-General's Report No 2 of 2005*: *Development Application and Approval Process: Report 7*, September 2006

7 See ACT Planning and Land Authority (2005), *Directions Paper*, Canberra; ACT Planning and Land Authority (2005), *Technical Paper 1: Leasehold Administration in the ACT. Its role in the planning system*; ACT Planning and Land Authority (2005), *Technical Paper 2: Review of the Territory Plan*; ACT Planning and Land Authority (2005), *Technical Paper 3:Streamlining Development Assessment and Building Approval Processes in the ACT*; ACT Planning and Land Authority (2005), *Technical Paper 4: Review of Environmental Impact Assessment in the ACT*; ACT Planning and Land Authority (2006), Outline of the Territory Plan Restructure, Canberra.

which will summarise the provisions of the draft bill. The Minister advised the Committee in late September 2006 that there may be amendments to the exposure draft legislation before it is introduced to the Assembly.[8]

1.6 This report is structured quite simply. It examines the main object of the draft bill and the functions and powers of the main institutions of governance that will administer the planning and development regime. It includes a review of the main planning instruments and processes administered by ACT Government entities, and includes a chapter on the management of public land. It summarises stakeholders' comments and in many cases the Minister's preliminary responses to those, and presents the Committee's views on the issues raised.

1.7 Had more time for the inquiry and report been available, the summaries of stakeholders' submissions could have been shortened. It is inevitable however, that when a detailed 'work-in-progress' is being reviewed in a relatively short time that some elegance and succinctness of expression is sacrificed. The Committee has not pursued in particular detail the issues that may arise in the restructured Territory Plan as the revision of the plan is another stage of the Planning System Reform Project. The Committee makes some comments about the need not to rush the passage of this legislation in its concluding remarks.

Background

1.8 Both Australian Government and ACT law[9] and policy govern planning in the ACT. The *Australian Capital Territory (Planning and Land Management) Act 1988* (Cwlth)[10] establishes the National Capital Authority, which prepares and administers the National Capital Plan. This Act also enables the Legislative Assembly to establish a statutory planning authority – now the ACT Planning and Land Authority – to develop and implement the Territory Plan. The

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[8] Oral response by the Minister for Planning, Mr Simon Corbell MLA, to the Planning and Environment Committee, 26 September 2006

[9] A list of legislation administered by the Planning and Land Authority is appended to its Annual Report, accessible at <http://www.actpla.act.gov.au/publications/index.htm>

[10] Accessible at ComLaw <http://www.comlaw.gov.au/ComLaw/legislation/actcompilation1.nsf/browseview?openform&VIEW=current&ORDER=bytitle&CATEGORY=actcompilation-Au>

primary Act for Territory planning currently is the *Land (Planning and Environment) Act 1991* (ACT).[11] This requires the Territory Plan to set out the planning principles and policies for giving effect to its object,[12] which is:

> to ensure, in a manner not inconsistent with the national capital plan, that the planning and development of the ACT provides the people of the ACT with an ecologically sustainable, healthy, attractive, safe and efficient environment in which to live, work and have their recreation.[13]

1.9 The current Territory Plan includes both a written statement and a map. The written statement contains general planning principles (Part A), specific land use policies (Part B), overlay provisions (Part C) and definitions of terms (Part D). The Territory Plan map shows which land use policies and overlays in the written statement apply to particular sections of land in the Territory. The Territory Plan is developed and implemented taking account of other strategic ACT Government policy documents such as *The Canberra Plan* and *People Place Prosperity: A Policy for Sustainability in the ACT*.[14]

1.10 The National Capital Authority is reviewing the National Capital Plan and invited stakeholders to comment on its discussion paper, *Review of the Format and Language of the National Capital Plan*, until 22 September 2006. The paper proposes a new format for the National Capital Plan and a single planning document for the Australian Capital Territory, which incorporates both the statutory requirements of the National Capital Plan and the Territory Plan. This could be a useful and constructive reform, reducing the complexity of planning in the Territory. It may also contribute to an improvement in the sometimes conflictual relationship between the National Capital Authority and the Planning and Land Authority. The National Capital Authority is also proposing that a Consultation Protocol be adopted, to standardise and clarify the consultation requirements for its planning decisions.

Development Assessment Forum

1.11 One of the important influences on the development of the exposure draft

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[11] Accessible at <http://www.legislation.act.gov.au/a/1991-100/current/pdf/1991-100.pdf>
[12] Land (Planning and Environment) Act 1991, sub-section 7(2))
[13] Land (Planning and Environment) Act 1991, sub-Section 7(1)
[14] Accessible at <http://www.cmd.act.gov.au/canberraplan/> and <http://www.sustainability.act.gov.au/policy.html>

planning bill was the national Development Assessment Forum process. The Development Assessment Forum was established in 1998 in response to a recommendation in 1996 from the Small Business Deregulation Task Force that a reform strategy for the building and development industry be developed.[15] The National Inquiry into Planning Education and Employment also called for improvement of the development assessment process.[16]

1.12 Members of the Development Assessment Forum included representatives of Australian governments, the development industry, and allied professional associations. The Forum was assisted by research produced by the University of Canberra's Centre for Developing Cities[17] and feedback received from a national consultation process. The model, which was finalised in early 2005, included ten leading practices and six assessment tracks for proposed developments that could be adapted for use in different jurisdictions.[18]

1.13 In August 2005 a meeting of the Local Government and Planning Ministers' Council acknowledged the model as an important reference for jurisdictions reforming their development assessment procedures, and noted that the ACT had already announced it would adopt most of the model in its new planning legislation.[19]

1.14 Other recent policy statements, inquiries into, and reforms of the planning system in the ACT include:

- a report and review of the concessional leases in the ACT and the Government's response;[20]

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15 Development Assessment Forum (2005), *A Leading Practice Model for Development Assessment in Australia*, p7, accessible at <http://www.daf.gov.au/reports/DAF_LPM_AUGUST_2005.aspx>

16 Standing Committee on Public Accounts, *Review of Auditor-General's Report No 2 of 2005: Development Application and Approval Process*, p61, citing a NSW Planning Institute submission

17 University of Canberra (2003), *Leveraging the Long Term: A Model for Leading Practice Development Assessment,* See also: P&A Walsh Consulting Pty Ltd & UTS Centre for Local Government (2002), *A National Development Assessment Forum: Study Comparative Performance Measurement and Benchmarking of Planning and Development Assessment Systems*, accessible at < http://www.daf.gov.au/reports/daf_benchmarking_final_1202.pdf>

18 S. Holliday (2006), 'Development assessment forum: leading practice model', 43(1) *Australian Planner*, pp16–17

19 Property Council of Australia ACT Division, *Transcript of Evidence*, 5 September 2006, p49. See also: Development Assessment Forum at <http://www.daf.gov.au/index.aspx>

20 ACT Planning and Land Authority (n.d.), *Planning System Reform Project: Report on the Granting and Administration of Concessional Leases in the Australian Capital Territory: Government Response to Report*

- the Canberra Plan (2004), which includes the *Economic White Paper*, the *Canberra Social Plan* and the *Canberra Spatial Plan*, and *People Place Prosperity: A Policy for Sustainability in the ACT;*[21]
- the report of the Australian Parliament's Joint Standing Committee on the National Capital and External Territories on the national capital and the role of the National Capital Authority;[22]
- the OECD's report on urban renaissance and sustainability in Canberra;[23]
- several earlier consultancies[24] and the report of the Rural Policy taskforce 'Towards a Sustainable Future', and the scrutiny reports and debates preceding the enactment of the *Planning and Land Act 2002* (ACT);
- the Nicholls study of betterment and change of use charge[25]
- the Stein Report on the administration of the ACT leasehold system, and the earlier reports it summarises.[26]

1.15 In July 2006 the Minister for Planning, Minister Corbell MLA, released the exposure draft planning and development bill. On 13 July 2006, having considered a request from the Minister, the Committee resolved to inquire into the Bill.

1.16 On 14 August 2006 the Committee advised the Minister that the Committee

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Recommendations, < http://www.actpla.act.gov.au/consultation/reform/pdf/concessional-rpt.pdf>, accessed 17 August 2006

[21] Accessible at <http://www.cmd.act.gov.au/canberraplan/> and <http://www.sustainability.act.gov.au/policy.html>. See also the public consultation documents and feedback provided, noted in the Department of Urban Services (2002) *Annual Report*, accessible at < http://www.urbanservices.act.gov.au/__data/assets/pdf_file/15352/annualreport0203c.pdf>.

[22] Parliament of the Commonwealth of Australia, Joint Standing Committee on the National Capital and External Territories (2004), *A National Capital, A Place to Live: Inquiry into the Role of the National Capital Authority*, Canberra.

[23] OECD (2002), *Urban Renaissance: Canberra – A Sustainable Future, Organisation for Economic Co-operation and Development*

[24] ACT Government (2002), *Department of Urban Services Annual Report 2001–02*, Canberra, pp101, 102. See also ACT Planning and Land Authority (2005), *Technical Paper 2: Review of the Territory Plan*, Planning System Reform Project, Canberra, pp46–50 which summarises the history of the Territory Plan and notes major reviews.

[25] Prof Des Nicholls (1999), *A Study of Betterment and the Change of Use Charge in the Australian Capital Territory: Its Impact on Investment and a Consideration of Options*, Canberra

[26] See Chapter 6 in Justice Paul Stein (Chair), Patrick Troy and Robert Yeomans (1995*), Report into the Administration of the ACT Leasehold to the Chief Minister ACT Government*, Canberra

would report on the proposed legislation during the October 2006 sittings, rather than in early September 2006 as the Minister had requested, and the Committee had initially agreed to. The later reporting date enabled the Committee to consider the recommendations made in the Public Accounts Committee's report on the *Review of Auditor-General's Report No 2 of 2005 – Development Application and Approval Process*, tabled on 21 September 2006, and to better assess the issues raised by stakeholders. Moreover, the Committee was unable to release this report out of session, and the timeframe for reporting during the September sittings was too short.

1.17 The Planning and Development Bill 2006 is expected to be introduced to the ACT Legislative Assembly in November 2006. The restructured Territory Plan is expected to be released in mid-2007.

1.18 The commencement date proposed for the new legislation is 1 July 2007.

Consultation Comments

Committee consultations

1.19 The Committee invited submissions from stakeholders by letter, public advertisements, and emails through networks. An advertisement appeared in *The Canberra Times* and *The Chronicle* on 22 and 25 July 2006 respectively. The Planning and Land Authority also placed a link on their website to the Committee's inquiry.[27] The Committee met twice during the inquiry[28] with officials from the Planning and Land Authority, who briefed the Committee on the Planning System Reform Project and responded to members' questions. The Minister attended one meeting for an extended discussion of the issues raised during the course of the inquiry.

General responses from stakeholders

1.20 Many stakeholders welcomed the proposed reform package on behalf of their members:

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[27] See <http://www.actpla.act.gov.au/consultation/reform/index.htm>, accessed 17 August 2006
[28] 1 August 2006 and 26 September 2006

- the Property Council of Australia, ACT Division, welcomed the release of the bill as an important step towards achieving the goal of delivering a best practice planning system that encourages investment, growth and high quality and sustainable development. It advised that it had been closely involved with the Development Assessment Forum model.[29] The Royal Australian Institute of Architects,[30] the Housing Industry Association in the ACT and Southern NSW,[31] and the ACT Law Society[32] similarly commended the model;
- the Housing Industry Association suggested that the proposed reform offers a framework to re-establish the ACT's reputation as a uniquely well planned city. The Association suggested that simplifying the planning system could reduce costs, encourage investment and improve housing affordability. It also welcomed the plainer language and clearer definitions and terminology in the draft bill;[33]
- the ACT Law Society welcomed the proposed consolidation of protocols and guidelines and the proposed track system for development assessments, noting the draft bill's general consistency with the Development Assessment Forum model;[34]
- the Conservation Council of the South East Region and Canberra said that the reforms would help achieve better natural and built environment outcomes in the Territory;[35]
- the Australian National University welcomed the likely impact of the reforms in the City west area known as the ANU Exchange, and the benefits delivered through the earlier removal of the need for some preliminary assessments, and the withdrawal of some third party appeal rights;[36] and

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[29] *Transcript of Evidence*, 5 September 2006, p49
[30] Submission no 5
[31] Submission no 13
[32] Exhibit No 5, Law Society of the Australian Capital Territory (2006), Planning System Reform Project, Planning and Development Bill 2006, Submission to ACT Planning and Land Authority, September 2006
[33] Submission no 13, *Transcript of Evidence*, 5 September 2006, pp41–43
[34] Submission no 13, *Transcript of Evidence*, 5 September 2006, p73
[35] *Transcript of Evidence*, 29 August 2006, p1
[36] Submission no 4

1.21 the Environmental Defender's Office agreed with the Planning and Land Authority that under current law a disproportionate amount of time was spent assessing minor developments and that more significant developments should have their impacts scrutinised more closely. Dr Prest suggested that the implementation of the Development Assessment Forum model would substantially and negatively impact on the community's democratic right to challenge major controversial developments.[37]

1.22 A practising barrister with expertise in town planning, Mr Richard Arthur, expressed the view that the draft bill is more complex than the current Act, and that various issues still need to be better thought through.[38]

1.23 Several organisations would have preferred to consider the whole planning reform package together, rather than to have the legislation developed before the Territory Plan reforms, so that the package could be better assessed.[39] The Institute of Architects submitted that it could not support the exposure draft bill without having seen the Territory Plan and associated codes.[40] It noted that only one sample of a zone policy, development table and design code had been provided, and that there were 'serious concerns that the proposed Planning Reform will fail to deliver the significant improvements in processing of development applications sought, based on the sample material provided'.[41]

1.24 The Planning Institute of Australia expressed general support for the draft bill and its track assessment system, but with reservations because of its preference to consider the bill alongside the restructured Territory Plan and other provisions such as the change of use charge formula.[42]

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[37] Submission no 12; *Transcript of Evidence*, 29 August 2006, p27. See also Submission no 1 where Ms Di Johnstone made a similar point

[38] Submission no 7 citing for example clauses 150, 162, 178, 179, 181; *Transcript of Evidence*, 29 August 2006, p17

[39] Submission nos 1, 7, 8, 10, 11; *Transcript of Evidence*, 29 August 2006, p9

[40] Clause 50 of the draft bill provides that the Territory Plan includes a statement of strategic directions, policy objectives for each zone on the Territory Plan map, development tables, codes for areas, zones and features, and maps.

[41] Submission no 5, p4; See also *Transcript of Evidence*, 5 September 2006, p62

[42] Submission no 8; *Transcript of Evidence*, 29 August 2006, pp8, 10, 12

1.25 The Housing Industry Association suggested that it would have been helpful to have had the codes to consider with the draft legislation, but that it accepted the Planning and Land Authority's intention to have the bill passed in 2006 or early 2007, and then to focus on the codes.[43]

1.26 Ms Nancy Louise and Mr Paul McCullough requested that the draft bill be withdrawn and redrafted so that it better complied with sustainable development principles and standards they prefer.[44]

Planning and Land Authority consultations

1.27 The ACT Planning and Land Authority has undertaken significant consultations on its planning reform package. A report on its consultation program between 27 May and 22 July 2005, and the ACT Government's response to community comments on the Planning System Reform Project is accessible on the Authority's website.[45] The Authority also ran a series of workshops and public briefings for community councils during July and August 2006, and accepted submissions on the proposed legislation until 31 August 2006.

1.28 The Planning and Land Authority ran workshops with case studies to get a sense of how the development assessment tracks would operate in practice. The Authority's lodgement area also had comments about this. The bill would be amended to clarify how development proposal could be reassigned across tracks.[46]

Committee comments

1.29 The Committee acknowledges the view that it would have been preferable for the Planning and Land Authority to release the exposure draft bill and restructured Territory Plan simultaneously, but it also accepts that this was not

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[43] *Transcript of Evidence*, 5 September 2006, p43

[44] Submission no 14

[45] ACT Planning and Land Authority (2005), *Planning System Reform Project: Government Response to Community Comments on the Planning System Reform Project*, <http://www.actpla.act.gov.au/consultation/reform/pdf/psrp-govt-response.pdf>, accessed 17 August 2006.

[46] Oral response by Director of the Development Services Branch, Ms Jacqui Lavis to the Planning and Environment Committee, 26 September 2006

practicable given the resources available to the Planning System Reform Project.

1.30 The Minister advised the Committee that he was aware of the views of the professional associations on this issue, but argued that it was a reasonable compromise to release the draft bill with proposed key codes under the Territory Plan that would be most heavily used. A draft residential zone and code had been made available and others were being developed.[47]

1.31 In the Committee's view, the Minister and Authority staff have provided detailed information documents and pursued consultations sincerely and in a transparent manner.[48] The project team is to be commended for their commitment to engaging with the community and for maintaining relatively open access to documents that explain the considerations informing policy development.

1.32 Nevertheless, as the Territory Plan will not be a disallowable instrument there will be little opportunity for the Assembly to scrutinise the revised plan. The Committee acknowledges that the Territory Plan is a technical document but the Committee considers that the Minister and the Authority should report to the Assembly on the key issues raised during its revision.

1.33 The Committee is also concerned that the intended meaning of the term 'executive' should be defined in the Act directly or by cross-reference. Note 2 to the Dictionary in the draft bill should be amended accordingly: refer Table 1.

RECOMMENDATION 1

1.34 **The Committee recommends that the draft bill be amended to require the Minister to report to the Assembly on the issues raised during the revision of the Territory Plan and its component parts.**

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[47] Oral response by the Minister for Planning, Mr Simon Corbell MLA to Planning and Environment Committee, 26 September 2006

[48] See for example: ACT Planning and Land Authority, *Government Response to Community Comments*, November 2005

Main object of legislation

1.35 The main object of the proposed legislation is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT:

> (a) consistently with the social, environmental and economic aspirations of the people of the ACT; and
>
> (b) in accordance with sound financial principles.[49]

1.36 'Sustainable development' is defined to mean:

> the effective integration of social, economic and environmental considerations in decision-making processes, achievable through implementation of the following principles:
>
> (a) the precautionary principle;[50]
>
> (b) the inter-generational equity principle;[51]
>
> (c) conservation of biological diversity and ecological integrity;
>
> (d) appropriate valuation and pricing of environmental resources.[52]

1.37 'Development', in relation to land, is defined to include:

> (a) the erection, alteration or demolition of a building or structure on the land;
> (b) the carrying out of earthworks or other construction work on or under the land;
> (c) beginning a new use of land or a building or structure on the land;
> (d) change of use of land, or a building or structure on the land, whether by adding a use or stopping a use and substituting another use;
> *Note* Development approval is not required for continuing use lawfully commenced (see s 125).
> (e) subdivision or consolidation of land (whether by lease variation or otherwise);

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[49] Clause 6

[50] i.e. if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation: clause 8

[51] i.e. that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations: clause 8

[52] Clause 8

(f) variation of a lease relating to the land (including surrender of the lease and grant of a new lease in different terms);
(g) variation of a lease granted as a concessional lease by surrender and regrant of the lease as a market value lease;
(h) the erection, fixing or display of a sign or advertising material otherwise than in accordance with a licence issued under this Act or permit under the *Roads and Public Places Act 1937*.[53]

1.38 The most significant differences between this chapter and the provisions in the *Planning and Land Act 2002* (ACT),[54] are that:

- clause 6 refers to the social, environmental and economic aspirations of the people of the ACT;
- in clause 7 the definition of development is more open-ended, referring to 'includes' rather than 'means';
    - 'work' on land is extended to include 'earthworks or other construction work' on land;
    - reference is made to 'beginning a new use of land' rather than 'use or change of use of a building…'; and
    - it includes variation of a lease or concessional lease.

Stakeholder comments

1.39 Several stakeholders expressed strong support for the recognition in the proposed legislation of the need for development to be sustainable, but suggested that improvements were needed:

- the ACT Council of Social Service Inc[55] and the Commissioner for the Environment, Dr Rosemary Purdie, commented that the proposed legislation would not necessarily ensure that development in the ACT was sustainable since key clauses link planning and land system outcomes to the very vague 'social, environmental and economic aspirations of the people of the ACT';[56]

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[53] Clause 7
[54] Section 5 definition of 'development' in *Land (Planning and Environment) Act 1991* (ACT)
[55] Submission no 10
[56] Clauses 6, 97

- the Conservation Council and the Environmental Defenders' Office suggested that the reference to economic aspirations and financial principles in clause 6 gave those issues a heavier weighting than social and environmental issues.[57] The Conservation Council also noted that the ACT Government's sustainability policy, *People Place Prosperity*, [58] includes principles about empowering people and engaging the community, and that the bill should include these.[59] Both organisations recommended that the bill be amended to refer to 'ecologically sustainable development' rather than 'sustainable development';[60]
- the ACT Council of Social Service and the Commissioner for the Environment requested that the social aspects of development, including justice principles, affordability, equity and inclusion, be better recognised in the proposed environmental impact assessment provisions.[61] The Council requested that the word 'needs' be included alongside 'aspirations'.[62] The perceived increasing concentration of people living in poverty was noted. Preference was expressed for a more pluralist community where a social mix was the norm, and where low-income groups had equitable access to public transport and other services, facilities and residential amenity;[63]
- Dr Purdie suggested similarly, that the social aspects of the draft bill be better recognised by including the definition of 'environment' from the *Environment Protection ACT 1997* (ACT), or by inserting specific references to social impacts in relevant clauses;[64] and
- Dr Purdie also requested that reference to ecologically sustainable development be incorporated or strengthened in other provisions of the bill, as did the ACT Council of Social Service and the Environmental

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[57] Submission nos 9, 12; *Transcript of Evidence*, 29 August 2006, pp3, 27
[58] ACT Government (2003), *People, Place, Prosperity: A policy of Sustainability for the ACT*, Chief Minister's Department, Canberra
[59] *Transcript of Evidence*, 29 August 2006, p3
[60] Submission nos 9, 12; *Transcript of Evidence*, 29 August 2006, p27
[61] Submission nos 6, 10; *Transcript of Evidence*, 29 August 2006, p37
[62] Submission no 10
[63] Submission no 10; *Transcript of Evidence*, 29 August 2006, pp36–37, 38
[64] Submission no 6, recommending amendments to paragraphs 112(f), 120(f) and clause 150 (e.g. paragraph (g)) and/or the dictionary; *Transcript of Evidence*, 29 August 2006, p22

Defender's Office, so that decision-makers' compliance with the principles would be a statutory obligation.[65]

1.40 Dr Purdie suggested:

- that the Planning and Land Authority be required to exercise its functions in a way that 'gives effect' to sustainable development, rather than 'has regard' to sustainable development, through an amendment to paragraph 11(3)(a);
- that the Land Development Agency be required to exercise its functions in a way that gives effect to sustainable development, through an amendment to sub-clause 31(1);
- that the Land Agency Board be required to have membership demonstrating expertise in environmental matters, through an amendment to sub-clause 42(2) [the Conservation Council made a similar point];[66]
- that estate development plans be required to demonstrate consistency with ecologically sustainable development, through an amendment to sub-clause 86(3);
- that planning reports and strategic environmental assessments under Part 5.6 be required to address ecologically sustainable development;
- that decisions on merit track and impact track assessments be required to take account of and provide a response to the advice of referral entities, and demonstrate or address consistency with ecologically sustainable development, through amendments to clause 111,[67] 112, 119, 120, 147, 157; and

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[65] Submission nos 6, 10, 12; *Transcript of Evidence*, 29 August 2006, p21

[66] Submission no 9, *Transcript of Evidence*, 29 August 2006, p3

[67] Mr Arthur also noted that while entity advice was given a new status in the draft bill it could also be ignored if the person deciding the application is satisfied various matters have been taken into account and the decision is consistent with the objectives of the Territory Plan: submission no 7, referring to sub-clause 111(2). He also referred to clauses 129 and 139 as providing little protection for developers

- that when the Minister exercises his call-in powers he or she does so having considered, and is required to explain how he or she considered, ecologically sustainable development.[68]

1.41 ACT for Trees Inc requested that sub-clause 6(b) be amended to include damage to trees or other construction work affecting trees.

1.42 The Institute of Landscape Architects submitted that in order for the object of the proposed legislation to be met, greater emphasis needed to be placed on landscape planning. The Institute also noted that clause 86 should be amended to include the 'landscape setting'.[69]

Committee comments

Ecologically sustainable development

1.43 The Committee considers that the proposed legislation should refer to 'ecologically sustainable development' rather than just 'sustainable development', primarily because this would be consistent with other ACT legislation and reporting requirements.[70] The *Environment Protection Act 1997* (ACT) requires that agencies report on their contribution to 'ecologically sustainable development' in their annual reports, and other Territory Acts also refer to 'ecologically sustainable development'. In 1992 all governments in Australia agreed to implement the National Strategy for Ecologically Sustainable Development, and the principles are incorporated in key Australian Government programs, and in legislation such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth).

1.44 There is a common view in several submissions suggesting that the proposed legislation needs to include clearer obligations requiring compliance with, and implementation of, these principles. These obligations can be expressed in the primary Act or can be referred to in subordinate legislation such as codes and

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[68] Paragraph 147(2)(e)
[69] *Transcript of Evidence*, 5 September 2006, pp66, 68
[70] e.g. *Auditor General Act 1996* (ACT), *Waste Minimisation Act 2001* (ACT), *National Environment Protection Council Act 1994* (ACT), *Territory-owned Corporations Act 1990* (ACT), *Independent Competition and Regulatory Commission Act 1997* (ACT), *Financial Management Act 1996* (ACT), *Fisheries Act 2000* (ACT)

regulations. As the Legislative Assembly is unable to amend subordinate disallowable instruments, and can only partially or fully disallow them, it is preferable to have these obligations clearly specified in the legislation.[71]

1.45 The Committee agrees that the legislative provisions should include explicit reference to ecologically sustainable development where appropriate and not rely on the objects clause as an aid to interpretation. The Committee appreciates that the objects clause aims to achieve sustainable outcomes, and there are precedents for courts referring to objects clauses, but the NSW Court of Appeal has said that 'whilst regard may be had to an objects clause to resolve uncertainty or ambiguity, the objects clause does not control clear statutory language, or command a particular outcome of exercise of discretionary power'.[72] Moreover, as a practical matter, it is preferable to include clear language about the importance of sustainability in relevant sections of the Act, as many officials without training in law who administer legislation may be unaware of the broader principles of statutory interpretation such as the influence of an objects clause.

1.46 In the Committee's view it is also preferable to have an objective commitment to ecologically sustainable development rather than linking the main object of the legislation to unquantifiable aspirations. The Committee noted in its issues paper on the proposed nomination of the ACT as a UNESCO Biosphere Reserve that the ACT does not demonstrate sustainability, although progress is being made.[73] The Australian Bureau of Statistics reported in 2005 that comfort rather than cost saving or energy conservation was the main reason that ACT households installed insulation in their dwellings. Only 20% of the

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[71] Chapter 7, Legislation Act 2001. Disallowed subordinate laws and disallowable instruments generally cannot be re-made in substantially the same form within six months of the disallowance: section 67 Legislation Act.

[72] *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (unrep), quoted in D.C. Pearce and R.S. Geddes (2006), Statutory Interpretation in Australia (6th ed.), Lexis Nexis, Chatswood, pp154–5

[73] ACT Government (2004), *Measuring our Progress*: *Canberra's Journey to Sustainability*, Vol. 1: Our Story, Canberra; Office of the Commissioner for the Environment (2003), *Progress Towards Sustainability: State of the Environment Report 2003*,Canberra, *3*; Australian Bureau of Statistics (2006), *Environmental Issues in the ACT: Behaviour of ACT Households*, 1344.8.55.001 - ACT Stats, 2006, 2 February, accessible at <http://www.abs.gov.au/Ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/146CD38767574BBCCA2571310000F7AF?opendocument>

survey respondents used front-loading washing machines. Only 23% of households were willing to pay extra for green power, down from 34% at March 2002.[74] But this is extrapolated survey data from small samples, and highly unreliable.

1.47 The ACT Government should refer to the objective and well-recognised principles of sustainability acknowledged often in other legislation, policy documents, international law and informed opinion.

1.48 As is now widely known, the concept of ecologically sustainable development incorporates the interdependent dimensions of environmental, social and economic sustainability. It recognizes that development should alleviate poverty so that needs can be met, whist ensuring that the necessary economic growth does not damage future generations' ability to meet their needs.

1.49 In the ACT, the social elements of sustainability tend to generate less reporting (demonstrating less activity) than the economic and environmental aspects. The Auditor General noted in her *Performance Audit Report on Reporting on Sustainable Development*, that while ACT Government agencies generally complied with their sustainability reporting obligations, most failed to include information on the contribution of outputs to the social element of sustainable development, and to supplement qualitative data with quantitative data. The Auditor-General also noted that almost half the audited agencies had no systems, guidelines and processes to meet sustainability-reporting requirements.[75]

Ministerial accountability and responsibility

1.50 The draft bill sets out the processes involved when the Planning and Land Authority refers development applications to other agencies (government departments, statutory bodies or utilities prescribed by regulation) for comment. The timeframe for comment will be 15 working days. Referral

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[74] Australian Bureau of Statistics (2006), *Environmental Issues in the ACT: Behaviour of ACT Households*, 1344.8.55.001 - ACT Stats, 2006, 2 February, accessible at <http://www.abs.gov.au/Ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/146CD38767574BBCCA2571310000F7AF?opendocument>

[75] ACT Auditor-General's Office (2005), *Performance Audit Report: Reporting on Ecologically Sustainable Development*, Canberra, p4

entities will have to act consistently with their advice in subsequent approvals in most cases.[76]

1.51 The Committee agrees with the comment made in two submissions that the Planning and Land Authority should not be able to ignore advice provided by a referral entity, even subject to compliance with conditions. The Committee believes that where an approval would be inconsistent with a referral entity's advice, the Conservator of Flora and Fauna should be required to provide a public advice to the Minister who should be required to decide the issue and report to the Assembly as to why the referral entity's advice would or would not be followed.[77] This would be consistent with the precautionary principle and doctrine of Ministerial accountability.

1.52 The Committee queries whether an amendment is necessary to include in the definition of 'development' works affecting trees as this is covered in the merit and impact assessment tracks, and the *Tree Protection Act 2005* (ACT) will continue to operate concurrently with the Planning and Development Act. If the Committee's recommendations are accepted, the Planning and Land Authority will not be able to override the advice provided under that Act.

RECOMMENDATION 2

1.53 **The Committee recommends that the Minister ensure that all codes and guidelines under the Act explicitly address the social aspects of sustainable development.**

RECOMMENDATION 3

1.54 **The Committee recommends that the proposed legislation refer to 'ecologically sustainable development' rather than 'sustainable development', in each instance, for consistency across ACT legislation.**

RECOMMENDATION 4

1.55 **The Committee recommends that clauses 6 and 97 be amended to omit reference to the 'social, environmental and economic aspirations of the**

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[76] See Chapter 7 Division 7.3.3

[77] Amending sub-clause 111(2)

people of the ACT'.

RECOMMENDATION 5

1.56 **The Committee recommends that paragraph 11(3)(a) be amended to require the Planning and Land Authority to exercise its functions in a way that 'gives effect to sustainable development', rather than 'has regard to sustainable development' as currently proposed.**

RECOMMENDATION 6

1.57 **The Committee recommends that sub-clause 42(2) be amended to require the Minister to ensure that the Land Agency Board has membership that demonstrates expertise in landscape architecture and ecologically sustainable development.**

RECOMMENDATION 7

1.58 **The Committee recommends that clause 86 be amended to require that estate development plans demonstrate ecologically sustainable development**

RECOMMENDATION 8

1.59 **The Committee recommends that 'the landscape setting and biodiversity corridors' be inserted before 'infrastructure works' in paragraph 86(3)(b).**

RECOMMENDATION 9

1.60 **The Committee recommends that decisions on merit track and impact track assessments be required to demonstrate or address consistency with ecologically sustainable development, through amendments to clause 111, 112 and 120.**

RECOMMENDATION 10

1.61 **The Committee recommends that where an approval would be inconsistent with an entity's advice the Minister should be required to make the decision and provide a response to the entity as to why the entity's advice is not being followed. The Minister's response should also be tabled in the Legislative Assembly.**

2 KEY INSTITUTIONS

ACT Legislative Assembly

2.1 The ACT Legislative Assembly (including its Executive and Ministers, committees and backbenchers, and the various informal sub-entities as which they may convene) plays an important governance and oversight role in relation to planning law and policy in the Territory. The Assembly's key function is to provide a forum in which elected representatives debate and legislate, and scrutinise the activities of the government and the public sector, including public expenditure.

2.2 The Executive[78] and the Minister for Planning have specified powers in the draft bill. The proposed legislation enables the Minister for Planning to:

- give written directions to the Planning and Land Authority about the general policies the Authority must follow, or require the Authority to revise all or part of the Territory Plan or review the plan, having given the Authority reasonable opportunity to comment and having considered its comments, and having presented a copy of the direction to the Legislative Assembly or its members;[79]
- consider a recommended direction of the Legislative Assembly and direct the Authority accordingly, or change the recommendation, or decline to direct the Authority as recommended and so advise the Assembly;[80]
- give the Authority a written Statement of Planning Intent setting out the principles governing planning and land development in the ACT. This

[78] Under the Legislation Act 2001 a function given to the Executive under an Act may be exercised by any two Ministers acting in concert: sub-section 253(1)

[79] Clause 13

[80] Clause 14

statement must be presented to the Assembly within six sitting days, or to each member within 10 working days, whichever is earlier;[81]

- permit the Authority, in writing, to provide planning services to someone other than the Territory;[82]
- require the Authority to provide a report or information about its operations;[83]
- give the Land Development Agency written instructions about the principles that are to govern the exercise its functions, having given the agency reasonable notice and considered its comments on the proposed direction;[84]
- try to ensure that the Land Agency Board has prescribed disciplines and expertise represented on it;[85]
- direct the Authority to prepare a planning report or a strategic environmental assessment in relation to a draft variation of the Territory Plan that the Authority is preparing, and/or to direct the Authority to tell the Minister when the draft plan variation is ready to be notified;[86]
- refer a draft plan variation to an appropriate committee of the Assembly not later than 20 working days after he or she receives it, with a request that the committee report on the draft plan variation;[87]
- take action under clause 73 where a committee fails to report within six months of referral of a variation;[88]
- approve a draft plan variation but only after having considered whether the draft variation of the Territory Plan would vary the Statement of Strategic Directions or promote the Planning Strategy, and having considered the recommendations of the relevant Assembly Committee.

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[81] Clause 15
[82] Clause 16
[83] Clause 17
[84] Clause 36
[85] Sub-clause 42(2)
[86] Sub-clause 60(2)
[87] Clause 70
[88] Clause 72

Alternatively, he or she may return the variation to the Authority with directions that it conduct further consultation, consider any relevant planning report or strategic environmental assessment, consider any suggested revision, revise the draft variation in a stated way, or withdraw the draft plan variation;[89]

- revoke his or her approval of a plan variation before it has presented to the Assembly and return it to the Authority;[90]
- fix the commencement day for a variation to the Territory Plan;[91]
- fix a day for the commencement of an approved provision of a partly rejected variation; or withdraw the provision;[92]
- direct the Authority to prepare a planning report or strategic environmental assessment in accordance with the Act;[93]
- consider whether the Planning Strategy should be reviewed, and if it is decided that the strategy be reviewed, arrange for the review;[94]
- declare that the impact track applies to a development proposal where satisfied that there is a significant risk of an adverse environmental impact;[95]
- direct the Planning Authority to refer a development application that has not been decided by the Authority in the exercise of the Minister's call-in powers;[96]
- consider an application referred under clause 144 in prescribed circumstances,[97] and take various actions as a result,[98] including presenting a statement to the Assembly within three sitting days;[99]

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[89] Sub-clause 73(1)–(3)
[90] Clause 74
[91] Sub-clause 79(2)
[92] Sub-clause 80(3)
[93] Sub-clauses 90(1) and 92(1)
[94] Paragraph 13(1)(b) and paragraph 94(5)(b)
[95] Clause 116
[96] Clause 144
[97] Clause 145
[98] Sub-clause 146(2)
[99] Sub-clause 147(2)

- approve, approve conditionally, or refuse a referred application within the prescribed time;[100]
- approve an application despite a deemed refusal;[101]
- approve an application subject to conditions;[102]
- decide whether or not to present an environmental impact statement to the Legislative Assembly;[103]
- establish a panel to consider an environment impact statement given to the Minister under section 195;[104]
- approve the grant of land in accordance with criteria prescribed by regulation;[105]
- direct the Authority in writing to prepare a planning report in relation to a proposal to grant a lease;[106]
- determine the period for a rural lease granted under paragraph 221(2)(b);[107]
- determine criteria in a disallowable instrument for the assignment or transfer of a lease containing building or development conditions;[108]
- determine criteria for the authorisation of payments for leases that are surrendered or terminated under the Act;[109]
- direct, on his or her own initiative or having considered a written request from the Conservator of Flora and Fauna, that the Authority complete a planning report or strategic environmental assessment for any aspect of a draft plan of management for public land;[110]

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100 Clause 148
101 Sub-clause 149(3)
102 Clause 150
103 Clause 196
104 Clause 198
105 Paragraph 208(1)(b)
106 Sub-clause 213(2)
107 Sub-clause 243(1)
108 Sub-clause 260(4)
109 Sub-clause 261(4)
110 Clause 283

- consider any recommendation relating to the draft plan of management for public land made by a Legislative Assembly committee before approving it, referring it back to the proponent with written directions that further consultations are necessary; consider revisions or revise the plan; defer giving the plan back to the relevant Minister until a stated date or event; or withdraw a draft plan of management;[111]
- approve guidelines for the exercise Ministerial powers under the Act, whether or not the Authority's advice has been considered;[112]
- declare a web site to be the Authority's web site;[113]
- determine, in writing, fees for the Act.[114]

2.3 Other Ministers are also given powers under the proposed legislation. For example:

- the 'relevant Minister' may designate a person or territory authority to act as a proponent in relation to a defined decision by the Minister to direct that an environmental impact statement be prepared or a panel established to conduct an inquiry.[115] The 'relevant Minister' is the Minister responsible for the administration of the Act or subordinate law under which the environmental impact statement or the relevant decision is authorised to be made;[116] and
- under clause 117 the minister responsible for the *Public Health Act 1997*(ACT) can make a declaration that a development application must be considered under the impact track.[117]

2.4 Under the proposed legislation, the Executive (i.e. at least two Ministers acting in concert or the ACT Government Executive – it is not clear) must make a planning strategy for the ACT;[118] must not do or approve anything inconsistent

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111 Clause 288

112 Clause 375

113 Clause 377

114 Clause 378; the Legislation Act 2001 contains provisions about the making of determinations and regulations relating to fees: see part 6.3

115 Clause 184

116 Sub-clause 184(2)

117 See also paragraph 106(2)(b)

118 Clause 97

with the Territory Plan;[119] and, at least once every five years, must consider and publicly notify whether the Planning Strategy should be reviewed,[120] and if so, arrange for the review.[121]

2.5 The Executive may:

- appoint a person to be the Chief Planning Executive for up to five years (with re-appointment possible) on satisfaction of prescribed matters;[122]
- suspend the Chief Planning Executive[123] or end his or her appointment not later than six sitting days after the day the reasons for the suspension are given to the Assembly and the Assembly has resolved to end the appointment;[124]
- approve the direct grant of a lease under paragraph 206(1)(d);[125]
- determine criteria for the granting of licences to occupy or use unleased land;[126]
- demand that the unlawful occupier of land give possession of the land to the Executive within a reasonable period[127] and may apply to the Magistrates Court for an order that possession of land be given to the Executive;[128] and
- make regulations for the Act.[129]

2.6 The proposed planning legislation recognises the importance of the broader Assembly by conferring on it various functions. For example, the Assembly:

- may, by resolution, recommend that the Minister give the Planning and Land Authority a direction. The Minister will be required to consider the recommended direction and so direct the Authority, or advise the

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[119] Clause 49 and sub-clauses 63(2) and 69(2)
[120] Clause 102
[121] Clause 103
[122] Clause 20
[123] Clause 23
[124] Sub-clause 23(3)
[125] Clause 208
[126] Clause 263
[127] Sub-clause 348(2)
[128] Sub-clause 348(3)
[129] Sub-clause 380(1)

Assembly that he or she does not propose to direct the Authority as recommended;[130]

- has a role in the ending of the Chief Planning Executive's appointment;[131]
- may reject proposed variations to the Territory Plan completely or partly;[132]
- may disallow various disallowable instruments;[133] and
- must be given various documents, such as Territory Plan variations and specified documents within five sitting days,[134] information on the exercise of the Minister's call in powers within three sitting days,[135] and a copy of a direction from the Treasurer to the Land Agency about the payment of funds to the Territory.[136]

2.7 Legislative Assembly committees also contribute in significant ways to the operation of democracy in the Territory. Committee scrutiny aims to hold members of the Executive Government accountable, to improve the quality of proposed legislation, to aid in policy development and to provide a forum for the public to participate in Territory governance. The membership of Assembly committees tends to reflect the composition of the Assembly, with parties represented on committees in proportion to their numbers in the Chamber.

2.8 The proposed bill suggests that the role of Assembly committees in scrutinising proposed variations of the Territory Plan may be reduced. The Minister will have a new discretion as to whether a proposed variation should

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[130] Clause 14

[131] Clause 23

[132] Clause 77

[133] Such as policy directions for lease variations to reduce rent (sub-clause 240(3)); Ministerial consents for the assignment or transfer of a lease (sub-clause 260(5)); criteria for the authorisation of payments for the refund on the surrender or termination of a lease (sub-clause 261(5)); criteria for the granting of licences to occupy or use unleased land; a determination of management objectives for public land (sub-clause 278(3)); plans of management for public land approved by the Minister (clause 291); determinations of fees (sub-clause 378(2))

[134] Clause 76

[135] Sub-clause 147(2)

[136] Sub-clause 34(4)

be referred to the appropriate committee for inquiry and report.[137] The timeframe for referral by the Minister is 20 working days.[138] In this and earlier Assemblies, the referral of proposed variations to the Standing Committee on Planning and Environment (or its equivalent) has been mandatory.

2.9 Under the proposed legislation the Minister is required to consider any Assembly committee recommendations in relation to draft variations or related documents before he or she exercises his or her powers in relation to the draft plan variation.[139] However if the Minister has referred a draft plan variation and the Assembly committee has not reported within six months of the referral date,[140] the Minister may take action in relation to the draft variation.[141] Where the Minister has not referred a draft plan variation to the Committee, the six-months time limit does not seem to apply.

2.10 The proposed legislation continues the role of Assembly committees in relation to scrutiny of draft plans of management for public land.[142] There is no new prescribed timeframe for a committee report on a draft management plan, which the Committee appreciates.

Stakeholder comments

2.11 The Commissioner for the Environment,[143] the ACT Council of Social Service,[144] the Conservation Council,[145] the Environmental Defenders' Office[146] and individuals[147] expressed concern that the bill introduces a new ministerial discretion as to whether draft variations to the Territory Plan should be referred to the appropriate Assembly Committee for inquiry and report. The

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137 Clause 70. The *Land (Planning and Environment) Act 1991* (ACT) provides that the Minister has to refer each proposed Territory Plan variation to the appropriate Assembly committee within 28 days of receiving it (section 25), for inquiry and report to the Assembly.

138 Subsection 70(2)

139 Clause 73

140 This should be 'draft variation' rather than 'report'

141 Clause 72

142 See clause 287 Exposure Draft Planning and Development Bill 2006 and section 203 *Land (Planning and Environment) Act 1991* (ACT)

143 Submission no 6 referring to paragraph 73(3)(a)

144 Submission no 10

145 Submission no 9; *Transcript of Evidence*, 29 August 2006, p3

146 *Transcript of Evidence*, 29 August 2006, pp33–34, discussing clause 70

147 Submission no 1

Council of Social Service was also concerned that if the Committee self-referred an inquiry into a draft variation to the Territory Plan, the Minister could ignore the inquiry process and make a decision regardless.[148]

2.12 The Commissioner for the Environment suggested that clause 147 of the draft bill should be amended to require the Minister to advise the Assembly about how he or she took ecologically sustainable development into account when deciding an application under section 148 (Ministerial call-in power for development applications). The Environmental Defender's Office and the Conservation Council went further; arguing that ministerial call in powers should be omitted from the proposed legislation for the reasons they provided.[149]

2.13 The Property Council suggested that implementation of the proposed new legislation needed to be monitored so that continuous improvement was possible.[150]

2.14 The Commissioner for the Environment also suggested that a requirement for public consultation should be included in clause 375, which enables the Minister to approve guidelines for the exercise of any power under the Act.[151] She also suggested that more information was needed about the matters proposed to be prescribed by regulation.

Committee comments

Role of the Assembly committee(s)

2.15 The proposed legislation, as some submissions recognised,[152] provides that an appropriate committee 'is not prevented from considering the draft plan variation documents if the draft plan variation is otherwise referred to the committee'.[153] In the sixth Assembly this would mean that the Planning and Environment Committee could self-refer Territory Plan variations for inquiry,

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148 *Transcript of Evidence*, 29 August 2006, p39
149 Submission nos 9, 12
150 *Transcript of Evidence*, 5 September 2006, p53
151 Submission no 6
152 Submission nos 1 and 10 for example
153 Sub-clause 70(3)

should it wish to do so, or the Assembly could refer matters for inquiry.[154] The six-month time limit prescribed in clause 72 does not seem to apply to inquiries generated otherwise than by Ministerial reference, but it is not clear if this was intended.

2.16 The Minister responded in detail to stakeholders' concerns. Minister Corbell said that the proposed legislation recognises that not all variations to the Territory Plan require the same level of scrutiny. If there are political consequences from a variation to the Territory Plan that would be clear when a minister or government is held accountable at the next election. The extra delay caused by scrutiny cannot always be justified. Often a policy debate may have concluded and there is no need to re-open it in an Assembly committee. Scrutiny is important but in some instances it just creates another level of bureaucracy. The Assembly would still be able to refer matters for inquiry and report. Developer-driven spot variations to the Territory Plan for example may still be referred, as would issues of policy or major initiatives such as a new suburb.[155]

2.17 The Committee supports the proposed changes to its role as it means that it will not be required to have referred to it each variation of the Territory Plan, however minor. Where there had already been extensive public consultation and engagement, the Committee should not re-run the consultation, or if the variation was minor the Committee should enter a 'no-comment' report. However, the Committee sees a need for some strengthening of the mechanisms for ensuring that the Committee is aware that the Minister is considering a draft Variation of the Territory Plan, and for the Committee to notify the Minister that it intends to conduct an inquiry into a proposed variation.

2.18 The Committee suggests that the Committee Office Secretariat (and through

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[154] ACT Legislative Assembly Standing Order No 216 provides that with the terms of reference agreed by the Assembly any standing committee can inquire into, and report on any matter referred by resolution of the Assembly. The Assembly resolved on 7 December 2004 to establish a range of general purpose standing committees 'to inquire into and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community': ACT Legislative Assembly (2004), *Minutes of Proceedings No 2*, Tuesday 7 December 2004

[155] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

the Secretariat the members of the appropriate Assembly Committee) should be provided with a copy of the documents given to the Minister under clause 67. These would already be public documents notified as available for public inspection. A set should be provided to the appropriate Assembly committee through the Secretariat so that the Committee can decide whether scrutiny by inquiry and report is warranted. The Committee needs to advised what variations are proposed, so that it does not have to monitor the Planning and Land Authority's website.

2.19 In this regard, the Committee considers that the note to clause 67 should be a provision of the legislation. It provides that the 'Minister must give a copy of the documents given to the Minister under this section to a committee of the Legislative Assembly (see s70)' which suggests that the Committee should receive a copy of the documents given by the Authority to the Minister under sub-clause 67(2). But notes are not part of an Act, so this text would not bind the Minister.[156]

2.20 The Committee also suggests that clause 71 be amended so that it is clearer that if the Committee has resolved to inquire into a draft plan variation itself, or the Assembly has referred an inquiry to the Committee, the Minister must not make a decision about the variation until the Committee has reported.

RECOMMENDATION 11

2.21 **The Committee recommends that clause 71 be clarified so that if the Committee has resolved to inquire into a draft plan variation the Minister must not make a decision about the variation until the Committee has reported.**

2.22 The Committee is concerned about the six-month timeframe for inquiry and report on Territory plan variations without any provision for extension by the Minister, the Speaker or the Assembly. The Committee tends to follow the recommended Government consultation timeframe of six weeks when inviting submissions. Where an inquiry is particularly broad and complex, the time allowed for submissions is usually longer. The Committee is also flexible in

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[156] Sub-section 127(1) Legislation Act 2001

accepting submissions out of time.[157] Public hearings need to be scheduled for when the Assembly is not sitting and there are no competing commitments, such as estimates or annual report hearings (which can each take a month or more out of the possible meeting times in a year). Moreover, as the Committee Office Secretariat has limited resources, and committees tend not to meet during sittings, it is possible that if the committee's work program is full or inquiries are particularly complex, that some matters may not be finalised within six months. In such circumstances the committee should be able to seek an extension of time from the Assembly, to enable the committee to conclude its inquiry and report.

2.23 The Committee appreciates that it is necessary and desirable to relegate detailed information to regulation but there is also a principle of statutory interpretation that provisions should not demonstrate an inappropriate delegation of legislative power to the Executive. The Assembly has a disallowance power in relation to disallowable instruments, but there are also limitations on when a disallowed regulation can be re-made. It would be preferable therefore, for the bill to include a requirement for agency and public consultation on proposed regulations and other subordinate instruments, and for the scope of the delegated legislative power to be reduced. This should occur in relation to provisions 82(1)(b), 89, 261(4), 263 and 278.[158]

2.24 If the Legislative Assembly has resolved that the Minister should give the Planning and Land Authority a direction, but the Minister declines to do this, the Minister should be required to explain his or her reasons for not doing so to the Assembly.

RECOMMENDATION 12

2.25 **The Committee recommends that a new sub-clause be inserted in clause 67 requiring the Minister to provide a set of the documents referred to in sub-clause 67(2) to the appropriate Assembly committee, and the note to clause 67 omitted.**

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[157] ACT Government (2005), *ACT Government Community Engagement Manual*, Canberra, p6
[158] See also submission no 6

RECOMMENDATION 13

2.26 **The Committee recommends that the draft bill be amended to enable the Legislative Assembly to extend the time available to an Assembly committee for inquiry and report on a draft plan variation beyond six months.**

RECOMMENDATION 14

2.27 **The Committee recommends that paragraph 147(2)(e) be amended to require the Minister's statement to address how the principles of ecologically sustainable development influenced the decision under section 148.**

RECOMMENDATION 15

2.28 **The Committee recommends that clause 14 be amended so that if the Legislative Assembly has resolved that the Minister should give the Planning and Land Authority a direction, and the Minister declines to do this, the Minister is required to explain his or her reasons for not doing so to the Assembly.**

RECOMMENDATION 16

2.29 **The Committee recommends the draft bill be amended to require intra-governmental consultation in relation to instruments made under sub-clause 82(1)(b), 261(4), 263 and 278. Parliamentary Counsel and the Assembly should also consider whether these provisions and clauses 89 and 93 represent an inappropriate delegation of legislative power to the Executive.**

Planning and Land Authority

2.30 The proposed legislation includes provisions concerning the establishment, functions, operations and staff of the Planning and Land Authority. Many relevant provisions of the *Planning and Land Act 2002* (ACT) have been carried forward. The Authority is an 'administrative unit' under the *Public Sector Management Act 1994* (ACT), following amendments to administrative arrangements in 2003.

2.31 The Planning and Land Act was enacted in the fifth Assembly. Liberal Party MLAs voted against the legislation which was consistent with the Carnell Government's response to key recommendations of the Stein Report, such as that a statutory Territory Planning Authority and Land Management Authority be created.[159] The Planning and Land Bill had been scrutinised by the Standing Committee on Planning and Environment[160] and the Legal Affairs Committee,[161] and those Committees' recommendations were known to the Assembly when the legislation was debated and adopted.[162]

2.32 Provisions in the Planning and Land Act concerning the Planning and Land Council were repealed earlier this year, effective from 1 July 2006.[163] The Council was discontinued as part of a cost-saving rationalisation of boards and committees advising the ACT Government. Savings of $700,000 over the next four years were projected as a result.[164] Some industry stakeholders had advocated the abolition of the Council.[165]

2.33 The Planning and Land Act includes a requirement that Minister initiate a review of the Act by the end of 2006, and prepare and present a report on the review to the Legislative Assembly 'as soon as practicable'.[166] The Committee does not know whether the Planning and Land Authority and the Land Development Agency were included in the 2006 Functional and Strategic

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159 ACT Legislative Assembly (2002), *Minutes of Proceedings No 43, 12 December 2002*, p499. See Mr Gary Humphries MLA, Minister for the Environment, Land and Planning (1996), *ACT Government Response to the Report of the Inquiry into the Administration of the A.C.T. Leasehold*, Canberra

160 ACT Legislative Assembly, Standing Committee on Planning and the Environment, *Planning and Land bill 2002 and Associated Legislation: Report No 9*, November.

161 ACT Legislative Assembly (2002), Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bill and Subordinate Legislation Committee), *Scrutiny Report No 17*, 9 August.

162 See ACT Legislative Assembly (2002), 'Government response to the Report of the Standing Committee on Planning and Environment Report No 9– Planning and Land Bill 2002 and Associated Legislation', 19 November, available from Committee Office; ACT Legislative Assembly (2002), Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bill and Subordinate Legislation Committee), *Scrutiny Report No 20*, 11 November, pp15–16

163 *Administrative (Miscellaneous Amendments) Act 2006*

164 Question on Notice No 26 from Mr Zed Seselja to the Minister for Planning, Mr Simon Corbell, <http://www.parliament.act.gov.au/downloads/issues-papers/Corbell%20Planning.pdf>,p6, accessed 18 August 2006

165 ACT Legislative Assembly, Standing Committee on Public Accounts (2006), *Review of Auditor-General's Report No 2 of 2005*: *Development Application and Approval Process: Report 7*, September 2006, pp67–68

166 Section 54

Review of Government Structures and Programs, also known as the *Functional Review of the ACT Budget* or the *Report of the Costello Review*, because that report has not been made available to Members of the Legislative Assembly.

2.34 The Government's view is that it has reviewed the Act in the course of the Planning Reform Project and would be reporting to the Assembly on the outcome of the project and when responding to this report.[167] The Minister also advised the Committee that he was prepared to consider whether a similar review and report clause should be included in the draft bill but that he would need to reflect on what an appropriate length of time would be before the Act should be reviewed.[168] The Committee notes that the Public Accounts Committee recommended a review after three years. The Committee suggests that a five-year review may deliver more results given the breadth of the reforms proposed.

Authority functions

2.35 The draft bill establishes the Planning and Land Authority as a body corporate with a seal,[169] and provides that the Chief planning Executive is the Authority.[170] The Authority's main functions, prescribed in clause 11, include:

- to prepare and administer the Territory Plan and propose amendments as necessary;
- to plan, approve and regulate the development of land and provide planning services;
- to advise on planning and land policy, including the broad spatial planning framework for the ACT;
- to maintain the digital cadastral database under the *Districts Act 2002* and make available land information;
- to grant, administer, vary and end leases on behalf of the Executive;
- to grant licences over unleased territory land;

[167] Oral response by the Chief Planning Executive to the Planning and Environment Committee, 26 September 2006

[168] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

[169] The Law Society queried the need for a seal: Exhibit no 5

[170] Clause 9

- to regulate the building industry;
- to make controlled activity orders;
- to review its own decisions;
- to ensure community consultation and participation in planning decisions; and
- to promote public education and understanding of the planning process.

2.36 The Authority must exercise its functions in a way that has regard to sustainable development and the proposed Statement of Planning Intent.[171]

2.37 The bill includes changed provisions concerning the public register required to be maintained by the Authority.[172]

Stakeholder comments

Advisory bodies

2.38 The Housing Industry Association welcomed the abolition of the Planning and Land Council.[173] Several other submissions and witnesses expressed regret that the proposed legislation did not provide for new advisory bodies or expert advisers such as a chief architect or design committee,[174] or Independent and Expert Assessment Panels.[175] The Planning Institute said that it was important that the Planning and Land Authority and the Minister could be given independent expert advice 'on a regular basis to enrich the authority's knowledge and the way in which is practises.'[176] Professor Roger Wettenhall suggested similarly, that boards give executives and staff another frame of reference, apart from the minister.[177] Ms Di Johnstone criticised the draft bill for its lack of provision for systematic consultation with the community on

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171 sub-clause 11(3)
172 Part 3.6 in the Bill
173 Submission no 13
174 Submission nos 2, 8; *Transcript of Evidence*, 29 August 2006, p10
175 Submission no 12
176 *Transcript of Evidence*, 29 August 2006, p10. See also p12
177 *Transcript of Evidence*, 5 September 2006, p59

planning issues.[178]

Authority functions

2.39 Mr Keith Storey, for ACT for Trees Inc, suggested that the Authority's role and functions should be better defined. Mr Storey suggested:

- 11(c): add additional words after 'land' so that it reads 'to plan and regulate the development of land to achieve better urban design outcomes in term of the built environmental character, amenity and liveability';
- 11(i): add the word 'building' so that it reads 'to decide building applications for approval to undertake development';
- 11(j): to regulate the building industry' should be amended to read: 'to ensure availability and release of land for development';
- to grant planning approval for building design and siting;
- provide certifiers approval for building construction plans, compliance with building regulations, inspection approvals during construction, and final certification on completion of the building;
- 11(l) add additional words after 'ACT' so that it reads ' to provide planning services, including services to entities outside of the ACT, including closer regional planning collaboration with adjoining NSW planning authorities';
- 11(o) add additional words after 'process' so that it reads 'to promote public education and understanding of the planning process and development outcomes, by providing easily accessible public information etc'.[179]

RECOMMENDATION 17

2.40 **The Committee recommends that the Minister consider whether the Authority's role and functions are appropriately defined.**

Resourcing

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[178] Submission no 1
[179] Submission no 2A

2.41 Several submissions emphasised the importance of providing the Authority with adequate resources, and of ensuring that staff had appropriate skills and training to discharge their responsibilities:

- the Planning Institute highlighted this need, particularly in areas such as compliance, so that high quality design could be delivered consistent with Canberra's national capital status;[180]
- the Housing Industry Association submitted that adequate resources needed to be provided to the pre-application process, and that if the Authority had the resources to meet with neighbours affected by proposed developments, the early identification and resolution of issues of concern would facilitate the finalisation of development projects. The Association also expressed concern that there may be too few qualified certifiers available to undertake the certification required;[181] and
- the Institute of Architects argued similarly that it was important that Planning and Land Authority staff assessing applications had the requisite professional qualifications in the area they were assessing. For example if an application was an architectural design, the assessor should have an architectural qualification. The Institute suggested that assessment could be outsourced to qualified personnel who would be listed and notified as competent to perform the assessment, as is proposed for impact assessment consultants.[182]

2.42 The Housing Industry Association suggested that the Authority needed to promote a change in its risk-averse culture which had developed in response to an 'extreme level of public consultation and scrutiny … and third party appeal rights'.[183]

2.43 The Institute of Landscape Architects submitted that the Planning and Land Authority needed to have staff capable of designing and implementing 'structure plans and concept plans that recognise and integrate with finer-grained landform and biophysical factors of a site so that the landscape can

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[180] Submission no 8; *Transcript of Evidence*, 29 August 2006, p11
[181] *Transcript of Evidence*, 5 September 2006, pp43–44
[182] Submission no 5, Appendix; *Transcript of Evidence*, 5 September 2006, p62
[183] Submission no 13

best accommodate the built form', noting that the design of open space was essential for creating a landscape setting, creating social bonds, promoting physical activity and making good neighbourhoods. It was also important that housing design responded to the biophysical characteristics of landscapes so that it was more efficient and appropriate.[184]

2.44 Mr Frank Mestrov suggested that 'newspaper' should be defined in the bill to mean a Canberra based newspaper, and that public notices about planning matters should all be published on a designated day of the week, or categories of matters should be published on designated days.[185]

Timeframes

2.45 Mr Mestrov suggested that all the timeframes in the draft Bill should be reviewed and further considered.[186] The Committee has done this, considering the clauses noted in Appendix D.

2.46 On the 15-day timeframe for referral agency processes, the ACT Heritage Unit regards that as 'quite workable in almost all cases' provided complete information is available for Heritage Council consideration.[187] The Commissioner for the Environment could see no justification for providing that consultation periods with referral entities of less than 15 working days could be prescribed by regulation. She suggested that if a shorter period were necessary this should be negotiated on a case-by-case basis.[188]

2.47 The Property Council welcomed the 15-day timeframe for inter-agency responses to development assessments.[189]

2.48 The Institute of Architects submitted that the timeframe for scoping an Environmental Impact Statement should be 10 days.[190] It also suggested that the timeframe for assessing an application in the merit track should be 20

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[184] *Transcript of Evidence*, 5 September 2006, pp66, 68, 69
[185] Submission no 11
[186] Submission no 11
[187] ACT Legislative Assembly, *Transcript of Evidence: Inquiry into Auditor-General's Report No 2 of 05*, Wednesday 6 September 2006, p12
[188] Submission no 6
[189] *Transcript of Evidence*, 5 September 2006, p54
[190] *Transcript of Evidence*, 5 September 2006, p65

working days from the day the application is lodged if there is no public notification requirement; 30 working days if public notification is required and no representation is made; and 45 working days in any other instance.[191] It also requested that development approvals should be terminated after three years in the development has not started, with an option to state a defined period other than three years.[192]

2.49 Mr Arthur queried why 20 working days should be allowed for the assessment of a code development. He also suggested that the time limits only provided 'Clayton's protectionism' because the Planning and Land Authority could continue past the time-limit and its decision would be a deemed refusal until the Administrative Appeals Tribunal determined that the appeal could be heard.[193] He also queried why 30 or 45 days was allowed for impact-assessed matters, depending on whether notification had to take place. He said the provisions assumed that an impact assessment would be lodged with the application, but that the applicant could have difficulty ascertaining whether this was necessary.[194]

2.50 Mr Mestrov submitted that the proposed Public Register should be required to provide public access to its contents within a specified maximum period, such as five working days for items of information required to be uploaded to the register.[195] The ACT Law Society also suggested that the public register and copies of development applications should be accessible on the Internet.[196]

2.51 Mr Mestrov commented that the proposed statutory consultation period for draft plan variations should be at least 30 working days, not the 15 working days currently proposed.[197]

2.52 The Housing Industry Association suggested that private certifiers should be contracted to review documents and inspecting works to ensure the proposed

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[191] Submission no 5, Appendix
[192] Submission no 5, Appendix
[193] *Transcript of Evidence*, 29 August 2006, p17
[194] *Transcript of Evidence*, 29 August 2006, p19
[195] Submission no 11
[196] Exhibit no 5
[197] Submission no 11

processing timeframes were complied with.[198]

Committee comments

Chief Planning Executive

2.53 The Committee is concerned about the provisions in the proposed legislation concerning the appointment and termination of appointment of the Authority's Chief Planning Executive.[199] These do not accord with the recommendations made in the Commissioner for Public Administration's 2003 *Report of the Review of the Public Sector Management Act 1994.*[200] The Authority is an administrative unit for the purposes of the *Public Sector Management Act 1994* (ACT) but the Chief Planning Executive, as the Planning and Land Authority, has some of the characteristics of a statutory authority.

2.54 The Assembly does not have a role in scrutinising proposed appointments to this position, because the Executive, and not the Minister, makes the appointment.[201] The Legislation Act provides that if *a* Minister has the power to appoint a person to a statutory position,[202] they must consult with an appropriate Assembly Committee before making the appointment, with specified exceptions.[203] The reference to the Executive, which avoids consultation with an Assembly committee, is not unusual, although the Committee notes that under the *Auditor-General Act 1996* (ACT) a Committee of the Legislative Assembly, the Public Accounts Committee, has a veto role in relation to the appointment of the Auditor-General.[204]

2.55 The proposed legislation does provide however, that the Assembly has a role

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198 Submission no 13

199 Clauses 20, 23

200 Commissioner for Public Administration (Richard Moss) (2003), *Report of the Review of the Public Sector Management Act*, Canberra, recommendations 26 and 27

201 See Legislation Act 2001 Division 19.3.3. Contracts for executive appointments are provided to the Assembly but not circulated, and may be viewed by a Member on request

202 The Assembly had enacted legislation in 1994 requiring proposed statutory appointments to be referred to an Assembly Committee for comment (see *Statutory Appointments Act 1994)*, discussed in Roger Wettenhall and John Laver, 'Administration away from the Core: Non-Departmental Organisation in ACT Government', *Canberra Bulletin of Public Administration*, No 103, March 2002, pp22–37. That Act was repealed in 2002 and equivalent provisions were inserted in the Legislation Act 2001 in 2002 by the Legislation Amendment Act 2002.

203 Division 19.3.3

204 Section 8, *Auditor-General Act 1996* (Cwlth)

in terminating the position of Chief Planning Executive. The Executive may suspend the chief planning executive from duty—

(a) for misbehaviour; or

(b) for physical or mental incapacity, if the incapacity affects the exercise of the chief planning executive's functions; or

(c) if the chief planning executive is convicted, or found guilty, in Australia of an offence punishable by imprisonment for at least 1 year; or

(d) if the chief planning executive is convicted, or found guilty, outside Australia of an offence that, if it had been committed in the ACT, would be punishable by imprisonment for at least 1 year.[205]

2.56 The Minister must present a statement of the reasons for the suspension to the Legislative Assembly not later than the first sitting day after the day the chief planning executive is suspended. The Executive must then end the chief planning executive's appointment, if within the next 6 sitting days after the day the statement is presented, the Legislative Assembly resolves to require the Executive to end the chief planning executive's appointment.

2.57 This clause could derogate from the Chief Planning Executive's human rights to privacy and to be treated with dignity when suffering from physical or mental incapacity which sufficiently affects the exercise of their functions to justify the termination of their employment. Inevitably their suspension and possible termination would attract media attention and their reputation may be impaired, even if they later recover from their disability or incapacity. There is no guarantee that under current Assembly standing orders and procedural arrangements the Chief Planning Executive would be given an opportunity to present their case to the Assembly or an Assembly Committee, and nor is it likely that their termination by the Assembly could be challenged in court because of the privileged nature of Assembly proceedings.

2.58 The Committee notes that the Chief Planning Executive may have legal remedies against the Executive concerning their earlier suspension, but the Committee is concerned that the statutory timeframe proposed may preclude the exercise of these, or require the Chief Planning Executive to seek injunctive

[205] Clause 23

remedies against the Executive before documents are tabled in the Assembly.

2.59 Similar provisions to those in the draft bill are found in other ACT Acts concerned with statutory public office holders.[206] The *Human Rights Commission Act 2005* (ACT) does not provide a role for the Assembly in terminating the appointment of the Human Rights Commissioner however.

2.60 The Committee appreciates that provisions such as these are intended to enhance the independence of appointees to high-level statutory positions, provide a safeguard against the misuse of executive power, and enable the Assembly to scrutinise proposed terminations. The Committee is concerned however, that the Assembly does not currently have any Standing Orders or other mechanisms in place to ensure that a suspended executive is dealt with according to the rules of natural justice and evidential principles, and with respect to their privacy.

2.61 The Committee is concerned that the proposed statutory provision (in clause 23) for suspending or ending the Chief Planning Executive's appointment, which continue those in the *Planning and Land Act 2002*, are additional to the contractual provisions envisaged under section 28A of the *Public Sector Management Act 1994* (ACT), and queries why private contractual remedies are regarded as insufficient, and why the Chief Planning Executive faces different termination procedures to other chief executives in the ACT public service, when the Planning and Land Authority has the same status as other 'administrative units' listed in the Chief Minister's Administrative Arrangements made under the *Public Sector Management Act 1994*.[207]

2.62 The Committee notes that the ACT Legislative Assembly's Public Accounts Committee recommended recently that the *Public Sector Management Act 1994* (ACT) be amended to prescribe principles of procedural fairness for the early termination of an employment contract for a Chief Executive in the ACT

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[206] e.g. *Electoral Act 1992* (ACT); *Commissioner for the Environment Act 1993* (ACT), *Ombudsman Act* 1989 (ACT)

[207] The Legislation Act 2001 (ACT) defines 'administrative unit' as an administrative unit for the time being established under the *Public Sector Management Act 1994*, section 13 (1)

public service.[208]

RECOMMENDATION 18

2.63 **The Committee recommends that the ACT Government review Part 3.4 of the exposure draft bill with a view to making its provisions consistent with those applicable to other ACT public service chief executives under the *Public Sector Management Act 1994* (ACT).**

RECOMMENDATION 19

2.64 **If the government does not agree with the recommendation above, the Committee recommends that the rules of natural justice and other due process procedural safeguards be required to be afforded the Chief Planning Executive when the Executive considers the suspension or termination of his or her employment, and when the matter comes before the Assembly. Similar safeguards should be inserted in other legislation providing for the suspension or removal of independent office holders.**

RECOMMENDATION 20

2.65 **The Committee recommends that the Government respond to the Standing Committee on Public Accounts' *Review of Auditor-General's Report No 2 of 2005*: *Development Application and Approval Process: Report 7* at the same time as it responds to the recommendations of this report.**

Advisory bodies

2.66 The Committee accepts the Minister's advice that his decision to abolish the Planning and Land Council was a necessary cost containment measure. The Minister advised the Committee that while he valued the independent and expert advice the Council had given over the three years, the costs of retaining the Council could not be justified in the budget environment and in the context of the budget for the Planing and Land Authority.[209]

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[208] ACT Legislative Assembly, Standing Committee on Public Accounts (2006), *Review of Auditor-General's Review Report: Matters relevant to the Office of the Special Advisor, Council of Australian Governments and Inter-governmental Relations: Report 6*, August, recommendations 3 and 4

[209] Oral response by the Minister for Planning, Mr Simon Corbell MLA to Planning and Environment Committee, 26 September 2006

2.67 The Planning and Land Authority advised the Committee that it has an Executive Policy Committee which comprises the three most senior planners in the Planning Authority: the Chief Planning Executive, the Deputy Chief Planning Executive and the Director of the Development Services Branch. That Committee scrutinises and vets proposals that previously would have been considered by the Planning and Land Council. Less senior officers in the Authority do not exercise their delegated power to approve planning decisions that would previously have been referred to the Council, without obtaining a recommended position from the Executive Policy Committee.[210]

2.68 The Minister advised the Committee that he would not be inclined to make the Planning and Development Forum a statutory body because the Forum performed a community consultation role and was not an expert body, but was valuable for the networks it represents in the property sector, and amongst community councils and professional associations. Since the Forum comprises representatives of a range of organisations it would be unwieldy to make this a statutory body as statutory processes would need to be followed concerning its meeting, membership etc.[211]

Training and development for Authority staff

2.69 The Chief Planning Executive advised the Committee that the Authority was developing a comprehensive training and development program for its staff and key users of the proposed legislation.[212] The Authority has had discussions with the University of Canberra about a possible post-graduate planning course but the University has not pursued that to date even though the Authority remains supportive. The Planning Institute at a national level has made a submission to the Minister for Immigration seeking the recruitment of planners from overseas. The Authority supports planners and members of the Planning Institute who wish to gain accreditation as a 'certified practising

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[210] Oral response by the Chief Planning Executive to Planning and Environment Committee, 26 September 2006

[211] Oral response by the Minister for Planning, Mr Simon Corbell MLA to Planning and Environment Committee, 26 September 2006

[212] Oral response by the Chief Planning Executive to the Planning and Environment Committee, 26 September 2006

planner'.[213]

2.70 The Committee notes that the Assembly's Public Accounts Committee has recently made several recommendations aimed at improving the tertiary education and in-house training opportunities for planners and aspiring planners within the ACT. These include that the Planning and Land Authority give priority to the development of a formalised training program to improve understanding within the Authority of legislative requirements, and that the Government encourage and support the work of the University of Canberra in establishing a professional planning course structure.[214]

Timeframes

2.71 A table summarising the timeframes for decisions under the proposed legislation is at Appendix D. The provisions that the Committee suggests be reconsidered include:

- the minimum 15-day public inspection period for draft variations of the Territory Plan and background papers, subject to possible extension;[215]
- the 20-day timeframe for Ministerial reference of a draft plan variation to an Assembly Committee without provision for notification about either the Minister's or Committee's decision concerning the need or otherwise for an inquiry;[216]
- the six-month timeframe for Assembly Committee reports (noted above);[217]
- the three-month limitation period for legal challenges on Territory Plan matters;[218]
- the public consultation period prescribed by regulation within which representations about publicly notified development applications must

[213] Oral response by the Chief Planning Executive to the Planning and Environment Committee, 26 September 2006
[214] *Review of Auditor-General's Report No 2 of 2005: Development Application and Approval Process: Report 7*, p52
[215] Paragraph 61(1)(a)
[216] Sub-clause 70(2)
[217] Clause 72
[218] Clause 96

be made, during which period the Authority can extend by notice published in a daily newspaper;[219]

- the two-week minimum period for persons who made a representation to the Authority to make a further representation on a new application;[220]
- the 20 working days given to the Authority to make a substitute decision or confirm a decision following a request for reconsideration, after which time the Authority is taken to have confirmed the original decision;[221]
- the minimum 20 working day time limit for comment on a draft scope for an environmental impact statement;[222]
- the minimum 15 working day period for the provision of written representations about a draft plan of management for an area of public land;[223] and
- the five working day period (or longer period as specified) within which persons can be required to undertake rectification work.[224]

2.72 The Committee notes that the ACT Government's Community Engagement Manual provides:

> The timing of any engagement activity is crucial to its success. …Ideally, the timeframe should be well connected to the decision-making timeframe so that the community can easily connect their engagement to the final decision.
>
> Recommendations regarding timeframes
>
> It is strongly recommended that the absolute minimum for any community engagement activity be six weeks. For large projects, policies and strategies seeking comprehensive feedback, twelve weeks is recommended.[225]

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[219] Sub-clauses 143(2), (3) & (5)
[220] Paragraph 174(3)(b)
[221] Clause 175
[222] Sub-clause 188(2)
[223] Sub-clause 284(3)
[224] paragraph 330(3)(f) and (4)
[225] ACT Government (2005), *ACT Government Community Engagement Manual*, p6

2.73 The Committee regards some of the timeframes in the draft bill as unnecessarily short and recommends that they be reconsidered.

RECOMMENDATION 21

2.74 **The Committee recommends that the short timeframes highlighted by the Committee be reconsidered in view of the ACT Government's *Community Engagement Manual*.**

Compliance and enforcement

2.75 The draft bill proposes many provisions which are similar to those in the *Land (Planning and Environment) Act 1991* (ACT) which provide for orders, directions for rectification, prohibition notices, injunctions and terminations of leases. Other legislation, such as the *Criminal Code Act 2002* (ACT) would also apply to the legislation when enacted.[226] The bill introduces a new complaints resolution process concerning 'controlled activities' (Schedule 2) which carry penalties of between 50 and 200 penalty units.[227] The offence provisions for undertaking development without approval, and undertaking prohibited development, have been refined, and the maximum applicable penalties have been significantly increased.[228]

Stakeholder comments

2.76 As noted above, the Planning Institute expressed support for the increased penalties and stronger compliance regime in the draft bill but noted that the Planning and Land Authority be adequately resourced so that it can properly administer the legislation.[229]

2.77 The Housing Industry Association noted that increased penalties should act as

[226] Clause 5
[227] See Chapter 11. The list of controlled activities is at Schedule 2 to the draft bill and can be expanded by regulation, including by cross-reference to other legislation. A penalty unit is $100 per unit and $500 per unit for corporations: s133 Legislation Act 2001
[228] See for example Part 7.4. The maximum penalty for the highest level offence of undertaking development without approval where the person knows or could reasonably be expected to know approval is required has been increased to $200,000 for individuals and $1, 250,000: clause 179. Clauses 331, 333 and 341 double the maximum 50 penalty units applicable under the Land (Planning and Environment) Act.
[229] Submission no 8

a disincentive to non-compliance.[230]

2.78 Mr Arthur expressed general satisfaction with the compliance provisions but noted that the penalty for failure to develop in accordance with a condition was less than failure to develop in accordance with an approval, and that this was anomalous.[231]

Committee comments

Compliance and complaints

2.79 The Committee is aware that the non-enforcement of Territory planning legislation has been an issue of concern to planning policy makers at various times. Promoting compliance was identified as a priority in the 1995 Stein report, which criticised the culture of non-enforcement of lease purpose clauses for more than 20 years.[232] The two most recent annual reports of the Authority do not indicate that compliance activity has been a high priority for the Authority.

2.80 The Committee welcomes the new complaints process which will have an increasingly important place in the planning regime given that third party appeals will be unavailable for code track developments, including many residential developments. The Committee notes that the provision of a telephone number for complaints purposes was recommended in the Public Accounts Committee's report on development applications, and that complaints resolution had been identified as an issue requiring attention in the Auditor-General's earlier report. The Public Accounts Committee also recommended that the Planning and Land Authority introduce a customer-feedback system.[233]

Strict liability offences

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230 Submission no 13

231 Submission no 7, citing clauses 179, 181

232 *Report into the Administration of the ACT Leasehold to the Chief Minister ACT Government*, p xxiv; paragraph 17.237

233 *Review of Auditor-General's Report No 2 of 2005*: *Development Application and Approval Process: Report 7*, pp54, 95; ACT Auditor-General's *Report No 2 of 2005 Development Application and Approval Process*, Canberra

2.81 The Committee notes that many of the minor offences in the draft bill are entirely or partially strict liability offences. This means that there is no requirement to prove a mental element such as intention or recklessness for the physical element of the offence, and the defendant can be found liable just for having done the unlawful acts. The defence of reasonable mistake automatically applies to strict liability offences however,[234] and in some of the provisions the defence of reasonable excuse applies.

2.82 Strict liability is less of a practical concern when the penalty is relatively low, such as one or five penalty units,[235] but the bill includes several strict liability offences which carry maximum penalties of 100 penalty units. These include obstructing, hindering, intimidating or resisting an authorised person in the exercise of the person's functions when the person knows that or is reckless about whether someone is an authorised person;[236] and undertaking development without development approval and undertaking a prohibited development without a reasonable excuse.[237]

2.83 Strict liability provisions put at issue the right to a fair trial and the presumption of innocence under the *Human Rights Act 2004* (HRA).[238] With strict liability the prosecution is relieved of its obligation to prove beyond reasonable doubt the mental elements of each alleged offence. This is a serious derogation from a fundamental criminal law principle and needs careful justification on a case-by-case basis. Generally under Commonwealth law, strict liability is discouraged for offence provisions carrying a penalty above 60 penalty units. A countervailing consideration under the Human Rights Act may be that the provisions are reasonable, demonstrably justifiable in a free and democratic society and authorised by Territory law. They may also be considered necessary for protecting the integrity of a regulatory regime,[239] such

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234 Section 36 of the Criminal Code. See for example the strict liability offences in clauses 142(2), 179(4), 180(4), 181(1), 325, 331(1), 333(1)(b), 341, 351, 356 and 357

235 See for example sub-clause 142(2)

236 Paragraph 333(1)(b)

237 See clauses 179(4), 180(4), 181(1)

238 Sections 21 and 22(1)

239 Commonwealth guidelines and these principles are discussed in Submission no 3, Professor Peter Bayne (2006), Australian Catholic University, Submission to the Standing Committee on Legal Affairs in relation to its inquiry into Strict Liability Offences, 17 July, accessible at < http://www.parliament.act.gov.au/committees/index1.asp?committee=66&inquiry=200>

as the planning system. This 'proportionality test' involves assessing whether the provisions serve an important and significant objective, and whether there is a rational and proportionate connection between the provision and the objective.[240]

2.84 The Attorney-General's view is that the imposition of strict liability is legitimate when requirements to prove fault, with respect to the physical elements of an offence, has undermined or will undermine the effectiveness of the offence in a significant number of cases and there are clear and legitimate grounds for penalising a person who lacks fault in relation to that element.[241]

2.85 The Committee notes that the proposed legislation includes strict liability provisions when there has been very little compliance activity undertaken in recent years, which militates against considering these as proportionate. On the other hand, the strict liability offences for developments undertaken without approval include two sections with much higher penalties for commensurate levels of intention (i.e. actions done with 'a guilty mind'), and in these offence provisions there is a defence of reasonable excuse.[242] Strict liability provisions tend to be the subject of recommendations by the Standing Committee on Legal Affairs[243] and the Assembly will consider the comments made by that Committee when its scrutiny of this bill is reported.

Minor restructuring

2.86 The Committee suggests that to increase the readability of the proposed legislation, the offence and civil liability provisions should be included in the one chapter, with Part 7.4 moved into Chapter 11.

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[240] See section 28 of the *Human Rights Act 2004* (ACT) and *R v Oakes* [1986] 1 SCR103; *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] 3 WLR 675; *Sunday Times v UK* (1979-80) 2 EHRR 245; *Ministry of Transport v Noort* [1992] 3 NZLR 260

[241] ACT Attorney General, Simon Corbell MLA (2006), ACT Government Submission to the Standing Committee on Legal Affairs, Inquiry into Strict Liability Offences in the ACT, accessible via <http://www.parliament.act.gov.au>

[242] See clauses 179(4), 180(4) and 181(1)

[243] See generally Legislative Assembly. Standing Committee on Justice and Community Safety, *Scrutiny Report No 2 of 2000*, 29 February 2000; Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report Nos 24*, 24 January 2003; *Scrutiny Report No 37*, 2 September 2003 and the following reports in 2004: Nos 43; 44; 45; 46; 47; 50; 52; 54; 2004–2005 Nos 2; 4; 6; 10; 11; 14; 15; 17; 20; 2006: Nos 21; 22; 25; 26; 27 & 30 (Positive comment by Stephen Argument); 32. (with thanks to Committee Secretary Ms Anne Shannon)

RECOMMENDATION 22

2.87 **The Committee recommends that consideration be given to moving sub-clauses 142(2)–(4) and Part 7.4 into Chapter 11 to co-locate the offence and civil liability provisions.**

Conservator of Flora and Fauna

2.88 The Conservator of Flora and Fauna, who is appointed under the *Nature Conservation Act 1980* (ACT),[244] has a range of statutory functions and powers under various ACT Acts. For example under the Nature Conservation Act, the Conservator:

- administers the licensing system for the taking etc. of native plants and animals;
- manages the nature reserve system in the ACT; and
- protects and conserves threatened species and ecological communities.

2.89 Under the *Tree Protection Act 2005* (ACT), the Conservator:

- advises the Planning and Land Authority in relation to tree protection and development applications;
- registers and de-register protected trees; and
- issues tree protection directions and authorise activities in relation to protected trees.

2.90 Under the proposed legislation, the Conservator:

- must be consulted about draft variations to the Territory Plan;[245]
- must have their advice applied in relation to a development approval in the merit track which affects a registered tree or declared site;[246]
- can provide a validation for a land management agreement for a rural lease by co-signing the agreement with the rural lessee;[247]

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[244] Section 7, currently Mr Hamish McNulty, Executive Director, Recreation and Land Management (to become Environment and Land Management), Department of the Territory and Municipal Services

[245] Sub-paragraph 59(b)(ii)

[246] Paragraph 111(1)(c),111(3)(a), 119(1)(b)(iv)

[247] Sub-paragraph 245(3)(b)(i);

- may recommend to the Planning and Land Authority that the Territory Plan be varied in relation to public land reserved for prescribed purposes such as national park, nature reserve, urban open space etc;[248]
- may determine management objectives for public land reserved for a purpose mentioned in schedule 3;[249]
- may prepare a draft variation of a plan of management for an area of public land;[250]
- may provide comment on draft plans of management for public land which the custodian of the land is required to take into account;[251]
- may prepare variations to plans of management in consultation with the custodian of the land;[252]
- may ask the Minister in writing to have a planning report or strategic environmental assessment prepared before he or she approves a plan of management;[253]
- can expect to see an explanation from the proponent of a draft management plan for public land to the Minister as to why a draft plan of management for public land has not incorporated the Conservator's comments;[254]
- may recommend or not, with the Custodian of Public Land, that part or all of an area of public land or future public land be leased, unless the land is or will be reserved as a wilderness area;[255] and
- may, with the Custodian of Public Land, provide or withhold written consent to the grant of a licence to occupy or use unleased public land.[256]

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[248] Clause 275
[249] Sub-clause 278(2)
[250] Sub-paragraph 279(b)(ii)
[251] Sub-clause 281(3)
[252] Clause 282
[253] Sub-clause 283(2)
[254] Paragraph 286(b)
[255] Clause 297
[256] Clause 299

Stakeholder comments

2.91 The Commissioner for the Environment advised the Committee that the draft bill should better identify when the Environment Protection Authority and the Conservator must be consulted. Dr Purdie suggested this should include when regulations are being drafted, and when the list of consultants for preparing environmental impact statements is being compiled (clause 197). Dr Purdie also suggested that the list of consultants should be reviewed regularly.[257]

2.92 The Conservation Council suggested clause 197 should be better drafted, and also that the possible certification of consultants should be explored with an appropriate professional association.[258]

Committee comments

2.93 The Committee recognises that the Planning and Land Authority is attempting to encourage the preparation of high quality environmental impact statements through clause 197, but how the list of consultants will be used is unclear. The value of the services provided through contributions to environmental impact statements will be substantial over time, so the Authority should be very careful about excluding consultants from the list. Restraint of trade or third-line forcing may also raise issues under the *Trade Practices Act 1974* (Cwlth).

2.94 The Territory has a *Government Procurement Act 2001* and Government Procurement (Principles) Guideline 2002, which provide principles for procurement activities by Territory entities. These principles include value for money; open and effective competition; probity and ethical behaviour; environmental sustainability; local industry development; management of risk, and ethical suppliers. Whilst this procurement legislation would not apply to procurement by entities other than Territory entities, its principles have merit, and are another reason for urging further consideration or elaboration of the proposed operation of this clause. Further consultation with the procurement policy area of the Department of Treasury appears warranted.

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[257] *Transcript of Evidence*, 29 August 2006, p23
[258] Submission no 9

RECOMMENDATION 23

2.95 **The Committee recommends that the bill be amended to require the Planning and Land Authority to consult with the Conservator of Flora and Fauna and the Environment Protection Authority when compiling the list of consultants under clause 197, and when drafting regulations under the Act.**

RECOMMENDATION 24

2.96 **The Committee recommends that the operation and wording of clause 197 be clarified following further consultation with the Department of Treasury, with a view to ensuring consistency with the aims of the ACT Government's procurement framework even if that framework is not directly applicable.**

RECOMMENDATION 25

2.97 **The Committee recommends that the Authority be required to review the list of consultants referred to in clause 197 every three years through a public and transparent process.**

Custodian of Public Land

2.98 The proposed legislation confers various functions and powers on a new statutory designation – the custodian of public land. The custodian is an entity given responsibility for land identified in the custodian map prepared by the Planning and Land Authority.[259]

2.99 The proposed functions and powers of the custodian of public land include to:

- exercise delegated power from the Authority to issue licences for unleased land and public land;[260]
- be consulted about a draft variation to the Territory Plan likely to affect unleased land or leased public land;[261]

[259] Clauses 293, 294

[260] Paragraph 19(1)(b)

[261] Paragraph 59(b)(iv), 67(2)(c)(v)

- provide written consent and to make recommendations in relation to an application to the Authority for a licence to occupy or use an area of unleased territory land that is not public land;[262]
- sign an application for development approval that relates to public land or unleased land;[263]
- recommend to the Authority that the Territory Plan be varied in relation to public land reserved for prescribed purposes such as national park, nature reserve or urban open space etc ;[264]
- prepare a draft plan of management or a proposed variation of the management plan in relation to public land identified in the Territory Plan, having taken into account comments provided by the Authority or the Conservator;[265]
- review management plans for public land at least once every ten years; and if satisfied that the it is no longer appropriate, prepare a draft variation;[266]
- recommend or not, that part or all of an area of public land or future public land be leased, unless the land is or will be reserved as a wilderness area;[267] and
- provide or withhold written consent to the grant of a licence to occupy or use unleased public land.[268]

Committee comments

2.100 The Committee is concerned that the office-holders of the position of Conservator of Flora and Fauna, and the custodian of public land, should be different people to avoid possible conflicts of interest in statutory functions. As currently drafted, the Conservator of Flora and Fauna and the custodian could

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[262] Paragraph 264(2)(c) and clause 265
[263] Clause 128(2)(b)
[264] Clauses 275 and 276
[265] Clauses 281 and 282
[266] Clause 282, sub-clause 292(2)
[267] Clause 297
[268] Clause 299

be the same senior ACT public servant.

2.101 In 1998 the Committee that preceded this Committee discussed the issue possible overlap in roles and recommended that the position of Conservator be separate from that of Executive Director of Environment ACT (as it then was).[269] The Committee's reasoning was that the position of Executive Director was required to balance competing claims (such as recreation and conservation) for the use of public land such as nature reserves, and that in view of government policy may accord conservation objectives a lesser value than other objectives.

2.102 In the Committee's view, where advice from the Conservator could conflict with advice from the land manager, the Committee suggests that the Minister should be required to make the decision resolving the conflict. The then Minister for Planning, Mr Brendan Smyth MLA, did not agree with an earlier similar recommendation. He said that the environmental impacts of development proposals were assessed in a public, accountable process and stakeholder comments were taken into account, including those from the Conservator.[270]

RECOMMENDATION 26

2.103 **The Committee recommends that the bill be amended to require that the custodian of public land not be the same person or entity as the Conservator of Flora and Fauna.**

ACT Heritage Council

2.104 Under the *Heritage Act 2004* (ACT) the ACT Heritage Council provides advice to the Planning and Land Authority on development approvals that relate to places on the ACT Heritage Register or nominated to that register. It does not have decision-making authority in relation to development approvals. The Act

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[269] ACT Legislative Assembly, Standing Committee on Urban Services, *Final Draft Management Plan for Canberra Nature Park: Report No 7* of the, September 1998.

[270] Mr Brendan Smyth MLA, Minister for Urban Services, Government Response to Recommendations of the Standing Committee on Urban Services Report No 7 for the Canberra Nature Park Management Plan.

includes a statutory turnaround period of 15 working days, which is one measure against which the Heritage Council's performance is assessed.

2.105 The Heritage Council has drafted a set of heritage guidelines that will apply to any new heritage listings and which are intended to ensure that the Heritage Council work is fully integrated with the planning system reforms. The agencies were working through some of the detailed aspects of their interaction in early September 2006. The Council expressed some reservations about exemptions under the code track for minor development applications that may affect a heritage place or area.[271]

Public Advocate

2.106 The proposed legislation does not provide explicitly for the involvement of the Public Advocate appointed under the *Public Advocate Act 2005* (ACT) in relation to controlled activity orders which may be sought against persons of impaired decision-making ability. The committee finds this surprising given the recognition of the important role that the Public Advocate performs under the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) where it may be reasonable to assume that the Advocate's services were less likely to be required. Under the latter Act the Advocate has to be given a copy of the application for a proposed preventative detention order and information about the place, date and time of the hearing. The Advocate is also entitled to be present at the hearing and to ask questions of anyone giving evidence and to make submissions to the court.[272]

2.107 The Committee notes that the draft bill does provide that the Authority may refer a complaint to another entity.[273] Presumably this would include the Public Advocate.

RECOMMENDATION 27

2.108 **The Committee recommends that the exposure draft bill be clarified with**

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[271] ACT Legislative Assembly, *Transcript of Evidence: Inquiry into Auditor-General's Report No 2 of 05*, Wednesday 6 September 2006, pp97–98

[272] See for example section 15

[273] Clause 311

respect to the role of the Public Advocate in relation to controlled activity orders.

Land Development Agency

2.109 The proposed legislation carries forward the provisions of the *Planning and Land Act 2002* (ACT) concerning the Land Development Agency, which is a statutory corporation governed by the *Financial Management Act 1996 (ACT)*.[274] Its functions include:

- to develop land;
- to carry out works for the development and enhancement of land; and
- to carry out strategic or complex urban development projects.[275]

2.110 The Agency may exercise these functions alone, through subsidiaries, joint ventures or trusts; or by holding shares in, or other securities of, corporations. It must exercise its functions in accordance with the main object of the Territory Plan and in accordance with the latest statement of intent for the land agency.[276]

2.111 The Land Development Agency has a governing board.[277] The currently prescribed disciplines and expertise represented among the member of the board are continued in the exposure draft bill.[278]

Stakeholder comments

2.112 Two submissions suggested that the Land Development Agency should be required to exercise its functions in accordance with the Territory Plan, rather than just its main object.[279]

2.113 The Housing Industry Association suggested that the Land Development

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[274] See Part 9 in particular: Governance of territory authorities
[275] Clause 31
[276] which is required to be prepared under the *Financial Management Act 1996* (ACT)
[277] Part 4.3 *Planning and Land Act 2002 (ACT)*, section 76, *Financial Management Act 1996* (ACT) and Part 4.3 of exposure draft bill
[278] Clause 42. This prescription of criteria is acceptable: sub-section 78(4) *Financial Management Act* 1996 (ACT)
[279] Submission nos 7, 8

Agency played a central role in ensuring that land supply in the ACT was adequate, appropriate and affordable, and that it was important for the Agency to be able to provide substantial input into the master planning of new green-field and brown-field estates.[280]

2.114 The Planning Institute expressed concern about the proposed exclusion of the Chief Planning Executive from the Land Development Agency board, which President Paul Cohen described as an 'inexplicable omission', given the expertise, powers and functions of the Chief Planning Executive.[281]

2.115 The Commissioner for the Environment expressed concern that under the proposed legislation the Planning and Land Authority would not be required to make reasonable effort to notify each of the stakeholders that make a representation about a development application. Dr Purdie commented that clause 158(2)(b) wrongly suggests that people who make a representation about a matter are necessarily connected, and that the Authority should have an obligation to make a reasonable effort to contact stakeholders.[282]

Committee comments

2.116 The Committee notes that clause 49 of the draft bill says that the Territory Plan will be binding on an appropriate range of Government decision-makers although 'entity' would be better than 'authority'.

2.117 The Committee notes the recognition of the Chief Planning Executive's significant role in the Planning Institute's suggestion that he or she should be appointed to the Land Development Agency board. However, the Committee agrees with the Minister that it would be inappropriate to facilitate the development of a conflict between the roles of regulator and developer in this way. The Planning Authority could not use its knowledge of planning law to assist or benefit a development, and nor early knowledge of proposed developments acquired from the board to influence planning decisions.

2.118 The Committee is aware that the 1995 Stein Report recommended, with a view

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280 Submission no 13

281 *Transcript of Evidence*, 29 August 2006, p13

282 Submission no 6

to ensuring collaborative administration of planning and land management, that a part-time statutory corporation be established to bring together the Territory Planning Authority and the Land Management Authority (now the Planning and Land Authority and the Land Development Agency). The Planning Institute has made a similar recommendation when suggesting that the Chief Planning Executive should be represented on the Land Development Agency Board.

2.119 The Carnell Government did not accept the Stein report recommendation because it considered that planning was an essentially political activity and that debate on planning and land management should occur as part of the democratic process of the self-governing Territory and its elected Assembly.[283]

2.120 The Committee agrees with the Minister's view that as the Chief Planning Executive is the Planning and Land Authority, which is the planning regulator in the ACT, and as the Land Development Agency is a developer, it would be inappropriate for the regulator to sit as a member of a board of a developer because of the real and likely perception of a conflict of interest.[284]

2.121 The Committee agrees with comments made in several submissions that the Agency Board's areas of expertise should include ecologically sustainable development and landscape architecture.

Tribunals and courts

Administrative Appeals Tribunal

2.122 Chapter 12 of the draft bill provides generally for the review of decisions under the legislation. Clause 369 and Schedule 1 of the draft bill defines which decisions are reviewable, the decision-makers whose decisions may be challenged, and the entities who are eligible to seek a review of a decision.

2.123 Eligible persons, who should have been given written notice, consistent with a

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[283] *ACT Government Response to the Report of the Inquiry into the Administration of the A.C.T. Leasehold*, re recommendation 8

[284] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

statutory code of practice, of a reviewable decision,[285] may apply to the Administrative Appeals Tribunal for a review of the decision made by decision-makers.[286] Schedule 1 requires that in relation to some reviewable decisions, the appellants had made representations about the proposal or had a reasonable excuse for not making a representation, and that they may suffer material detriment if the development application were to be approved. 'Material detriment' in relation to land is defined to mean that

- the decision has, or is likely to have, an adverse impact on the entity's use or enjoyment of the land other than an impact on business competition for the person or their associate; or
- for an entity that has objects or purposes—the decision relates to a matter included in the entity's objects or purposes.[287]

2.124 Applications for review in legal proceedings other than the Tribunal must be begun within 28 days of the decision.[288] Judicial review through the courts may also be available depending on the circumstances and the applicant's means.

2.125 Relevant *Land (Planning and Environment) Act* provisions, which the above provisions will replace, provide that application may be made to the Administrative Appeals Tribunal by 'a person whose interests are affected by a decision mentioned in schedule 4, part 4.1, column 4'.[289] The Act provides for the review of a range of decisions made under the Act or the Territory Plan.[290] These also include approvals granted subject to a condition;[291] decisions mentioned in schedule 4, part 4.2, column 4 of the Act; concerning the maximum price of a copy of a draft environmental impact statement; and a variation by the Conservator of Flora and Fauna of a land management agreement. Matters listed in schedules 6 and 7 of the *Land (Planning and Environment) Regulations 1992* are excluded from objections and third party appeals. The Heritage Council has statutory standing for some appeals under

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[285] The code of practice in force under section 25B of the *Administrative Appeals Tribunal Act 1989* (ACT)
[286] Clause 370
[287] Clause 374
[288] Clause 371
[289] Section 275
[290] Part 6.6.1; see also paragraph 7(3)(e)
[291] Subject to a 4 week timeframe: section 276

the current Act.[292] Some provisions require objections to have been lodged during a consultation period.[293] Unincorporated associations can appeal against some decisions, as can organisations or associations of people if the decision relates to a matter included in the objects or purposes of the organisation or association.[294] Provision is made for joinder of parties in s 28 of the *Administrative Appeals Tribunal Act 1989* (the AAT Act).[295] Notices sent to persons likely to be affected by these decisions must comply with the requirements of the code of practice in force under the *Administrative Appeals Tribunal Act 1989* (ACT).

2.126 Under the Land (Planning and Environment) Act, the test for whether someone will be 'affected' by a decision is that the effect must be adverse and of substance.[296] An economic effect on a person is insufficient.[297] Relevant case-law is summarised in the *Lowndes* decision, where the applicant was found not to have standing to challenge the variation of the lease plan for a shopping centre because it did not detract from the applicant's use of the shopping centre.[298] These cases demonstrate that whether a person is sufficiently 'affected' will vary with the facts of each case and the views of the Tribunal as to the sufficiency of the impact. The impact must be of 'some substance' and adverse; the applicant must have more than an intellectual or emotional interest. Much depends on the legislative context and the nature of the matter in respect of which the impact is claimed. An adverse impact on residential amenity, or the amenity of a person's land, have been found to give standing.[299]

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[292] Sub-section 275(2)

[293] See for example sub-section 276(2)

[294] See for example sub-section 276

[295] Sub-section 28(3) for planning matters

[296] *Jewel Food Stores Pty Ltd & Ors v Minister for Environment, Land and Planning & Ors* (1995) 122 FLR 269

[297] *Westfield Lt v Commissioner for Land Planning and Ors* [2004] ACTSC 49;

[298] *Lowndes and ACT Planning & Land Authority & Anor* [2006] ACTAAT 5 (28 February 2006) The decision summarises the decision in *McCullough and ACT Planning & Land Authority & Anor* [2003] ACTAAT 50 (9 November 2003) and *Kourpanidis and Planning & Land Management and Perin Property Group Pty Ltd* [1997] ACTAAT 184 (19 May 1997)

[299] See the cases including *Lord v Hiscock* (1980) 47 LGRA 168, cited in Hon Justice R. Preston (2006), 'Standing to sue at common law in Australia', Paper presented to the joint seminar on legality of administrative behaviours and types of adjudication', accessible at <

Authority responses to Tribunal decisions

2.127 The Planning and Land Authority has an Administrative Appeals Tribunal Decisions Review Committee that considers the Tribunal's decisions to ensure that legislative, policy or procedural reforms are addressed. It reports to the Authority's Planning and Land Authority Policy Committee. Information provided by the review committee demonstrates that the Planning Reform Project had taken Tribunal decisions into account when developing the draft bill. For example:

- the bill proposes that the Authority will have satisfied its duty to notify 'petition-style' objectors where two or more people make a representation and the Authority only notifies one person of its decision to refuse the application,[300] overcoming a decision given in an AAT directions hearing;
- the bill is intended to provide that notice of a deemed refusal does not need to be given to an applicant if they were given information about deemed refusals and their rights to seek a review of the deemed refusal;[301] and
- providing that notice of an approval of an application includes information about any conditions that the approval is subject to (rectifying an omission from section 243 of the *Land (Planning and Environment) Act 1991*.[302]

Review of ACT Tribunals

2.128 The Department of Justice & Community Safety is currently reviewing all ACT Tribunals, with a view to increasing efficiency, cost-effectiveness, sufficiency of powers, jurisdiction and governance arrangements. This Review had been announced in the 2006 ACT Budget. The Department is expected to provide an options paper to Government in late 2006 with a view to making

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http://www.cjc.nsw.gov.au/lawlink/lec/ll_lec.nsf/3c435965abde29044a256d66000a361c/14ff0157f81d9b0eca25718c001fcf8b/$FILE/China_-_ Standing_to_sue_at_common_law_.doc>

300 Clause 158

301 Sub-clause 156(2), responding to *Tokich and ACT Planning & Land Authority & Anor* [2005] ACTAAT 7

302 Paragraph 155(3)(c); responding to *Tokich and ACT Planning & Land Authority & Anor* [2005] ACTAAT 7

recommendations in early 2007, in time for the budget cycle.[303]

Stakeholder comment

2.129 The proposed provisions concerned third party appeal rights generated a mixed response:

- the Planning Institute endorsed the continuing approach of prescribing the matters to which appeal rights attach, and persons eligible to seek reviews of decisions,[304] but said that the draft bill proposed to broaden too widely the range of people who could currently appeal;[305]
- the Property Council was similarly concerned that organisations could be formed or have their objects amended simply to exercise appeal rights, and preferred that the organisation only have rights to make representations, unless they can demonstrate material detriment to their use or enjoyment of land;[306]
- the Housing Industry Association suggested that the bill achieved the right balance because neighbourhood comments would be invited on residential developments which impact on others, while more sensitive projects have more extensive consultation and appeal rights. Rear neighbours should not be entitled to comment on neighbours' front yard additions for example.[307] The HIA welcomed the proposed reduction in consultation and appeal rights, but noted that provided community input was considered early, industry could address that and have more certainty about the development. Costs caused by project delays would be reduced;[308] and
- the Property Council 'applauds' the proposed implementation of the Development Assessment Forum's approach to limiting third party

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[303] Comment by Ms Renee Leon, Chief Executive Office of the Department of Justice and Community Services, 22 September 2006 to a seminar on proposed Tribunal reforms

[304] As did the ACT Law Society: *Transcript of Evidence*, 5 September 2006, p74

[305] Submission no 8; *Transcript of Evidence*, 29 August 2006, pp11–12

[306] *Transcript of Evidence*, 5 September 2006, pp55-56

[307] Submission no 13

[308] Submission no 13; *Transcript of Evidence*, 5 September 2006, pp42, 45. The Property Council agreed that community involvement was better 'at the beginning of a policy definition process', with later appeal rights contingent on establishing material detriment: *Transcript of Evidence*, 5 September 2006, p56

appeals, but requested that the costs provisions of the *Administrative Appeals Tribunal Act 1989* (ACT) be reviewed so that costs could be awarded against unmeritorious claimants. The Council requested that the interaction of that Act and the planning system be reviewed.[309]

2.130 Others suggested that appeal rights to the Administrative Appeals Tribunal were unnecessarily restricted.[310] The Conservation Council[311] and the Environmental Defenders' Office[312] both argued that liberal third party appeal rights in the ACT had not opened the floodgates of litigation. The Council suggested that a broad definition of standing be retained, at least for merit and impact track developments. The ACT Law Society,[313] the ACT Council of Social Service,[314] Ms Johnstone,[315] and Mr Mestrov similarly argued for broad rights of appeal.[316]

2.131 At least two stakeholders[317] expressed concern about the proposed restrictions on appeal rights and the lack of available information about what would be appellable in the merit track.[318] Ms Johnstone provided a detailed critique of restrictions on third party appeals and their impact on the broader community's capacity to express dissent about proposed developments.[319]

2.132 The Environmental Defender's Office queried whether environmental organisations with broad objects clauses would have standing to lodge third party appeals; whether a property interest in land was required and whether it would be possible to have an interest in public land.[320] Dr Prest suggested that clause 374 in the draft bill was modelled on Victorian legislation and that the reference to land may be inappropriate for the ACT leasehold system, and may deny standing to national environmental organisations if 'land' is construed

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309 *Transcript of Evidence*, 5 September 2006, pp51–52
310 Submission nos 10, 12, Conservation Council, *Transcript of Evidence*, 29 August 2006, pp4–5
311 Submission no 9; *Transcript of Evidence*, 29 August 2006, pp5, 7
312 Submission no 12; *Transcript of Evidence*, 29 August 2006, pp28, 31
313 Exhibit no 5
314 Submission no 10
315 Submission no 1
316 Submission no 11
317 Submission nos 1, 12
318 Submission no 1 made a similar point
319 Submission no 1
320 Submission no 12

narrowly to mean the land affected by the proposed development.[321] In his view there was no evidence to suggest that developments were being held up in the ACT because of appeal rights, and he noted that that the Administrative Appeals Tribunal already had power to dismiss frivolous or vexatious appeals, and in some cases to direct that no subsequent applications on the matter be made.[322] Dr Prest also suggested that appeal rights should not be restricted to neighbours and emphasised how important appeal rights were to improve the quality of decision-making, enhance the delivery of services and programs, and prevent corruption and non-compliance with Territory legislation. He welcomed restrictions on appeals by commercial rivals for commercial purposes.[323] He suggested that a standing provision similar to that in the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) could be included in the planning bill.[324]

2.133 The ACT Council of Social Services Inc urged the Committee to examine the issues with care. They expressed concern about the apparent reduction in oversight and appeal mechanisms.[325]

2.134 Mr Arthur and the ACT Law Society differed from both these views, arguing that the material detriment test in the draft bill was probably substantially the same as the test currently used by the Administrative Appeals Tribunal.[326]

2.135 Mr Arthur agreed with the Environmental Defender's Office, the Property Council,[327] and the ACT Law Society[328] that the reference to adverse impact on use and enjoyment of land was probably intended to refer to 'their' land, i.e. the objector's land, which would substantially narrow the range of possible third party appellants.[329]

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[321] *Transcript of Evidence*, 29 August 2006, p30, referring to section 374 *Planning and Environment Act 1987* (Vic)
[322] *Transcript of Evidence*, 29 August 2006, pp28–9. See section 43A *Administrative Appeals Tribunal Act 1989* (ACT). The ACT Law Society also noted that the AAT could already prevent the hearing of vexatious appeals: *Transcript of Evidence,* 5 September 2006, p74
[323] Submission no 12; *Transcript of Evidence*, 29 August 2006, p32. See clause 374(2) and also Land (Planning and Environment) Amendment Regulation 2006 (No 2) SL2006-13
[324] Submission no 12
[325] Submission no 10; *Transcript of Evidence*, 29 August 2006, pp36–37
[326] *Transcript of Evidence*, 29 August 2006, p18; *Transcript of Evidence*, 5 September 2006, p74
[327] *Transcript of Evidence*, 5 September 2006, p55
[328] Exhibit no 5; *Transcript of Evidence*, 5 September 2006, p34
[329] Submission no 12; *Transcript of Evidence*, 29 August 2006, p18

2.136 The Minister's view, conveyed to the Committee, is that policy content should not be debated after a political decision has been made to adopt a policy. The Planning and Land Authority cannot change the policy and should be left to implement it. Debates on the merits over the content of codes should be part of the political process and not planning decisions.[330]

ACT Magistrates Court, Supreme Court and other courts

2.137 The role of the courts ACT Magistrates Court, Supreme Court and other courts regarding the implementation of the proposed legislation includes:

- determining criminal prosecutions for breaches of the Act;
- providing a forum for cost recovery for authorised rectification work[331] or determining compensation which is claimed for the exercise of enforcement powers;[332]
- determining the transfer or assignment of leases or interests in leases under family or bankruptcy or insolvency law;[333]
- the Magistrates Court issuing an infringement notice under the *Magistrates Court (Planning and Development) Regulation 2006* in relation to conduct complained of if grounds exist;[334]
- the Magistrates Court issuing an order for the return of possession of land to the Executive[335] or determining disputes concerning infringement notice liability;[336] and
- the Supreme Court for issuing injunctions under the Act,[337] and hearing applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1989* (ACT)

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[330] Oral response by the Chief Planning Executive to the Planning and Environment Committee, 26 September 2006
[331] Clause 334 and section 177 Legislation Act 2001
[332] Clause 368
[333] E.g. clause 247
[334] paragraph 309(1)(f)
[335] Sub-clause 348(3) & (4)
[336] Paragraph 366(1)
[337] Paragraph 309(1)(i), clause 344

Committee comments

2.138 The Committee agrees with several stakeholders that appeals are not currently a major impediment to development in the ACT. The Authority's Annual Report for 2005–06 says that only one applicant requested an internal review of decisions during the financial year, no appeals were made to the Administrative Appeals Tribunal, and no complaints were made to the ACT Ombudsman. The Authority reports that it appealed from one Tribunal decision on a matter involving the interpretation of the Building Code.[338] The Committee also notes that according to the Auditor-General, in 2003–04 only 71 development assessments were appealed out of 5 339 assessed. Most appeals were resolved in favour of the Authority, leading the Auditor-General to conclude that the Authority's decisions were fair.[339] The Minister advised the Committee that even a small number of appeals can be significant for developers and households given the costs, uncertainty, caution, hesitancy and loss of time caused by appeals.[340]

2.139 The Minister and officials advised the Committee that the issue re 'their land' would be clarified. The intention was to continue existing provisions.[341] The Minister noted that there have been instances where traders had joined together to oppose a development, but the Government's aim was not to stymie the activities of legitimate groups who may be concerned about heritage, conservation etc. This was a question of balance. In the Minister's view, open standing provisions create problems and a more sophisticated appreciation of the politics of appeals is needed.[342] The Administrative Appeals Tribunal may address these issues.[343]

2.140 The Committee notes that the Standing Committee on Legal Affairs

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338 ACT Planning and Land Authority (2006), *Annual Report 2005–06*, Canberra, pp23, 72

339 ACT Legislative Assembly, Standing Committee on Public Accounts (2006), *Review of Auditor-General's Report No 2 of 2005: Development Application and Approval Process*, p69

340 Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

341 Oral response by the Manager, Planning System Reform, Ms Beth Gibson to the Planning and Environment Committee, 26 September 2006

342 Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

343 Oral response by Director of the Development Services Branch, Ms Jacqui Lavis to the Planning and Environment Committee, 26 September 2006

(performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) has recently reviewed the human rights implications of administrative and judicial review of administrative decisions,[344] and will not restate the relevant law in detail. Suffice it to say that the Human Rights Act provides that everyone has the right to rights and obligations recognised by law decided by a competent, independent and impartial court or tribunal after a fair and public hearing.[345] In *Begum v. London Borough of Tower Hamlets*[346] Lord Hoffman summarised the emerging principles as:

> [33]…first, that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing) court has 'full jurisdiction' over the administrative decision. And fourthly, as established in the landmark case of *Bryan v United Kingdom* (1995) 21 EHRR 342, 'full jurisdiction' does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in *Alconbury,* at p 1416, para 87, 'jurisdiction to deal with the case as the nature of the decision requires.'

2.141 This summary presents an approach similar to that in other cases such as *Kaplan v United Kingdom* [347]and *R v Alconbury*.[348] Thus not every administrative decision has to be fully appellable to be human rights compliant. A right to judicial review of legal aspects may be sufficient depending on the circumstances. The Human Rights Act creates opportunities to test the approach in the ACT and to contribute to the evolution of human rights law in this area. It is also difficult to speculate on the scope of rights to appeal until

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[344] ACT Legislative Assembly (2006), Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bill and Subordinate Legislation Committee), *Scrutiny Report No 32*, 18 September, pp4–12

[345] Section 21

[346] [2003] 2AC 430, accessible at <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldjudgmt/jd030213/begum-2.htm>

[347] (1980) 4 EHRR 64, 90, paragraph 161

[348] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, [2001] UKHL 23

the Territory Plan components are released.

2.142 In the Committee's view, the adverse impact approach that has evolved through Tribunal decisions and case-law seems to be similar to the 'material detriment' test for standing in the draft bill. There will be additional constraints on standing under the planning reforms however, depending on whether a development is in the code track; and in the merit-assessable track, depending on whether third-party appeals are available, the person has made a representation during the public notification period or had a reasonable excuse for not doing so, and whether the person could suffer material detriment.

2.143 Judicial review is not prevented under the draft bill except outside the prescribed time-frames, but there may be a human right query as to whether a decision which is taken to be affirmed by the Planning and Land Authority because the time-limit has lapsed would satisfy the requirement for independent preliminary review of an administrative decision.

2.144 The Committee expects that the issue of appeal rights will be carefully assessed again by the Legal Affairs Committee (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) when the bill is introduced to the Assembly. The Committee also notes that the ACT is currently conducting a major review of Tribunals in the ACT and the Committee anticipates significant improvements as a result of that review.

2.145 Mr Seselja makes some additional and dissenting comments on third party appeal rights at Appendix A.

RECOMMENDATION 28

2.146 **The Committee recommends that sub-clause 374(1)(a) be amended to replace the word 'the' before 'land' with 'their'.**

3 PLANNING INSTRUMENTS AND PROCESSES

Territory plan

3.1 Clause 49 of the draft bill provides that the Territory Plan binds the Territory, the Executive, a Minister and Territory authorities, who must not do any act, or approve the doing of an Act that is inconsistent with the Plan.[349]

3.2 The Territory Plan will include:

- a Statement of Strategic Directions[350] which may contain planning principles covering areas of national, regional and Territory interest, including principles for sustainable development. Its broad strategic principles will guide long term planning for the ACT that reflects and promotes the planning strategy. It will also guide the preparation and making of variations to the Territory Plan, and guide environmental impact statements, planning reports and strategic environmental assessments;[351]
- policy objectives for each zone identified in each Territory Plan map that set out the intended use and development for the zone, and which must be consistent with the statement of strategic directions;[352]
- development tables that set out which assessment track applies to development proposals; the development proposals that are exempt from requiring development approval or approval subject to a condition; prohibited developments, and the code that development proposals must comply with;[353]

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[349] Clauses 63 and 69 concern the interim effect of draft variations of the Territory Plan and similarly preclude inconsistent acts or approvals
[350] Paragraph 50(1)(a)
[351] Sub-clause 51(2)
[352] Paragraph 50(1)(b) and clause 52
[353] Sub-clause 50(1)(c); clause 53; see also clause 106

- codes for areas, zones and features in the ACT which must be consistent with policy objectives that apply to the code.[354] Codes will provide the detailed rules (the code requirements) that apply to development proposals that the code applies to, and the merit criteria that apply to development proposals the code applies to, other than proposals in the code track;[355] and
- maps (the Territory Plan maps).[356]

3.3 The Territory Plan may, but need not, identify future urban areas and the zones within those areas;[357] areas of public land reserved in the plan;[358] and may include anything else relevant to the main object of the Territory Plan.[359]

3.4 At least one Territory Plan map must set out zones, precincts and designated areas in the ACT.

3.5 The Territory Plan will not be a subordinate law or disallowable instrument so the Legislative Assembly will not have a scrutiny and disallowance function in relation to it.[360]

Stakeholder comments

3.6 The statement by the Institute of Architects declining to endorse the proposed reforms until the new Territory Plan has been released, and the Planning Institute's similar reservations, were noted above.

3.7 The Planning Institute welcomed the proposed Statement of Strategic Directions but expressed concern about its relationship with the Planning Strategy which was likely to have a more pervasive influence, including in

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354 Paragraph 50(1)(d); clause 54

355 Codes that apply only in a stated area are a precinct code. A concept plan is also a precinct code: paragraph 85(b). A code that sets out the requirements for types of development, or states that it is a development code, is a development code. A code that states that it is a general code, or that is not a precinct code or a development code, is a general code: clause 54

356 Clause 55

357 Sub-clause 50(2)

358 Sub-clause 50(2)(b)

359 Sub-clause 50(2)(c)

360 See the definition of subordinate law and disallowable instrument in the Legislation Act 2001 sections 8 & 9

unintended areas.[361] The Institute also expressed reservations about incorporating broad policy statements such as the Canberra Plan, into the Territory Plan, because they were still relatively untested.[362]

3.8 The Conservation Council requested that the proposed Statement of Strategic Directions in the draft Bill[363] include a firmer commitment to the inclusion of prescribed matters, including the principles for sustainable development. In the Council's view this is necessary because the important functions that the Statement of Strategic Directions will have in informing long term planning, proposed variations to the Territory Plan, and guiding environmental impact statements, planning reports and strategic environmental assessments. The Council also requested:

- that the bill include a requirement for a strategic environmental assessment before any reviews of the Territory Plan; and
- that the proposed new 'PR3 Metropolitan Landscape zone' not replace the current B12 Hills Ridges and Buffers land use policy of the Territory Plan.[364]

3.9 The Housing Industry Association expressed support for the proposed changes to the Territory Plan, five-yearly reviews of the Territory Plan and shorter timeframes for approval of minor variations to the Territory Plan. The Association also welcomed the proposed new planning codes, suggesting that these should allow for more innovative designs and flexibility enabling changing market needs to be met, and opportunities pursued. The Association described these as the most critical part of the reform project.[365] It also welcomed the incorporation of the Canberra Spatial Plan in the bill.[366]

3.10 Several stakeholders[367] expressed disquiet about the Planning and Land Authority's power[368] to make technical amendments to the Territory Plan without a public consultation process, and particularly noted the potential

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[361] Submission no 8
[362] *Transcript of Evidence*, 29 August 2006, p9
[363] Sub-clause 51(1)
[364] Submission no 9
[365] Submission no 13, *Transcript of Evidence*, 5 September 2006, p42
[366] Submission no 13
[367] Submission nos 1, 6, 7, 9
[368] Clause 82

breadth of paragraph 82(1)(b).[369] Suggestions for improving transparency and scrutiny included:

- drafting the scope of the power more carefully;[370]
- listing such amendments in the Authority's annual report with an explanation why public consultation was not required;[371]
- making technical amendments by way of disallowable instruments;[372] and
- referring all amendments to the Territory Plan to an Assembly committee.[373]

3.11 Mr Gilbert expressed concern that the content of existing master plans and neighbourhood plans may be incorporated in precinct codes or zones. In his view plans which were subordinate to the Territory Plan were 'a waste of time and money' as they did not offer additional protection, except for the non-isolation principle in subordinate plans which is intended to ensure that a single-storey homeowner cannot be isolated by adjacent taller developments. Mr Gilbert recommended that this principle be included in codes under the Territory Plan. To reduce the range of interpretative discretion that the Planning and Land Authority could exercise, Mr Gilbert suggested that the Territory Plan should include the principle that specified standards, rules criteria, etc would be applied unless the applicant for a development and persons materially affected agree otherwise.[374]

3.12 The ACT Council of Social Service expressed the contrary view that Master Planning and Neighbourhood Planning processes were important for community engagement, and that downgrading their status may lead to a loss of community confidence in the planning process.[375]

3.13 The Institute of Architects suggested that precinct codes should be flexible enough to permit 'localised negotiation for innovative design solutions within

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[369] Submissions no 7, 9
[370] *Transcript of Evidence*, 29 August 2006, p37
[371] Submission no 11
[372] Submission no 10
[373] Submission no 9
[374] Submission no 15
[375] Submission no 10

a precinct', and for a merit-based consultation process for assessing applications against the precinct plans.[376]

3.14 The Property Council suggested that a concurrent reform should be the consolidation of the National Capital Plan and the Territory Plan into one streamlined plan, and that this should be done through a transparent process. They also suggested that the Australian Government should consider delegating some of the its powers to the ACT Planning and Land Authority, so that it could assess applications for the National Capital Authority, citing the *Environmental Protection and Biodiversity Conservation Act 1999* (Cwlth) as a model.[377]

3.15 The Commissioner for the Environment said that 'extensive consultation on the zone objectives and policies, with ACT Government agencies and the community' was 'critical', and that there should be opportunity for codes to be amended and updated to improve their focus on sustainability.[378] Dr Purdie noted that the code for house design, for example, needed to ensure that water and energy conservation and water use efficiency was maximised.[379]

3.16 The Commissioner for the Environment also submitted that:

- the codes in the Territory Plan need to be consistent with and help give effect to the ecologically sustainable development and guiding principles in the government's sustainability policy *People Place Prosperity*, including all R, C, I, B and T zones. In particular all zones need to include a policy commitment 'to promote energy conservation and efficiency, and conservation and sustainable water use in subdivision planning, building design and construction';
- proposed Zone PR1 should include in its objectives, recognition of the contribution of such areas to wildlife corridors and the urban forest; and

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[376] *Transcript of Evidence*, 5 September 2006, p64
[377] *Transcript of Evidence*, 5 September 2006, pp52–53
[378] Submission no 6
[379] Submission no 6

- the new zone PR3 should better recognise the nature conservation values and functions of these areas.[380]

3.17 Dr Purdie commented that in addition to community consultation, community education was needed about the way that the Territory Plan operated.[381]

3.18 Mr Arthur submitted that without seeing the development table it was very difficult to assess the operation of the track system. He noted that the legislation does not allow a code application to be approved with conditions other than those specified in the regulations,[382] which had not yet been drafted, and that this may not be workable. He suggested if an application did not comply with a code it would have to be assessed under the merit track, rather than be approved under the code track subject to conditions.[383] Mr Arthur noted that the exposure draft bill envisages that there may be inconsistencies between two or more codes and that it proposes a hierarchy of codes.[384] He suggested that the proposed hierarchy would create fertile ground for litigation.[385]

3.19 The ACT Commissioner for the Environment urged that 'every effort be made' to ensure that the codes are developed so as to be consistent, and that they be reviewed after the first 12–18 months of operation and periodically thereafter.[386]

3.20 The ACT Council of Social Service Inc welcomed the retention of community facility zoning in the Territory Plan but expressed regret that some land in this category had been lost, such as with the Section 84 development in Civic.[387]

Committee comments

3.21 The Committee is concerned that when the new legislation is enacted the current Territory Plan will be replaced and the draft bill does not provide for a

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380 Submission no 6
381 *Transcript of Evidence*, 29 August 2006, p22
382 Sub-clause 150(4)
383 *Transcript of Evidence*, 29 August 2006, pp18, 19–20
384 Clause 107
385 Submission no 7
386 Submission no 6, *Transcript of Evidence*, 29 August 2006, p23
387 Submission no 10; *Transcript of Evidence*, 29 August 2006, pp38-39

transparent consultative process for the development of its replacement. The National Capital Plan does override the Territory Plan and provides some safeguards, but in recognition of participatory democracy under self-government (which the Government and Authority demonstrate a commitment to), the Territory Plan, and all its components, should be subject to widespread public scrutiny.

3.22 The Committee recognises that while the three-month timeframe referred to in clause 96 for the commencement of proceedings questioning a provision of the Territory Plan provides some certainty for the planning system, this clause could not prevent challenges to the Territory Plan where it is inconsistent with Australian Government legislation, and the National Capital Plan. It may also face an interpretative challenge on human rights grounds because of the brevity of the appeal period, but a counter-argument may be that the period is a reasonable limitation on rights in a democratic society.

3.23 Paragraphs 50(2)(a) and (b) are of more concern to the Committee. These provide that the Territory Plan 'may, but need not', identify future urban areas and zones within those areas, and identify reserved areas of public land.[388] The Committee regards the location of future urban areas and zones, and reserved areas of public land as highly significant issues for investors, homebuyers and a wide range of people concerned with recreation, conservation and other uses of public land.

3.24 It is also important that areas reserved as public land are included because clause 281 provides that the custodian for an area of public land must prepare a draft plan of management for the area as soon as practicable after the area is identified as public land in the territory plan. If the reserved areas are not identified in the Territory Plan, a draft plan would not have to be prepared, unless otherwise required by legislation or the relevant Minister.

RECOMMENDATION 29

3.25 **The Committee recommends that sub-clause 50(2) be amended to require the Territory Plan to include future urban areas and reserved areas of**

[388] Cross-referencing to section 276

public land.

RECOMMENDATION 30

3.26 **The Committee recommends that the draft bill require a transparent consultative process, with a report to the Legislative Assembly, concerning the development of the new Territory Plan and its component parts.**

RECOMMENDATION 31

3.27 **The Committee recommends that the draft bill be amended to require the components of the Territory Plan to be reviewed after 30 months of operation initially, and five-yearly thereafter, unless the Minister requires an earlier review.**

Planning policy documents

Planning Strategy

3.28 The draft Bill requires the Executive to make, by way of notifiable instrument, a planning strategy for the ACT that sets out long term planning policy and goals to promote the orderly and sustainable development of the ACT, consistently with the social, environmental and economic aspirations of the people of the ACT, and sound financial principles.[389]

3.29 The Planning Strategy is intended only to:

- inform the development of the Statement of Strategic Directions in the Territory Plan while not forming part of, or affecting the Territory Plan;[390]
- be considered by the Planning and Land Authority when a draft variation of the Territory Plan proposes to vary the Statement of

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[389] Clauses 97–99
[390] Clause 100

Strategic Directions,[391] and when deciding whether a review of the Territory Plan is necessary;[392]

- be considered by the Minister when a draft variation of the Territory Plan is proposed that would vary the Statement of Strategic Directions;[393] and
- be considered by the Executive when considering whether a review of the strategy is necessary.[394]

3.30 The Planning Strategy is not to be a relevant consideration for administrative law purposes except in relation to decisions referred to in the paragraph above.[395] The validity of a provision of the Territory Plan is not to be questioned in a legal proceeding only because it was inconsistent with the Planning Strategy.[396]

3.31 In relation to other planning policy documents, the content of the Statement of Planning Intent is prescribed by clause 15, and the Statement of Strategic Directions by sub-clause 51(1).

Planning reports

3.32 The draft bill also provides for planning reports. The draft bill has the Planning and Land Authority preparing these. But they are also 'a report prepared as prescribed by regulation',[397] which suggests that proponents may be required to prepare them. If this is intended this should be specified in the bill. The role of planning reports is also referred to in other provisions of the draft bill.[398]

3.33 The Planning and Land Authority has advised the Committee that planning reports are intended to have three primary functions:

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[391] Sub-clause 59(d))

[392] Paragraph 94 (2)(e)

[393] Paragraph 73(3)(b)

[394] Clauses 101 and 102

[395] Subclause 101(1)

[396] Clause 96

[397] Clause 89. See also Legislation Act 2001, section 9.

[398] Sub-clauses 60(2), 73(2), 90(1), 213(2), 283

- to identify and assess the impacts of granting a proposed Crown lease and inform the decision about whether it is to be offered;
- to assist in the crafting of the terms of a draft Crown lease to be made available to prospective purchasers; and
- to inform the Authority's consideration of whether a variation to the Territory Plan is appropriate.[399]

3.34 Planning reports are not intended to be used when a plan variation is proposed which has major strategic planning implications, in which case a strategic environmental assessment would more likely be required. The Authority advised that a planning report may be required where, for example, the leasing of a parcel of undeveloped commercial land in the city centre was proposed which raised issues of appropriate use (commercial, residential or a mixture of both), building form (height, siting, gross floor area), provision of infrastructure, tree retention and traffic management. The Authority said that in contrast, a planning report would not usually be needed for a small, undeveloped parcel attached to a local centre.

RECOMMENDATION 32

3.35 **The Committee recommends that 'planning report' be better defined in the draft bill.**

Stakeholder comments

3.36 The Conservation Council noted that the over-emphasis on economic and financial matters in the main object of the draft Bill is repeated Chapter 6.[400]

Committee comments

3.37 The Committee welcomes the integration of the current key policy documents such as the Strategic Plan in the new legislation but questioned the Minister as to whether more confusion was being created by the range of policy mechanisms recognised. The Minister responded that the Statement of

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[399] Explanatory note provided by Mr Vic Smorhun in response to request, 6 October 2006
[400] Submission no 9; see clause 99

Planning Intent, the Statement of Strategic Directions, the Planning Strategy and the Territory Plan were all mechanisms to inform decision-making at different points in the planning process. Participants in the planning system would have different interactions with these mechanisms.[401]

3.38 Minister Corbell said that the Planning Strategy would be the highest-level policy document, providing a long-term strategy for the physical development of the city, equivalent to the Spatial Plan. As the Territory Plan provides current land use policies and controls, the government of the day has to have a means of identifying longer term planning aims. These can change with governments, should they wish to change policy direction, but a long-term strategy is desirable. For example, the development of the Molonglo Valley requires a substantial change to the Territory Plan. A Planning Strategy provides a basis for negotiations with the National Capital Authority over future planning.[402] Since the National Capital Authority can override planning initiatives that are inconsistent with the National Capital Plan it is important that a long-term policy is in place to demonstrate the need for changing the National Capital Plan. The Territory Plan cannot be *required* to be consistent with the Planning Strategy if that strategy is inconsistent with the National Capital Plan; hence the use of the term 'should' in the draft bill.[403]

3.39 The Minister also explained that the Statement of Strategic Directions was intended to translate higher-level policy goals into the more detailed requirements of the Territory Plan.[404]

3.40 The Committee notes that the broad language in sub-clause 101(4) aims to prevent consideration of the Planning Strategy by the Planning and Land Authority, the Minister or any other entity, except in prescribed circumstances. This has to be interpreted, as far as possible, consistent with the freedom of thought, conscience and religion, and freedom of expression protected under

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[401] Oral response by the Chief Planning Executive to the Planning and Environment Committee, 26 September 2006

[402] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

[403] Oral response by the Chief Planning Executive to the Planning and Environment Committee, 26 September 2006

[404] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

the *Human Rights ACT 2004* (ACT).[405] The Planning Strategy is a notifiable instrument[406] and therefore a public document. Members of the Legislative Assembly, policy makers, students and researchers and a wide range of other stakeholders would read it. In the Committee's view this draft clause should be amended to clarify the use to which the Planning Strategy is intended to be put.

3.41 According to the Minister, the Statement of Strategic Directions is intended to translate higher-level policy goals into the more detailed requirements of the Territory Plan.[407] The Statement of Planning Intent is a means for the government of the day to inform the Planning and Land Authority what its planning objectives are. Without it there would be no formal mechanism for these policy objectives to be outlined in a transparent way. The Statement of Planning Intent is a public communications mechanism for the government and the Planning and Land Authority.[408]

3.42 Notwithstanding the Minister's assurances, the Committee would prefer that the Statement of Strategic Direction incorporate the content of the Statement of Planning Intent, so as to reduce the range of policy instruments in place.

RECOMMENDATION 33

3.43 **The Committee recommends that the function of the Statement of Planning Intent and the Statement of Strategic Directions be combined and the Statement of Planning Intent omitted.**

RECOMMENDATION 34

3.44 **The Committee recommends that the relationship between the Planning Strategy and the Statement of Strategic Directions be clarified.**

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[405] Sections 14 and 16 respectively.

[406] Clause 98

[407] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

[408] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

RECOMMENDATION 35

3.45 **The Committee recommends that sub-clause 101(4)(a) be clarified so that it is more consistent with the human rights of freedom of thought and expression.**

RECOMMENDATION 36

3.46 **The Committee recommends that sub-clause 86(2) be amended to require an estate development plan to recognise and respond to the landscape setting in which the proposed estate would be located.**

Environmental Impact Assessments

Environmental impact statements

3.47 Some of the features of the draft legislation include:

- the absence of preliminary assessment provisions;
- mandatory environmental impact statements for impact track development proposals;[409]
- provisions empowering each Territory Minister responsible for legislation under which an environmental impact statement can be authorized, to require the preparation of an environmental impact statement or the establishment of a panel to conduct an inquiry;[410]
- environmental impact statements which are to be prepared and submitted by proponents of development proposals, whether they be private or public sector;[411]
- prescribed minimum content for environmental impact statements but flexible scope[412] following public notification,[413] with provision for

[409] Clause 118
[410] Clause 184
[411] Clauses 184 and 192
[412] Clauses 185 and 187
[413] Clause 188

public feedback over a 20 working day period,[414] followed by publication of all feedback made;[415]

- authorization for the Authority to prepare a list of consultants considered suitable for environmental impact statement work;[416]
- creation of a Ministerial discretion as to whether an environmental impact statement should be presented to the Legislative Assembly;[417] and
- provision for the Minister to establish a panel to conduct an inquiry about any aspect of a submitted environmental impact statement within 15 working days of the Minister receiving it, with panel reports due within 60 working days.[418]

3.48 As the draft bill provides that its provisions on environmental impact statements may be made shorter and more streamlined, the Committee does not provide extensive commentary on these provisions.[419]

Strategic environmental assessments

3.49 The draft bill also provides for strategic environmental assessments, which are defined as a 'comprehensive environmental assessment, suited to proposals in relation to major policy matters rather than individual development proposals'.[420] The Planning and Land Authority will prepare these when directed by the Minister to do so, or when the Authority is satisfied it is necessary and convenient to do so in relation to a matter relevant to the main object of the Act.[421] The draft bill provides that the contents of a strategic environmental assessment can be prescribed by regulation.[422]

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[414] Clauses 189 and 190
[415] Clause 190
[416] Clause 197
[417] Clause 196
[418] Part 8.3, clauses 198–200
[419] See note to clause 200
[420] Clause 91
[421] Clause 92
[422] Clause 93

Stakeholder comments

3.50 Several stakeholders welcomed the proposed provisions concerning environmental impact statements.[423]

3.51 The Institute of Architects submitted that the provision for scoping an environmental impact assessment should be drafted more clearly and the period for representations to be made to be shortened so that the draft document has to be issued within 10 working days and the finalized document issued within 15 working days.[424]

3.52 The Planning Institute welcomed the limits on the Minister's powers with respect to environmental impact statements, but suggested that the draft bill should better specify what happens once the environmental impact statement has been submitted; whether 'accepts' means 'approves', and what happens once it has been accepted.[425] The Institute of Architects made a similar point, querying whether acceptance by the Authority was necessary for the environmental impact statement to be regarded as complete for the purposes of clause 122.

3.53 The Commissioner for the Environment recommended that the Minister be required to declare the impact track applicable under clause 116 for any activity that carries a risk of significant environmental harm, replacing the current broadly discretionary provision. Dr Purdie also suggested that the frequency of an impact was a relevant consideration that should be included in sub-paragraph 116(4)(b)(i). Dr Purdie also said that public comment should be required for strategic environmental assessments in Part 5.6, and that this would ensure that the public could provide comment on reviews of the Territory Plan, since such reviews are required to include a strategic environmental assessment.[426]

3.54 The Conservation Council expressed strong support for strategic

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[423] Submission nos 2, 9, 13; Australian Institute of Architects, *Transcript of Evidence*, 5 September 2006, p65

[424] Submission no 5, Appendix

[425] Submission no 8

[426] Submission no 6

environmental assessments but suggested that more detail needed to be included in the draft bill, with minimum content prescribed by regulation. The Council suggested that the minimum content requirements applying in the European Union, such as mandatory triggers, public consultation and next steps once submitted (such as a requirement that all written comments or representations be taken into account, to provide a response and the release of the document to the public), be included.[427]

3.55 The Council also submitted that:

- the planning system should be required to include assessment of the 'no development to proceed' option as too often political decisions were made that developments would go ahead even if they were contrary to ecologically sustainable development;[428]
- the bill should be amended to ensure that members of the public and the Flora and Fauna Committee were invited to comment on a proponent's draft environmental impact statement[429] after it had been submitted and before a decisions was made or approval given, and that they had an appropriate period of time within which to do that, such as six weeks;
- that an evaluation of the environmental impact statement be tabled in the Assembly and made available to the public;
- the Minister be required to report on what considerations were taken into account when approving, or not approving, the proposed development;
- as the minister only has 15 working days to decide whether to establish an inquiry panel, the environmental impact statement would need to be publicly released before that, and for a reasonable length of time (say 5 working days before the decision to establish a panel is made) so that members of the public could make representations about its adequacy and/or whether a panel of inquiry was needed;

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[427]Submission no 9; *Transcript of Evidence*, 29 August 2006, pp3, 5, 6
[428] *Transcript of Evidence*, 29 August 2006, pp2–3
[429] The Commissioner for the Environment made a similar point about the need for public consultation on the content of a draft EIS: Submission no 6

- guidelines be developed for ecological assessments;
- cumulative impacts be assessed;
- motor sports facilities or venues should require an environmental impact assessment regardless of their capacity; and
- environmental impact statements should be required for site selection as well as site development, and that round table conferencing could contribute to the clarification of issues relevant to the selection of particular sites.[430]

3.56 The Environmental Defender's Office would prefer that a broader range of options for environmental assessment, including preliminary assessments, was retained. However it also welcomed the reduced scope of ministerial discretion.[431] It called for the legislation to set out the requirements for best practice in this area,[432] to require consultants to formally attest to the correctness of their reports, and to make it an offence to provide false and misleading information.[433]

3.57 ACT for Trees Inc suggested that inquiry panels should be constituted for high impact urban development projects to assess economic viability, sustainability and urban design outcomes, and that developers should be required to submit studies on these issues with their development application.[434]

3.58 The Australian Government Minister for the Environment and Heritage, Senator the Hon Ian Campbell, advised the Committee that officers of his Department and the ACT Government were endeavouring to ensure that the provisions of the Planning and Development Bill met the accreditation requirements of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act). The Council of Australian Governments (COAG) in the Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment agreed to work cooperatively to avoid duplication in

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430 Submission no 9; *Transcript of Evidence*, 29 August 2006, p4
431 Submission no 12; *Transcript of Evidence*, 29 August 2006, p34–35, such as the reference in subclause 116(3) to off-site impacts
432 citing M. Raff (1997), 'Ten principles of quality in environmental impact assessment', *Environment and Planning Law Journal*, 14(3), 207–221
433 Submission no 12
434 Submission no 2

environmental assessment and approvals processes. The EPBC Act provides for the making of bilateral agreements with the states and territories to accredit their environmental assessment and, in particular circumstances, environmental approval processes. Assessment bilateral agreements were already in place with Tasmania, the Northern Territory, Western Australia and Queensland.[435]

3.59 The Minister for Planning, Mr Corbell, advised the Committee that he had asked the Authority to consider the European Union's standards on environmental impact assessment, as they seem to be well accepted, but that there was also a need for flexibility and reasonableness because some proposed developments would generate different issues and impacts. Compare a dam with a mobile phone tower for example. The public would be able to comment when the scope of the impact assessment was being formulated.[436]

3.60 The Director of Development Services in the Planning and Land Authority advised the Committee that the proposed legislation would allow impact assessment to be integrated with development approvals. Conditions could be attached to development approvals concerning monitoring or mitigation for example.[437]

Committee comments

3.61 The Committee agrees with stakeholders that many aspects of these impact assessment provisions are welcome and appreciates that the Planning and Land Authority is continuing to refine them. The Committee understands that provisions enabling a Minister to require a decision-maker to direct the preparation of an environmental impact assessment have only recently been introduced in Victoria[438] so the continuation of previously underused

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[435] Letter from the Minister for the Environment, Senator the Hon Ian Campbell, to the Committee Chair, Mr Mick Gentleman MLA, dated 6 September 2006, responding to a Committee invitation

[436] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

[437] Oral response by Director of the Development Services Branch, Ms Jacqui Lavis to the Planning and Environment Committee, 26 September 2006

[438] Stephanie Niall (2006), 'Recent changes to Victoria's environmental impact assessments', *EnviroWorks*, 12 September 2006

provisions here is commendable. The potential for monitoring and evaluation activities to be linked to development conditions is particularly welcome as monitoring and evaluation has been a relatively neglected area in environmental impact assessment to date.[439] The introduction of strategic environmental assessments is also particularly welcome, as these can substantially strengthen the contribution that policies, plans and programs can make to sustainable development. [440] The Committee expects that the Planning and Land Authority and parliamentary counsel would have already clarified the provisions concerning the 'next steps' following submission of an environmental impact assessment as the draft bill states that further work was progressing on the provisions concerning inquiry panels.[441]

3.62 The Committee agrees with Dr Purdie that there should be public notification and consultation requirements for strategic environmental assessments both before and after preparation, as well as for environmental impact assessments, but notes that the Minister had indicated a willingness to consider the European Union's directive on impact assessment.[442] The Committee agrees that motor sports facilities should be the subject of environmental impact assessment regardless of their capacity and that site selection as well as site development should be assessed. The 'no development' option should also be considered when a proponent's development application is being assessed.

3.63 The Committee appreciates the motivation, but does not agree with the suggestion that the consultation period on assessment scoping documents should be shortened, as all the timeframes in the bill are already very short.

3.64 The Committee does not consider that new regulatory provisions are

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439 Ian Thomas and Mandy Elliott (2005), *Environmental Impact Assessment in Australia* (4th ed), The Federation Press, pp214–218

440 Rodger Eade (2000) 'Issues in Environmental Impact Assessment: What has Scoresby taught us?' *Urban Policy & Research* 18(4), 515-27; Thomas and Elliott (2005), *Environmental Impact Assessment in Australia* (4th ed), pp51–57

441 Refer comment on p156 of the exposure draft bill

442 For the EU requirements see: Directive 2001/42/Ec of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment', *Official Journal of the European Communities,* L 197/30, accessed 21 September 2006 at: <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_197/l_19720010721en00300037.pdf#search=%22european%20union%20strategic%20environmental%20assessment%22>

necessary to require consultants to attest to the reliability of their work as there are professional disciplinary, common law and statutory criminal law provisions which may be applicable in appropriate circumstances.

3.65 The Committee considers that 'cumulative impacts' would already be covered by 'scope and length of time of the impact' and 'the sensitivity, resilience and rarity of the environmental function, system, value or entity likely to be affected' in sub-paragraphs 116(1)(i) and (ii) of the draft bill. '

3.66 The Committee expects that the concerns expressed about high impact urban development projects would be addressed in planning reports, environmental impact assessments or strategic environmental assessments.

3.67 The Committee would prefer that all planning reports, environmental impact statements and strategic environmental assessments were made notifiable documents, with copies *required* to be made available to the appropriate Assembly committee.

3.68 The Committee would also prefer to see the minimum content of environmental impact statements prescribed in the legislation rather than by regulation as the Assembly's role in relation to improving regulations is limited.

3.69 The Committee also suggests that clause 188 be amended to include the use of opt-in email lists as an additional means for notifying the public that documents are available for comment.

RECOMMENDATION 37

3.70 **The Committee recommends that the draft bill require public notification and a reasonable consultation period for strategic environmental assessments and environmental impact assessments, both before and after their preparation, and before submission to the Minister.**

RECOMMENDATION 38

3.71 **The Committee recommends that planning reports, environmental impact assessments and strategic environmental assessments be made notifiable instruments.**

RECOMMENDATION 39

3.72 **The Committee recommends that consideration be given to whether Part 5.6 of the Bill, 'Planning reports and strategic environmental assessments' should be moved into Chapter 8, and be titled more broadly, such as 'Sustainability assessments and inquiries'.**

Leases and Licences

3.73 Chapter 9 of the draft bill deals with the granting of leases and licenses, concessional leases, rent variations, lease variations, rural leases, improvements, certificates of compliance and surrendering and terminating leases.

3.74 As noted above, the ACT leasehold system was reviewed thoroughly in 1995 and the Stein report recommended that the system be retained because it prevents land speculation, allows unearned increments to be retained by the Territory, defrays the cost of the Territory, and ensures orderly planning by lease purpose clauses.[443]

Stakeholder comments

Lease purpose clauses

3.75 The Housing Industry Association suggested that lease and development conditions should be simplified so that the Territory Plan is the primary planning document and applies more clearly. It noted that a Change of Use Charges consultation document would be issued at a later date.[444]

3.76 The Council of Social Service cautioned against broadening the range of permitted uses in lease purpose clauses, arguing that the application of planning principles protects a range of important values.[445]

3.77 Ms Johnstone expressed concern about possible changes in several land use policies under the proposed new zones which could have significant impacts,

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[443] *Report into the Administration of the ACT Leasehold*, pp xi, xix, paragraph 13.37
[444] Submission no 13
[445] Submission no 10

and that lease variations or development approvals should not permit this without extensive community consultation.[446]

3.78 Several other industry and professional organisations indicated that crown lease purpose clauses were of concern. The Property Council and the Law Society both submitted to the Committee that the uses permitted under a crown lease should not require additional planning approval to be activated.[447] The Property Council suggested that the current draft provisions would create uncertainty, increase complexity, create delays and increase the government's workload.[448] They argued that as the definition of development includes 'use', a change of use would require a development assessment. Mr Wheeler, for the Property Council, described this as an 'acquisition of pre-existing rights' and 'a revolutionary concept'.[449]

3.79 The Law Society said that it would be unable to support the proposed legislation if the concept of use as development remained.[450] The Society neither understood nor saw the need for the provisions, and suggested that they eroded the fundamental features of the ACT leasehold system. Mr del Rio, for the Society, said that the proposal created additional red tape and uncertainty for investors. He quoted the 1995 Stein report and its view that 'lease purpose clauses need to be clear and unambiguous, rigorously enforced, reviewed and amended when appropriate to encourage desired development, and not overridden by a statutory zoning plan'.[451] The report had recommended that the principle of 'ensuring orderly planning by lease purpose clauses' be enshrined in the *Land (Planning and Environment) Act,* with the other principles of 'avoiding land speculation, allowing unearned increments to be retained by the people, defraying the cost of establishing the National Capital'.[452]

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[446] Submission no 1
[447] *Transcript of Evidence*, 5 September 2006, p49
[448] *Transcript of Evidence*, 5 September 2006, p49
[449] *Transcript of Evidence*, 5 September 2006, p50. See also p14
[450] Exhibit no 5
[451] *Transcript of Evidence*, 5 September 2006, p78, citing Justice Paul Stein (Chair), Patrick Troy and Robert Yeomans (1995*), Report into the Administration of the ACT Leasehold to the Chief Minister ACT Government*, Canberra, p115, paragraph 13.28
[452] *Report into the Administration of the ACT Leasehold to the Chief Minister ACT Government*, p116, Rec 4

3.80 Mr Arthur suggested that the proposed new clauses 125, 383–386, and regulation 4 had the effect of requiring development approval to be given before a dormant land use permitted under a lease purpose clause could be activated.[453]

3.81 Several submissions asked the Committee to review the merits of retaining lease purpose clauses in Crown leases. Mr R.S. Gilbert described lease purpose clauses as 'superfluous, a waste of time and money, an unnecessary duplication of planning and development controls… [and] a hangover from the early days when Canberra was small, didn't have a zoning Plan dictating land use, and development was small enough to be controlled through individual lease provisions.'[454] Mr Gilbert suggested that the sole purpose of such clauses was to trigger change of use charges, which were inequitable because leaseholders would have paid for the range of development rights that were specified in their lease purpose clauses when they acquired their leasehold interest, and were required to pay to activate the right unless the value of the land was not affected by the development.

3.82 Mr Gilbert also criticised the change of use charge as poorly administered and suggested it be replaced by a levy or development tax not linked to land values, which would be a more transparent, equitable and efficient.[455] He further recommended that if lease purpose clauses were to be retained, a broader range of uses should be specified in the lease.

3.83 Mr Arthur noted that while there may be a policy intent to broaden the lease purpose clauses for commercial leases, this was not yet reflected in the legislation. He also noted that whereas previously the range of permitted uses could be used, under the proposed legislation a use could not be activated without specific development approval. He noted that this was desirable from a planner's point of view but less so for the person who paid for the range of use rights. He was not sure whether a limitation on rights was intended as several clauses combined could be interpreted in a similar way to current

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[453] Submission no 7
[454] Submission no 15
[455] Submission 15A

provisions.[456]

3.84 Mr Arthur explained that the Territory Plan, which is a statutory planning and control system, was now being used in a manner similar to planning controls in other jurisdictions. There was nothing that the leasehold system could do now that could not be done by a statutory planning control system. He suggested that leases could be removed from the system, which would make it simpler.[457] The Law Society similarly commented that it would not be opposed to an abandonment of the leasehold system.[458]

RECOMMENDATION 40

3.85 **The Committee recommends that the exposure draft bill be amended to allay the concerns raised by the ACT Law Society and other stakeholders in relation to use as development.**

Security for loans

3.86 The Property Council and the ACT Law Society both requested a technical amendment to a provision of the draft bill that provides that a leaseholder cannot offer the leasehold as security for a loan unless the leaseholder has obtained a certificate of compliance for a building on it (clause 259). The Law Society explained that since the effect of this provision is that it is illegal in the ACT for anyone who buys a block of land to build on to consolidate their loans (such as home loan, car loan etc), and that this provision, which would be carried over from the Land *(Planning and Environment) Act 1991*, is routinely breached, but never enforced. Nevertheless it could be read as an impediment to investment.[459] The Property Council suggested that this provision discriminates against young people.[460]

Land management agreements

3.87 The Conservation Council suggested that land management agreements were

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[456] *Transcript of Evidence*, 29 August 2006, p19
[457] Submission no 7; *Transcript of Evidence*, 29 August 2006, p20. See also comments in Submission no 7 concerning clauses 169 and 170
[458] *Transcript of Evidence*, 5 September 2006, p80
[459] *Transcript of Evidence*, 5 September 2006, p75
[460] *Transcript of Evidence*, 5 September 2006, p51

an important conservation mechanism for rural lands to preserve biodiversity and that these should be made publicly available on request, so that the community can be engaged in that conservation as well.[461] The Council also suggested that in their view it would be preferable to deal with predation by cats on native wildlife by including bans on cats in leases rather than having mandatory containment under the *Domestic Animals Act 2000* (ACT). The Council also noted that it is yet to be seen whether cat containment will work.[462]

3.88 The ACT Council of Social Service Inc endorsed the proposals in the draft bill concerning concessional leases but queried the extent of the Planning and Land Authority's expertise and powers in relation to the classification of leases as concessional, and whether there should be third party appeal rights in relation to the exercise of those powers. The Council also urged that the Authority be required to consult with other agencies before granting a concessional lease.[463]

3.89 The Law Society welcomed the clauses in the bill concerning concessional leases but suggested that amendments should be made so that when the Planning and Land Authority has determined that a lease is concessional, or is considering designating a lease concessional, that is reported. The Society also suggested that the concept of 'less than market value' needed to be refined as there were diverse situations were less than market value was paid for a lease but it was not concessional (such as where off-site works were required to be done or the leaseholder undertakes infrastructure works on the lease).[464]

Committee comments

3.90 The Committee is aware that the Planning and Land Authority has commissioned consultancy reports on change of use and infrastructure charging issues. These were still being considered by the Authority and the

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[461] Submission no 9; *Transcript of Evidence*, 29 August 2006, p4
[462] *Transcript of Evidence*, 29 August 2006, p6
[463] Submission no 10; *Transcript of Evidence*, 29 August 2006, p37
[464] *Transcript of Evidence*, 5 September 2006, pp75–77

Minister in August 2006, and were not made available to the Committee.[465] The Minister for Planning advised the Committee that change of use charging policy would not apply to changes of uses permitted in the lease. The amended policy would be based on codified charges rather than a valuation exercise.[466] If a new land use was applied for that was different from the range of uses permitted in a lease, a change of use charge may be payable.[467]

3.91 On the ACT leasehold system, the Minister advised the Committee that it provides a public benefit because it ensures that the community's interest in land is protected. Unearned increments on change of use are returned to the community. In a freehold system the main beneficiary of a change of land use from rural to residential is the landowner. The Government cannot capture the unearned increment and is limited to getting some revenue benefit from developer contributions. If a leaseholder wants to change the use of land he or she has to purchase additional rights which enables the Government, and through it the community, to capture some of that unearned increment.[468] The Committee agrees with these comments.

3.92 The Minister also advised the Committee that it was neither the Government's policy objective or intention, and nor had there been a Cabinet decision to take away rights already granted in leases. Issues of drafting detail about lease purpose clauses and 'use' meaning development that are of concern in the draft bill are being worked through. The Government's aim is to remove the ambiguity that exists in the current relationship between the lease and the Territory Plan in regulating use.[469]

3.93 The Minister advised the Committee that the Government's intention was to ensure that the Territory Plan remained the main instrument for regulating

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465 Advice from Mr Vic Smorhun, Manager, Communications & Government Services, ACT Planning and Land Authority, 16 August 2006

466 Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

467 Oral response by the Chief Planning Executive to the Planning and Environment Committee, 26 September 2006

468 Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006. See also Chapter 13 of the *Stein Report into the Administration of the ACT Leasehold.*

469 Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

land use, whilst also recognising that leases establish tenure and permit a range of uses. There was no Government proposal to say that leases would not continue to specify a range of uses. The current system combines both statutory planning instrument and a leasehold system. While it is a dual system the Territory Plan is the primary instrument, but this would not diminish the range of uses available to leaseholders in their lease. The complexities of this issue were still being discussed within Government.[470]

3.94 The Minister further advised that the Government's main aim was to ensure consistency with the Development Assessment Forum model, and to better integrate and streamline development, and simplify the system. While the Territory Plan is the main planning instrument, leases are evidence of tenure and uses cannot be taken away. Permitted uses will continue before and after July 2007, and will be renewable for 99 years. The key features of leases will continue after the reforms are in place. Conditions or clauses relating to planning and development matters in leases may differ because planning and development matters will be included in the Territory Plan, but that would only mean that some of the very prescriptive clauses that are in some leases will become unnecessary.[471]

3.95 The Minister explained to the Committee that leaseholders would continue to be able to exercise the uses permitted under their leases in the reformed system. This is covered in the transitional provisions of the draft bill. Leases would only need to be varied if a more fundamental change of land use was sought. The Minister said that the Law Society's concerns seem to be based on a concept, the abandonment of a use, that is found in other jurisdictions. The Bill is drafted so that uses cannot be abandoned. If a leaseholder wants to use a lease for a purpose not permitted in the lease, they will need to get approval from the regulatory system. This may not be a planning matter. For example some uses require approval under the Environmental Protection Act, or under the liquor licensing regime. The regulatory impact would remain unchanged

[470] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

[471] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

but it would be brought within the development assessment process.[472]

3.96 The Chief Planning Executive advised the Committee that rather than 'use as development' it would be better to refer to 'the consequences of use' and to consider the broader community impacts of the use. Conditions can be included in development approvals to mitigate the impacts of use. For example noise attenuation measures can be required. Car parks can be required. This approach is more consistent with what occurs in other jurisdictions. Currently there may be some confusion because of the different approvals needed. In future some developments will not need approval because they will be in the code track or exempt from approval.[473]

3.97 The Committee recognises that the issue of 'use as development' and change of use charges has caused considerable consternation amongst industry and professional stakeholders and expects that the provisions of the final draft bill will be clearer.

3.98 The Committee also notes that in 1996 the then Minister for the Environment, Land and Planning, Mr Gary Humphries MLA, in the ACT Government's response to the Stein report on the ACT leasehold system, did *not* agree that the four objectives of the system (including that the Territory Plan not override lease purpose clauses), noted above, be included in the Land (Planning and Environment) Act. Mr Humphries explained that while there was a need for clear policy objectives for the system, this was only in the context of the overall planning and land management system and broader strategic planning.[474]

3.99 On concessional leases, the Minister advised that these are leases for which less than market value is paid. A concessional lease does not reflect market value arrived at by a competitive process, while recognising that while the government ownership of the land means that this is not a pure market situation. Moderate-income land ballots do not involve concessional leases.

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[472] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

[473] Oral response by the Chief Planning Executive to the Planning and Environment Committee, 26 September 2006

[474] Minister for the Environment, Land and Planning, Mr Gary Humphries MLA (1996), 'ACT Government response to the report of Inquiry into the Administration of the A.C.T. Leasehold', Canberra.

The market value is assessed and the land is sold at market value, which, because of the size of the block or the location of the land, could be considered an 'affordable' price. Nor is there a concessional lease just because the lessee has agreed to undertake infrastructure works, and the price of the land has been reduced accordingly. The cost of servicing land is still part of the market price.[475]

3.100 On the removal of clause 259 from the Bill, the Minister advised the Committee that he had not yet been convinced of the need to do this, but that he would be willing to reconsider the issue if need be. Minister Corbell explained that when land is acquired in the ACT it is acquired for use as physical development and should not be acquired as security for some other purpose or project unrelated to land. If clause 259 were to be removed, land banking would be encouraged, and land sites could become vacant for long periods of time. Land could be used as security for activities unrelated to the land. If the provision is retained the Government may need to consider whether the Planning and Land Authority and the Registrar of Land Titles should increase their monitoring and compliance activities concerning it. Even if the provision is not a compliance priority that does not mean it is unimportant.[476]

3.101 The Committee appreciates the Minister's comments but is of the view, nevertheless, that the ACT Government should review clause 259 with a view to amending it, to ensure that everyday transactions are not deemed unlawful.

RECOMMENDATION 41

3.102 **The Committee recommends that clauses 224 and/or 225 be amended to require the Authority to consult with other agencies before granting a concessional lease.[477]**

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[475] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

[476] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006

[477] *Transcript of Evidence*, 29 August 2006, p37

RECOMMENDATION 42

3.103 **The Committee recommends that the ACT Government review clause 259 with a view to amending it to ensure that everyday transactions are not deemed unlawful.**

Development Approvals

3.104 The model development assessment process proposed by the national Development Assessment Forum has been incorporated in the proposed legislation. The draft bill provides that:

- specified constructions, such as single residences in greenfield areas and small structures like garages, sheds and pergolas, if certified by a private sector building certifier would not need development approval from the Planning and Land Authority. Private certifiers will not be permitted to certify developments requiring development approvals or having unit title conditions;
- proposed developments will be assessed according to the assessment track they are assigned, and there will be no self-assessed track;
  - code track proposals will not require public notification, will not create rights of review, and there will be no consultative referral within government on the proposal;[478]
  - merit track proposals must be publicly notified under division 7.3.4 and there may be a right of review under chapter 12 in relation to a decision on the application;[479]
  - impact track proposals[480] must include an environmental impact statement in relation to the proposal, must be publicly notified under division 7.3.4, must be the subject of intra-governmental

[478] Clause 109

[479] Clause 113. A person other than an applicant may apply for review of a decision to approve a development application in the merit track only if the application is required to be notified under section 142 (see sch 1, item 3).

[480] See clause 115 proposal in the relevant development table; Schedule 4; section 116 declaration, or section 117 public health minister declaration

review and comment, and there are third party appeals rights in relation to a decision on the application;[481]

  - exempt track proposals may proceed without development application or approval;[482] and
  - prohibited track proposals may not be the subject of a development proposal[483]

- proposed developments in the merit track will be notifiable, but only some assessed applications will be subject to third-party appeals; and
- all impact assessed development applications will require notification and be subject to third-party appeals.[484]

3.105 The definition of 'development' in clause 7 was noted above.

Stakeholder comments

3.106 Several stakeholders' concerns about technical amendments were noted above.[485]

3.107 The Environmental Defender's Office suggested that the aim of expediting approvals could be pursued by offering faster processing for proponents demonstrating improved environmental performance against specified criteria.[486]

3.108 The Conservation Council queried whether code track developments should be required to be consistent with any land management agreements applicable to the rural lease on which the development is proposed, and/or with the advice of the Conservator of Flora and Fauna in relation to the proposal.[487] The Council also disagreed with the proposal that water tanks built in front of a

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481 Clauses 118, 119, 121, 138 and proposed regulations

482 Clause 124. See the draft 'Proposed list of buildings and structures exempt from requirements to obtain Development Approvals under the Planning and Development Act' and draft 'Proposed reforms to increase the levels of exemptions from Building Act 2004 provisions for low complexity building work', both of which are available from the Planning and Land Authority

483 Clause 126

484 'Development assessment reform – Government response fact sheet', <http://www.actpla.act.gov.au/consultation/reform/pdf/factsheet09.pdf>, accessed 17 August 2006

485 Submissions no 7, 9

486 Submission no 12; *Transcript of Evidence*, 29 August 2006, p27

487 Submission no 9

residence not be exempt from development assessment, arguing that a visible water tank demonstrates improved urban sustainability.[488]

3.109 Mr Arthur suggested that the bill currently does not provide for development applications to be moved between assessment tracks, citing the example of a protected tree being located on a property proposed to be developed with a single residential dwelling that otherwise complied with code requirements.[489] He expressed concern that the bill authorised the Planning and Land Authority to act inconsistently with written advice provided to a proponent with the aim of guiding and assisting the applicant to make a development application.[490] He also said that the notification provisions 'have lost cohesion'.[491] The Institute of Architects made a similar point, suggesting that the Authority should only be permitted to act inconsistently with written advice they had provided if the development application differs from the pre-application or if there is new information that changes the probable impact or effect of the proposal.[492]

3.110 The Housing Industry Association expressed confidence that the streamlining of the approvals system would improve customer service for proponents, and free up staff in the Planning and Land Authority to take more complicated planning approval decisions. It welcomed the use of private building certifiers in the exempt approval track as likely to deliver cost savings, quicker processing and consumer benefits.[493] The Association expected that the reforms to the consultation process would also reduce community criticism of planning decisions, and help to reduce the risk-averse culture in the Planning and Land Authority. It expected to make a substantial contribution to the development of the codes, and welcomed the further development of electronic lodgement procedures.[494]

3.111 The Institute of Architects suggested similarly that the use of private certifiers for greenfields developments should enable Authority staff to respond better

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[488] Submission no 9
[489] *Transcript of Evidence*, 29 August 2006, p17
[490] Submission no 7, referring to sub-clause 127(4)
[491] Submission no 7, referring to clauses 133, 140, 141, 142
[492] Submission no 5; Appendix
[493] Submission no 13
[494] Submission no 13; *Transcript of Evidence*, 5 September 2006, p43

and engage more positively with professionals in the development industry.[495]

3.112 The Property Council expressed disappointment that the draft bill did not include a self-assessment track, as recommended by the Development Assessment Forum. It also suggested that the schedules were not very clear as to which track would be applicable. The Council also suggested that the greenhouse emission trigger was too vague, and decisions made to apply it should be appellable.[496]

3.113 The ACT Council of Social Service differed from this industry perspective, expressing concern that poorly built residences may be approved for sale, and that low income earners may be particularly vulnerable to having to live in sub-standard accommodation.[497]

3.114 The Institute of Architects suggested that the criteria in a development table that is applied to a development application should be negotiated and agreed between the proponent and the Planning and Land Authority before the application is progressed.[498] The Institute queried the different lengths of time and consultation requirements for merit track proposals and whether relatively simple proposals might be unwittingly classified as merit track proposals, citing as an example the relocation of a driveway in a suburb with a developed street tree canopy. The Institute suggested that performance-based assessment should be preferred to overly prescriptive or mechanistic dimensional controls, and that third party consultation should only be mandatory where a party would be 'materially affected' by a proposed development.[499] The Institute of Landscape Architects agreed that performance based assessment criteria was an important way of encouraging industry and assessors to work more co-operatively for desirable outcomes.[500]

3.115 The ACT Commissioner for the Environment submitted that the legislative criteria by which proposed developments are assigned to code assessment or

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495 *Transcript of Evidence*, 5 September 2006, p67
496 *Transcript of Evidence*, 5 September 2006, pp53, 55
497 Submission no 10
498 Submission no 5, Appendix
499 Submission no 5, Appendix; *Transcript of Evidence*, 5 September 2006, pp62, 64, 65, 71, 72
500 *Transcript of Evidence*, 5 September 2006, p67

merit assessment should be more clearly drafted.[501]

3.116 The Council of Social Service argued that the level of consultation on codes should be the same as for proposed variations to the Territory Plan.[502]

3.117 The Law Society welcomed the proposed hierarchy of codes, the timeframe of 15 working days for agencies to respond to various issues, and the proposed pre-application meetings, but suggested that the matters listed in Schedule 4 should be more clearly defined.[503]

Committee comments

3.118 The Committee agrees that the Planning and Land Authority should not have statutory authorisation to act inconsistently with the written advice it has provided to a proponent. Similarly, the Authority should not be authorised to act inconsistently with the advice of referral agencies, or in such circumstances the Minister should be required to resolve the issue.

3.119 In relation to self-assessment, the Minister explained that the draft bill does not include self-assessment as recommended by the Development Assessment Forum because neither the Government or the former Planning and Land Council was comfortable with it. Self-assessment assumes that the developer would be able to engage its own certifier rather than an independent third party undertaking the assessment.[504] In the Minister's view, the draft bill represents a quantum leap from the system currently in place, which is still complex. To have self-assessment would add another layer of complexity but could be modelled on the BASIX system in NSW. The Local Government and Planning Ministerial Council resolved that the application of the Development Assessment Leading Practice model should be used by each jurisdiction to meet its own needs.[505] The Committee accepts these explanations.

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[501] Submission no 6, referring to Schedule 4 of the draft bill
[502] Submission no 10
[503] Exhibit no 5, *Transcript of Evidence*, 5 September 2006, p73
[504] Oral response by the Minister for Planning, Mr Simon Corbell MLA to the Planning and Environment Committee, 26 September 2006
[505] Oral response by the Chief Planning Executive to the Planning and Environment Committee, 26 September 2006

Tree protection

3.120 The definition of 'development' in the exposure draft bill is a simplified and more consolidated definition than in the *Land (Planning and Environment) Act 1991* (ACT) but it is broader than in the *Australian Capital Territory (Planning and Land Management) Act 1988*.[506]

3.121 The new bill provides that development approvals must not be given in the merit[507] or impact assessment tracks[508] if the proposed development would affect a registered tree[509] or declared site[510] under the *Tree Protection Act 2005* (ACT), and would be inconsistent with the advice of the Conservator of Flora and Fauna. However the Planning and Land Authority also has the power to approve, amend or replace a tree management plan in force for a tree.[511]

Stakeholder comments

3.122 The Housing Industry Association welcomed the use of the Development Assessment Forum model for a national planning code, noting that this should lead to more streamlined approval processes. It also welcomed the new role for private Building Certifiers in the exempt approval track as this reduces development costs for the builder and designer and should benefit consumers.[512]

3.123 The Environmental Defender's Office criticised one of the underlying objectives of the Development Assessment Forum model, which was to reduce public notification and public appeal rights so as to streamline development processes. Dr Prest queried whether restrictions on appeal rights were consistent with the principles of sustainable development and their recognition of the importance of public participation in decision-making

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[506] In the Commonwealth Act 'works' includes the construction, alteration, extension or demolition of buildings or structures, landscaping, tree-felling, or excavations, but excludes anything done inside buildings or structures: s.4.
[507] Clause 111(note subclause 3)
[508] Sub-paragraph 119(1)(b)(iv). See also 119(3)(b)
[509] Registered tree—see the *Tree Protection Act* 2005, section 9
[510] As defined in the *Tree Protection Act 2005*
[511] Clause 148(3)
[512] Submission no 13

processes.[513]

3.124 The Institute of Architects suggested that the Planning and Land Authority should have the power to make a decision to determine a matter where referral authorities could not agree on that matter. The Institute cited the example of Amaroo school and conflicting positions taken by Environment ACT (as it then was), and the proponent, which delayed the project.[514]

Definition of 'development'

3.125 Mr Keith Storey, for ACT for Trees Inc suggested that the definition of 'development' in the exposure draft bill should be amended to include in paragraph (b) 'landscaping, earthworks and tree felling'. He also suggested that clause 148(3) should be amended so that the Planning and Land Authority is required to make decisions about approving, amending or replacing a tree management plan in consultation with the Conservator of Flora and Fauna.[515]

3.126 The Law Society suggested the definition should be exhaustive (i.e. 'means') rather than inclusive (i.e. 'includes'), and the concept of use as development should be omitted.[516]

Works approvals

3.127 The ACT Ombudsman, Professor John McMillan, advised the Committee that his Office had dealt with two complaints in recent times concerning development approvals issued by the Planning and Land Authority. ActewAGL had intervened in both cases to prevent works continuing contrary to the *Utilities Act 2000* (ACT). The Ombudsman said that in both instances the Authority should have ensured that relevant approvals were in place before allowing the works to commence.

3.128 Professor McMillan sought clarification in relation to works in the 'code track' and whether safeguards were in place to ensure ActewAGL approvals were

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[513] *Transcript of Evidence*, 29 August 2006, p33, referring also to the Aarhus Convention
[514] *Transcript of Evidence*, 5 September 2006, pp63, 65
[515] Submission no 2A
[516] Exhibit no 5

obtained before work commenced.[517]

Public consultation strategies

3.129 Several submissions commented that stakeholders need a reasonable length of time to comment on development projects.[518] ACT for Trees Inc also suggested that the Planning and Land Authority should consult more meaningfully with stakeholders, and better explain development proposals so that stakeholders understand what is needed to achieve sustainable, and better built, urban environments. Community Planning Forums could be one way to achieve this.[519]

3.130 Mr Merstov suggested that where documents relevant to a proposed variation were withheld, the reason for the exclusion should be provided, and clause 64 amended accordingly. Full transparency should be the applicable principle, and where documents were withheld (for example under clause 372), this should be reported and subject to appeal.[520] The Council for Social Service argued similarly that the grounds on which documents could be withheld, such as privacy or public security, should be prescribed, and not be discretionary.[521]

Committee comments

Definition of 'development'

3.131 The Committee does not agree that the Planning and Land Authority should be able to override advice from referral agencies, especially where the advice is of an expert nature. The Conservator of Flora and Fauna or the Minister should have the final say. If there is uncertainty and disagreement about outcomes, the precautionary principle would suggest that the position favouring the environment should prevail. In this context the Committee is concerned about sub-clause 148(3) which enables the Authority to override or

517 Submission no 3
518 Submission no 2
519 Submission no 2
520 Submission no 11
521 Submission no 10

amend tree management plans.

RECOMMENDATION 43

3.132 **The Committee recommends that the draft bill provide for developments to be moved between tracks where appropriate.**

RECOMMENDATION 44

3.133 **The Committee recommends that sub-clause 148(3) be amended so that the Authority cannot amend a tree management plan unless this is consistent with the advice of the Conservator of Flora and Fauna (as under sub-clause 119(3)).**

4 MANAGEMENT OF PUBLIC LAND

4.1 Chapter 10 of the exposure draft bill provides for the recognition of public land in the Territory Plan and its management. The draft bill requires the Planning and Land Authority to create a custodianship map that identifies and 'gives administrative responsibility for' unleased land and public land in the ACT.[522] The map may include anything else the Authority considers appropriate.[523]

4.2 Part 10.4 provides for the development, content, scrutiny, variation and review of plans of management for public land. This part includes requirements for public consultation, reference to a Legislative Assembly Committee and Ministerial consideration of the committee's recommendations, provides for planning reports and strategic environmental assessments, and specifies the Minister's powers and responsibilities in relation to the draft management plans he is given for consideration and approval. The draft bill provides that a plan of management must describe the area of public land to which it applies and how the management objectives for the area are to be implemented or promoted. Schedule 3 prescribes the management objectives for public land.

4.3 Chapter 10 limits the ability of the Authority to issue leases in relation to public land or future public land, unless on the written recommendation of the Conservator of Flora and Fauna and the Custodian.[524] Similarly the written agreement of the Conservator and the Custodian is required for the issuance of licenses to occupy or use public land.[525]

Stakeholder comments

4.4 The Conservation Council suggested that 'wildlife corridor' be included in the list of purposes for which public land may be reserved. The Commissioner for

[522] Clause 294
[523] Sub-clause 294(2)
[524] Clauses 295–297
[525] Clauses 298–299

the Environment suggested similarly, that the management objectives should include providing habitat and connectivity for fauna and flora and to provide for urban forest to included.[526]

4.5 Greening Australia suggested that the proposed custodianship map should recognise partnership arrangements and stakeholder involvement in land management. Mr Toby Jones, Chief Executive Officer of Greening Australia in the ACT & Southeast NSW, advised the Committee that it was important that community involvement in land management be recognised so that decisions would be less likely to be made that overrode the community's contribution. Mr Jones noted that volunteers and Greening Australia, in partnership with the ACT Government, had planted 58,000 native trees, shrubs and grasses for bushfire recovery. The original partnership between the ACT Government and Greening Australia had evolved into the ACT Landkeepers Program, which had overseen 53 community events between January and August 2006, including seed propagation, planting, maintenance and monitoring activities. Mr Jones said that Greening Australia has a volunteer database of 1,600 people, and aims to see 10,000 volunteers register and regularly contribute so that the momentum of high levels of community participation could be maintained over the long term. This would assist recovery from the January 2003 bushfires by contributing to the restoration and transformation of the burnt landscape.[527]

Committee comments

Custodian map

4.6 The Committee welcomes the proposed custodian map as this should clarify, simplify and make more accessible the land management responsibilities held by ACT Government agencies. This is particularly important for fire risk management, biodiversity conservation and restoration, consideration of applications for approval for infrastructure works etc. The Committee is concerned about two issues however:

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[526] Submission nos 6, 9
[527] Mr Toby Jones, oral communication to Committee Secretary, 1 September 2006

- the need for approval of the map by the ACT Executive and public notification, and
- the desirability of the map recognising partnership and stewardship arrangements.

4.7 The Chief Minister is responsible for allocating responsibility for administrative units and legislation to Ministers in the ACT Executive.[528] The administrative arrangements so issued are effectively a distribution or allocation of rights and responsibilities amongst Ministers in relation to the exercise of executive power. Similarly a custodianship map with statutory force effectively allocates rights and responsibilities and distributes executive power in relation to public land in the Territory. Such a map should therefore be required to be approved, and substantial amendments approved, by the Chief Minister.

4.8 But land management of unleased land and public land in the ACT is not only a government responsibility. The Territory has a network of community groups and individuals in publicly supported organisations such as Catchment Groups, and Park Care, Land Care and Water Watch groups.[529] Australian Government and Territory financial assistance can be provided to these organisations through programs funded by the Natural Heritage Trust or by Territory or private sector funding programs. The stewardship contribution made by these groups is sufficiently important to be recognised on the custodianship map, perhaps through an optional overlay with contact information. This may also encourage other stakeholders to contribute to the activities of these organisations.

4.9 The Committee also considers that it would be appropriate for the custodianship map to recognise the association of Indigenous Australians with land in the ACT. Whilst local families contest traditional associations in the

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[528] Section 14, *Public Sector Management Act 1994* (ACT). See also section 43 of the Australian Capital Territory (Self-Government) Act which provides that an ACT Minister shall administer such matters relating to the powers of the Executive as are allocated to that Minister from time to time by the Chief Minister.

[529] 16 urban Landcare, 14 Park Care, 4 rural Landcare, 3 sub-catchment umbrella organisations and more than 100 Waterwatch and Frogwatch volunteers: Rob Youl, Sue Marriott and Theo Nabben (2006), *Landcare in Australia Founded on Local Action*, SILC and Rob Youl Consulting Pty Ltd, p8

ACT and its broader region, it is generally recognised that there is a significant and substantial Indigenous heritage and continuing Indigenous culture in the ACT.

RECOMMENDATION 45

4.10 **The Committee recommends that the custodianship map created and maintained by the Planning and Land Authority which gives administrative responsibility for unleased land and public land in the Territory be approved by the Chief Minister when first made, and that the Chief Minister approves significant amendments to it.**

RECOMMENDATION 46

4.11 **The Committee recommends that the custodianship map recognise and represent in broad terms the spatial range of stewardship responsibilities assumed by not-for-profit organisations in relation to unleased land and public land, and that the map acknowledge the ongoing associations with Territory land expressed and valued by Indigenous Australians in the Territory. The need for disclaimers preventing any legal consequences from this 'informational' recognition should be considered.**

Management of public land

4.12 Public land in the ACT which is designated as a protected area such as a national park or nature reserve forms part of the National Reserve System (NRS), which aims to be comprehensive, adequate and representative. Commonwealth, State and Territory Governments endorsed the National Reserve System in the 1992 National Forest Policy Statement, the 1996 National Strategy for Conservation of Australia's Biological Diversity, and more recently in the National Resource Management Council's publication *Directions for the National Reserve System – A Partnership Approach* (2005).

4.13 A National Reserve System Task Group, which comprises representatives of all States and Territories, is implementing the 38 directions agreed in the *Directions* document. The Task Group reports to the Natural Resource Management Ministerial Council through the Natural Resource Management Policy and Programs Committee.

4.14 In August 2006 the National Reserve System Task Group agreed provisionally to a National Code of Public Protected Area Management for all public protected areas in the nine jurisdictions of Australia, i.e. the Commonwealth of Australia and the States and Territories. The code deals with planning, management, partnerships, compliance, enforcement and monitoring and evaluation. The Ministerial Council will be asked to endorse the National Code when it is finalised.

4.15 The proposed code provides that Australia's National Reserve System will be managed to ensure that:

- natural and cultural heritage values are identified and protected to maintain or enhance their condition now and for future generations;
- collaborative partnerships are established across community sectors that have a special interest in protected areas including Indigenous communities, neighbours, the visitors and park users, the scientific community and education and research institutions and the tourism industry where appropriate;
- Indigenous peoples are recognised as having a special connection to land and being culturally committed to caring for country using traditional knowledge of the Australian environment. The national reserve system provides an important opportunity to support these cultural needs and involve Indigenous people in its management;
- services and opportunities for public appreciation, understanding and experience are provided through programs that are culturally appropriate and ecologically sustainable, and do not compromise protected area values;
- an understanding and appreciation of the natural and cultural values of protected areas in the national reserve system is promoted together with an appreciation of the importance of protected areas as key areas for securing Australia's natural diversity; and
- management is informed, adaptive and transparent.

4.16 The proposed National Code also includes a statement of general principles by which protected areas are to be managed. These are:

Interconnectedness of values and places

Protected area management aims to incorporate and integrate natural values, Indigenous cultural and broader community values, and historic heritage values.

Protected areas are also part of broader bioregional, social, cultural and economic landscapes, and they should be managed in this context.

Good neighbour

Protected area managers are economically and socially part of local and regional communities, and recognise the need to be valued, responsible, and active local and regional community participants and members.

Community participation and collaboration

Protected areas are conserved for the benefit of and with the support of the community, and this is best achieved through awareness, understanding and involvement.

Environmental stewardship

Responsibility for protecting and conserving protected area values extends beyond the management body to include lessees, licensees, relevant public and private authorities, visitors, neighbours and the wider community.

Transparent decision making

The framework and processes for decision-making should be open and transparent. The reasons for making decisions should be publicly available, except to the extent that information, including information that is culturally sensitive or commercial-in-confidence, needs to be treated as confidential.

Effective and adaptive management

Protected area management should apply an adaptive management approach to support continuous improvement in management. This includes monitoring the outcomes of management and taking account of the findings of monitoring and other research to improve management effectiveness. Management decisions should have a firm scientific basis or be supported by relevant experience. Management bodies need to maintain and improve their capacity to learn from experience, to value and build staff expertise, and draw on input from other stakeholders.

Appropriate use

Access to and use of protected areas must be consistent with the long term protection of their values, the maintenance of physical and ecological processes and agreed management objectives.

Indigenous people's knowledge and role

Protected areas are part of landscapes that have supported and continue to give identity to Indigenous people who have traditional and historical connections to, and knowledge of the land. Indigenous people are recognised and respected as the original custodians of the lands, waters, animals and plants now within protected areas. Their living and spiritual connections with the land through traditional laws, customs and beliefs passed on from their ancestors are also recognised. The role of Indigenous organisations in the protection and management of country is acknowledged.

Applying the 'precautionary principle'

Protection of the natural and cultural heritage of the National Reserve System should include identifying and taking appropriate actions to avert and actively manage emerging threats and risks. Effective management must be based on the best available information. However, where there are threats or potential threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation or harmful disturbance to natural and cultural places.

Inter-generational and intra-generational equity

Management seeks to ensure that the health, diversity and productivity of the environment and the integrity and significance of cultural places are maintained or enhanced for the benefit of future generations, and that decisions affecting current generations are socially equitable.

4.17 In the Committee's view, the aims of the proposed National Code and the principles it includes should be implemented through the proposed new planning legislation and management plans for public land, as largely occurs already. The Committee recognises that there may be some adjustment to the language currently proposed before the code is endorsed by the Ministerial

Council.

4.18 As currently drafted, the code seems to extend the IUCN reserve management principles currently recognised in the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) and its regulations because it includes new principles recognising stakeholders' responsibilities to exercise environmental stewardship in protected areas; includes obligations to undertake monitoring and evaluation to enhance management effectiveness; recognises Indigenous people's knowledge and role in protected area management; and highlights the need for management decisions to deliver inter-generational and intra-generational equity.[530] These principles are consistent with developments in international environmental law and policy manifest in the Convention on Biological Diversity and recommended by the IUCN through its World Parks Congress.

RECOMMENDATION 47

4.19 **The Committee recommends that the management objectives referred to in clauses 278 and 280 and Schedule 3 of the draft bill be amended to better accord with the general principles developed by the National Reserve System Task Group to implement the National Resource Management Council's *Directions for the National Reserve System – A Partnership Approach* (2005), and that plans of management are consistent with these when and if the principles are endorsed by the relevant Ministerial Council.**

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[530] Section 348 *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), Regulation 10.04 and Schedule 8 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cwlth)

5 CONCLUSIONS

5.1 The Committee has found many commendable aspects in this draft legislation. These include the substantial simplification of many of the provisions of current legislation (although more could be done), the track assessment system, the new complaints process, the much improved impact assessment provisions, the custodian map, and the increased penalties for non-compliance.

5.2 The Committee also appreciates the willingness of the Minister and Planning and Land Authority senior officials to meet with the Committee to discuss issues that have arisen during the course of the inquiry.

5.3 The Committee acknowledges the significant concern expressed by some stakeholders that integral components of the reform package, such as the revised Territory Plan, should be available for consideration. The Committee urges the Assembly not to rush the passage of this legislation in the face of this significant concern, noting that its proposed commencement date is not until 1 July 2007. In addition, the Committee recommends that the Assembly insist on a transparent consultative process on the development of the replacement Territory Plan.

5.4 The Committee, having carefully considered the draft bill, submissions, and evidence presented in public hearings, recommends that in addition to the recommendations suggested above, the need for other relatively minor or technical amendments, and other queries, be considered.

RECOMMENDATION 48

5.5 **The Committee recommends that the need for the relatively minor and technical amendments in Table 1 be considered.**

Table 1: Additional suggested minor and technical amendments

Clause/item	Suggested amendment
14(2)(b)	amend to require Minister to provide a statement of reasons as to why the Assembly's recommendation will not be implemented
31(4)(a)	omit 'the main object of'
28	amend to require public register to be accessible via the Internet

Clause/item	Suggested amendment
49	replace ‘authority’ with ‘entity’
50(2)	replace ‘may, but need not’ with ‘shall’ in respect of paragraphs (a) and (b)
51(1)	replace ‘may’ with ‘shall’
54	include requirement for public consultation and report to the Legislative Assembly on the restructured Territory Plan
61(1)(a)	amend to require documents to be available on the Internet
64	amend clause 64 to require the Authority to include an explanation in the documents given to the Minister and the Assembly committee explaining the reasons for the non-disclosure of part of the Territory Plan
Part 5.6 (clauses 89-93)	include a requirement for public participation in the preparation and review of strategic environmental assessments
72(1)(b)	Replace ‘report’ with ‘draft variation’
77(3)	clarify intent
101(4)(a)	omit or clarify
105(2)	the decision that a development application is in, or not in a particular track should be reviewable
111(2)	where approval would be inconsistent with an entity’s advice the Minister should be required to make the decision and to provide the reasons why the entity’s advice is not being followed
111(3)	replace first-appearing ‘an’ with ‘a’
116(4)(b)(i)	insert ‘frequency’ after ‘size’
122	omit ‘applies’
123	clarify the intent of this clause
124	replace ‘may be proceeded’ with ‘may proceed’ as this is simpler language
126	Is it usual for structure plans for future urban areas to specify which entities are permitted to undertake development in the area?
127	insert clearer exclusionary threshold criteria for consideration of development proposal (Native Title Act precedent?) amend 127(2)(4) as it is too open-ended and unjustifiably negates the statutory obligation of 127(2)(a)-(e) and 127(3).
141, 142	these provisions should include a requirement that the Authority make a reasonable effort to notify all adjoining places
156(2)	‘if the application contains information’ : should this read ‘if the Authority has given the applicant information…’?
157(3)	omit
158(2)(b)	amend to require that the Authority make a reasonable effort to contact people who have made a representation about a development application
174(3)	include a requirement that the Authority consult with referral agencies when reconsidering the original decision or any new information received in relation to a development application
179/181, Schedule 2	are the differences in penalties for development inconsistent with an approval, and development inconsistent with an approval condition intended?
185	insert a requirement for consultation with referral agencies
187	insert a requirement for consultation with referral agencies
188	omit ‘and’ in para 188(1)(b) and insert after para (c) (deleting full stop), ‘and, (d) by notifying persons who have agreed to receive Authority notifications

Clause/item	Suggested amendment
	by electronic mail.'
191(2)	the Authority should be required to indicate why any matters that were raised in consultations were excluded from the EIS
196	amend to require the Minister to present an EIS to the appropriate Assembly Committee
197	is this intended to refer to a list of EIS consultants rather than the people to be consulted, or both? It should include principles consistent with the Government's procurement framework. Amend to require the Authority to consult with the Commissioner for the Environment and the Conservator of Flora and Fauna and to provide a copy of the list to the appropriate Legislative Assembly committee. This clause also should include a requirement for periodic review.
276	add 'biodiversity corridor' and 'designation under an international agreement to which Australia is a party'
286(c)	include a requirement for the report to provide a written explanation of the proponent's response to the comments provided during the proponent's consultation
375	insert a requirement for public consultation on guidelines for the exercise of the Minister's powers under the Act
380	insert a sub-clause specifying the minimum requirement for developing key recommendations such as a mandatory requirement to involve referral agencies and criteria for when public comment will be sought
Dictionary	o include a definition for 'executive', referring to the the *Legislation Act 2001* (ACT) and *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) o include a definition for environment that incudes social aspects as well as biophysical aspects (e.g. subsection 4(1) of the *Environment Protection Act 1997* (ACT)) o include a detailed definition for biodiversity corridor (pulling across Schedule 4 definition) but amend it to recognise the biodiversity corridor value of urban open space o define 'newspaper' to mean the daily newspaper sold in the Territory that has the highest average daily circulation
Schedule 1, item 2, column 2	replace section 148 with 148(1)(b) for consistency?
Schedule 4, Part 4.2, column 2, item 8	omit paragraphs (a) and (b)

Mick Gentleman MLA
Chair
13 October 2006

Appendix A: Additional and dissenting comments ~ Mr Zed Seselja

Third Party Appeals

1.1 Certain development approvals are subject to third party review by persons suffering 'material detriment'.

- Material detriment is defined as a decision which has or is likely to have an adverse impact on an entity's use or enjoyment of the land, or the decision relates to a matter included in the entity's objects or purposes.

1.2 This clause as drafted would allow virtually any grouping to gain standing by ensuring that their objects or purposes related to a particular development, or were sufficiently broad to cover all developments.

1.3 It would be relatively simple for commercial rivals to set up groups to challenge decisions.

1.4 The Bill should be amended to ensure that this loophole is closed.

RECOMMENDATION 1

1.5 Clauses which grant standing for third party appeals should be amended to ensure that organisations cannot be established specifically to gain standing

Zed Seselja MLA
Deputy Chair
16 October 2006

Appendix B: List of Submissions and Exhibits

List of submissions

No 1 — Ms Di Johnstone

No 2 — Mr Keith Storey for ACT for Trees Inc

No 2A — Mr Keith Storey for ACT for Trees Inc, supplementary comments

No 3 — Prof John McMillan, ACT Ombudsman

No 4 — Mr Warwick Williams, Director Facilities and Services, ANU

No 5 — Royal Australian Institute of Architects, ACT Chapter

No 6 — Dr Rosemary Purdie, ACT Commissioner for the Environment

No 7 — Mr Richard Arthur

No 8 — Mr Paul Cohen, President, Planning Institute of Australian (ACT Division)

No 9 – Ms Trish Harrup, Director, Mr Trish Harrup, Director, Conservation Council of the South East Region and Canberra

No 10 – Mr Llewellyn Reynders, Senior Officer, Media and Policy, for ACTCOSS Inc

No 11 – Mr Frank Mestrov

No 12 – Dr James Prest, Principal Solicitor, Environmental Defender's Office (ACT)

No 13 – Ms Caroline Lemezina, Executive Director, Housing Industry Association ACT/Southern NSW

No. 14 – Ms Nancy Louise and Mr Paul McCullough

No. 15 – Mr R S Gilbert

No 15A – Mr R S Gilbert, supplementary

List of Exhibits

No 1 — Property Council of Australia, 'Planning Reform Project Planning and Development Bill', Submission to the ACT Planning and Land Authority, August 2006

No 2 — Roger Wettenhall, 'Parliamentary Oversight of Statutory Authorities: A Post-Uhrig Perspective', *Australasian Parliamentary Review*, Spring 2005, Vol 20(2), 39–63

No 3 — Roger Wettenhall and John Laver, 'Administration away from the Core: Non-Departmental Organisation in ACT Government', *Canberra Bulletin of Public Administration*, No 103, March 2002, pp22–37

No 4 — Professor Roger Wettenhall, 'The Corporate Governance Debate: The Australian Public Sector Post Uhrig: Where Will This Path Lead', Paper presented to the conference *Corporate Governance in the Public Sector: From Theory to Practice*, 8–10 March 2006

No 5 — Law Society of the Australian Capital Territory: Planning System Reform Project Submission to the ACT Planning and Land Authority, Planning and Development Bill 2006, September 2006

Appendix C: List of witnesses

On 1 August 2006 Officials from the Planning and Land Authority briefed the Committee on the Planning System Reform Project and the exposure draft bill, and responded to members' questions. Officials attending were:

- Mr Neil Savery, Chief Planning Executive
- Ms Jacqui Lavis, Director, Development Services Branch
- Ms Beth Gibson, Manager, Planning System Reform Project
- Mr David Dunstan, Senior Policy Officer, Planning System Reform Project
- Ms Jenny Priest, Senior Policy Officer, Planning System Reform Project and Consultation Program Manager

On 29 August 2006 the Committee called and examined the following witnesses:

- Ms Trish Harrup, Director, Conservation Council of the South-east Region and Canberra
- Mr Paul Cohen, President, Planning Institute of Australia (ACT Division)
- Mr Richard Arthur, Barrister, Blackburn Chambers
- Dr Rosemary Purdie, ACT Commissioner for the Environment
- Dr James Prest, Principal Solicitor, Environmental Defenders' Office (ACT) (Inc)
- Mr Robin Brown, President, ACT Council of Social Service Inc
- Mr Llewellyn Reynders, Senior Officer Media and Policy, ACT Council of Social Service Inc

On 5 September 2006 the following witnesses were called and examined:

- Mr Alan Morshchel, Planning Adviser, Housing Industry Association
- Ms Caroline Lemezina, Regional Executive Director, Housing Industry Association
- Ms Catherine Carter, Executive Director, Property Council of Australia (ACT)
- Ms Jo Metcalfe, Member, ACT Division Council

- Mr Chris Wheeler, Treasurer, ACT Division, Property Council of Australia
- Professor Roger Wettenhall, Visiting Professor, Centre for Research in Public Sector Management, University of Canberra
- Mr Andrew Mackenzie, President, Australian Institute of Landscape Architects (ACT Chapter)
- Ms Melinda Dodson, President, ACT Chapter, Royal Australian Institute of Architects
- Mr Andrew Wilson, Chair, Planning Committee, ACT Chapter, Royal Australian Institute of Architects
- Mr Alfonso del Rio, Property Law Committee, Law Society of the ACT

On 26 September 2006 the Committee again met with officials from the Planning and Land Authority who discussed the draft bill with the Committee. The Minister also attended, and led the discussion. Officials in attendance were:

- Mr Neil Savery, Chief Planning Executive
- Ms Jacqui Lavis, Director, Development Services
- Ms Beth Gibson, Planning System Reform Project
- Mr Vic Smorhun, Manager, Communications & Government Services
- Ms Gina Pinkas, Advisor, Minister for Planning

The following MLAs' advisers attended with the leave of the Committee: Ms Claire Bongiorno and Mr Bob O'Heir.

Appendix D: Table of proposed timeframe provisions

Key: AAT = Administrative Appeals Tribunal; DA= development application; EIS = Environmental Impact Statement; Leg Ass = Legislative Assembly

CLAUSE	TIMEFRAME	EXTENSION?
13(3)(b)	Leg Ass to receive a copy of Minister's direction to the Planning and Land Authority within 6 sitting days of it being given to the Authority, or MLAs to receive copy within 10 working days of the Authority receiving it	13(4): If 13(3) not complied with the direction is taken to have been revoked
15(2)(a) & (b)	Leg Ass to receive a copy of Minister's Statement of Planning Intent within 6 sitting days of it being given to the Authority, or MLAs to receive copy within 10 working days of the Authority receiving it	
23(2), (3) & (4)	Minister must give Leg Ass a statement of reasons for suspension of chief planning executive. If Leg Ass resolves to end chief planning executive's appointment, the Minister must end their appointment. If neither of above occurs, chief planning executive's suspension ends	
34(4)(a) & (b)	Leg Ass to receive a copy of Treasurer's direction to LDA to pay amount to Territory, within 6 sitting days of it being given to Agency, and if not within time, MLAs to receive copy within 10 working days for	34(5): if 34(4) is not complied with the direction is taken to have been revoked at the end of the period when a copy of the direction should have been given to MLAs
36(2)(b)	LDA must be given a reasonable opportunity to comment on a proposed Ministerial direction	
36(4)	Ministerial direction to LDA to be notified within 10 working days	36(5): if 36(4) not complied with the direction is taken to have been revoked at the end of the 10 working days
42(4)	Members of the LDA Board can be appointed for up to 4 years	42(4) note: Board members may be re- appointment if eligible
61(1)(a)	Draft variations of the Territory Plan and background papers must be notified as available for public inspection for at least 15 working days	61(2) the Authority can extend or further extend consultation period 376: If a notifiable instrument made under 61, 66, 68, 73, 78, 80, 83, does not state an expiry date, the instrument expires 6 months after notification
61(1)(c)	Written comments on draft variations of the Territory Plan and background papers must be notified as available for public inspection for at least 15 working days after consultation period ends	
63(3)	Period of 'interim effect' after public notification means: defined period for ACT Government (as specified) not to do or approve anything inconsistent with the Territory Plan as proposed to be varied by a draft variation i.e. between date of notification and earliest of: date when draft variation given to Minister, or date withdrawn, or 1 year later than notification day	
69	Period of 'interim effect' after draft variation given to Minister means: defined period for ACT Government (as specified) not to do or approve anything inconsistent with the Territory Plan as proposed to be varied by a draft variation i.e. between date of notification and earliest of: day variation approved under 79 or 80; day variation is rejected by the Leg Ass, day variation withdrawn, or 1 year later than notification day	

CLAUSE	TIMEFRAME	EXTENSION?
70(2)	Minister has 20 working days to refer a draft plan variation to an Assembly Committee	
72	Minister can exercise powers in relation to a draft variation to the Territory Plan if the Assembly committee has not reported within 6 months of referral of draft plan variation	
76(1)	Minister must present prescribed documents concerning an approved Territory Plan variation to the Assembly within 5 sitting days of approval	
77	Notice of motion to disallow Territory Plan variation must be given to Leg Ass within 5 sitting days of day variation presented to the Authority; motion must be called within 5 sitting days or if called but not resolved, will be considered rejected unless election called during period, then presented on first sitting day of new Assembly	
79(1) & (2)	Minister must set a commencement date for Territory Plan variation if Assembly does not disallow variation within 5 sitting days of presentation and 77(3) n/a	
88(4)	Authority must publish a newspaper notice advising land not in future urban area and include map an information within 5 days of variation being made	
94(1), 102	The Authority and the Executive must consider whether the Territory Plan should be reviewed at least once every 5 years	
96	Territory Plan provisions can only be challenged within 3 months of commencement of provision or variation of provision	
110	Authority has 20 working days after application made to approve DA in code track	130(3) (4) – up to 40 working days if further information required
114(a) & (b)	Authority has 30 working days after receipt if no representation made to decide an application for a merit track proposal. Otherwise the Authority has 40 working days.	130(3) (4) – up to 40 working days if further information required
122(a)(i) & (ii)	Authority has 30 working days to decide a DA if an EIS was complete when the application was made and if no representation was made. Otherwise the Authority has 45 working days	130(3) (4) – up to 40 working days if further information required
130(2), (3) & (4)	Authority can extend by at least 20 working days, or less as prescribed by regulation, the time within which an application must provide further information in relation to a DA.	152: If the further information provided within the time allowed is insufficient, the Authority can, extend the period for the provision of further information for up to 20 working days after applicant receives insufficiency notice. 153: If the Authority has, within 10 working days of application being lodged, asked the applicant for further information in relation to the application, but the applicant does not provide this before the time stated or as extended, the time for deciding the application is extended by the time in the notice or as extended.
137	Authority does not have to refer a DA to an entity if the application adequately consulted the entity within 6 months of lodging the application and the entity agrees in writing to the proposed development	
138(2)	Referral entity must provide advice to the Authority within 15 working days of DA being given to entity	
143(2), (3) & (5)	Representations about publicly notified DAs must be made within the public consultation period prescribed by regulation. The Authority can extend the public consultation period or as extended, by notice published in a daily newspaper	
146(4)	A notice of the Minister’s decision to consider a referred DA must be notified under the Legislation Act within 15 working days	

CLAUSE	TIMEFRAME	EXTENSION?
147(2)	Minister must present to the Leg Ass a statement with prescribed information about his or her decision on a referred DA ('call-in') within 3 sitting days of decision	
148(2) & (4)	Referred DAs (called in applications) must be decided within the time prescribed for the track in which the DA is considered (see cl.148(4) note), or that time plus extended time 153: the Authority can, within 10 working days of receiving application, gives the applicant a notice under s130 seeking more information	If time expired is a deemed refusal, but the Minister can still approve the application unless the AAT has finally dealt with the application 153(2): If the applicant does not give the Authority the further information the Authority requested under s130, the time for deciding the DA is extended for the same length of time as the further period stated in the request notice or as extended under 130(4) 154: Time for deciding a referred DA is extended if the application is amended only from date of application to decision on amendment or after end of public consultation period of amendment requires notification
150(3)(b)	The Authority can require a development to be carried out in stages as stated in approval	
151	The Authority can ask applicant once only for further information in relation to the DA within 10 working days of application being lodged. The time for deciding the application is extended until the information is provided.	The Authority can extend the period within which information must be given for up to 20 working days or shorter as required by regulation: 130(4)
154(1)	If an applicant asks the Authority to amend its DA under s133, the time for deciding the application is extended from the date of the application until the later of the following: the day the application is amended or if the application must be publicly notified, the day after the public consultation ends	
161(1)(c)	Applicant who made a single representation against a DA must apply to the AAT within 20 working days of being told of the Authority's decision to approve a DA in order to prevent DA commencing within 20 working days (if other requirements of cl.161 met)	
161(2)	DA approval takes effect 20 working days after the day notice of the decision to approve the application is given to the person who made the representation	
162(1)(c)	Applicants who made multiple representations against a DA must apply to the AAT within 20 working days of being told of the Authority's decision to approve a DA in order to prevent DA commencing within 20 working days (if other requirements of cl.161 met)	
162(2)	DA approval takes effect 20 working days after the day notice of the decision to approve the application is given to every person who made the representation	
168	A development approval is revoked if the proponent does not finish the approved work (if other than a lease variation) within 2 years of date of approval or within an extension of the 2 years stated in the approval or other period stated in the approval	168(3): The Authority can extend the prescribe period if a request is made before the end of the period permitted for finishing the development
170(2) & (3)	A development approval for a new use or change of use that does not require a lease variation ends after 2 years if use as approved does not begin within 2 years of approval	

CLAUSE	TIMEFRAME	EXTENSION?
173(3)(a) & (b)	Applicant can apply to the Authority, within 20 working days of being told of the decision by the Authority, for a reconsideration of the original decision to approve a DA subject to a condition or to refuse a DA	173(3)(b): the Authority can permit the applicant a longer period within which to apply for a reconsideration of the decision
174(1) & (2)	The Authority must reconsider and substitute a new decision or confirm the original decision on a DA within 20 working days of receiving an application for a reconsideration of a decision	174(2): the Authority and the applicant can agree to extend the period within which a new decision is to be made
174(3)(b)	The Authority must notify anyone who made a representation about a DA and give them reasonable time (ie not less than 2 weeks) to make a representation on the new application	
175	If the Authority does not make a substitute decision, or confirm the original decision within 20 working days, the Authority is taken to have confirmed the original decision	
188(2)	The Authority must allow at least 20 working days for public comment on a draft scoping document for an EIS	
194(3)	The Authority must allow a proponent at least 20 working days to respond to the Authority’s written notice that it does not accept the EIS	
199(2)	If the Minister wishes to establish a panel to conduct an inquiry into an EIS he must establish the panel within 15 working days of receiving EIS	
200(2)	A panel established to conduct an inquiry into an EIS must report within 60 working days	
210(2) & (3)	When the Authority has granted a lease by direct grant in a quarter, within 5 working days of the end of the quarter the Authority must give the Minister a statement that sets out the prescribed information for each lease granted within the quarter. Minister must present this information to the Leg Ass within 5 sitting days of receipt	
219	If a person fails within period prescribed by regulation to accept and execute a lease or pay an amount required before the lease is granted, the Authority may by written notice end the person’s right to be granted the lease.	
220	Lessee or anyone else with an interest in a lease must not, during a restricted period, deal with the lease without the written consent of the Authority. 220(6): different periods apply depending on the nature of the lease or as prescribed.	
221	The Authority can, in prescribed circumstances, grant lessees a further lease for up to 99 year or period determined for a rural lease under s243	
224	If a lessee applies for a decision about whether a lease is concessional and the Authority has not decided within 30 days after the day the application is made, the Authority is taken to have decided that the lease is a concessional lease	
232(2)(a)	If the Authority varies the rent payable under a lease the Authority must give the lessee written notice and the variation comes into operation 20 working days after the notice is given or a later day as specified in the notice	
233(2)	If the Authority varies the rent payable under a lease and the lease does not provide for arbitration, the lessee may, within 20 working days of receiving notice about the variation, ask the Authority to review the variation	
234(2)	The Authority may approve a reduction of rent or relief from compliance with a person’s lease provision for a maximum period of 3 years (including any pre-approval period)	
242	Prescribed leases cannot be varied earlier than 5 years after the day the lease is granted	
243	The Minister may determine the period for which a rural lease is to be extended provided this is not inconsistent with the period determined by National Capital Authority for a rural lease in a designated area.	
243(6)	Provision permitting inclusion of period commencing before Act expires after 1 year after commencement of section	
244	‘Holding period’ for a lease longer than 21 years is 10 years after lease begins; if lease is less than 21 years; at the end of a third of the lease term	
256(2)	If compensation is payable under s252 the Authority must decide the value of improvements as soon as practicable	

CLAUSE	TIMEFRAME	EXTENSION?
282	The custodian for an area of public land must prepare a draft plan of management for the area as soon as practicable after the area is identified as public land in the territory plan.	
284(3)	People must be given at least 15 working days to provide written representations about a draft plan of management for an area of public land	
287(2)	The Minister must refer a draft plan of management for public land and associated reports to an appropriate committee of the Leg Ass within 5 working days of receiving it	
291(2)(a)	Plan of management commences on the day after the 6th sitting day the plan is presented to the Leg Ass	
292(2)(a)	The custodian of public land must review the plan of management at lease once every 10 years	
296 & 297	The Authority must not grant a lease of future public land during the period of interim effect under part 5.3 of the draft plan variation unless the lease is recommended in writing by the Conservator of Flora and Fauna and the Custodian, and the land is not proposed as a wilderness area	
307	The Authority can require a complainant to give more information about a complaint within a reasonable period of time, and may extend that period	
313	The Authority must return a document produced in accordance with an information requirement to the person who produced the document as soon as practicable.	
316(4)(b)	A person who is given a show cause notice in response to an application for a controlled activity order has 10 working days within which to give the Authority written reasons explaining why the order should not be made	
317(4)	If the Authority fails to make a decision on a controlled activity order within the time prescribed by regulation the Authority is taken to have refused to make the controlled activity order	
319(4)(a)	A person who is given a show cause notice in response to the Authority's proposal to impose a controlled activity order has 10 working days within which to give the Authority written reasons explaining why the order should not be made.	
330(3)(f) & (4)	A person can be required to complete rectification work within 5 working days of receiving a notice or within any longer period specified in the notice. If rectification work not done, the Authority may authorise someone else to carry out the work and the reasonable cost of that work will be a debt to the Territory	
345(3)	If the Authority terminates a lease in accordance with the Act the termination takes effect 10 working days after the notice is given	
345(4)	The Authority must give a copy of the termination notice to stated persons at the same time or as soon as practicable after giving it to the lessee	
346(3)	If the Authority terminates a licence in accordance with the Act the termination takes effect 5 working days after the notice is given	
347(1)(iii)	A lessee or licensee must tell the Authority in writing within 15 working days of receiving a notice why the lessee or licensee thinks the lease or licence should not be terminated	
348(2)	The Executive may demand by written notice that an unlawful occupier give possession of the land to the Executive within the reasonable period stated in the demand	
348(3)(a) & (b)	The Magistrate's Court may issue an order giving possession of land to the Executive and may authorise a police offer to enter the land with reasonable assistance and force within 20 working days after the warrant is issued	
351(3)(b)	A person who is stops being an inspector must return their identity card as soon as practicable and within 5 working days of not being an inspector	
356(2)	An inspector must, as soon as practicable, record the reason they required a person to state the person's name and address under ss356(1)	
364(2)	A thing found at premises entered under a search warrant may be moved to another place for examination or processing for up to 72 hours	364(3): An inspector may apply to a magistrate for an extension of time if the inspector believes on reasonable grounds that a thing found on premises cannot be examined or processed within 72 hours

CLAUSE	TIMEFRAME	EXTENSION?
366(1)	Things seized must be returned to their owner or reasonable compensation paid to the owner in circumstances and time periods (1 year or 60 days) prescribed	
376	If a notifiable instrument made under ss 61, 66, 68, 73, 78, 80, 83, does not state an expiry date, the instrument expires 6 months after notification	
390	s220 applies to a special lease under the s164 of the repealed Act. The prescribed period for a special lease in s220(6) is 5 years	