LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

Inquiry into Planning Bill 2022

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[redacted]

Thank you for accepting submissions for the Inquiry into the Planning Bill, 2022. I am making a submission because I am concerned that the new legislation removes the public's ability to apply to 'the authority' for a Controlled Activity Order (CAO). This is Section 350(1) in the Planning and Development Act 2007, and it is omitted from the new Planning Bill 2022.

The rationale for this change was presented in the 'key changes from the Planning and Development Act document', under 'issue 12'. The rationale is that the authority isn't able to dismiss frivolous & vexatious applications for CAOs from the public.

On first impression this sounds reasonable, but removing the entire public's ability to apply for a CAO is a significant change with implications for ACTs community, people and environment. It silences the community, NGOs, legal agencies, and other Government directorates and leaders. Legitimate and genuine applications for CAOs from the public should still have a place in the Planning Bill 2022.

The public can still make a complaint about a controlled activity - isn't this enough?

In the new Bill, just like in the old legislation, the public can still make a complaint to 'the Authority' if they believe a person was, is or will be undertaking a controlled activity (part 11.2 of the old legislation and 12.2 of the new proposed legislation). 'The authority' can decide to 'take no further action' on this complaint (s346 of the old legislation and s417 of the new proposed legislation). They can dismiss it if they believe the complaint (a) lacks substance; or (b) is frivolous, vexatious or was not made honestly; or c) has been adequately dealt with. The Government's decision to 'take no action' on a complaint, is not reviewable via ACAT.

However, in the Planning and Development Act 2007, the public can still make an application to 'the authority' for a Controlled Activity Order (CAO) (s350,1). This avenue is more powerful, and if 'the authority' makes a decision not to take action and make a Controlled Activity Order (s351,2,c) then the member of the public may seek a review of this decision at ACAT.

This is the difference: The ACT Government's decision to take action or dismiss an application for a CAO is reviewable at ACAT, however, the authorities decision to take action or dismiss a complaint is not. This is what

is being removed in the new legislation. The public will no longer have the ability to apply for a CAO, which will remove our ability to appeal the ACTs Government decision to ACAT.

Why is this a problem?

It is a problem because, despite the best intentions of 'the Authority' and the ACT Government, sometimes illegal development activity might still slip through the bureaucratic cracks. One of ways that this is currently addressed, is allowing the public and other agencies to identify and apply for a Controlled Activity Order (CAO), and then most importantly, seek a review of this decision at ACAT. It is a safety net. It curtails the impacts of Government complacency, mistakes, poor oversight or even negligence and corruption.

Is there really a prevalence of frivolous and vexatious applications from the public for a 'controlled activity' order?

The rationale for taking away the public's ability to apply for a CAO is that the authority has no avenue for dismissing vexatious and frivolous applications.

However, there hasn't been any data released publicly to indicate that 'the authority' is burdened by excessive vexatious and frivolous applications. I reached out to the EPSDD and CMTEDD on Wednesday 26th October, and asked for the number of Controlled Activity Complaints, and the number of applications for Controlled Activity Orders received from the public over the past 5 years. Of these, I asked how many were dismissed, or could be regarded as frivolous and vexatious. I have not received a response from either Directorate, and it has been over 3 weeks.

I suspect that the number of honest and genuine applications from the public far outweighs the number of dishonest and vexatious ones. There is value in allowing the public to submit genuine and honest applications for a CAO.

In your Inquiry, please consider and investigate if the rationale for removing the public's ability to make an application for a Controlled Activity Order is founded. Please think critically about **why** the ACT legislators are advocating for this change, and the detrimental impacts it may have for our community, our environment and the transparency and integrity of planning & development in the ACT.

An Example of an honest application: The Brindabella Christian College car park.

The Brindabella Christian College (BCC) created a car park on public land next to its school in Lyneham in 2009, and bitumen sealed it in late 2016. The site is block 23, section 41 Lyneham. The land is zoned PRZ1 and is reserved for public open space under S315 of the Planning and Development Act (2007).

The car park was created, designed and developed to service the staff, families, students and visitors to the school. A car park for a school is not permissible on the site. It was developed without a Development Application (DA) and without DA exemption, and it, therefore, did not go through the ACT's Development Assessment process.

I submitted a 'Controlled Activity Complaint' to 'the authority' about the car park development. The controlled activity is: undertaking development without required development approval

In July 2022, I received a response from the ACT Government. The response advised that the government had decided to **'not take action'**. The Government argued that the car park didn't require development approval as it was considered to be a 'public car park', and that it was ancillary to the sports fields rather than the college. They posited that it was developed informally over time by players and spectators to the Lyneham Neighbourhood Oval and was formalised as part of ACT public infrastructure maintenance works.

This is not accurate. The car park was designed and developed by the school for the school. There is plenty of evidence to illustrate this, including historical aerial photographs showing when the car park was established, statements from the school, car park design plans from the schools developer, and historical statements from the Government in 2012, 2014 and early 2016 explaining that BCC does not have permission to develop a formal car park. The BCC refers to it as "our car park". There are reserved spaces for the BCC principal and vice principal. The school even has their sign at the front of the car park, which they moved from their old onsite car park to the new car park site when they began parking on the oval.

The response from the ACT Government appears to be an attempt to sanction the development within the legislation. Myself and the community strongly disagree with the decision from the Government to 'take no action' on the controlled activity.

I am concerned that the car park is dangerous and puts children who are walking and cycling to school on Brigalow St at considerable risk. I am seeking action on the controlled activity to keep the community and all vulnerable road users safe, and to uphold the ACT Planning legislation and protect public land.

The car park should go through the proper Development Application (DA) and assessment process, to ensure that it is redesigned to ACT codes and standards and assessed through the DA process, to keep children from both schools who are walking and cycling on Brigalow St safe.

It is concerning that the Government dismissed the Controlled Activity Complaint and decided to 'take no action'. It appears to be poor oversight from the government, or even an attempt to hide previous mistakes regarding the site. E.g. in their July 2022 response to the controlled activity complaint, the ACT Government stated that EPD relied on the car park when assessing DA201629628 (a DA for further school expansion on b4, s41), stating that *"This DA could not have been approved without the existence of this carpark. Development under this DA had already been completed"*. If the car park is indeed a public car park, and not the BCCs exclusive 'off site' car park, as stated in DA201629628 then it probably should **NOT** have been used to process DA201629628.

Either way, regardless of if it was simply oversight or intentional, I am relieved that the public still has an opportunity to submit an application for a COA, which provides an avenue for me to seek a review of the ACT Government's decision at ACAT. However the new legislation will shut this door.

The new legislation shuts the door on an important safety net that can serve to catch and remedy controlled activities, like the dangerous Brindabella car park, that have been missed, ignored or even suppressed by the ACT Government.

I am very concerned with the changes to the new legislation to silence members of the public who are making honest and genuine attempts to protect their community and the environment against controlled activities.

I would like to ask the ACT Legislative Assembly to please consider:

1. **Restore the public's ability to make an application for a 'Controlled Activity Order' in the new legislation (s350(1) in the Planning and Development Act, 2007). I agree that vexatious and dishonest applications would be burdensome to the authority, however, the 2007 legislation already provides an option for Controlled Activity Orders (COA)s to be dismissed - See section 351(2)(c), so why not just simply elaborate on the dismissal process, to allow 'the authority' to better identify and dismiss frivolous & vexatious CAOs - via transparent criteria, like they do for Controlled Activity Complaints (CAC)s? Wouldn't this solve the problem, without silencing honest and genuine applications from the public?**

2. **Or, alternatively, why not formalise the Controlled Activity Complaints (CAC) process and allow the public to seek an ACAT review of the Government's decisions in regards to CACs? This could be achieved by a small and simple change to the new Planning Bill 2022: The ACT Government's decision under s417 could simply be included as a reviewable decision on schedule 6.2, with the person(s) who made the complaint listed as an eligible entity for a reviewable decision, who may apply to the ACAT for review of the decision (s502).**

Either of these two options would restore some of the balance of power to the public, allowing them to seek a review of the ACT Government's decision to 'take no action' against a Controlled Activity at ACAT.

Please

Thank you for taking this submission into consideration.