LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING, TRANSPORT, AND CITY SERVICES
Ms Jo Clay MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair),
Mr Mark Parton MLA

Submission Cover Sheet

Inquiry into Urban Forest Bill 2022

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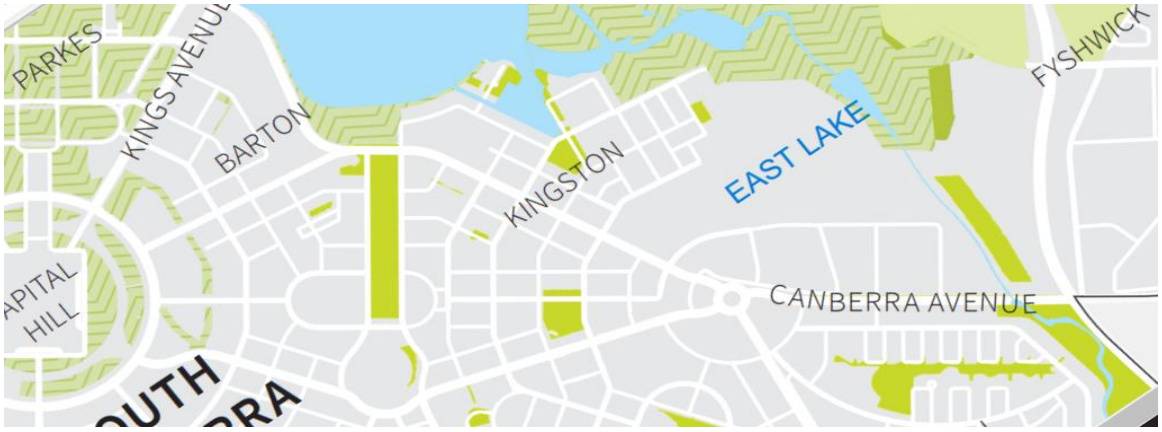

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To: **Transport Canberra and City Services**
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KBRG SUBMISSION ON DRAFT *URBAN FOREST BILL 2020*

The Kingston and Barton Residents Group Inc. (KBRG) is an incorporated, voluntary, not for profit, non-political, community organisation that seeks to promote and protect the interests of our local community and the environment. We are very concerned to see real action to mitigate and adapt to the impacts of climate change both in our area and more broadly and support the ACT government's intentions to greatly increase tree cover across Canberra.

The stated aim of the new Urban Forest strategy, legislation and consultation is to foster support for increasing the canopy coverage to 30% by 2045. KBRG supports this aim but has several specific concerns about the legislation that we believe must be addressed for it to be effective.

KBRG appreciated the presentation by ACT government staff (Daniel Iglesias) and Helen Oakey of the Conservation Council at the ISCCC public meeting of 10 May 2022. KBRG notes the importance (mentioned by multiple speakers at that discussion) of the interdependency of the Urban Forest Bill and the draft Planning Bill and the comments in this submission include references to relevant parts of the Planning Bill.

This KBRG submission identifies the key concerns of many of our residents, which are in summary:

1. Concern regarding decision-making powers vested in the 'Director-General' regarding public land and circumstances in which the conservator's advice can be overturned, with insufficient requirements for scrutiny by the Legislative Assembly and many risks of decisions being overturned under the urban planning legislation.
2. Concern that residents should be able to get approval for tree work in a reasonable time when evidence is presented that a tree is threatening lives or property.

3. Concern that there should be some (limited) discretion for applications regarding work on a tree on single residence where the tree is just above the dimensions covered by legislation (eg a tree that is 8.1m instead of 8m.)
4. Concern about transparency and public notification of decisions – these transactions should not just be between the applicant and relevant government bodies but should be publicly accessible.
5. Importance of 'granular' measurement and setting targets for tree canopy coverage.
6. Need for mandatory provisions for developer contributions to funding of the canopy to ensure consistence and enforceability. Voluntary provisions will not deter bad practice.
7. Further clarity is needed for requirements for replacement of trees that are removed and tree bond
8. General support for the mature tree action plan
9. Need for enforcement and adequate penalties, especially regarding parking under protected trees
10. Support for 'declared site' s69 requirements.

Our detailed comments follow:

1. Decision-making powers separated between the Conservator and the 'Director-General' and difficulty in following circumstances in which the conservator's advice can be overturned. Requirements for decisions by the Minister and scrutiny by the Legislative Assembly are also hard to find eg annual reports.

Section 13 of the Bill states ***decision-maker*** means—

(a) for a decision or other function relating to a registered tree, a regulated tree or a remnant tree—the conservator; or

(b) for a decision or other function relating to a public tree—the director-general.

Nowhere in the Exposure Draft is the Director-General further described so it is presumed the Director-General relevant to this legislation is the D-G of TCCS. Readers are referred to the 'Dictionary' (p116) to s163 which does not appear in the document. Sections 148 to 300 are absent.

The decision-making roles becomes more confusing in s107 as particular tree matters relating to development applications are decided by a different D-G, under the Planning and Development Act. It would greatly add clarity if the Director-General and Directorate is specified in the legislation. The reasons for the separation of decision-making do not appear to be provided in any of the information on the Have Your Say webpages.

It is important for the Conservator to be able to make decisions with independence. The grounds for rejection of Conservator advice must objective and clear, particularly when this advice concerns development applications.

It is noted that in s107 the Bill states: "*Note 4 Development approvals*
"A development approval that is inconsistent with the conservator's advice in relation to a registered tree or declared site must not be given (see *Planning and Development Act 2007*, s 119 (1) (c) and (3) and s 128 (1) (b) (iii) and (5))."

While this appears unambiguous there is a further statement:

> "However, for a development proposal in the merit track that is related to light rail, the conservator's advice in relation to a registered tree or declared site need not be followed in certain circumstances (see *Planning and Development Act 2007*, s 119A).
>
> A development approval that is inconsistent with the conservator's advice in relation to a regulated tree may be given only in the circumstances set out in the *Planning and Development Act 2007*, s 119 (2), s 119A (2) and s 128 (4)."

These provisions need to be read in relation to the relevant sections of the draft Planning Bill, which appear to give the planning authority greater discretion to make decisions contrary to the conservator's advice.

S119 (2) states:

> "(2) Also, development approval must not be given for a development proposal in the merit track if approval would be inconsistent with any advice given by an entity to which the application was referred under section 148 (Some development applications to be referred) unless the person deciding the application is satisfied that— (a) the following have been considered: (i) any applicable guidelines; (ii) any realistic alternative to the proposed development, or relevant aspects of it; and (b) the decision is consistent with the objects of the territory plan."

S119A (2) states:

> "(2) Section 119 (1) (c), (2) and (3) does not apply to the development proposal if the person deciding the development application for the proposal is satisfied that following the entity's advice will— (a) risk significant delay to the commencement or completion of the development to which the proposal relates; or (b) risk significantly increasing the financial or resource cost for completion of the development to which the proposal relates; or (c) be a significant impediment to the commencement or completion of the development to which the proposal relates".

This is absurdly difficult to follow- it is surely better to state simply, as in s119 (3):

> "To remove any doubt, if a proposed development will affect a registered tree or declared site— (a) the person deciding the development application for the proposed development must not approve the application unless the approval is consistent with the advice of the conservator of flora and fauna in relation to the proposal."

Furthermore, in s128 Impact track—when development approval must not be given:

> "(4) In addition, development approval must not be given for a development proposal in the impact track if approval would be inconsistent with any advice given by an entity to which the application was referred under section 148 (Some development applications to be referred) unless the person approving the application is satisfied that— (a) the following have been considered: (i) any applicable guidelines; (ii) all reasonable development options and design solutions; (iii) any realistic alternative to the proposed development, or relevant aspects of it; and (b) the decision is consistent with the objects of the territory plan".

But then, s128 (5) states:

"(5) To remove any doubt, if a proposed development will affect a registered tree or declared site— (a) the person deciding the development application for the proposed development must not approve the application unless the approval is consistent with the advice of the conservator of flora and fauna in relation to the proposal; and (b) subsection (4) does not apply in relation to the conservator's advice."

While there are numerous requirements in the Bill for payments to the canopy fund to be reported, these are not easy to identify clearly in the Bill and it appears that any interested person must wait for an annual report and then search to find the information. This will deter active scrutiny by the Assembly and interested citizens. It is not apparent why the relevant information could not be provided via a website that loads data promptly as payments are made. This is easily possible and is done by numerous small local government agencies around the world that have few staff and resources.

KBRG has urged that applications, notifications and decisions such as proposals for tree-damaging activities should be publicly available (with any sensitive information such as Aboriginal cultural information redacted) as is done for example by many councils in NSW.

2. Importance for residents of being able to get approval in a reasonable time when evidence is presented that a tree is a serious threat to lives or property

KBRG supports the inclusion of greater clarity regarding the circumstances in which trees may be removed to safeguard persons and property in s39 (3)c. This has been a repeated concern for many of our members.

A known defect of the previous legislation was that a healthy tree could not be readily approved for removal, even if it shed limbs that were a risk to life and property, as has been notoriously the case with at least one large eucalypt in Barton.

It is important that clear evidence is provided where risks to life and property are cited for tree removal (or substantial pruning) but it is important that the process should not be unduly onerous or expensive. Decision criteria must be clear, evidence requirements must be unambiguous.

The guidance on evidence requirements related to s39 (3)c is minimal, it would be helpful if this could be clarified in any Regulations or policy information. This is a regular problem in inner southern suburbs where there are mature trees of considerable size in close proximity to residences, play areas and public spaces. The professional experience and knowledge of the conservator would be invaluable in resolving the often complex decisions in removing trees to avoid spurious allegations about tree safety to allow tree removals that result in financial benefit.

3. Need for limited discretion for application of requirements for a tree on private land just exceeds dimensions covered by legislation

KBRG considers that some discretion is needed when a tree is just at the regulated size limit (eg 8.0 +/-0.1m high) to avoid perverse outcomes.

While we note the importance of clarity and objectivity in the legislation, it is important to avoid rigid requirements where a tree on a block with a single residence is only marginally above the regulated dimensions. Rigid application risks perverse outcomes if residents seek to remove trees before they reach the dimensions covered by the legislation.

Specifying the size of the tree at the time of the original application would be appropriate since trees continue to grow during the time required to process the application. A case in Barton about a decade ago involved five different assessments of a tree that was barely within the regulated height but was causing structural damage to a heritage house. Although the damage was documented by a post-graduate qualified engineer this advice was ignored in favour of an opinion (with no evidence) by a certificated horticulturist. Meanwhile the tree grew larger and it took over 18 months and thousands of dollars of documentation by arborists for approval to remove the tree and underpin the house to rectify the damage it caused. The residents had proposed to plant over 50 trees and shrubs within the canopy area of the original tree and have since done so. A more nuanced assessment of the tree problem would have avoided over $5,000 in costs to the resident. The benefits of improved health of the remaining and additional trees would have easily outweighed the removal of one tree that barely exceeded the regulated height.

4. Importance of transparency and public notification of decisions not just the applicant and relevant government bodies

Under this Bill most of the applications, decisions and notifications specified in the legislation are only provided to the applicant and decision-maker and in some cases to referred authorities (eg when involving development applications).

A well-known tree case in Manuka was of broad public interest since the tree provided major landscape amenity to the entire shopping precinct but adjacent lessees and nearby residents were unable to find out what was occurring in the decision-making process despite their legitimate concerns. The evident deterioration of the then healthy tree, followed by its rapid death and subsequent removal and replacement by a 'green wall' to allegedly compensate for the tree- this created public outrage. In many jurisdictions the application and decision process would be published (with appropriate redactions of personal information) on a website.

KBRG again urges greater transparency by requiring public notifications (on the TCCS website) for applications, decisions and notifications for tree decisions as is done for development applications.

5. Importance of 'granular' measurement and setting targets for tree canopy coverage

The 30% canopy goal appears to be based on 30% of the urban land area of the ACT and is not further targeted or measured at a district or suburb level. KBRG notes that contrary to many expectations of the 'leafy' suburbs of Kingston and Barton, that these suburbs actually have low canopy coverage (19% in Kingston and 21% in Barton according to the interactive map at https://www.cityservices.act.gov.au/trees-and-nature/trees/urban-forest-strategy .

We believe canopy 'targets' must be determined at a suburb and district level to allow meaningful reporting of progress towards the 30% canopy goal. Failure to measure canopy at a fine granularity and at regular intervals may produce unintended consequences especially as allowing 'offset' plantings will complicate compliance measurement for high density areas.

Reduction in canopy cover in Kingston and Barton and elsewhere in the inner south is due to increasing urban density with consolidation of blocks leading to removal of mature trees to build multi-unit developments. In addition, many trees in Kingston and Barton are mature exotic plantings from the 1920s and declining eucalypts planted in the 1960s and many of these trees are in poor health and will need replacement in coming decades. Removal of large numbers of trees in the Parliamentary Zone for the tram will reduce canopy in the Inner South and is strongly opposed by KBRG.

There are limited sites where new trees can be planted in Kingston and Barton, apart from street trees and parks since it is apparent from the interactive map provided in the Urban Forest Strategy that most of these suburbs are either already covered by buildings, or roads and parking. Remaining unbuilt areas such as the Golden Sun Moth reserve have recently been sold and built over. Many residents are willing to plant more trees but cannot do so because of backspine reticulation of powerlines which limits significant areas of some blocks.

However, it is important that new apartment developments are encouraged to plan and allocate space for new trees to promote continuity of the canopy and provide amenity to residents and visitors (see also 6 below). KBRG has opposed development applications that seek to trade off space for trees with 'green walls' which provide far less amenity. Green walls frequently fail and can be easily removed. It is important that green walls are not included in any measure of canopy cover as they do not provide 'canopy' benefits such as shade and wildlife habitat.

6. Need for mandatory provisions for developer contributions to funding of the canopy to ensure consistence and enforceability

KBRG supports the UF Bill coverage of both public and private land but considers that mandatory developer contributions are necessary.

Developers are asked to "contribute" to funding of the urban canopy, but why is this not made mandatory? There is no explanation of why a voluntary approach is considered sufficient to encourage retention of trees. Penalties for unauthorised tree removals or damage are not differentiated for individuals or corporations where higher penalties for corporations are applied in many other Acts.

A voluntary contribution may be supported by some developers but this will risk perverse outcomes since non-contributing developers can achieve greater profits and avoid regulatory burdens than those who voluntarily contribute. Many developers consider trees create a maintenance burden and want to develop to zero lot lines to maximise returns.

It is unclear from the information provided on the ACT website that the contribution fund will be sufficient to encourage developers to retain trees. There is no cost benefit analysis of the legislation- why not? Making the system mandatory would generate information that would make it easier to monitor the progress towards the 30% canopy target.

Allowing developers and individuals to pay to plant off site (similar to environment offset programs) also risks perverse outcomes although there are potential benefits in flexibility. The 'offsets' will make it more difficult to retain canopy in specific areas, particularly where land values are high in inner Canberra, thus risking drastic reduction of landscape amenity.

7. Requirements for replacement of trees that are removed (ss 34 to 42)

KBRG supports the requirement for replacement of trees but again there is insufficient detail on some aspects.

Questions that must be resolved by providing further detail in the Bill include:

a) Will tree canopy agreements entered by a lessee bind any future lessee of the site if the property is sold?
b) How will such agreements be recorded so that purchasers of property are aware of any tree agreements relating to their site? For example, will the agreement be recorded as an encumbrance on the property?

c) Will a tree bond obligation be transferred to the new owner if not discharged at the time of sale?

The exposure draft specifies a requirement for two trees to be planted (see example regarding homeowner at https://yoursayconversations.act.gov.au/urban-forest-bill/about-draft-urban-forest-bill) in which case a homeowner seeking to remove a protected tree "would need to sign a canopy contribution agreement to plant two new trees elsewhere on her property or pay $1200 if this were not possible". Although various considerations and exemptions can be invoked, these are not clear and simple. In many cases in Kingston and Barton protected trees may be need to be removed due to natural deterioration, which is beyond the control of the resident. A resident who has already planted numerous trees may not have any space for two additional trees of equivalent eventual size of the original tree as many free-standing houses in Kingston and Barton (most of which are heritage-listed) already have over 40% canopy cover.

The exposure draft does not specify the size of the replacement trees or whether these requirements should be addressed through a tree management plan as part of the application to remove a tree. It can be foreseen that replacing a mature protected tree over 8m high with two miniature fruit trees would not help to achieve canopy targets. Perverse outcomes could arise if residents seek to replant trees to avoid costs but where the locations are unsuitable eg shading of solar panels, etc. The legislation appears to be complex to manage which risks making it costly to administer.

KBRG believes the Exposure Draft should be revised to clarify and simplify requirements for the replacement trees and to allow residents who are only applying to remove trees due to natural deterioration to take account of existing tree coverage of the block.

Regarding exemptions in the legislation and removal of pest trees

S11(2)a states: a tree is not a regulated tree if it is—

(a) a pest plant under the *Pest Plants and Animals Act 2005.*

The exposure draft does not make explicit, but implies that a pest plant of regulated size is not regulated under the Act and because it is not covered by the Act, it may be removed with no replacement being necessary. However, there are some private residences currently with over 60% canopy where this coverage is largely due to mature pest trees.

Removal of the pest trees and failure to replace the trees would drastically reduce amenity and would fail to increase canopy cover. KBRG urges that it should be explicit that removal of pest trees of regulated size should require replacement under the same conditions applying to other tree removals.

8. Mature tree action plan

KBRG supports the requirements for managing mature native trees to require a tree management plan to ensure they are retained to support wildlife habitat and biodiversity. We note that balanced decision-making is required to mitigate risks arising from mature native trees with hollows for fire and safety by ensuring regular checking of the physical integrity of the trees, noting the increasing frequency of storms and high temperatures.

9. Enforcement, notices and penalties, especially regarding parking under protected trees

KBRG supports the increased information on penalties provided in the bill (ss 43 to 50), particularly since this appears to give scope and/or increased clarity regarding enforcement for damage to trees due to parking on the roots of a protected tree, unauthorised building work affecting trees and ability to impose directions.

KBRG has made numerous previous submissions to Have Your Say detailing the damage arising from parking on tree roots (resulting in compaction of soil that inhibits water uptake) and erosion of soil leading to blocked drains (transfers costs to taxpayers) and damage to branches. In Kingston and Barton root damage is particularly problematic due to illegal verge parking for events at Manuka Oval, and 'opportunistic' illegal verge parking at a childcare centre and the Kingston Hotel, which also cause traffic hazards. While Manuka Oval has cooperated with residents to control illegal parking and damage to trees, owners of the other properties had told KBRG that we should pay for the installation of bollards! ACT government agencies informed us that they have no powers to enforce penalties for kerb parking, and this must be addressed in this Bill although it is not clear which offence provision will apply. Residents across Canberra should be discouraged from creating tree-damaging verge parking areas adjacent to their property but it is not clear how this could be effected through this Bill.

The penalties applied to offences are unlikely to deter some developers especially for properties where the profits will greatly exceed the penalties. Again, corporations have a higher obligation and awareness of the law and penalties should be at a higher scale for developers to create more effective deterrents.

KBRG notes the enforcement provisions in tree management plans, bonds, etc and generally supports these. However, KBRG believes that many of the notices, decisions and tree management plans are only communicated to the applicant and other referred agencies and are not made public yet there is legitimate public need for disclosure and most jurisdictions provide this information publicly on a website with appropriate redactions for privacy protection. Public disclosure would benefit researchers in measuring the effectiveness decisions made under the legislation in contributing to the canopy target.

Service of tree protection directions (see s45 and similar) allow a written tree protection direction "where a protected tree is located by leaving it, secured conspicuously, on or at the land" but this should also be supplemented by email and website notification so neighbouring properties are also aware of the compliance requirement. Uncooperative lessees can (and often do) remove the sign and claim they never received notification.

and difficulty in following circumstances in which the conservator's advice can be overturned

10. Declared site s69 requirements

KBRG supports the s69 'Declared site' provisions and supports s69 (5) b to apply a declared site for a longer period. This is a stronger deterrent to damaging or removing a tree for the purpose of achieving better financial benefit. While it is expected that this provision would not often be needed, developers should be aware of this potential penalty.

General comments

In summary, KBRG welcomes the updated, extended and revised provisions in this Bill that improve upon the Tree Protection Act. However, we remain concerned that many decision-making processes are complex and hard to understand for ordinary residents. Additional clarity is needed regarding decision-making powers of the conservator for tree matters involved in development applications as well as referrals for heritage matters.

No cost benefit analysis is available for this legislation and there is no explanatory memorandum to explain the rationale for the division of decision-making between the conservator and director-general. No assessment or comparison with alternative strategies for encouraging the 30% canopy target are provided. Residents of Kingston and Barton are strongly supportive of retaining and maintaining our urban forest and many properties have canopy cover exceeding 60% of the block but we are concerned that mature trees in decline or dangerous trees must be able to be managed effectively through simple and clear cut processes.

KBRG notes the power of the Minister to exclude entities or activities from this Act (s141) which we believe cannot be left as presented and must be further clarified.

KBRG looks forward to further engagement on the issues raised in this draft Bill and urge that you consider all the matters raised in previous and current consultations around the protection of trees.

Richard Johnston
President, Kingston and Barton Residents Group Inc. 16 May 2022