



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 Planning Bill 2022

Submission Number: 9

Date Authorised for Publication: 17 November
2022



Environmental Defenders Office

10 November 2022

Standing Committee on Planning, Transport and City Services
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

By email only: LacommitteePTCS@parliament.act.gov.au

Dear Standing Committee

Inquiry into Planning Bill 2022: Submission from the Environmental Defenders Office Ltd

Thank you for the opportunity to provide a submission in relation to the Planning Bill 2022.

On 17 June 2022, the Environmental Defenders Office Ltd (**EDO**) provided a submission on the draft Bill to the Environment, Planning and Sustainable Development Directorate (**EPSDD**) via email during public consultation.

Compatibility of the Bill with human rights

Our submission analysed the draft Bill by examining the extent to which the draft Bill promotes environmental justice. We also considered the extent to which the draft Bill promotes the right to a clean, healthy and sustainable environment (the 'right to a healthy environment'). We note that the ACT Government is currently investigating including the right to a healthy environment in the *Human Rights Act 2004* (ACT), and that the draft Bill will be examined for its compatibility with rights under that Act.

As we submitted, we consider that:

- the rights that are engaged by the Bill include the right to life,¹ the right to freedom of expression including access to information,² the right to participate in public affairs,³ and the right to culture,⁴ and in particular how these rights relate to the environment;

¹ *Human Rights Act 2004* (ACT) s 9.

² *Ibid*, s 16.

³ *Ibid*, s 17.

⁴ *Ibid*, s 27.

T +61 2 6230 6627

W edo.org.au

E canberra@edo.org.au

PO Box 1616, Canberra ACT 2601

ABN: 72002 880 864

- the people whose rights are affected by the Bill are all people in the ACT, including First Nations people, children and young people, people who are financially disadvantaged, and other overburdened people and communities;
- we anticipate that the Bill will have some negative impacts on substantive environmental human rights including those relating to climate change, biodiversity loss, and destruction of Aboriginal cultural heritage, and on procedural environmental human rights including the right to information, the right to participate in decision-making, and access to justice.

Our submission addresses why we consider the draft Bill will negatively impact the above human rights.

EDO recommendations

In our submission, we made 35 recommendations which, if accepted by the ACT Government, will better protect the ACT's environment from harm caused by development, and better protect the rights of people in the ACT to participate in the planning system and to live in a clean, healthy and sustainable environment. Our recommendations are also consistent with the objectives of the Bill to support and enhance the ACT's liveability and prosperity, and promote the well-being of residents by creating an effective, efficient, accessible and enabling planning system.⁵

From our review of the version of the Planning Bill 2022 introduced to the Legislative Assembly on 21 September 2022, EPSDD has incorporated only 2 of our 35 recommendations in the Bill, namely our recommendations that the principles of good consultation should be enshrined in the Bill (recommendation 29), and that the principles of good consultation should reflect best practice (recommendation 30). We commend these changes, which we consider go some way towards improving the ACT community's right to participate in environmental decision-making, which is one of the procedural elements of the right to a healthy environment.

However, we are disappointed that the majority and remainder of our recommendations have not yet been incorporated into the Planning Bill 2022.⁶ EDO has recently undertaken analysis of the extent to which community rights are protected in planning and environmental laws in each Australian state and territory, including the ACT. Our analysis identified that, although the ACT is one of the higher performing jurisdictions, there is still limited accountability and transparency in environmental decision-making and our analysis ranks the ACT's performance as 'mediocre' overall. Our analysis indicates that if more is not done to ensure that the Bill promotes community rights, the Bill may be inconsistent with its own object of creating an accessible planning system that provides a scheme for community participation.⁷ This analysis will be available in a forthcoming report that we can provide to the Standing Committee once published.

⁵ Planning Bill 2022, s 7(1).

⁶ We acknowledge that some of our recommendations are addressed at the Territory Plan, which was released for public comment on 1 November 2022. At the time of writing, we have not yet reviewed the Territory Plan. However, we intend to review it and make further submissions during the public consultation period. In those submissions, we will consider the extent to which the Territory Plan incorporates the recommendations from our submission of 17 June 2022.

⁷ Planning Bill 2022, s 7(1)(c).

In **Attachment A** to this letter we have set out how the Bill addresses each of our 35 recommendations.

We have **enclosed** a copy of our original submission dated 17 June 2022 with this letter. We strongly encourage the Standing Committee to consider and uphold our remaining 33 recommendations, which are consistent with the object of the Bill as well as the international best practice and standards that will be required of the ACT Government if the right to a healthy environment is enshrined in ACT law.

Please do not hesitate to contact me should you wish to discuss.

Yours sincerely,

Environmental Defenders Office



Melanie Montalban

Managing Lawyer, ACT

Class ref.

Encl: Submission from EDO on the Planning Bill 2022 (ACT) dated 17 June 2022



Attachment A

Recommendation	Submission page no.	Relevant section(s) of the Bill	Incorporated?
<u>Outcomes-focussed</u>			
1: 'Desired future planning outcomes' and 'good planning outcomes' should be clearly defined in the Bill.	7	N/A	No – The Bill now includes the principles of good planning (s 10) however it is not clear whether these are intended to be the same as 'desired future planning outcomes' or 'good planning outcomes'.
2: Outcomes-focussed provisions should be appropriately balanced with mandatory provisions and technical specifications.	8	N/A	N/A – The extent to which outcomes-focussed provisions are balanced with mandatory provisions and technical specifications is currently unclear, however will become clearer upon review of the Territory Plan.
3: The Bill must include strong compliance monitoring, reporting requirements and evaluation to ensure desired outcomes are being met.	8	N/A	No – The development offences, controlled activities and enforcement powers in the Bill appear to remain relatively the same.
<u>Objects of the Bill</u>			
4: The objects of the Bill should be rewritten to provide that the overarching object of the Bill is the	8 - 10	7	No

T +61 2 6230 6627

W edo.org.au

E canberra@edo.org.au

PO Box 1616, Canberra ACT 2601

ABN: 72002 880 864

Recommendation	Submission page no.	Relevant section(s) of the Bill	Incorporated?
achievement of ecologically sustainable development (ESD), and should also include: <ul style="list-style-type: none"> • protection of the right to a clean, healthy and sustainable environment; • reduction of greenhouse gas emissions; • protection of the environment; • protection of natural, built and cultural heritage, including Aboriginal heritage; and • promotion of knowledge, traditions and customs of traditional custodians. 			
5: People and bodies involved in the administration of the Bill should be required to exercise powers and functions, and make decisions, consistently with the objects of the Bill.	10 - 11	N/A	No
<u>Object of the Territory Plan</u>			
6: The object of the Territory Plan should be consistent with the objects of the Bill.	11	46	No
7: The object of the Territory Plan should be expanded to include a clean, healthy and sustainable environment.	11	46	No
<u>Ecologically sustainable development</u>			
8: The definition of ESD should be updated to recognise that ESD requires the effective integration	12 - 14	9	No

Recommendation	Submission page no.	Relevant section(s) of the Bill	Incorporated?
of environmental, economic, social and equitable considerations in decision-making processes, and that ESD can be achieved through the implementation of ESD principles.			
9: All decisions, powers and functions under the Bill should be exercised to achieve ESD.	14	N/A	No – Although the Bill contains a definition of ESD, there are no provisions in the Bill that require consideration of ecologically sustainable development, other than its inclusion in the objects of the Bill in s 7(1)(b).
<u>Planning strategies</u>			
10: The Bill should clearly state the hierarchy of planning strategies for each type of decision made under the Bill.	15	N/A	No
11: The Bill should clearly identify when district strategies and the statement of planning priorities are relevant to each type of decision under the Bill.	15 - 16	37	No
12: Following a decision to make the Planning Strategy and/or a district strategy, the Territory Plan should be reviewed for its consistency with the strategy.	16	N/A	No
<u>Justice as recognition</u>			
13: The Bill should be designed to enable overburdened individuals and communities to enjoy access to environmental benefits and access to procedural rights, including the ability to participate	19	N/A	No – At this stage, our overarching concerns about the accessibility of the Bill, and the reformed planning system more generally, remain.

Recommendation	Submission page no.	Relevant section(s) of the Bill	Incorporated?
in the planning system and to have their voices heard.			
<u>Climate change and greenhouse gas emissions</u>			
14: Climate change should be a mandatory consideration for all decisions made, and powers and functions exercised, under the Bill.	22	e.g. 73(3), 116(4), 183	No
15: The Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to contribute to climate change through greenhouse gas emissions.	22 - 23	184, 186, Chapters 12 and 13	No
16: The Bill should include definitions for 'climate change', 'sustainable' and 'resilient'.	23 - 24	N/A	No
<u>Biodiversity</u>			
17: Offsetting principles should be enshrined in the Bill. The Bill should clearly state that offsetting should only be allowed in limited circumstances and in line with the best practice science-based principles.	25 - 27	N/A	No
18: The definition of 'protected matters' should include matters protected under the <i>Nature Conservation Act 2014</i> (ACT).	27 - 28	217	No
19. Decision-makers should be required to consider the cumulative impacts of a proposed development.	28	183	No

Recommendation	Submission page no.	Relevant section(s) of the Bill	Incorporated?
20. The Bill must set clear and appropriate limits on the Chief Planner's power to override the Conservator of Flora and Fauna's advice on development application.	29 - 30	187	No
21. The Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to have a significant adverse environmental impact.	30	184, 186, Chapters 12 and 13	No
<u>Aboriginal cultural heritage</u>			
22. The Bill should include provisions requiring decision-makers to consult with representative Aboriginal organisations for key planning decisions including development applications, and should incorporate the principle of free, prior and informed consent.	32 – 34	N/A	No
23. The ACT Government should develop specific guidelines for consultation with First Nations, which should be culturally safe and developed through consultation with First Nations people and communities.	34 – 35	N/A	N/A – While this recommendation does not relate to the Bill, such guidelines have not been produced at this stage.
24. The Bill should introduce a duty on decision-makers to refuse development applications for proposals that will have a significant adverse impact on Aboriginal cultural heritage.	35	186	No

Recommendation	Submission page no.	Relevant section(s) of the Bill	Incorporated?
<u>Access to information</u>			
25. Ensure the Territory Planning Authority's website is accessible.	37 – 38	N/A	N/A – This recommendation concerns the Authority's website and not the Bill.
26. Ensure information is available to people with no internet and at no additional cost.	38 – 39	495, 505	No – The Bill does not include provisions ensuring that information included on the Authority's website is also available to be inspected in person, or that there is no fee for inspecting associated documents. At this stage, there is much to be done to ensure that planning information is available to people with no internet and at no additional cost.
27. The Territory Planning Authority should be required to continuously disclose environmental risks of development to the public.	39	N/A	No
<u>Participation in decision-making</u>			
28. The Bill should require longer periods for public consultation on key planning decisions.	40 – 41	53, 112, 173	No – The public consultation periods have remained the same.
29. The principles of good consultation should be enshrined in the Bill.	41 – 42	11	Yes
30. The principles of good consultation should reflect best practice.	42 – 43	11	Yes, to some extent, although the principle of free, prior and informed consent is still not reflected in the Bill.

Recommendation	Submission page no.	Relevant section(s) of the Bill	Incorporated?
<u>Access to justice</u>			
31. The Bill should include open standing provisions allowing any person to seek review of government decisions.	44	Schedule 6, Part 6.1, s 6.1	No
32. The Bill should enable third parties to seek review of all key planning decisions in the ACT Civil and Administrative Tribunal.	44 - 46	Schedule 6, Part 6.2	No
33. The Bill should not prohibit third parties from seeking an extension of time for making an application to the ACT Civil and Administrative Tribunal for review.	46	503(4)	No
34. The Bill should enable any person to access administrative or judicial remedies to enforce a breach, or anticipated breach, of the Bill.	46 – 47	409, 452	No – The actions that are available to people in the ACT are only available to controlled activities, and the list of controlled activities is not that extensive.
35. There should be no limits on the matters upon which a planning decision can be challenged.	47 – 48	80(2)	No