
ACT Planning System Review and Reform Project

Submission on Draft Planning Bill 2022

15 June 2022



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About Greater Canberra

Greater Canberra is a community organisation, established in 2021, that is working towards a more liveable, sustainable and affordable Canberra for everyone. We believe that forward-thinking urban planning is vital to ensuring that future Canberrans can enjoy social and economic equality and a high quality of life.

Our members come from all over Canberra, and from a variety of backgrounds - both renters and homeowners, from different stages of life, different levels of wealth, and different occupational and professional backgrounds.

We believe better planning policy can create a more liveable, sustainable and affordable city.

We believe every aspect of the city, from its parks, to its shops, to its public amenities, should make a positive impact on the lives of Canberrans. We value walkability, active and public transport, vibrant and engaging public spaces, and diverse housing that meets the evolving needs of Canberran families.

We believe we can house the next generation of Canberrans through better use of the space we have, not endless sprawl that damages our natural environment. Embracing density will allow more Canberrans to live within the existing urban footprint, in close proximity to workplaces and amenities, allowing a lower-carbon and less car-dependent lifestyle.

We believe that by building more housing, we can make Canberra affordable for all. For most Canberrans, the ability to afford a home is the difference between economic security and financial stress. Today, many Canberrans struggle to afford a home, unless they already own a property, or are helped by someone who does. This hurts our economy and damages the social fabric of our city. We believe that with the right policies, all Canberrans can afford to live with dignity.

Executive summary

We welcome the Planning System Review and Reform Project as an opportunity to ensure that the ACT's planning system is able to meet the needs of future generations of Canberrans, and we thank the Directorate for the opportunity to provide our views on the draft Planning Bill.

We support the Government's objectives of modernising the ACT's planning framework, and delivering a planning system that is easier to use, enables sustainable growth and provides both clarity and flexibility in outcomes and assessment processes. We believe that as a rapidly changing and growing city, Canberra has a unique opportunity, as a combined state and local jurisdiction, to develop an agile and responsive planning system that sets us apart from other jurisdictions in Australia.

In this submission, we outline our perspectives on a number of aspects of the proposed new planning framework:

- **Affordability and housing supply must be a core object and principle:** High housing costs are a key driver of poverty and inequality in our city, as well as a dampener on economic development. The planning system has a vital role to play in ensuring adequate housing supply. Affordability and adequate housing supply need to be at the core of our planning principles - the current version of the Bill does not do this. The current objects and principles of good planning are poorly structured and cast affordability as only a peripheral concern.
- **Outcomes-focused planning:** We believe an outcomes-focused approach to development assessment can enable a broader diversity of housing options. However, it is currently unclear how this system will ultimately function. We are concerned that the shift to an outcomes-based framework, without a corresponding streamlining and clarification of planning review processes, will replicate many of the current issues in our planning system.
- **District-level strategic planning:** The Bill gives little detail about how the proposed district-level strategic planning process will work. District strategies should ensure appropriate local community input into how planning objectives are achieved, but must not be used as a way for existing residents of particular districts to block much-needed housing, at the expense of other districts.
- **Territory Priority Projects:** We support the Bill's proposed mechanism for fast-tracking Territory Priority Projects, although we are concerned that the draft provisions leave open too much potential for litigation. The Minister's use of TPP powers should be checked through parliamentary and political accountability, rather than judicial review.
- **Principles of good consultation:** Good public consultation needs to be fair and to capture the views of the broader community across all demographic groups, rather than being a veto point for a noisy minority. We support the Bill's flexible approach towards

improving public consultation through principles set out in a legislative instrument rather than in the text of the Bill. A disallowable instrument could be used to provide additional parliamentary accountability.

- **Role and powers of the Chief Planner:** While we support the Chief Planner's broad powers to make planning decisions, they should serve at the pleasure of the ACT Executive. The Chief Planner is the most powerful actor within the planning system, and they should be accountable to the elected government.
- **Third party merits review:** ACAT's role in providing merits review of development approvals is complicated, expensive, anti-democratic, and slow. A non-adversarial internal review process would provide faster, better and fairer outcomes. Failing this, third party ACAT appeals of DAs should be further limited.

List of recommendations

Recommendation 1: A 'equitable and prosperous city' object should be inserted into the Bill as a coequal object to the 'ecologically sustainable development' object.

Recommendation 2: The 'activation and liveability principles' should be split into the separate 'affordability principles' and 'activation and liveability principles'.

Recommendation 3: The high quality design principles should be amended to make explicit that local settings and contexts can evolve over time, including through development, to better meet changing community and environmental needs.

Recommendation 4: The high quality design principles should be amended to include a provision related to building quality and energy efficiency.

Recommendation 5: The investment facilitation principles should be renamed 'economic prosperity principles' to better reflect their nature and aim, and should express a goal of maximising incomes and minimising poverty.

Recommendation 6: The role of district strategies should be clarified to ensure they do not create inequities between districts.

Recommendation 7: The Minister should be able to declare any development proposal a Territory Priority Project if they are satisfied that there has been sufficient community consultation about the proposal. Paragraphs 212(1)(a)-(c) should be removed.

Recommendation 8: The principles of good consultation should include, where appropriate, requirements for:

- representative sampling
- low-cost forms of participation
- consideration of the views of potential future residents.

The principles should not put excessive weight on less representative consultation processes, or on mere quantity of submissions.

Recommendation 9: Principles of good consultation and associated guidelines should be determined by the Minister in a notifiable instrument (or disallowable instrument).

Recommendation 10: The Chief Planner should serve at the pleasure of the ACT Executive, without a fixed term.

Recommendation 11: Merits review for development approvals (other than DAs involving an EIS) should be undertaken by an internal review mechanism, rather than ACAT, that is less formal and non-adversarial.

Should this not be accepted, third party ACAT reviews should be limited in regards to all public and social housing, along all light rail corridors, and in all group centres.

Outcomes, objects, and principles of good planning

We support the Bill's proposed transition toward an outcomes-focussed system of planning. Our planning system is the framework for how we as a community make political decisions regarding land use, and these decisions should be centred on the outcome of such decisions, rather than rules-based proceduralism.

However, the Bill currently does not define 'outcomes', and instead it is implicit that the 'outcomes' to which planning decisions are required to give effect are articulated within the hierarchy of principles, strategies, and plans within the legislative framework.

At the apex of this hierarchy are the objects of the Bill in clause 7, and thereafter the principles of good planning in clause 9. Every other element of the planning system is 'downstream' of these two sets of concepts.

As such, the objects and principles of good planning flow down through the entire planning system. This is particularly the case as the Territory Plan, Planning Strategies and other instruments must be consistent, promote, or give consideration to the objects and principles of good planning.

This means that it is of paramount importance that the objects and principles of good planning accurately reflect the outcomes that Canberrans expect and need from the planning system. Outcomes omitted from the objects and principles of good planning will be legally and practically excluded from our planning framework.

In our media release after the release of the Bill for consultation, we argued that affordability needs to be front and centre in the Bill's objects and principles.¹ We reiterate those concerns, and outline potential amendments below.

How housing supply drives housing costs

A wide range of economic literature indicates that reforming planning rules to permit more mid-density or 'infill' housing can lead to higher economic growth and sustained reductions in housing costs. To highlight four recent economic papers in this area:

- [Hsieh and Moretti \(2019\)](#) find that planning restrictions that reduce housing supply in urban areas prevent talented workers from moving to jobs that best suit their skills, reducing overall economic output in the United States by a third over a 45 year period.
- [Li \(2020\)](#) analyses the local impacts of new market-rate high-rise apartment buildings in New York, and finds that a 10% increase in housing stock reduces rents by 1% and has

¹ "Affordability should be front and centre of planning reforms", 16 March 2022, <https://www.greatercanberra.org/blog/media-release-affordability-should-be-front-and-centre-of-planning-reforms/>

a downward impact on property prices within a 500 foot radius. New construction also has a positive impact on local restaurant openings.

- [Tulip and Saunders \(2019\)](#) develop an empirical model of the Australian housing market, and estimate that in aggregate, every 1% increase in the housing supply leads to a 2.5% reduction in housing costs, consistent with a range of international estimates.
- [Greenaway-McGrevy and Phillips \(2021\)](#) analyse reforms to the Auckland planning system that allowed more mid-density developments in inner urban areas, and find that they doubled the rate of new housing construction in the city in the four years after implementation.

Unfortunately, these findings regarding the relationship between planning rules, economic growth, and housing affordability are not reflected in the current ACT planning system.

The importance of affordability and density for Canberra

A core objective of Canberra's planning system should be to create a city that works for its residents by minimising housing costs, reducing transport and other emissions, and minimising travel and commuting time between home, employment, and amenities.

However, these concepts are inadequately expressed in the Bill:

- That housing be 'affordable' is a quaternary concept within both the object and the principles of good planning:
 - That development be 'affordable' is one element (of eight), of one limb (among four) of the definition of *maintenance and enhancement of cultural, physical and social wellbeing of people and communities*, which in turn is one of five different components of the concept of *ecologically sustainable development* which makes up one of the three objects of the Bill in subclause 7(1).
 - 'Living affordability' is an element of the principle that urban areas should have a 'a range of high-quality housing', which is one limb (of five) of the *activation and liveability principles* which is one (of eight) of the principles of good planning.
- There is no element of the object or principles of good planning that contemplates the planning system's role in providing an adequate supply of public or social housing.
- There is no element of the object or principles of good planning that includes poverty alleviation, or otherwise directs planning to consider social or economic disadvantage of residents or communities.
- While one limb of the *activation and liveability principles* includes promoting 'active travel and convenient and efficient use of public transport' there is no principle that reflects the importance of proximity of housing, goods, services, amenities, employment and other important community spaces.

The omission of these concepts reflects a longstanding blindspot in Canberra's planning imagination. We are the most expensive city in Australia to live in, and it is discouraging that the Bill barely identifies this as an issue that the planning system should address.

We note with concern the long history of urban planning consciously and unconsciously entrenching class and racial disparities. The extensive international (particularly American) literature on this issue is well known,² but Canberra's own history of classist planning is more obscure.

The Griffin Plan conceived of an egalitarian city, and several crucial urban planning decisions (such as the decision not to extend the urban footprint into Canberra's hills to avoid creating elevated suburbs) are reflective of this aim. However planning decisions in the 1920s saw the creation of socially stratified suburbs, as noted by Fischer in *Canberra: Myths and Models*:

For what was at the back of the planners' minds was a suburban middle-class ideal community with residential areas neatly graded according to salary and public service rank. Their approach was in fact a process of site planning carried out in a Victorian frame of mind that translated the anticipated social hierarchies into spatial hierarchies. Whether the planners were aware of it or not, when they arranged residential subdivisions and government housing in strict accordance with the occupational hierarchies in the public service, they were repeating the tradition in which the British used to design their administrative capitals in the colonies, especially in India, where the planned capital of the Punjab, Chandigarh, began to follow this example as late as the 1950s. When Australian parliamentarians warned that 'a caste system worse than that in India' was about to be created at Canberra, the planners claimed ignorance and innocence. They did not admit to planning social segregation. With the passage of time, their moral and social views, which could best be termed paternalistic and mid-Victorian, lost their grip on the local population, but they left their imprint on the way in which the different residential areas were laid out.³

The Inner South in particular continues to be shaped by this social stratification in planning a century ago. Where once there were smaller residences for workmen in Kingston and Barton, there are now medium or high density developments, such as Kingston Place (formerly the Printers' Quarters). Many of the suburbs with very large block sizes (Forrest, Red Hill etc) were originally intended for upper class inhabitation, and continue to be very low-density suburbs in what is still the ACT's highest income postcode (2603).⁴

Planning decisions are political decisions, and shape the society in which we live in. Attempts to marginalise these concerns simply allow for planners and other individuals to make these political decisions without scrutiny or conscious consideration.

² Silver, [The Racial Origins of Zoning in American Cities](#), 1997.

³ Fischer, K. F. "Canberra: Myths and Models." *The Town Planning Review* 60, no. 2 (1989): 155–94.

⁴ Australian Taxation Office, [Individual Income Tax Statistics](#), 2018-19.

An 'equitable and prosperous city' object

The existing concept of 'ecologically sustainable development' in clause 8 of the Bill is a valuable one. It is vitally important that Canberra's future development be ecologically sustainable, in both reducing emissions and protecting our natural environment.

However, currently this is the only substantive (rather than process oriented) element of the Bill's objects, and consequently many other desirable outcomes of the planning system have been incorporated through the concept of 'the maintenance and enhancement of cultural, physical and social wellbeing of people and communities'.

For clarity, ease of interpretation and ensuring that the social and economic goals that Canberrans expect of the planning system are given sufficient weight, we recommend the insertion of a **coequal object** as a new paragraph 7(1)(d) of the Bill, to be defined in a new clause 8A in a similar fashion to current clause 8.

Recommendation 1: A 'equitable and prosperous city' object should be inserted into the Bill as a coequal object to the 'ecologically sustainable development' object.

Key concepts in this new object should include:

- Minimising housing costs for Canberrans while ensuring that housing is built to a high standard
- Ensuring that there are housing options for all Canberrans, regardless of income
- Adequate provision of public, social and affordable housing should be a core object of our planning system
- Ensuring that every district of Canberra has abundant affordable and social housing to prevent spatial socio-economic segregation
- Eliminating poverty and unsheltered homelessness
- Minimising the financial, environmental and temporal cost of living of Canberrans as it relates to transport, goods and services. The planning system should enable cheap, low emission, convenient access to key locations via efficient and frequent public transport, mixed land use and walkable localities
- Ensuring abundant provision of cultural, social and civic infrastructure such as libraries, theatres, parks, sporting facilities, and parks
- Maximising the discretionary income of residents.

As this object would be read alongside and consistent with the existing 'ecologically sustainable development' object, it would not risk adversely impacting environmental and ecological protection in the planning framework.

Activation and liveability principles

Currently, the activation and liveability principles are the most substantial of the principles of good planning, containing the largest number of subcomponents, and covering a broad range of issues - including integration of public transport and active travel, mixed land uses, housing mix and affordability, and amenity.

Each of these components are important to the planning processes and outcomes, and we're concerned that compacting them in a single set of principles may not lead them to being given sufficient weight against the other more focused sets of principles in evaluating desired outcomes.

Recommendation 2: The 'activation and liveability principles' should be split into the separate 'affordability principles' and 'activation and liveability principles'.

The affordability principles should include:

- Urban areas should include a range of high-quality housing options with an emphasis on living affordability (from the current activation and liveability principles)
- Planning and design should strive to reduce housing, transport, food, and other living costs, both financial (as a percentage of median disposable incomes) and temporal (time and convenience)
- Places - employment, housing, amenities, services, green space, etc - should be located such that they are *temporally proximate* to each other. Walkable, mixed use localities with efficient and frequent public transport are key to the future of Canberra. An objective of planning should be to minimise the amount of time that people spend in transit a month while getting to where they need to go.
- Planning, design and development should strive to eliminate poverty and homelessness, particularly through planning's ability to reduce the financial and temporal cost of necessities (housing, transport, food, education, healthcare). Planning and design can alleviate or exacerbate the deprivation and exclusion of poverty and homelessness.
- Urban areas should be planned, designed and developed to have an abundance of housing affordable to the least well off in society (by public, social, inexpensive or otherwise affordable housing). Districts should be planned to ensure that this housing is evenly distributed across Canberra, minimising spatial socio-economic segregation.

The liveability and activation principles should remain largely unaltered, but should:

- Further emphasise the importance of proximity and co-location in activation
- Further emphasise the importance of public transport and active transport
- Identify that planning, design and development should create civic and cultural infrastructure and public spaces (theatres, libraries, schools, community facilities, sporting infrastructure, parks) at the centre of our communities. While the current

principles mention that districts should be planned, designed and developed 'to cater for a diverse range of cultural and social activities', the importance of civic infrastructure should be more explicitly stated.

High quality design principles

We agree with the vast majority of the content of this principle, especially as it concerns built form accessibility and inclusivity, contribution to the urban forest, and the connection of places with each other and efficient transport.

We do however note concern with two elements of this principle:

- Paragraph (a) appears to be a major barrier to the evolution of localities to meet our city's changing population and needs
- There appears to be no element of this principle ensuring that the actual built form is high quality in a practical sense (energy efficiency, safety, high quality construction, etc), rather than abstract concepts of aesthetics.

Paragraph (a) of the *high quality design principles* currently provides that:

- (a) development should be focussed on people and designed to—
- (i) reflect local setting and context; and
 - (ii) have a distinctive identity that responds to the existing character of its locality; and
 - (iii) effectively integrate built form, infrastructure and public spaces;

Again, the Territory Plan must 'promote' principles of good planning. This creates an obvious difficulty, because if the Territory Plan must promote development that 'reflects local setting and context', then how can the Territory Plan ever decide that the local setting and context should change?

Over time, the character and context of localities will and must change to meet the needs of a growing city and changing economy. Kingston Foreshore, the Lonsdale/Mort Street area of Braddon, NewActon, and vast stretches of the Woden and Belconnen town centres are all examples of positive change in our city, which have received significant community support.

The ability of the Territory Plan to change intended land use to meet the coming challenges of creating a more affordable, liveable, sustainable, compact and efficient city should not be hampered by this tautology within the high quality design principles.

Recommendation 3: The high quality design principles should be amended to make explicit that local settings and contexts can evolve over time, including through development, to better meet changing community and environmental needs.

Recommendation 4: The high quality design principles should be amended to include a provision related to building quality and energy efficiency.

Investment facilitation principles

Economic considerations should be core to the planning system. A prosperous city with low costs of living, high wages, and a diversified high-skill economy is crucial to increasing quality of life, minimising poverty, and ensuring that our city has the tax base needed to address the climate crisis and other public policy challenges, while providing the services (education, healthcare, social security) and infrastructure that residents expect.

The investment facilitation principles express these considerations well, but we believe the phrase ‘investment facilitation’ does not properly reflect the impact these issues have on the lives of all Canberrans, not just businesses and investors.

Additionally, these principles should be further strengthened:

- Planning and design should aim to maximise the discretionary (after tax, housing and other necessity costs) income of residents at every income level
- Planning and design should aim to minimise poverty within our city, in a way that is consistent with and mutually supports the poverty alleviation element of the affordability principle.

Recommendation 5: The investment facilitation principles should be renamed ‘economic prosperity principles’ to better reflect their nature and aim, and should express a goal of maximising incomes and minimising poverty.

Environmental, sustainability, and related principles

Greater Canberra has sustainability as one of its core objects, and we support the heavy focus on sustainability, environmental and ecological matters in the principles of good planning. Given that they are largely adequately expressed, we have no comment on these principles.

District-level strategic planning

District-level strategic planning has been highlighted as a key element of the new strategic planning process, creating a layer between the city-wide objectives of the Planning Strategy and the detailed rules of the Territory Plan. The Bill provides for the making of district strategies (clause 37), but provides little detail as to what will be contained in these strategies or how they will impact the development of codes in the Territory Plan.

We appreciate the policy rationale for establishing a layer of strategic and spatial planning that improves the linkages between strategic goals and specific rules. However, we are extremely concerned that district strategies could become a way for existing residents of particular districts to block much-needed housing, at the expense of other districts.

As we also discuss later in this submission (see the section on *Principles of good consultation* and Recommendation 8), public consultation surrounding District Strategies needs to be truly representative and future-focused. The community councils, whose boundaries align with Canberra's districts, are not fully representative of the broader population of their districts, and they are not representative of future residents. Participation in consultation is strongly aligned with socioeconomic and educational background. Different districts have different socioeconomic characteristics, and there is a significant risk that if district-level planning is done poorly, districts with wealthier, better-resourced and more influential residents and organisations will come out ahead of those that are not.

District Strategies should ensure that planning objectives are achieved while accommodating the unique needs of different parts of Canberra, but they cannot be used to impose requirements that have the effect of privileging one district over another, or adding peculiar considerations that create major practical problems for proponents in particular districts. Such requirements would create inequitable outcomes with a disproportionate impact on areas that are less well-off, and make it more difficult to deliver on the overall goals of the Planning Strategy.

We therefore recommend that district-specific land use rules (whether in District Codes in the Territory Plan, or elsewhere) be kept to an absolute minimum. The simplicity and ease of use of the planning system would suffer if district-level planning rules and policies effectively fragment the planning system. Uniformity and universality of planning processes and considerations across the districts are key to ensure equitable outcomes and an efficient planning system.

Recommendation 6: The role of district strategies should be clarified to ensure they do not create inequities between districts.

Territory Priority Projects

We firmly support giving elected governments the ability to say “yes” to vitally needed development, and believe a fast-track mechanism for high-priority projects is necessary to avoid critical infrastructure projects being stuck in litigation. We support the intent and principle of the Territory Priority Projects mechanism.

The current drafting of the TPP provisions however fall short in two ways:

- The criteria for the minister to declare a development a Territory Priority Project is unnecessarily restrictive, and exposes the Territory to pointless judicial challenges.
- The Chief Planner’s ability to veto a TPP without the Chief Planner being politically accountable for doing so is anti-democratic and undesirable.

Currently, clause 212 of the Bill provides that:

(1) The Minister may declare that a development proposal is a territory priority project (a territory priority project declaration) if the Minister is satisfied that—

- (a) the proposal is of significant benefit to the people of the ACT; and
- (b) the proposal is for critical public infrastructure or facilities; and
- (c) the proposal is for development that is time critical; and
- (d) there has been sufficient community consultation about the proposal.

This exposes a TPP declaration to judicial review on the basis that the Minister could not have been simultaneously satisfied of these four criteria. The threshold for judicial review of a ministerial state of satisfaction is high,⁵ and such challenges are likely to fail, but they may still involve complex legal arguments about the definition of “critical public infrastructure” (which is not provided in the Bill), “significant benefit to the people of the ACT”, and what is “time critical”, which may allow for litigants to delay a process whose entire point is to allow for the fast tracking of development proposals.

Other submissions have argued that social and public housing should be able to be declared a TPP. We support such a change, but recommend that the Act go further, and allow for *any* development proposal to be declared a TPP by the Minister, as future circumstances may require. The Minister’s use of the TPP powers should be checked by parliamentary accountability and political remedies.

This would remove three of four criteria, and therefore reduce the scope for spurious litigation. The community consultation requirement should be retained.

⁵ See [Avon Downs Pty Ltd v Commissioner of Taxation](#) (1949) 78 CLR 353 at 360

Recommendation 7: The Minister should be able to declare any development proposal a Territory Priority Project if they are satisfied that there has been sufficient community consultation about the proposal. Paragraphs 212(1)(a)-(c) should be removed.

The second issue would be addressed by adopting Recommendation 10, allowing the Executive to dismiss the Chief Planner if the situation warrants.

Principles of good consultation

We support the Bill's new concept of principles of good consultation, determined by the Minister via a notifiable instrument (clause 10).

Public consultation is a long-standing element of Australian urban planning processes, and high-quality consultation processes are widely recognised as important in ensuring the needs of the community are factored into planning. However, public consultation processes as currently practised have a number of critical flaws. The new Bill provides the ACT with an opportunity to rethink how consultation fits in our planning system.

Ensuring representative consultation

Public consultation processes often struggle to properly represent the diversity of Canberra's community, and favour residents from higher socioeconomic and educational backgrounds (who are disproportionately homeowners rather than renters). People who are time-poor, due to work or family commitments, have difficulty making a meaningful contribution - it can be very difficult to attend meetings or write lengthy submissions with hard deadlines. The outcomes of consultations are often biased towards retirees and those without dependents.⁶

Residents' associations and community councils often play an outsized role, as few people are sufficiently engaged to make substantive submissions on the highly technical issues of planning. However, while they may play an important role in representing certain constituents in their neighbourhood or district, the reality is that their membership bases are often nowhere near as diverse as the broader community.

Consultation processes that relate to particular neighbourhoods or districts also listen almost exclusively to the voices of existing residents, without taking into consideration the needs of future residents. This leaves the interests of future residents to be represented through the public interest considerations applied by professional planners, rather than by voices from the community.

We strongly believe that consultation must be a mechanism to utilise local knowledge, improve planning outcomes and satisfy competing planning needs, rather than an opportunity for a small subset of the community to veto change at the expense of others. Public consultation outcomes that are unrepresentative of the Canberra community should not be given undue prominence in decision making. Public consultation needs to capture the views of the broader community, not just the loudest voices who happen to turn up.

⁶ See, for example: Einstein et al., [Still Muted: The Limited Participatory Democracy of Public Zoom Meetings](#), 2021; Taylor, Elizabeth & Cook, Nicole & Hurley, Joe. (2016). [Do objections count? Estimating the influence of residents on housing development assessment in Melbourne](#). Urban Policy and Research. 34. 1-15. 10.1080/08111146.2015.1081845.

We recommend that the following concepts should be included in the principles and guidelines:

- **Representative sampling:** Representative population samples, obtained using statistically-valid techniques, should be used wherever possible to capture the needs of different demographic groups (such as age, gender, income, education, cultural background, and homeownership status). This is particularly important for consultations with a broader impact, such as the Planning Strategy and District Strategies.
- **Low-cost forms of participation:** Consultation processes must have appropriate avenues for low-cost forms of engagement that do not involve attending meetings or making lengthy submissions. This could be done in a variety of ways, and the guidelines should encourage innovative approaches. Such participation should be treated as equally as possible with higher-cost forms of participation, however the focus should never be on the mere quantity of submissions.
- **Consideration of the views of potential future residents:** The needs of potential future residents, not just existing residents, must be considered. This is particularly applicable to District Strategies, where the views of current residents, community councils and residents' associations need to be considered in the context of the needs of the broader Canberra community. Consultation efforts should find ways to include views of potential future residents, and community organisations that are not tied to a particular geographical area.

Recommendation 8: The principles of good consultation should include, where appropriate, requirements for:

- **representative sampling**
- **low-cost forms of participation**
- **consideration of the views of potential future residents.**

The principles should not put excessive weight on less representative consultation processes, or on mere quantity of submissions.

Allowing flexibility in the principles of good consultation

Some organisations have expressed their support for including the principles of good consultation in the text of the Planning Bill itself. Entrenching the principles of good consultation in primary legislation has the obvious benefit of ensuring those principles cannot be changed on a whim.

However, we believe it also makes it significantly more difficult to evolve the principles and develop new best practices in response to changing community needs. Additionally, placing the principles in primary legislation also imposes unnecessary restrictions on the form of the

guidelines due to more restrictive legislative drafting requirements, which may make the guidelines less helpful and harder to interpret.

Placing the principles in a legislative instrument will allow them to be fine-tuned as the Planning Authority, developers, community members and other stakeholders adapt to the processes of the new system, and to be revised over time as community expectations change. We therefore strongly recommend that principles of good consultation should remain a matter for secondary legislation.

If it is considered desirable to subject the Minister's decisions to further public and parliamentary scrutiny, the guidelines could be made a disallowable instrument rather than a notifiable instrument, allowing the Assembly to consider and debate all new guidelines if it sees fit.

Recommendation 9: Principles of good consultation and associated guidelines should be determined by the Minister in a notifiable instrument (or disallowable instrument).

Governance, decision making and review

At the core of our planning system is a simple question:

Who decides?

Ultimately, planning is about deciding the physical, spatial form of our society. Planning decisions - individually and in aggregate - have enormous impacts on our society, culture, economy, environment.

This presents the planning system with an overwhelming number of consequential decisions, both general and specific. Should our residential neighbourhoods be those of detached houses or medium density? Where should our supermarkets, schools, parks, and restaurants be located? How will people get to places they need to go, and how long will it take to get there? What areas should we preserve and what areas will we allow to evolve?

The sum of these decisions in turn determine the cost of offering city services, the quality of employment and educational opportunities, the length of commutes, the cost of housing, emissions, and the likelihood we are to have strong communities.

There is no objectively 'right' answer to these land use questions, as they involve questions of preferences, values, and balances between competing objectives and differing interest groups. What is preferred by established, homeowners residents is often counter to the interests of young prospective residents.

Consequently, land use and planning questions are inherently, unavoidably political. Decision makers will always bring their own values and conceptions of what makes a 'good place' and a 'good society'.

Who decides?

The Bill answers the question of who decides in the following way:

- The Legislative Assembly decides by passing the overarching Planning Bill and approving the Territory Plan
- The Executive decides by approving the Draft Territory Plan, Planning Strategy, District Strategy and other matters
- The Minister for Planning decides by declaring Territory Priority Projects, giving directions to the Authority, making Statements of Planning Priorities and many other powers
- The Chief Planner decides by deciding on individual DAs including Territory Priority Projects, Estate Development Plans, making minor Territory Plan amendments, initiating major territory plan amendments and many other powers

- The National Capital Authority, along with other Commonwealth bodies, decides as it relates to matters under relevant Commonwealth legislation, and as referral entities that must be consulted on DAs and Territory Plan variations
- The Heritage Council decides what locations to register, what conservation guidelines to issue in relation to those registered places, and as a referral entity for DAs and Territory Plan variations
- The Conservator of Flora and Fauna decides which trees are to be protected under the *Tree Protection Act*, and then as a referral entity to DAs and Territory Plan variations
- The Design Review Panel provides advice on prescribed developments
- Members of the public decide when they opt in to the various points of public consultation for DAs, Territory Plan variations and other matters, and importantly as litigants in judicial or merits review challenges
- The market decides by determining what developments and designs are most economic to build
- Individual developers and proponents decide by proposing DAs and any accompanying variations to the Territory Plan
- The ACT Civil and Administrative Tribunal (ACAT) decides by exercising merits review over DAs (outside the town centres, the University of Canberra campus and Kingston Foreshore)
- The Supreme Court decides whenever there's any question of any of the above parties overstepping their role within this complex statutory framework.

This creates an extremely complex system with many veto points, where even necessary and broadly supported developments can be held in limbo for years or decades, for reasons that are often unclear or unexplainable to the layperson. The system is so complex, complicated and decentralised, that the buck stops with no one, as each of these actors can plausibly blame others for bad outcomes, delays or other issues.

Furthermore, since most of these actors have no democratic legitimacy to make decisions (for the most part being unelected independent statutory office holders), exhaustive public consultation is undertaken as a substitute to an electoral mandate. This creates serious problems, as people who opt into the highly inaccessible planning debate are extremely unrepresentative of the broader population.

It also creates a heavily legalistic, rule-based and litigious planning culture, where the default way of resolving many planning issues is in the courts or in the tribunal.

This combination of many independent actors, extensive consultation requirements, and decision makers who do not feel democratically empowered to make decisions leads to stasis, path dependence, and a limited ability to respond to environmental and economic challenges. The Planning System Review should take the opportunity to fix this situation.

Role and powers of the Chief Planner

The Chief Planner is by far the most powerful actor within the Bill's decision making framework. They are the maker of most decisions, or at least have the largest amount of influence over what decisions are made. In particular:

- The Chief Planner has the crucial power to approve, reject or conditionally approve development approvals, including estate approvals giving them by far the largest influence over the built form of Canberra. This includes the ability to veto Territory Priority Projects declared by the Minister
- The Chief Planner has absolute and complete control over the Territory Planning Authority, which is legally an extension of their person under subclause 13(3). This gives them complete and direct control over the priorities and focuses of the Authority (subject to certain restraints such as ministerial directions under clause 17)
- The Chief Planner prepares the Draft Territory Plan, and while the Executive may refuse to approve it, they cannot directly amend it themselves - instead they may request that the Chief Planner make requested changes. The Legislative Assembly also cannot amend the Territory Plan once passed to them for ratification
- The Chief Planner is responsible for reviewing the Territory Plan
- The Chief Planner has the power to make minor amendments to the Territory Plan, and has the effective ability to veto major amendments, including minister-initiated major amendments under paragraph 63(1)(b).

We are not opposed to the planning system having an actor who is empowered to make decisions and resolve the inevitable tensions between competing interests, institutions and policy objectives, as the Chief Planner largely can do.

Our view, however, is that this actor should be ultimately democratically accountable to the ACT electorate. Planning decisions are political decisions, and Canberrans should be able to democratically shape our planning system by electing a government that shares their values and priorities.

However, in the Bill, the Chief Planner is a statutory officer holder that can only be dismissed for cause, meaning they are not accountable to the Minister or to the Assembly. Clause 29(1) establishes the circumstances under which a Chief Planner can be dismissed, mostly for reasons of corrupt, criminal or other misconduct.

It appears unlikely, under the current drafting of these provisions, that the Assembly or Executive can dismiss the Chief Planner because they have lost confidence in the Chief Planner's ability to perform the role, either due to underperformance or lack of alignment with the Government's planning priorities and vision.

This could give rise to a whole collection of unfortunate situations including:

- The Chief Planner may be appointed for a term of up to five years, which is longer than the four year Legislative Assembly term. It is possible therefore for an outgoing

government facing probable electoral defeat to install a partisan Chief Planner with the aim of frustrating the new government's planning or infrastructure agenda for the entire next term of government.

- A government may promise to build a key piece of infrastructure (such as light rail, a hospital extension or so on) in an election, and subsequently declare that project a Territory Priority Project, only for the Chief Planner to then veto the project on the basis that they do not believe the project is conceptually consistent with their own interpretation of the principles of good planning.
- The Minister may initiate a major amendment to the Territory Plan, directing the Chief Planner to prepare a draft amendment under paragraph 17(1)(b). The Chief Planner could then oppose the amendment, and withdraw it under paragraph 63(1)(b), effectively vetoing the major amendment.
- The Chief Planner may fail to act in a way that is sufficiently aligned with the Statement of Planning Priorities, Planning Strategy or general policy direction from the Minister in exercising their functions, including by deliberately not acting on priorities of the elected government.

We would hope that none of these situations ever occur. However, the Bill at the moment does not have a satisfactory method of resolving them, unless the Chief Planner having a disagreement with the government or Assembly, on matters of policy and exercise of their functions, qualifies as 'misbehaviour' under paragraph 29(1)(a).

We also note that unaccountable decision makers holding strong political views, and using their power over planning decisions to realise those views is unfortunately all too common. For instance, the views of the National Capital Development Commission (NCDC) first Chief Planner, Peter Harrison, architect of the Y-Plan here is instructive. During his tenure, Harrison:

- Described street life as a 'third world notion' that was the result of inadequate housing and described walkable suburbs in other cities, like Glebe, as 'vestiges of the third world'⁷
- Described public transport as a 'welfare service'⁸
- Described terrace housing as a 'denial of human dignity' noting that 'I don't regard a terrace as fit for human habitation.'⁹

We still live with the consequences of Harrison's beliefs today.

Planning then, is too important to be left to planners without political oversight and accountability from the elected government.

⁷ National Library of Australia, [Interview with Peter Harrison by James Weirick](#), 1990, session 1, 00:17:

⁸ National Library of Australia (Trove), Peter Harrison '[The Disaster of Civic](#)' Letter to the Editor, *Canberra Times*, 2 October 1986

⁹ National Library of Australia, [Interview of Peter Harrison by James Weirick](#), 1990, Session 3, 00:11:05.

The appropriate conception of the Chief Planner is as an agent of the Executive that is in turn accountable to the Legislative Assembly. The elected government of the ACT should be able to have a Chief Planner that is aligned with their values, priorities and objectives, and to dismiss Chief Planners that frustrate their democratic mandate.

This would make our planning system more democratically responsive and ensure better alignment between the Minister/Executive/Assembly's vision for the planning system (reflected in the relevant strategies and plans) and the implementation of that vision through decisions on individual DAs and the Territory Plan.

We are of the view that the risks from this change, such as perceived politicisation of the role or undue political influence over individual DAs are sufficiently mitigated by the practical and political costs of dismissing a Chief Planner, and the high bar of requiring Cabinet approval for such a decision.

Recommendation 10: The Chief Planner should serve at the pleasure of the ACT Executive, without a fixed term.

We also note that some other bodies have proposed that the problem of the Chief Planner's powers and lack of accountability be addressed by creating panels of other unaccountable, unelected statutory officeholders to review their decisions. We are of the view that this would make decision making slower, more expensive, and more likely to be influenced by special interests.

ACAT's role within the planning system should be minimised

Under the current planning system, ACAT has a merits review function over most DAs, including third party merits review, where essentially anyone can litigate against a DA being granted.

Many Canberra community organisations are frustrated with ACAT's function in the planning system. It's a byzantine, complicated, gameable, opaque, expensive and slow process that produces unpredictable and inconsistent planning decisions, frequently in ways that are directly contrary to established practice and government policy.

ACAT effectively serves as the actual apex decision maker for most of Canberra's individual planning decisions (that is, any development not exempt from ACAT review). Furthermore in most of the ACT, nearly anyone can challenge a DA in ACAT as a third party. This state of affairs undesirable on many levels including:

- Structuring the process as litigation turns what should be a holistic question of the best planning outcome for the ACT community into an adversarial legalistic process.
- It places unelected and unaccountable tribunal members as the makers of political decisions regarding merits and land use.

- It creates an extremely high barrier to participation in the planning system, in terms of time, money, and technical knowledge.
- It distorts the evidence and views presented to ACAT to reflect the interests and perspectives of the parties to the litigation. This implicitly marginalises the interests and views of all other stakeholders who are not party to the litigation.
- The attempts at transparency and accessibility that are made during the DA process become extremely opaque during ACAT review. When a DA goes to ACAT it becomes extremely difficult for the general public to know what's going on, and largely impossible for them to have any input (as non-parties) until it's finalised and any judgement is published.
- It can take a very long time, and be very expensive to everyone involved. These costs fall most heavily on small scale developments by unsophisticated developers, such as non-profit social housing development and "mum and dad" developers of low intensity housing such as duplexes.
- ACAT appeal processes can and have been weaponised by commercial actors seeking to prevent the construction of competitors.¹⁰
- ACAT decisions can overturn planning orthodoxy, causing ACTPLA to make targeted technical amendments to effectively overrule the decision. This leads to a great deal of uncertainty and unnecessary legislative churn in the planning system.

These issues are not unique to the ACT. There is mounting academic literature in the United States context that suggests that 'citizen voice' - the ability of any given individual with sufficient resources and time to delay infrastructure and development for years or even decades via litigation - is a major driver of infrastructure and housing costs.¹¹ However, Canberra can and should do better than such a system.

Case study: YWCA YHomes Ainslie (Allen & Ors v ACTPLA)

A good example of some of the undesirable consequences of ACAT merits review of planning decisions is the recent Tribunal decision in [Allen & Ors v ACTPLA & Ors \[2021\] ACAT 88](#). This case involved a DA by YWCA Canberra to build a social housing complex on CFZ land in Ainslie. The intended tenants of this YHomes project were women on modest incomes, including victims of domestic violence.

This kind of social housing development is desperately needed to address the housing crisis that is most acute among Canberra's most vulnerable. However, YWCA had the misfortune of

¹⁰ See [Noah's Ark Resource Centre Incorporated v ACTPLA & Ors \(Administrative Review\) \[2018\] ACAT 95](#) and [Sladic & Anor v ACTPLA; Charter Hall Retail REIT & Ors v ACTPLA \(Administrative Review\) \[2018\] ACAT 38](#)

¹¹ Brooks, Leah and Liscow, Zachary D., Infrastructure Costs (December 1, 2021). American Economic Journal: Applied (forthcoming), Available at SSRN: <https://ssrn.com/abstract=3428675> or <http://dx.doi.org/10.2139/ssrn.3428675> See also Sabin, Paul [Public Citizens](#)

proposing social housing in an affluent suburb, with nearby residents who opposed the development

While the stated reasons for this opposition varied, a common theme was that the plot would be best suited for an early childcare facility or some other similar community amenity, even though no such development had recently been proposed on the space.

After a long, complicated and expensive ACAT case, ACTPLA's approval of the YWCA DA was reversed. There were many contributing factors to this decision, but one particularly concerning one was the Tribunal's introduction of a novel interpretation of solar access rules that departed from established precedents (*Benevolent Society v Waverley Council* [2010] NSWLEC 1082) and the Tribunal's reasons for doing so [at 194]:

Notably, while overshadowing by vegetation generally is ignored, it nevertheless may be relevant to a qualitative assessment of whether an area receives adequate sunlight, particularly where solar access may be affected by dense vegetation. This approach is understandable where block sizes generally are smaller, and the density of development in metropolitan areas of NSW generally greater than in Canberra. **It is not at all clear that the same considerations should apply here. Canberra is known as the 'bush capital' and from the beginning was planned as a garden city.** A notable feature of the urban landscape and streetscape throughout Canberra, except perhaps in some of the newer suburbs, is that it is dominated by large trees. It is one of the things that differentiates Canberra from other cities. Living with trees is what Canberrans do. We are strongly of the view that how a development proposal responds to site constraints arising from the presence of trees that are considered worth preserving, is an essential consideration at the DA approval stage.

This passage is extraordinary, for multiple reasons. In it, two unelected and unaccountable tribunal members dramatically alter ACT planning law, in such a way that would have drastically constrained residential development in inner Canberra. They do so based on their own beliefs about community values, and the way Canberra should be.

This is not the role of the ACAT or its members, and it never should be. Rather, it should be a role for the democratically elected members of the Legislative Assembly, the Executive that is accountable to them, and the delegates of that Executive. While we disagree with ACAT's reasoning, the current planning system forces ACAT members to make such judgements, because it places them at the apex of the planning system.

ACTPLA subsequently made a technical amendment to the Territory Plan to overturn this interpretation, which we supported. YWCA has since submitted a second DA, which may very well go to ACAT for a second time. It is likely that the project will get built in some form, but only after years of wasted time, money, effort and energy, while Canberra's housing crisis worsens and valuable social housing remains unbuilt.

These issues may well be further magnified by a transition to an outcomes-focussed system, which is inherently more discretionary, and may consequently widen the scope of matters that

are reviewable by ACAT. Determination of what outcomes the planning system seeks to pursue, and if developments are consistent with those outcomes should be decided by a body that is ultimately responsible to the Legislative Assembly. A Chief Planner accountable to the ACT Executive is consistent with this principle, while the ACAT is not.

A better system

ACAT's role in planning is broken, which the Bill tacitly acknowledges by prohibiting third party ACAT review for the town centres, University of Canberra campus and Kingston Foreshore.

This has directly led to a much more rapid pace of development and change in these areas as opposed to other group centres subject to third party ACAT review. In the amount of time that the Dickson Coles has been trapped in an ACAT induced limbo (denying Dickson residents vital supermarket competition to help drive down cost of living pressures), the Lonsdale and Mort Street areas of Braddon have been transformed into a vibrant mixed use, medium-rise district.

Currently, a large high density development in a town centre by a large sophisticated developer is not subject to potential third party ACAT review, but a unit titled duplex development on a RZ1 fluffy block is, with such developments being frequent targets of litigation). The concentration of new infill housing in town centres over medium-density infill in the suburbs is a predictable result of such structural incentives.

Other stakeholders have recommended that third party ACAT appeals be limited in regards to social or public housing. While this would be a positive change, in light of the above evidence we recommend that the Bill however go further and completely remove ACAT from the regular DA process, with the exception of developments that involve an Environmental Impact Statement.

Freed from ACAT's nature of as a tribunal that hears litigation, this internal review mechanism could engage in deeper community consultation to ensure that the best possible planning decision is made in every case.

It would be faster, cheaper, less confrontational, more accessible, more open and transparent than the current ACAT processes.

As such bodies would be internal to the Territory Planning Authority, the Chief Planner (who would be directly accountable to the Executive) would retain the ability to make a final decision on the review at any time.

Moving ACAT's merits review function to another unelected body of independent statutory office holders, such as an independent planning commission, or some other panel would not fix these issues.

The purpose of review decisions is to ensure that the correct decision was made in line with government policy and priorities. It is not to give rich and well-resourced litigants options to sue to force the system to conform to outcomes that they desire.

Recommendation 11: Merits review for development approvals (other than DAs involving an EIS) should be undertaken by an internal review mechanism, rather than ACAT, that is less formal and non-adversarial.

Should this not be accepted, third party ACAT reviews should be limited in regards to all public and social housing, along all light rail corridors, and in all group centres.