



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ENVIRONMENT AND TRANSPORT AND CITY SERVICES
Ms Suzanne Orr MLA (Chair), Miss Candice Burch MLA (Deputy Chair), Mr James Milligan MLA

Submission Cover Sheet

Nature in Our City

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The Committee Secretary
Standing Committee on Environment and Transport and City Services
Legislative Assembly for the ACT
GPO Box 1020
Canberra ACT 2601

29 November 2018

By email: LACommitteesETCS@parliament.act.gov.au

Dear Committee Secretary,

Nature in our City: Environmental Defenders Office ACT Submission

Canberra's growing population *'lead(s) to expanding urban areas which can and do put pressure on the natural environment. This is especially the case in a land locked city where the options for urban development either become developing up or developing out.'*¹ As Canberra grows and develops, there are strong concerns that Canberra is losing its character as the 'bush capital'. Whether building up or building out, key changes to our laws are required to ensure the best outcomes for the natural environment, including the protection of vulnerable biodiversity, are achieved.

The Environmental Defender's Office (ACT) Inc ('EDO ACT') is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental policy and law reform, and offer community legal educational publications and programs. The EDO ACT is grateful for the invitation to make a submission to this important and relevant inquiry and makes a number of recommendations.

ToR 1. The level of public support for and satisfaction with amount and quality nature and natural environment areas in Canberra, particularly in urban areas.

As a community legal centre providing advice and assistance to individuals and community groups concerned about the protection of the environment in the ACT and surrounds, we can attest to the high level of public support for nature and natural environment areas in Canberra and their concern at the incremental loss of this valued resource. There are many in the ACT who volunteer hours working to better nurture and maintain our city – whether through engaging with development

¹ Statement for Inquiry, Inquiry into the value of the natural environment to an urbanising Canberra, 23 February 2018.



processes, land care, or educating their communities. Indigenous Australians have a unique relationship with the environment and take on stewardship role in protecting it. There are also individuals and community groups who are acutely aware, and have a great appreciation, of their local environment, having lived in their communities for long periods of time and gained knowledge of habitat, patterns and migrations of species. Given the level of public support and involvement in environmental issues in the ACT, the EDO ACT continues to assert the need for improvements in legislation with respect to public consultation on matters that affect the natural environment. Ensuring active and genuine community participation on matters concerning nature in our city includes:

(i) Continuing support for groups protecting the natural environment in the ACT

The ACT community is unique in its level of engagement with environmental issues – being home to community councils, residents' groups, landcare groups, environment groups – to name a few. The role of residents' groups and community councils is unique in the ACT. Support to community groups in the ACT who represent local interests in the protection of nature in our city is best recognised through secure funding and ongoing government support to ensure community voices are articulated in such matters.

Recommendation 1(i): Support to community groups, including Community Councils, must be strengthened through sufficient, ongoing funding. Weight must be given to their positions on matters that affect the natural environment.

(ii) Improving consultation processes

Recognising that there is a broad level of public support for high-quality nature and natural environment areas in the ACT, it is vital to utilise community interest and expertise through consultation processes.

The EDO ACT supports comments from the Director-General of Canberra's Environment, Planning and Sustainable Development Directorate (EPSDD), Ben Ponton, who committed to pursuing a "citizen focus" to planning, observing that 'it's about understanding what's important to communities, what's important to government and working to provide for high quality public spaces and improved environmental management'.²

² Katie Burgess, 'Ben Ponton named new head of ACT Environment, Planning and Sustainable Development directorate', The Canberra Times (online), 19 April 2017. See <http://www.canberratimes.com.au/act-news/ben-ponton-named-new-head-of-act-environment-planning-and-sustainable-development-directorate-20170419-gvniz1.html>.



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In the EDO ACT submission to the Inquiry on Development Application processes in the ACT,³ we made several detailed recommendations for better public consultation. These include (but were not limited to):

- Increasing the accessibility of the Environment, Planning and Sustainable Development Directorate Planning Website by including plain language and best practice content and design;
- Extending the minimum notification period for major developments from 15 to 30 days;
- Increasing the transparency of pre-DA discussions between the Planning and Land Authority and the applicant. In addition, the EDO ACT recommends that applicants present community concerns to the Planning and Land Authority, including how they propose to address those concerns; and
- Creating detailed information guides for all users of the DA process including third parties, together with information on public consultation and community engagement and ensuring this resource is made available on the ACTG Planning website.

Our recommendations are uncontroversial. Community engagement and meaningful participation are basic rights. In our submission to the DA Inquiry, we highlighted three fundamental rights, or "pillars", set out in Principle 10 of the Rio Declaration,⁴ including the rights to access information, public participation and access to justice. The Australian Panel of Experts on Environmental Law (APEEL),⁵ advocate that '[d]emocratic governance of common resources requires participation and accompanying rules and institutions',⁶ noting that while '[r]epresentative democracy is important to environmental governance ... participatory democracy is also necessary, especially because of this relationship of trusteeship over the environmental commons'.⁷

In addition, the Indigenous people in our ACT community hold knowledge of the land that goes beyond the contemporary interests of the broader community. Consultation with Indigenous people is often triggered through the identification of heritage sites, however Indigenous interests are much broader than this. Further exploration of good consultation processes with ACT's Indigenous people is required, to ensure Indigenous culture and knowledge is respected.

³ Available at www.edoact.org.au/submissions.

⁴ The Rio Declaration on Environment and Development was the product of the 1992 United Nations "Conference on Environment and Development" (UNCED), aka the Earth Summit. It consisted of 27 principles intended to guide countries in future sustainable development <<https://sustainabledevelopment.un.org/milestones/unced>>.

⁵ Australian Panel of Experts on Environmental Law (APEEL) is comprised of experts with extensive knowledge of, and experience in, environmental law.

⁶ Australian Panel of Experts on Environmental Law, 'Democracy and the Environment' (Technical Paper 8, 2017) 8.

⁷ Ibid.



Recommendation 1(ii): Ensure meaningful and effective consultation processes are in place in the ACT to support the community, particularly Indigenous people, to fully participate in decisions that affect their natural environment.

ToR 2. The types of nature and natural environmental areas within Canberra e.g. urban open spaces or bushland reserves and the existing or potential benefits and challenges they bring to Canberra's:

- a) Social amenity;
- b) Economic development;
- c) Biodiversity; and/or
- d) climate resilience.

Canberra is privileged to host a variety of natural environment spaces. Non-Urban Zones (NUZ1-NUZ5) and Parks and Recreation Zones (PRZ1-PRZ2) contained within the Territory Plan provide multiple benefits, as discussed by other submissions to this Inquiry.

In particular, we point to the importance of these zones in protecting biodiversity. Maintaining, improving, and protecting these zones is necessary not only to protect the species that live there but also to prevent habitat fragmentation.⁸ Green spaces are also essential to mitigate the impact of a warming climate by reducing heat islands and energy consumption. Any rezoning of these areas for development must consider the benefits that they provide to nature in our city, through processing in the impact track so that environmental impacts are assessed.

Recommendation 2: Maintain and improve natural environment spaces in the ACT, with particular focus on Non Urban Zones and Parks and Recreation Zones under the Territory Plan.

ToR 4. Managing the interface between the natural environment and urban areas particularly in regards to conserved environmental areas.

(i) Protecting the natural environment when expanding

The EDO ACT has discussed the impacts of greenfield development on the natural environment in submissions to the Housing Choices Discussion Paper (February 2018); ACT Climate Strategy to a Net Zero Emissions Territory (April 2018); and Inquiry into Engagement with Development Application

⁸ Refer to EDO ACT submission to the Nomination of Unnatural Fragmentation of Habitats as Key Threatening Process, available at www.edoact.org.au/submissions.



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Processes in the ACT (August 2018).⁹ It remains our position that, where possible, greenfield development should be avoided due to its impacts on the environment.

The impacts of greenfield development are discussed by the ANU Fenner School of Environment & Society submission to this Inquiry:

"We note that all greenfield urban developments in Canberra impact upon nationally threatened species (e.g., pink-tailed worm lizard, golden sun moth, superb parrot) and ecological communities (e.g., natural temperate grassland, box-gum grassy woodland) and remove large numbers of eucalypts that pre-date European settlement. Research suggests that compact, as opposed to sprawling, development results in better outcomes for biodiversity (Sushinsky et al., 2013, Villaseñor et al., 2017)."

We applaud the ACT Government's recognition of the impact of greenfield development on the natural environment in its submission to this Inquiry 'as outlined in the ACT Planning Strategy (2012), Government is adhering to the compact city policy and greenfield expansion is increasingly limited'.¹⁰ We further note that the ACT Government's 2012 ACT Planning Strategy commits to 'create a more compact, efficient city by focusing urban intensification in town centres, around group centres and along the major public transport routes, and balancing where greenfield expansion occurs'.¹¹ In addition, Point 1.9 of the Statement of Strategic Directions states that 'Urban expansion will be contained in order to minimise impacts on valuable natural and rural areas'.¹²

We are concerned that despite broad recognition of the impacts of greenfield development, land releases and developments in greenfield areas in the ACT continue.¹³ Given the impact of greenfield development on the natural environment, the EDO ACT welcomes solutions that reduce developments on greenfield land by creating a more compact city through urban infill initiatives.

As stated in the EDO ACT submission to the Housing Choices Discussion Paper:

⁹ Available at www.edoact.org.au/submissions.

¹⁰ See https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/1233366/Submission-067-ACT-Government.pdf.

¹¹ ACT Government, Environment and Sustainable Development, ACT Planning Strategy: Planning for a sustainable future (ACT Government, 2012) 42.

¹² Statement of Strategic Directions, N12008-27, at 1.9. See <https://www.legislation.act.gov.au/DownloadFile/ni/2008-27/copy/74258/PDF/2008-27.PDF>

¹³ ACT Government Land and Property Report (2017)

https://www.planning.act.gov.au/_data/assets/pdf_file/0016/1226104/act-land-and-property-report-december-2017.pdf; https://www.planning.act.gov.au/_data/assets/pdf_file/0008/1207295/Indicative-Land-Release-Program-2018-19.pdf.



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Where greenfield developments cannot be avoided, there must be comprehensive assessment by independent experts of any greenfield site to identify environmental and heritage value in these areas. It is essential for government to include sufficient buffer zones, conservation corridors and no-go development areas in development planning to reduce the environmental impact.

We continue to maintain that, considering it is likely that greenfield developments will have a significant adverse environmental impact particularly with respect to threatened species of flora and fauna, development applications must be lodged in the impact track and accompanied by an environmental impact statement.

Recommendation 4(i): Development on greenfield land must be avoided. Where new developments on greenfield land are unavoidable, best practice techniques must be applied to reduce the environmental impact of these developments. This includes comprehensive assessments of greenfield sites to identify and protect environmental values. It is most appropriate that DAs for development on greenfield land be lodged in the impact track and Environmental Impact Statements undertaken.

(ii) Assessing the impacts of development and other activities on nature in our city

Accurate, objective and consultative environmental assessments are essential to understanding and protecting nature in our city. Given the scale of current development in the ACT, it is essential that environmental assessments carefully and accurately address the impact of proposed developments on the environment, including biodiversity and the ACT's emission reduction targets. Projects with the largest potential impacts must attract the greatest scrutiny.

As a community legal centre specialising in planning and environment law, we and our community clients have frequently raised concerns about the quality and independence of information provided for Environmental Impact Statements (EIS), and EIS exemption applications, as well as the level of scrutiny this information receives.

The EDO ACT continue to assert that to increase the level of objectivity in the environmental assessment process, independent assessors are chosen from a pool of accredited assessors to assess the impacts of proposed projects. To increase transparency and remove any perception of



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bias, the experts must be assigned to a project by an independent body. We note that the EDO ACT is not alone in making this recommendation.¹⁴

In addition to assessing the direct environmental impacts of a proposal, environmental assessment must include:

- assessment of cumulative impacts of multiple projects;¹⁵
- assessment of climate change impacts (including mitigation and adaptation requirements); and;¹⁶
- assessment of the potential impacts of feasible alternatives.¹⁷

Considering the level of public support for quality nature and natural environment areas in Canberra, particularly in urban areas, it is vital that the public are given sufficient opportunity to engage in consultation processes during the environmental assessment process. In particular, the *Planning and Development Act* offers no opportunity for further public consultation following initial consultation on a draft EIS, nor is material made readily available to the public illustrating public concerns have been addressed in any final EIS provided.

Given the importance of environmental assessment, particularly on nature and natural environment areas in Canberra, we have significant concerns about the EIS exemption process, and refer to section 2(g)(iii) of our submission to the Inquiry into Development Application processes in the ACT.¹⁸ Several major developments have been granted an exemption from providing an EIS since 2013 and, whilst the law states that *'the Minister may grant an EIS exemption for the proposal if satisfied that the expected environmental impact of the development proposal has already been sufficiently addressed by a recent study, whether or not the recent study relates to the particular development*

¹⁴ See Australian Panel of Experts on Environmental Law, Technical paper 2. This recommendation has also been made by EDO NSW and others in their Submission on the draft Environmental Planning and Assessment Amendment Bill 2017 (NSW). See

https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/3657/attachments/original/1488778490/Planning_Reform_Bill_2017_EDO_NSW_submission_Mar2017.pdf?1488778490; Accreditation Scheme for the Application of the Biodiversity Assessment Method (NSW)

https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/3974/attachments/original/1497580543/Assessor_Accreditation_Scheme_-_EDO_NSW.pdf?1497580543.

¹⁵ See Murray Raff, 'Ten Principles of Quality in Environmental Impact Assessment' (1997) 14 *Environmental and Planning Law Journal* 207-221.

¹⁶ Australian Panel of Experts on Environmental Law, Technical Paper 3, 3.2.2.

¹⁷ See Murray Raff, 'Ten Principles of Quality in Environmental Impact Assessment' (1997) 14 *Environmental and Planning Law Journal* 207-221.

¹⁸ Available at www.edoact.org.au/submissions.



proposal',¹⁹ the quality of the studies which have been submitted to the Minister for EIS exemptions do not, in our view, meet the standard required for an EIS.

Until EIS exemptions are treated with the same scrutiny as an EIS, the Minister must take a precautionary approach in approving EIS exemptions. There is a large body of law discussing what is required for an EIS to adequately inform a decision-maker.²⁰ The law does not require absolute perfection for an EIS, however, there are minimum standards which an EIS must meet.

Recommendation 4(ii): The Planning and Land Authority must advise against, and the Minister must refuse to grant any EIS exemption that does not meet the minimum standards required for an EIS.

ToR 5. Current policy or regulatory settings that impede the integration of the natural environment within optimal urban development and design.

(i) Integration of nature in urban areas

Legislation that promotes green infrastructure is necessary to encourage planners and developers to include, protect and/or preserve nature in urban areas. Research has shown that institutional barriers are the greatest factor in planners failing to implement green infrastructure. One of the key challenges for the uptake of green infrastructure is overcoming the path-dependence of existing planning institutions, including planning departments.²¹

We note that earlier this year, the ACT Government released its Living Infrastructure Information Paper (2018) to inform a future Living Infrastructure Plan, as part of the ACT Climate Change Adaption Strategy (section 15). The Information Paper sketches a broad picture of future plans for living infrastructure, and we look forward to the final Plan. In the meantime, the EDO ACT would like to highlight the following laws and policies that impede the integration of the natural environment within optimal urban development and design:

¹⁹ Section 211H(2) *Planning and Development Act (2007)*.

²⁰ See Preston J, 'Adequacy of Environmental Impact Statements in NSW (1986), 3 EPLJ 194; Murray Raff, 'Ten Principles of Quality in Environmental Impact Assessment' (1997) 14 *Environmental and Planning Law Journal* 207-221; Gerry Bates, 'Environmental Law in Australia' (2010) [10.85].

²¹ Tony Matthews, Alex Lo, and Jason Byrne (2015) Reconceptualizing green infrastructure for climate change adaptation: Barriers to adoption and drivers for uptake by spatial planners. *Landscape and Urban Planning*, 138, pp. 155-163. See

https://eprints.qut.edu.au/82596/1/Reconceptualizing%20green%20infrastructure%20for%20climate%20change%20adaptation_Authors%20accepted%20copy.pdf.



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Removing current regulatory barriers to enhancing green spaces

In order to identify regulatory barriers which are currently preventing community groups from improving the natural environment, we refer to the experiences of members of the public working first-hand with these issues. For instance, the submission of the Lyneham Commons outlines in detail a number of regulatory barriers for the Committee's consideration.²²

Integration of living infrastructure requires a mix of tools

Research into green infrastructure policies has shown that the most effective packages contain a mix of mandatory and voluntary elements.²³ Mandatory rules applied to new buildings and renovations were found to be the most effective way of integrating green infrastructure into cities. This can be contrasted with policies for retrofit of existing buildings, where it was concluded that a voluntary approach is preferable.²⁴

In the ACT, there are a number of mechanisms that can be modified to integrate the natural environment into urban spaces. This includes:

- Integrating living infrastructure into the Territory Plan and relevant codes;
- Considering the importance of green spaces at the Development Application stage; and
- Implementing policies, including educational guides, for introducing green infrastructure.

Such initiatives are taking place in other jurisdictions. For example, City of Chicago's Green Permit Program encourages green roofs and sustainable building design by prioritising review for green buildings and expediting building permits for projects that incorporate green building techniques.²⁵ Projects meeting specific criteria are eligible for an expedited Green Permit Process. More locally, local councils in inner Melbourne, including the Cities of Melbourne, Yarra, Stonnington and Port Phillip developed the Growing Green Guide as an educational tool to provide advice on green roofs and green walls.²⁶

²² See https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/1233339/Submission-047-The-Lyneham-Commons.pdf.

²³ SJ Wilkinson, P Brown, and S Ghosh (2017) *Expanding The Living Architecture In Australia* pp. 1 – 54 <https://opus.lib.uts.edu.au/handle/10453/119804>.

²⁴ *Expanding The Living Architecture In Australia*, 2017, pp. 1 – 54 <https://opus.lib.uts.edu.au/handle/10453/119804>.

²⁵ A Kazmierczak and J Carter (2010) *Adaptation to climate change using green and blue infrastructure*. http://resources.cleanenergyroadmap.com/BENV_Z_chicago-green-roofs-permit-program.pdf.

²⁶ *Growing Green Guide: A guide to green roofs, walls and facades in Melbourne and Victoria* (2014) <http://www.growinggreenguide.org/>.



Minimum requirements for green infrastructure should be introduced

The EDO ACT recommends the introduction of minimum requirements for green infrastructure in order to ensure that nature is integrated into our city as it becomes denser. This includes legislative requirements for living infrastructure into relevant codes in the Territory Plan, including the multi-unit housing code.

This is in line with Item 10 of the ACT Climate Change Adaption Strategy , that states the ACT will:

“Introduce mandatory requirements to planning for new estates in Territory Plan and Sub-division guidelines and design standards that reflect leading practice with regard to future climate change scenarios.”

Such initiatives currently take place in Toronto, Canada. In 2009, the City of Toronto adopted a bylaw that governs the construction of green roofs on new development. The Green Roof Bylaw sets out a graduated green roof requirement for new development or additions that are greater than 2,000m² in Gross Floor Area.²⁷ Toronto also encourages green roof retrofits on existing buildings through an “Eco-Roof Incentive Program” which provides financial assistance to property owners that install green roofs. The program demonstrated benefits for energy efficiency, stormwater management, GHG emissions reduction, increased air quality, reduced heat islands, economic development, and increased green spaces.²⁸

Recommendation 5(i): Existing legislation, regulations and policies be reviewed with a view to increasing living infrastructure within our city.

(ii) Prioritising nature in our city in the ACT planning objects

Currently, the natural environment is not prioritised within the planning system. The objects of the *Planning and Development Act* are (section 6):

to provide a planning and land system that contributes to the orderly and sustainable development of the ACT— (a) consistent with the social, environmental and economic aspirations of the people of the ACT; and (b) in accordance with sound financial principles.

²⁷ Toronto Municipal Code Chapter 492, Green Roofs <https://www.toronto.ca/city-government/planning-development/official-plan-guidelines/green-roofs/green-roof-bylaw/>.

²⁸ For full details see Toronto City, *Eco-Roof Incentive Program Review & Update (2016)*. See <https://www.toronto.ca/legdocs/mmis/2016/pg/bqrd/backgroundfile-97954.pdf>.





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Whilst the environment is one of several considerations, it is often disregarded entirely. Whilst section 9 of the *Planning and Development Act* defines “sustainable development” as including important environmental principles such as the precautionary principle, the inter-generational equity principle, conservation of biological diversity and ecological integrity, and appropriate valuation and pricing of environmental resources, these principles are rarely engaged in current planning processes.

Consideration of the environment commonly arises where an applicant has identified environmental assets within a development application and, depending on the application, the information they provide on the location and quality of environment assets is the only information used to assess environmental considerations. Inevitably, the principles that conserve nature in our city give way to more immediately powerful economic and social considerations. The conservation of the natural environment must be given explicit priority in the *Planning and Development Act*, rather than being listed as one of many objects.²⁹ Decision-makers must also be required to exercise their functions in order to achieve these objects, and to be given adequate resources in order to do so. In addition, the objects must be reframed in a way that the decision-maker must do more than merely consider them in their decision. In order to conserve and protect nature in our city, the *Planning and Development Act* needs to be redrafted to require the decision-maker to exercise their decision-making power to actually achieve environmental objectives.

Recommendation 5(ii): Conservation of the natural environment must be given explicit priority in the Planning and Development Act objects. Legislation must state that environmental aims be given priority when planning decisions are made.

6. Any other relevant matter.

(i) Making use of the systems that already exist to protect nature in our city

The ACT already has several laws in place to protect the natural environment, and these need to be given greater weight in the planning process such that they achieve their aims of biodiversity protection. In addition to establishing new mechanisms for better environmental laws, it is important that current laws are being utilised and enforced. The correct implementation of these mechanisms needs strengthening to protect nature in our city – there is little use in laws protecting the natural environment if they are not utilised.

²⁹ Justice Brian J Preston, 'Adapting to the impacts of climate change: The limits and opportunities of law' (2012). See

http://www.leg.justice.nsw.gov.au/Documents/preston_%20adapting%20to%20climate%20change%20and%20law%2030april%202012.pdf.



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For example, Action Plans developed under the *Nature Conservation Act* are informed, expert documents aimed at understanding threatened species, ecological communities and key threatening processes. The Act imposes a duty on the Conservator to take reasonable steps to implement action plans that are in force (section 107) and to monitor and report on their effectiveness to both the public and to the minister at least once every 5 years (section 108). However, the action plans are barely referenced in the *Planning and Development Act*, despite development being a threat to many threatened species and ecological communities. In order to truly integrate natural environment protections in the ACT planning process, implementation of Action Plans must included as part of the *Planning and Development Act*.

Recommendation 6(i): Decision-makers and regulatory bodies must ensure that the mechanisms in place to protect the natural environment are integrated into the Planning and Development scheme.

Should you have any questions or would like further information on the above, please do not hesitate to contact Stephanie Booker on [REDACTED]@ [REDACTED]

Yours faithfully

Stephanie Booker
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